ECLIC 4

EU and comparative Law
Issues and Challenges

International Scientific
Conference

EU 2020 – Lessons from the past and solutions for the future

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JOSIP JURAJ STROSSMAYER UNIVERSITY OF OSIJEK

Hanns Seidel Stiftung

Europska komisija

EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES (ECLIC) – ISSUE 4
ISSN 2459-9425

Publishers:
Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek

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International Scientific Conference

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Conference book of proceedings

In Osijek, 10-11 September 2020

Publishers
University Josip Juraj Strossmayer of Osijek
Faculty of Law Osijek

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ISBN 978-953-8109-33-1

International Scientific Conference

“EU 2020 – lessons from the past and solutions for the future“

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September, 2020.

The world around us is constantly changing but rarely so much as in 2020, when the changes caused by Covid -19 pandemic were dramatic and required effective and quick response to deal with health and economic challenges ahead. In those turbulent times, Europe has not only acted to protect the health of its citizens but has also worked to preserve our economy and ensure future growth. As the guardian of the Treaties, the European Commission has stayed true to its role to contribute to the functioning of the European Union, but this is something, which would not be possible without our values and freedoms as the foundations of our Union.

This is therefore the right time to revert to the values and freedoms upon which the European Union is built and highlight their importance in maintaining Europe's position of a global actor. The principles referred to are democracy, rule of law and fundamental rights and freedoms. Indeed, the entire structure of the EU acquis has been built on the premise of respect for the rule of law. The knowledge and understanding of the EU acquis is essential for legal professionals and academia throughout the EU. EU acquis is not only a tool to ensure respect to rule of law in the EU but also the best means of promoting the finest legal solutions for modern societies in the EU and to respond to the challenges of new economic trends, digitalisation and other new emerging social relations.

The role of the EU acquis is also to envisage future changes within the EU and to ensure timely and efficient response to many situations that would arise as a result of dynamic economic relations. In that respect, legal professionals have a role as well. It is on the legal profession to develop good understanding and knowledge of the EU acquis, which nowadays makes a significant portion of the national legal systems in whole EU. This is because the effective application of the EU law exceeds in importance for numerous aspects of our life in Europe. It is essential for the proper functioning of the internal market, for maintaining an investment-friendly environment and mutual trust among members of the Union. At its core, rule of law relies on effective judicial protection based on independence, quality and efficiency in national justice systems.

Our common goal therefore should be to make our legal system more efficient and ensure that our common standards are best applied throughout the EU. This is how we uphold the principles we hold important. In that framework, the ECLIC conference is an important step in the right direction. This year theme "EU 2020 – lessons from the past and solutions for the future" is a timely definition of the pressing challenges we are dealing with in 2020. Thus while There can be no doubt that the research papers and discussions presented in these proceedings will provide a valuable addition to overall efforts in promoting rule of law. It is also a critical assessment of progress done in past, which helps to establish the path ahead so we can improve in the future – enriching our common knowledge for the ultimate beneficiaries - all Europeans, past and present.

Ognian Zlatev
Head of European Commission Representation in the Republic of Croatia

Topic 1

EU legal issues

UDK 349.6:341.231.14
Review article

STANDING IN ENVIRONMENTAL LAW AFTER *URGENDA*, *JULIANA* AND *COVID-19 CRISES:* WHO SHOULD FORCE GOVERNMENTS TO ACT IN ENVIRONMENTAL ISSUES RELATED TO CLIMATE CHANGE?*

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ABSTRACT

Teaching environmental law and climate change issues one may open a number of questions on relations between environmental protection, governmental duties and public rights, starting with: has a government duty to care and maintain a dissent environment and stable climate conditions?; what is a ground for governmental decision-making on actions threatening sustainability of the climate conditions?; where is the beginning and the end of the responsibility of an individual or of an country? The article outlines the elements that provide the criteria under which one may discus on whether it should be the court to force the government to act or should it be a parliament to set laws initiating actions to protect citizens and their human rights from irreversible climate change? The article points out the recent cases State of the Netherlands v. Urgenda Foundation (court decision from December 2019) and Kelsey Cascadia Rose Juliana v. USA (court decision from January 2020). In Urgenda, the court concerned questions: whether the Netherlands is obliged to reduce the emission of greenhouse gases from its soil by at least 25% by the end of 2020 compared to 1990, whether the court can order the State to do so and whether the government is bound to protect human rights in climate crisis? In Juliana, a group of children between the ages of eight and nineteen filed suit against the federal government, claiming that the government violated their constitutional rights by causing dangerous carbon dioxide concentrations. Although the court had found the injury and evidence on causation between government's actions and climate crisis, it found a lack of redressability. The aim of the article is to examine if the concepts of European Green Deal presented on January 2019 by the Von der Leyen Commission to enshrine the 2050 climate neutrality target into life are in line with conclusions from analysed cases and lessons learned from COVID-19 crisis.

* The paper is result of research activities under Jean Monnet Chair in European Environmental Law organized with the support of the Erasmus+ Programme of the European Union

***Keywords**: Individual rights to enforce climate protection, Government's commitments to tackle the climate crisis, State of the Netherlands v. Urgenda Foundation (December 2019), Kelsey Cascadia Rose Juliana v. USA (January 2020), Duty to care and human rights obligation, Illegality of the third runway at Heathrow airport over climate change (February 2020), European Green Deal, COVID-19 crisis and climate crisis*

1. INTRODUCTION

In the days of uncertainty regarding the health, economic and social consequences of the spread of the SARS-CoV-2 virus, a need arises to draw a parallel between the actual catastrophic consequences of climate change and the more drastic ones predicted by scientists. The first question that comes up is how do societies determine which public interest should have an overriding character, especially having in mind the incidence of influenza pandemics. Sometimes the consequences are less visible and sometimes they are more apparent. Thus, for example, the 1957-1958 influenza pandemic took 116,000 lives in the USA alone.[1] Ten years later, in 1968, an another influenza pandemic took about 100,000 lives in the US.[2] Following SARS pandemic in 2003, the scientists suggested that a massive spread of viruses within the same family can be expected in the coming decades. Consequences of decisions made by a particular state in matters of importance for the spread of various types of viruses are global. The same goes for the impact of any of the states on climate change: defining the percentage of greenhouse gases (GHG) emission reduction, adhering to commitments issuing from international agreements, taking measures at a national level to reduce emissions but also to eliminate the already occurring effects of climate change of one state on all other states. Another question then arises as to whether the states are restricted by the international law or weighing interests is solely within their competence? The first binding international agreement debated under the auspices of the World Health Organization, to link environmental conditions and human health, is the UNECE Protocol on Strategic Environmental Assessment to the Espoo Convention (Kiev, 2003).[3] The starting point of Parties to the Protocol was the need and importance of strengthening international cooperation in assessing transboundary effects on the environment, including health. The Protocol also regulates the obligation of the state emitting GHG and activities that may have a significant transboundary effect on the environment and health, to inform all potentially affected states,

1 Viboud, C. *et al., Global mortality impact of the 1957–1959 influenza pandemic*, The Journal of infectious diseases, *vol.* 213, no. 5, 2016, pp. 738-745

2 Jester, B.J.; Uyeki, T.M.; Jernigan, D.B., *Fifty Years of Influenza A (H3N2) Following the Pandemic of 1968*, American Journal of Public Health, *vol.* 110, no. 5, 2020, pp. 669-676

3 Law on ratification of the SEA Protocol to the Convention on Environmental Impact Assessment in a Transboundary Context, "Official Gazette of the RS"– International contracts, no. 1/2010

before adopting any plan or program, about the planned activities and include them in the process by hearing their comments. For decades, environmental law has considered legal mechanisms that provide criteria for determining how states should act in a legal issue of a global nature. This has led to the introduction of certain principles and changes in procedures with an environmental element in domestic law. One of basic principles comes from the Rio Declaration on Environment and Development (1992). The Principle 2 of the Rio Declaration has introduced a significant restriction on the discretion of states, by requiring that states exercise their sovereign right to exploit resources only in accordance with their own environmental policies and only to the point where such activities do not cause damage to the environment of other states. The additional obligations of states established by Principle 15 (precaution) and Principle 18 (notification of emergencies) introduce the criteria that states must take into consideration when exercising discretionary power in environmental and climate change decision-making or an area of public health.

The third question refers to the degree of certainty of impact on human health and the environment? According to European Environment Agency's data from 2017, at least 10,000 people per year in Serbia do not reach the expected age because they breathe excessively polluted air. The World Health Organization's report on the impact of ambient air on human health in Serbia estimates that in 2016 the exposure to polluted air caused 6,592 deaths and 131,183 lost years of life as a result of air pollution.[4] The total health cost of polluted air in Serbia amounts to around 1.7 billion euros.[5] It is estimated that globally 4.2 million people died prematurely that year due to exposure to polluted air.[6] Member States' health costs were also estimated.[7] A study by the World Health Organization has found that the financial cost of air pollution in Europe stands more than US$ 1.6 trillion, which is about a tenth of the European GDP.[8] Analyses also show that air quality

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4 Republic of Serbia, Ministry of Health., Belgrade 2019. Health impact of ambient air pollution in Serbia, p. vii., [http://www.euro.who.int/__data/assets/pdf_file/0020/412742/Health-impact-pollution-Serbia.pdf?ua=1], accessed 15. April 2020

5 Matković Puljić, V., *et al.,* Hronično zagađenje ugljem, 2019, p. 12, [https://www.env-health.org/wp-content/uploads/2019/03/Chronic-Coal-Pollution-report_SRB.pdf], accessed 15. April 2020

6 Dechezleprêtre, A.; Rivers, N.; Stadler, B., *The economic cost of air pollution: Evidence from Europe*, 2019, p. 44

7 European Environmental Agency. Damage costs of air pollution from industrial facilities in Europe., [https://www.eea.europa.eu/data-and-maps/data/revealing-the-costs-of-air/damage-costs-of-air-pollution], accessed 15. April 2020

8 World Health Organization, 2015. Air pollution costs European economies US$ 1.6 trillion a year in diseases and deaths. [http://www.euro.who.int/en/media-centre/sections/press-releases/2015/04/air-pollution-costs-european-economies-us$-1.6-trillion-a-year-in-diseases-and-deaths,-new-who-study-says], accessed 15. April 2020

improvements explain 15% of GDP growth in Europe over this period.[9] With the introduction of the Green Deal and ambitious climate goals by 2050, the EU should reduce the health system expenditures by 200 billion euros each year. Therefore, the annual costs and death toll are familiar. There are still no estimates for other parts of the world, but scientists leading the US administration's fight estimated the virus could kill between 100,000 and 240,000 Americans.[10] At the same time, scientific analyses show that around 200,000 Americans lost their lives because of air pollution each year even when pollution levels are in line with US Environmental Protection Agency›s guidelines.[11] The analyses also point to a clear link between areas exposed to polluted air and the risk of death. Scientists from Harvard School of Public Health "TH Chan" found that an increase in only one microgram per meter of PM2.5 particles was associated with a 15 percent increase in coronavirus mortality rates.[12] This shows that those who are most vulnerable due to exposure to poor air quality and climate change effects are at greatest risk of death from COVID-19 as well. Measures aimed to prevent the spread of the coronavirus resulted in 3.3 million filing for jobless claims already.[13] The number of employees in the coal industry, who would be directly affected by the transition to renewable energy sources, is many times lower, but although the number of deaths is constant and recurring year by year, globally, we scarcely come across government decisions applying the same approach to reduce GHG emissions (for example European Green Deal or Danish "green reboot").[14]

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9 Dechezleprêtre; Rivers; Stadler, *op. cit.,* note 6, p. 7

10 Buckley, S., *et al.*, published on 31 March 2020. White House Project Grim Toll From Coronavirus. The New York Times. [https://www.nytimes.com/2020/03/31/world/coronavirus-live-news-updates.html], accessed 15. April 2020

11 Bowe, B. *et al.*, *Burden of Cause-Specific Mortality Associated With PM2. 5 Air Pollution in the United States*, JAMA network open, *vol.* 2, no. 11, 2019, pp. e1915834-e1915834

12 Xiao Wu *et al.*, published 6 April 2020. Air pollution linked with higher COVID-19 death rates. Harvard T.H. Chan., [https://www.hsph.harvard.edu/news/hsph-in-the-news/air-pollution-linked-with-higher-covid-19-death-rates/], accessed 15. April 2020

13 Casselman, B.; Cohen, P.; Hsu, T., published on 26 March 2020, '*It's a Wreck': 3.3 Million File Unemployment Claims as Economy Comes Apart*, The New York Times, [https://www.nytimes.com/2020/03/26/business/economy/coronavirus-unemployment-claims.html], accessed 15. April 2020

14 See: Report on the comprehensive economic policy response to the COVID-19 pandemic, Council of the EU, 09/04/2020, 21. Roadmap for Recovery. Work is ongoing on a broader Roadmap and an Action Plan to support the recovery of the European economy through high quality job creation and reforms to strengthen resilience and competitiveness, in line with a sustainable growth strategy. Preconditions for a stable and efficiently functioning of national economy and their impact on real GDP growth after the global recession of 2008 may provide the base for that strategy. Ivanović, V.; Stanišić, N., *Monetary freedom and economic growth in new European Union member states*, Economic research, *vol.* 30, no. 1, 2017, pp. 453-463

Pointing out the outstanding legal issues both regarding the implementation of measures to prevent the further spread of the COVID-19 and the implementation of measures to prevent climate change, as well as facing the consequences in both cases, indicates a large number of outstanding issues that cannot be solved solely on state level.[15] At the same time, it also indicates that the states as well as the development of individuals' rights to protect themselves from climate change are those with the key role in finding an effective legal framework to decelerate climate change or other global challenges. This study is outlined in five parts. To start with, in section II, the basis for the right to legal remedy in climate change cases, we point to the recent cases *State of the Netherlands v. Urgenda Foundation* (court decision from December 2019) and *Kelsey Cascadia Rose Juliana v. USA* (court decision from January 2020) in which states took different positions on who, on whose behalf, under what conditions has a standing to initiate the rights protection proceedings that may be threatened by climate change. Next, in section III, obligation of the state to fulfil not only commitments following the international agreements but to go beyond is examined and new approaches in the *Juliana* case and *Urgenda* case are zoomed in. Bearing in mind that climate change poses an existential threat with irreversible and devastating consequences to people and that governments throughout the world exercising discretionary power may drive the climate change process past the point of no return, in section IV European Green Deal to enshrine the 2050 climate neutrality target into life and lessons learned from *Urgenda* and *Juliana* are analysed. In the final section V the findings are summarised.

2. THE BASIS FOR THE RIGHT TO LEGAL REMEDY IN CLIMATE CHANGE CASES

2.1. Occurrence of damage directly attributable to activities of GHG emission operators as basis for imposition of provisional measures in administrative procedure

In practice of the German Administrative Court, we come across a series of actions taken in order to determine liability for damages based on a share of the largest GHG emitters in contributing to climate change. One of the cases that provides a starting point for further analysis is the case of *Lliuya v. RWE AG*, tried by the Administrative Court of Germany.[16] In November 2015, Mr *Saúl Luciano Lliuya*, a farmer living near the Peruvian lake of *Huaraz*, in a lawsuit filed with

[15] Bronin, S.C., *What the Pandemic Can Teach Climate Attorneys*, Stanford Law Review Online, *vol.* 72, 2020

[16] Landgericht Essen, Urt. v. 15.12.2016, Az.: 2 O 285/15

the Administrative Court, requested imposition of provisional measures aiming to prohibit further activities of RWE, one of Germany's largest electricity producers, and indemnity for damage caused by climate change. In the lawsuit it is stated that RWE contributed to climate change by emitting large amounts of GHG, and, as a consequence, should take responsibility for melting of mountain glaciers near the city of *Huaraz*. The melting of the glaciers led to a rise in the nearby lake level, which urged the residents of this city to take a number of measures in order to mitigate the effects of climate change related to flood protection. Taking into account the contribution of RWE to climate change, the plaintiff requested indemnity of 0.47% of the cost from the company. In this case, the Administrative Court held that the causal link between the GHG emissions from RWE and the effects of climate change related to the melting of glaciers in Peru cannot be established. It is further stated that taking into account the cumulative liability of all pollutants for climate change does not lead to a different decision, given that no single pollutant, even a considerable one such as RWE, has a decisive impact on climate change.[17] The court rejected the request for determining provisional measures and the claim for damages, arguing that a contrary decision would not represent an effective legal remedy given that even a complete and permanent suspension of the RWE operation would not put an end to the melting of the glacier.

The possibility of indemnity for environmental damage is regulated identically in European Union law. The Environmental Liability Directive 2004/35/EC reads as early as in its introductory section that not all environmental damage can be eliminated. The mechanism of legal protection of the environment from damage can only be activated if the damage is concrete and quantifiable and if a causal link can be established between the damage and one or more pollutants. Therefore, Directive 2004/35/EC can only be applied in cases with established liability for environmental damage caused by diffuse pollution, only if it is possible to determine the causal link between the damage and the activity of the particular operator.[18] Does this mean that the argument that other operators and individuals contribute to climate change through their activities may deprive them of the possibility of indemnity for damage caused by climate change? Does this mean that for the largest pollutants, for which the amount of annual emissions can be determined, that amount can be used in order to apply the polluter pays principle, thereby ensuring indemnity for caused by climate change, where the value would depend on its share of total GHG emissions? In addition to the obligation to comply with the rules governing trade in these emissions, operators emitting GHG would also have

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17 See Zahar, A., *Mediated versus Cumulative Environmental Damage and the International Law Association's Legal Principles on Climate Change*, Climate Law, *vol.* 4, no. 3-4, 2014, pp. 217-233

18 The Environmental Liability Directive 2004/35/EC, *OJ L 143, 30.4.2004, p. 56–75,* Art. 4(5)

an additional obligation which would possibly affect finding alternative options. However, this raises an additional question: who and at what point is responsible for merging development policies with climate change?

It is possible to answer this question by analysing cases before administrative court which decided on the activities of operators that may contribute to climate change. The origin of this idea in comparative law is found in the practice of the Supreme Court of New Zealand[19] In that case, the Court, in deciding on the appeal against the decision of the Environment Court granting a permit to engage in mining activities, also considered whether the administrative authority making the decision on granting permit for activities that may contribute to climate change (in this case the Environment Court has the jurisdiction for issuing administrative acts which decide on granting permits), is required to consider the effects of the proposed activities on climate change?[20] The Court held that the governing body may have such an obligation, but only after adopting a separate act on New Zealand's National Environmental Standards. Such an act is necessary because it would provide a code for aligning environmental, climate and other policies. Without predefined benchmarks, policy alignment would not be consistent. In other words, it could occur that in the same circumstances preference is given to different public interests.

The most recent example found in the UK jurisprudence implies that the Paris Agreement temperature goal has binding effect and must be integrated in each decision that could jeopardise that goal.[21] British NGOs Friends of Earth and Plan B Earth filed a suit against the Secretary of State for Transport alleging that the climate change impacts related to the expansion of Heathrow airport were not considered adequately. Assessing the actions of government and Paris agreement commitments, the Appeal court ruled plans for a third runway at Heathrow airport illegal as the government's commitments to tackle the climate crisis had not been taken into account by the ministers. The Appeal court stressed that the commitment to the Paris Agreement made by the Government is a document that confirms Governmental policy in climate change. In the decision, the court also points out the relationship between the Paris Agreement and the Parties' activities in implementing GHG reduction measures: the decision-maker, in this case the Secretary, is obliged ,,to take the Paris Agreement into account when arriving at his decision (...) it does not follow from this that the Secretary of State was

[19] The High Court of New Zealand Christchurch Registry, CIV 2012-409-000972 [2012] NZHC 2156

[20] See Mayer, B., *The applicability of the principle of prevention to climate change: A response to Zahar,* Climate Law, *vol.* 5, no. 1, 2015, pp. 1-24

[21] Court of Appeals on appeal from the Queen's Bench Division Divisional Court Lord Justice Hickinbottom, Mr Justice Holgate and *Mr Justice*[2020] EWCA Civ 214, 27 February 2020

obliged to act in accordance with the Paris Agreement or to reach any particular outcome".[22] This, it appears, introduces an additional dilemma: what does it mean to take the Paris Agreement into account, if not to assess whether the decision contributes to achieving GHG reduction in accordance with the obligations of a particular state arising from that agreement or not? The decision-maker is required to determine how the Paris Agreement affects the substance of the decision and to determine whether a positive law (Climate Change Act in the UK) sets objectives that differ from those set out in the Paris Agreement.

2.2. Violation of basic human rights caused by climate change, preventing the occurrence of irreversible consequences, preventing further damage and protecting future generations as a basis for deciding on state liability for climate change damage: New approaches in the Urgenda case

Analysing cases led before the European Court of Human Rights (ECtHR) has not brought us to any decisions that point to additional elements of associating basic human rights with the consequences of climate change.[23] The 2009 UN Human Rights Commissioner's Report indicates that the specific nature of climate change makes it impossible to associate their consequences with violations of basic human rights, firstly because "there is no way of establishing a causal link between climate change and the contribution of a particular state", and also because "climate change leads to profound consequences along with natural disasters and other forms of environmental degradation."[24]

In recent practice of the Dutch Court of Appeal and Supreme Court, we come across a case that links basis for imposition of provisional measures on operators or determining state's liability for breach of the obligation to prevent further damage caused by climate change to violations of basic human rights, most importantly the violation of Article 2 (protecting the right to life) and Article 8 (right to private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[25]

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22 *Ibid.*, par. 238

23 Drenovak-Ivanović, M., *Human rights obligations related to climate change*. Legal life, 2017, pp. 226-242

24 OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/ 10/61*, 2009, para. 70

25 Climate Case Urgenda, Hoge Raad, 20-12-2019, ECLI:NL:HR:2019:2007, 19/00135. [https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf], accessed 15. April 2020. Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.005, into force from 3 September 1953. See Krstić, I.; Čučković, B., *Procedural aspects of article 8 of the ECHR in environmental cases: The greening of human rights law*, Annals of the Faculty of Law in Belgrade, *vol.* 63, no. 3, 2015, pp. 170-189

In a case initiated upon a complaint filed by 900 citizens of the Netherlands and the Environmental Organization against the Dutch Government, it was argued that the negligent attitude towards climate change, as noted in strategic documents and legal framework developed during the 5 years before the lawsuit, augments the contribution of the Netherlands to climate change and exceeding global warming limit.[26] Referring to the reports and analyses presented during the proceedings, the Court decided that the state had done little to prevent climate change, and that the measures proposed to be implemented by 2030 and beyond could not compensate for the actions due as early as possible.[27] An analysis is provided as an example, showing that urgent application of the measures defined for the post-2030 period would result in a reduction of 28% of GHG emissions by the end of 2020.[28] In a unanimous decision by a three-member panel, the Hague District Court stated that it is the Government's duty to care for citizens and protect citizens from potential climate change hazards and ordered a reduction in GHG emissions in the Netherlands for at least 25% by 2020.[29] The explanation indicates that the fulfilment of obligations assumed from international agreements does not relieve the state from the responsibility to protect citizens by taking additional reduction measures that go beyond obligations under international agreements.[30] The reasoning provides a retrospection, reminding that, by 2011, the Netherlands had an obligation to reduce GHG emissions by 30% by 2020, and the abandonment of these goals was not explained by any scientifically based arguments or analysis (para. 52).

The *Urgenda* case represents a significant precedent that links the jurisprudence of the ECtHR to climate change for the first time. The Court of Appeal states that the state is encouraged to take measures to prevent damage as much as possible,

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26 Rechtbank Den Haag, 24-06-2015, C/09/456689 / HA ZA 13-1396. Lin, J., *The first successful climate negligence case: A comment on Urgenda foundation v. the state of The Netherlands (Ministry of Infrastructure and the Environment)*, Climate Law, *vol.* 5, no. 1, 2015, pp. 65-81; De Graaf, K.J.; Jans, J.H., *The Urgenda decision: Netherlands Liable for role in causing dangerous global climate change*, Journal of Environmental Law, *vol.* 27, no. 3, 2015, pp. 517-527

27 Climate Case Urgenda, Hoge Raad, 20-12-2019, ECLI:NL:HR:2019:2007, 19/00135, pars. 70-73

28 *Ibid.*, para. 47

29 "This duty of care entails that in 2020, the Netherlands must achieve a reduction in greenhouse gas emissions of 25%-40% in comparison to emissions in 1990. A reduction of this magnitude is necessary to have any hope of achieving the 2°C target. This is also the most cost-effective option. (...) the State has a duty of care to take mitigating measures...", (para. 49); "... The Court of Appeal is of the opinion that a reduction obligation of at least 25% by the end of 2020, as ordered by the District Court, is in line with the State's duty of care (para. 53)." Climate Case Urgenda, Parket bij de Hoge Raad, 13-09-2019, ECLI:NL:HR:2019:1026, [https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:1026], accessed 15. April 2020

30 Drenovak-Ivanović, M., *Impact of Environmental Acquis and Chapter 27 Negotiations on the Development of Climate Change Rights in Serbia*, Legal life, 2018, pp. 335-350

whenever the government has knowledge and reports on existence of real and imminent danger.[31] Since climate change is a dangerous threat that can lead to loss of life and violation of the right to family life, it is an obligation of the state to protect the rights contained in Articles 2 and 8 from industrial activities that may violate these basic human rights. Particular consideration was given to the possibility to include in a complaint the protection of victims outside the jurisdiction of the ECHR, as well as to protect the rights of future generations.[32] In deciding on this issue, a key role was given to the objective of the Court's decision. According to the Court of Appeal, it protects the rights of current generations, not exclusively the rights of younger generations, since they already face the consequences of climate change, which they will continue to encounter throughout their lives if GHG are not effectively reduced globally.[33]

The analysis of *Urgenda* case leads to several conclusions. First, the ECHR and ECtHR jurisprudence provide the basis for individuals' rights to enforce climate action of states.[34] Secondly, the protection of basic human rights cannot point to the definition of the obligation of the state by applying duty of care, but is determined on the basis of the GHG reduction targets established to help reaching goals defined by the scientists' positions and the Paris Agreement.[35] Thirdly, it is the obligation of the state to reduce but also to ensure the reduction of GHG which means that the state has a positive obligation to start reduction efforts at the earliest possible stage. It also raises some important questions that determine the further development of individual rights to enforce climate protection: is the

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31 Climate Case Urgenda, Parket bij de Hoge Raad, 13-09-2019, ECLI:NL:HR:2019:1026, para. 45 [https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:1026], accessed 15. April 2020; Verschuuren, J., *The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal upholds judgment requiring the Netherlands to further reduce its greenhouse gas emissions*, Review of European, Comparative & International Environmental Law, *vol.* 28, no. 1, 2019, pp. 94-98

32 Leijten, I., *Human rights v. Insufficient climate action: The Urgenda case*, Netherlands Quarterly of Human Rights, *vol.* 37, no. 2, 2019, pp. 112-118

33 Climate Case Urgenda, Parket bij de Hoge Raad, 13-09-2019, ECLI:NL:HR:2019:1026, para. 37-38, [https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:1026], accessed 15. April 2020

34 Winter, G., *Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation*, Transnational Environmental Law, *vol.* 9, no. 1, 2020, pp. 137-164

35 Minnerop, P., *Integrating the 'duty of care'under the European Convention on Human Rights and the science and law of climate change: the decision of The Hague Court of Appeal in the Urgenda case*, Journal of Energy & Natural Resources Law, *vol.* 37, no. 2, 2019, pp. 149-179; Wegener, L., *Can the Paris Agreement Help Climate Change Litigation and Vice Versa?*, Transnational Environmental Law, *vol.* 9, no. 1, 2020, pp. 17-36

court competent to compel the government to act,[36] or the legislator has a final say in making decisions on reducing GHG emissions and adapting to the effects of climate change? Calling upon the human rights protection cleared the way for the Court of Appeals in *Urgenda* to reject the state's reliance on the system of separation of powers.[37] However, this also raises the question of how such a decision, if made by a court, can be acted upon.

3. SHOULD THE STATE FULFIL ONLY THE OBLIGATIONS ISSUING FROM INTERNATIONAL AGREEMENTS OR DO MORE: NEW APPROACHES IN THE *JULIANA* CASE

Among the key issues in establishing climate change rights is: does absence of having a critical role in causing climate change absolve the operator of responsibility for the consequences of climate change; does the fact that even without the operation of one operator GHGs that accelerate climate change would continue to be produced stultifies imposition of provisional measures to ban one operator; does the fact that one state cannot prevent climate change by itself also means that domestic courts should not act in cases involving the determination of the state's responsibility for implementing measures or determining the policy that does not lead to climate change mitigation?

In the *Urgenda* case the Court of Appeal clearly stressed that even if there was no complete scientific certainty regarding the effectiveness of the reduction order it does not entitle the state to refrain from taking further measures.[38] But, is it the court that should order that? The first case in the US to consider this issue and legal standing in climate legal actions was Massachusetts v. EPA.[39] The Supreme Court unambiguously confirmed that EPA can regulate GHG, such as carbon dioxide , as "air pollutant" under the Clean Air Act that should mitigate the consequences of climate change despite the fact that climate change has a global nature.[40]

In *Juliana* case (Youths' Climate Case), a group of children between the ages of eight and nineteen filed suit against the federal government, asserting that it vio-

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36 Burgers, L., *Should Judges Make Climate Change Law?*, Transnational Environmental Law, *vol.* 9, no. 1, 2020, pp. 55

37 The Court of Appeal held that measures were called for because the state was violating human rights, and that the reduction order imposed on the state allowed it sufficient room to choose how it would comply with that order. Climate Case Urgenda, Parket bij de Hoge Raad, 13-09-2019, ECLI:NL:HR:2019:1026, para. 67, [https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:1026], accessed 15. April 2020

38 *Ibid.*, para. 63

39 Massachusetts v. EPA, 549 U.S. 497 (2007)

40 Massachusetts v. EPA, [https://www.justice.gov/enrd/massachusetts-v-epa], accessed 15. April 2020

lated their constitutional rights by causing dangerous carbon dioxide concentrations. The plaintiffs asked the Supreme Court to order the government to act on climate change.[41] The court found a concrete injury and evidence on causation. It was 2-1 decision by which the court found a lack of redressability because the issues presented in Juliana were beyond the power of the court to remedy. In other words, the court held that reaching a decision which would request from the Government to make a plan to "phase out fossil fuel emissions and drag down excess atmospheric CO2" is not within the jurisdiction of the court. Such a decision should be made by "the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box".[42] Dissenting Judge Staton stressed "(...) the injury at issue is not climate change writ large; it is climate change beyond the threshold point of no return. (...) practical redressability is not measured by our ability to stop climate change in its tracks and immediately undo the injuries that plaintiffs suffer today—an admittedly tall order; it is instead measured by our ability to curb by some meaningful degree what the record shows to be an otherwise inevitable march to the point of no return. As we approach that threshold, the significance of every emissions reduction is magnified. (...)".[43]

The analysis of *Juliana* case leads to several conclusions. Both the reasoning of the decision and the reasoning in the dissenting opinion indicate that there is evidence that the federal government had been promoting the use of fossil fuels for years despite reports showing ,,that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse".[44] This is the first case in the US that clearly presents the existence of the climate crisis, points to evidence that unambiguously confirms it, and to the need to urgently find measures to reduce GHG emissions. What has been left undone is an analysis of arguments that would provide the court, in a system of separation of powers, with certain jurisdictions in cases that reasonably indicate that there was a dramatic risk of harm and passing the point of no return. If the Supreme Court considers that it does not have jurisdiction to oblige the Government to adopt the relevant act of precisely defined content, could the Government be

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41 Juliana v. United States, no. 18-36082 (9th Cir. 2020)

42 Juliana v. United States, p. 32, [https://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/17/18-36082.pdf], accessed 15. April 2020. See: Parenteau, P., *End Game for the Kids Climate Case?*, published on 29 January 2020, [http://vjel.vermontlaw.edu/end-game-kids-climate-case/], accessed 15. April 2020

43 Juliana v. United States, p. 45, [https://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/17/18-36082.pdf], accessed 15. April 2020

44 Juliana v. United States, p. 11, [https://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/17/18-36082.pdf], accessed 15. April 2020. See Gundlach, J., *Climate risks are becoming legal liabilities for the energy sector*, Nature Energy, *vol.* 5, no. 2, 2020, pp. 94-97

obligated to some other enactment? We believe that the court could have at least requested continued cooperation at international level in the fight against climate change and further compliance with the obligations under the Paris Agreement and future climate agreements. Following the previously analysed decision on the third runway at Heathrow airport, we conclude that the court could also point to the obligation of decision-makers to take the Paris Agreement into account when preparing the decision.

4. EUROPEAN GREEN DEAL TO ENSHRINE THE 2050 CLIMATE NEUTRALITY TARGET INTO LIFE AND LESSONS LEARNED FROM *URGENDA* AND *JULIANA*

The European Green Deal is a roadmap aimed to point out the most important steps to make Europe the first climate-neutral continent by 2050.[45] European Climate Law[46] should be the cornerstone that would frame turnover of the political commitments into a legal obligation. Under Charter of Fundamental Rights of the European Union, high level of environmental protection in accordance with the principle of sustainable development is guaranteed by Article 37.[47] However, the proposal of the European Climate Law does not further specify the link between the violation suffered by individuals, which could jeopardise their human rights, including the right to a high level of environmental protection.

By analysing the proposal of European Climate Law, we conclude that the new Article 11, which introduces a multilevel climate and energy dialogue, can be the basis for further development of climate change rights. The newly proposed Article would oblige Member States to introduce a dialogue, in the format customary in the law of a Member State, that would, as a result, enable a dialogue between local government, civil society, economic and investor representatives and the general public on whether the EU is meeting climate-neutrality objectives.[48] The dialogue would also be led, by the same stakeholders, on different scenarios for the development of energy and climate change policies. If we compare the proposed measures

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45 European Commission. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal. Brussels, 11.12.2019 COM(2019) 640 final; Haines, A.; Scheelbeek, P., E*uropean Green Deal: a major opportunity for health improvement*, The Lancet, 2020

46 European Commission. Proposal for a Regulation of the European Parliament and the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), Brussels, 4.3.2020 COM(2020) 80 final 2020/0036 (COD)

47 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391

48 Hilson, C., *Hitting the Target? Analysing the Use of Targets in Climate Law*, Journal of Environmental Law, 2020

with the positive law of the Member States, or with Serbian positive law, we can see that this is a strategic environmental impact assessment procedure. The EU has not gone beyond what was already provided for under existing law. The essence of further development of legal mechanisms guaranteeing the reduction of GHG emissions and adaptation to climate change, which is an obligation established by the proposed European Climate Law in Art. 2 and Art. 4, is the development of climate change rights at Member State level. The central place, in fact, seems to be the adaptation of the legal system, which has to find the basis for applying traditional legal norms to new social relations that emerge from the rapid rise of climate change impact. Member States' legal systems should also make it possible for the transition to the new climate neutrality goals to be just and inclusive, leaving no one behind. The analysed cases of *Urgenda* and *Juliana* indicate that the most important task in achieving such a transition is to find the basis,[49] within the legal systems of the Member States,[50] to turn the objectives of achieving climate neutrality and the goals of the European Green Deal into concrete individual rights to enforce climate protection. The criteria for these actions should have been included in the proposed European Climate Law.

5. CONCLUDING OBSERVATIONS

Climate change and the consequences of the spread of COVID-19 are crisis situations with significant impacts on sustainability and security. The decisions of the governing bodies, courts, strategic documents and proposals for climate change law indicate the extent to which measures to fight climate change and measures to adapt to climate change are taken into account in decision-making. Judge Staton started her powerful dissent in *Juliana* comparing the emergency of climate change situation with "an asteroid barrelling toward Earth" and Judge Hurwitz, explaining the decision and writing for the majority, stressed that the plaintiffs presented in *Juliana* ,,compelling evidence that climate change has brought ... eve of destruction ... nearer." Although an individual operator is not the only contributor to climate change, nor is any state for that matter, it does not entitle the state to refrain from taking further measures. The *Urgenda* case indicated that a state has a duty to care and that the obligation to reduce GHG emissions urgently is in line with its human rights obligation. This means, firstly, that a state has an

[49] Fisher, L., *Challenges for the EU Climate Change Regime*, German Law Journal, *vol.* 21, no. 1, 2020, pp. 5-9

[50] Lukic, M., *Relevance of conceptualizing the relationship between international and national law for the legal nature of the European Union*, Archibald Reiss Days, 2015, pp. 331-339; See European Commission. Proposal for Regulation of the European Parliament and the Council establishing the Just Transition Fund. Brussels, 14.01.2020 COM(2020) 22 final 2020/0006 (COD)

obligation to cooperate with other states at the international level in the fight against climate change, and to fulfil its obligations under the Paris Agreement and future climate agreements. Second, a state has an obligation to develop a climate change policy that is aligned with the objectives issuing from the Paris Agreement. Such policy should contain clear guidelines for integrating climate change interests into policy development in other areas, as well as criteria for weighing overriding interests when more than one public interest is involved, one of which is climate. Third, duty to care means that a state has an obligation to take into account the violation of basic human rights due to climate change. Fourth, a state has an obligation to turn the objectives of the fight against climate change into concrete individual rights to enforce climate protection. Those conclusions could be universal and applicable in other jurisdictions.

Responses to the crisis caused by the expansion of COVID-19 demonstrate that societies can find both economic and industrial potential to overcome current challenges in the state of emergency.[51] Climate change is not uncertain and it requires identical activities from the states. Initiatives for such activities can already be found in the recommendations of the leading political parties and business associations in Denmark who requested a "green reboot" that puts green growth as a base of the recovery from the coronavirus crisis.[52] In March 2020, the Heads of States and Governments invited the Commission to use Green Deal and its Investment Plan as a base for comprehensive EU recovery plan integrating the green transition to push forward to boost green recovery and just transition after COVID-19.[53]

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UDK 341.231:342.7](4-67EU)
Review article

A DECADE OF BALANCING WITH EU HUMAN RIGHTS PROTECTION: BETWEEN NATIONAL AND INTERNATIONAL COMPETENCES AND SOURCES OF LAW, INDIVIDUAL AND SYSTEMIC INTERESTS

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ABSTRACT

The path towards establishing and advancing human rights' protection within the EU legal system seemed straightforward a decade ago. With the entry into force of the Lisbon Treaty in 2009, the Charter of Fundamental Rights of the EU became part of primary law, together with a commitment of accession to the European Convention on Human Rights. In 2010, Protocol 14 to the ECHR entered into force, allowing the EU to accede to the ECHR. A draft agreement on accession was finalized thereafter. In 2014, however, the Court of Justice of the European Union issued a negative opinion on the draft accession treaty, citing perceived threats to autonomy of EU law, competence of the EU and powers of the Court. A year earlier, in February 2013, the CJEU rendered judgments in cases Fransson and Melloni whereby it provided crucial rules for interpretation of clauses 51(1) and 53, respectively, of the Charter. The field of application of the Charter was equated with the scope of EU law. Primacy, effectiveness and unity of EU law, both primary and secondary, were prioritized over human rights and fundamental freedoms recognized by international agreements, including the ECHR, as well as by the Member States' constitutions. The realm of fundamental individual rights remains to this day the decisive grounds for asserting the core principle of EU constitutionality: the autonomy of EU law. Accession to the ECHR remains to this day a proclaimed goal of EU governing bodies, but little palpable progress is being made. Protection of fundamental rights at EU level has remained a point of contention among academics. Some question the very need for its existence, in view of constitutional guarantees by Member States and the ECHR.

Others, however, claim that the CJEU sacrificed protection of individuals' rights for the interest of promoting constitutionality of the EU. These critiques seem unwarranted. Article 2 TEU necessitates existence of an efficient mechanism for protection of fundamental freedoms at EU level. Historical examples of political communities built on multi-ethnic, civic model all show necessity of integrating human rights protection at the constitutional level. Constitutionality of the EU has been developing for six decades, for the most part under the guise of autonomy of EU law. It requires that primacy of fundamental rights, as guaranteed by EU law, be affirmed both vis-à-vis Member States and international treaties. However, one may not expect that fundamental rights and freedoms within the EU be protected in a uniform and efficient manner unless a system for enforcing such rights and freedoms is not put in place first.

***Keywords**: EU Charter of Fundamental Rights, Kadi, Melloni, Fransson, primacy of EU law, constitutionality of EU law, Tarrico*

1. INTRODUCTORY REMARKS

The turn of the first decade of the 21st century seemed to have put the protection of human rights within EU law on a firm and transparent footing. With the entry into force of the Lisbon Treaty on 1 December 2009, the Charter of Fundamental Rights of the European Union (the Charter) became part of primary law, together with a commitment of accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In 2010, Protocol 14 to the ECHR entered into force, allowing the EU to accede to the ECHR. This ultimately led to the finalization of the draft agreement on EU accession to the ECHR in April 2013. The newly formed normative framework did not seem conducive to creating contentious issues.

In contrast to such semblance, however, the past decade brought about several major developments of contentious nature in the realm of EU law on human rights. Naturally, a question arises on whether a sensible development, or a regression may be discerned in the outcomes of subject conflicts, or the conflicts have played out in a random and chaotic fashion. In order to be able to look for an answer to that question, however, one needs to identify a perspective on the context of the subject phenomena.

The issues that were raised had a common root: plurality of layers of human rights protection in EU law, both in terms of sources of law – national constitutions, the Charter, the ECHR etc – and in terms of courts competent for enforsing said sources – ordinary and constitutional courts of Member States, the Court of Justice of the European Union (CJEU, or Court), the European Court of Human Rights (ECtHR)

It seems that the subject developments should be analyzed in the context of the process of constitutionalization of the EU, i.e. that the substance of the inquiry

should consist in learning whether said developments furthered that process, reversed it to a certain extent, or have not had any impact upon it.

The reasons for such choice of context are manifold. The subject matter of human rights protection firmly belongs to the universally accepted realm of *materia constitutionis.* The process of constitutionalization of the European Communities by virtue of case law of the CJEU spans five decades, between its *Costa v. Enel* and *Kadi* judgments. The creative role of the CJEU in respect of constitutionalization of EU law has been established in academic literature for several decades.[1] Case law of the CJEU also represents the primary environment in which the conflicts that are the subject of this paper have transpired.[2] Last but not least, in view of the conceptual proclamation of the "ever closer Union", a finding on whether the Union has in fact become closer as result of the subject developments is certainly warranted.

It should be noted that although the subject conflicts have both played out in the framework of, and resolved by virtue of case law of the CJEU, their outcomes, due to the formative role of the CJEU, have a profound impact not only on EU law, but also on the values and policies of the EU. These judgments have provoked a great deal of discussions and many opposing views among academics, as well as in the realms of law and public policy, so that they may be regarded as embodiments of wide intellectual, societal and political disputes. Their holdings have a capability to influence the manner in which EU law, its values and its constitutionality are conceptualized in the future. These are precisely the reasons why we use a reference to contentious developments in the area of human rights law, instead simply to judgments of the CJEU.

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1 Weiler, J.H.H, *The Reformation of European Constitutionalism*, Journal of Common Market Studies, *vol*. 35, issue No. 1, 1997, p. 98

2 In fact, protection of fundamental rights under Community and Union law was born and had developed until the drafting and enactment of the Charter not by virtue of the founding treaties, but by virtue of case law of the CJEU, which regarded fundamental rights as an integral part of general principles of Community law. Trstenjak, V.; Beysen, E., *The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU,* European Law Review*, vol*. 38, no. 3, 2013*,* p. 294; Opinion of the Court 2/13 of 18 December 2014, [2014] ECR, ECLI:EU:C:2014:2454, par. 37

2. *MELLONI* – NATIONAL CONSTITUTIONAL RIGHTS V. EU LAW

2.1. The facts of the case and the holding

In February 2013 the CJEU issued a judgment in the case *Stefano Melloni v. Ministerio Fiscal,*[3] thereby ceasing the opportunity to add an important tenet to the doctrine of primacy of EU law. It did so in response to the first ever request for a preliminary ruling made by the Spanish Constitutional Court.

The reference for a preliminary ruling was made in relation to interpretation of the right to a fair trial, as guaranteed by Article 47 of the Charter and by the Spanish Constitution. The Spanish Constitutional Court had been interpreting Spanish Constitution as requiring that a person tried *in absentia* had to be afforded right to apply for a retrial, irrespective of whether such person had been represented by lawyers in the first trial. Contrary to such interpretative rule, a framework decision of the Council of 2009[4] amending, *inter alia,* the basic framework decision on the European Arrest Warrant of 2002,[5] explicitly excluded the possibility that the judicial authority executing the European Arrest Warrant (EAW) may refuse to execute such a warrant issued for the purpose of executing a custodial sentence or a detention order if the subject person, even though he or she did not appear in person at the trial, *inter alia*, "had given mandate to a legal counsellor… to defend him or her at the trial, and was indeed defended by that counsellor at the trial."[6]

In the case at hand, Stefano Melloni, although not present in person, was undisputedly represented by lawyers at a trial before Bologna Appeal Court in 2003, at which he was sentenced to ten years in prison for bankruptcy fraud.[7] After he was arrested in Spain in 2008, proceedings for his surrender to Italy pursuant to EAW were commenced. Mr. Melloni eventually petitioned to the Spanish Constitutional Court, claiming, *inter alia*, that his right to a fair trial would be violated by

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3 Judgment of 26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, C-399/11, [2013] ECR, ECLI:EU:C:2013:107

4 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* 81/24

5 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] *OJ L* 190/1

6 Council Framework Decision 2002/548/JHA, as amended by Council Framework Decision 2009/299/JHA, article 4a

7 *Stefano Melloni v. Ministerio Fiscal*, par. 14

a surrender to a country in which he would not be able to challenge a conviction rendered *in absentia*.[8]

The Spanish Constitutional Court articulated its reference in the form of three questions.[9] The third one turned out to be of utmost significance for interpreting the systemic protection of human rights within the EU:

> "…does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the constitution of the first-mentioned Member State?"[10]

The answer the CJEU provided to the cited question was a negative one, supported, most directly, with the following reasoning:

> "… allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under the Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State … would undermine the principles of mutual trust and recognition which that decision [the Framework Decision] purports to uphold and would, therefore, comprise the efficacy of that framework decision."[11]

The cited finding was based on a general rule of interpretation of Article 53 of the Charter which the Court put forth in the same decision:

> "It is true that Article 53 … confirms that, where an EU legal act calls for national implementing measures, national authorities and courts

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8 *Ibid.*, par. 15-18

9 The manner in which the three questions were structured and formulated seems to suggest that the Spanish Constitutional Court was in fact aiming to receive a specific set of answers. Such analysis, however, would surpass the scope and focus of this paper.

10 *Stefano Melloni v. Ministerio Fiscal,* par. 26

11 *Ibid.*, par. 64

> remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised."[12]

In order to support this interpretative rule, the Court invoked the authority of its doctrine of primacy of EU law, by referring to its own case law dating as far back as the judgment in *Internationale Handelsgesellschaft* of 1970.[13] In contrast to the judgments it cited – *Internationale Handelsgesellschaft* and *Winner Wetten*[14] – both of which upheld primacy and effectivess of EU law as inviolable,[15] in this instance the Court added a third element: unity of EU law.

2.2. Significance of the judgment

The Spanish Constitutional Court complied with the holding of Melloni, modified its case law on the right to a fair trial, but felt compelled to restate its adherence to the *controlimiti* doctrine.[16]

Prima facie, *Melloni* and *Internationale Handelsgesellschaft* may seem similar. Both judgments gave priority to secondary EU law over basic rights, and structural principles in the case of the latter, enshrined in a national constitution of a Member State. The significance of *Melloni* is not only based, however, on the substance of the holding, but on the context in which it was rendered. During the forty and so years that separate the two judgments, secondary EU law has grown exponentially and has spread to many areas which were previously insulated from it. In parallel with that growth, rose the pressure on constitutional courts of Member States to protect basic rights under national constitutions from possible infringements by virtue of the sprawling EU secondary law. The holding in *Melloni* prevented that Article 53 of the Charter be instrumentalized for the articulation of that pressure, and that a dent be made in the scope of the non-codified doctrine of primacy of EU law by virtue of mere interpretation of a (codified) Charter provision.

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12 *Ibid.*, par. 60

13 Judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* C-11/70, [1970] ECR 1125, ECLI:EU:C:1970:114

14 Judgment of 8 September 2010, *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim*, C-409/06, [2010] ECR I-8015, ECLI:EU:C:2010:503

15 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, par. 3; *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim*, par. 61

16 Torres Pérez, A., *Melloni in Three Acts: From Dialogue to Monologue,* European Constitutional Law Review, no. 10, 2014, pp. 319-323

As had been explained by De Witte before the judgment in this case was issued, Article 53 is worded in an ambiguous manner: the wording "in their respective fields of application"[17], pertaining to the Union law, international law and the Member States constitutions, was not well suited to the actual situation in which a great deal of EU law overlaps with the scope of national laws.[18] Perhaps this perceived ambiguity may very well be the principal reason why the Court in *Melloni* developed the doctrine of primacy of EU in such manner that it encompasses the "unity" of EU law. The concept of unity clearly underscores that all EU law provisions, even those subject to transposition to national laws, form a unified body of law which is afforded primacy.

Furthermore, the holding in *Melloni* was particularly significant since the doctrine may have seemed vulnerable after it remained non-codified in the Lisbon Treaty in spite of the fact that its codification had been included in the failed EU Constitution.[19]

The holding, however, instigated fierce academic debates, in which many experts both supported[20] and criticized it.[21] De Visser pointed out to expectations that enforcement of fundamental rights at EU level would have a centralizing effect on EU law, which had beenexpressed by several academics, and offered support to such expectations by pointing out to the example of post-WWII Germany, where the activity of the Federal Constitutional Court had such effect.[22] Similarly, some authors have made comparisons with the protection of basic constitutional rights at the federal level in the US,[23] although arguments have also appeared, based on

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17 Article 53, the Charter

18 De Witte, B., *Tensions in the Multilevel Protection of Fundamental Rights*, *The Meaning of Article 53 EU Charter*, in: Silveira, A.; Canotilho, M.; Madeira Froufe, P. (eds.),Citizenship and Solidarity in the European Union P.I.E. Peter Lang, Bruxelles, Bern, Berlin, Frankfurt am Main, New York, Oxford, Wien, 2013, p. 206

19 Article I-6, Treaty Establishing a Constitution for Europe (Rome)

20 E.g. Appanah, D., *Charte des droits fondamentaux de l'Union européenne et Convention européenne des droits de l'homme: entre coherence et legitimation. A propos des arrêts Aklagaren c/Hans Akerberg Fransson et Steffano Melloni c/Ministerio Fiscal rendus par la Cour de justice le 23 février 2013*, Revue Générale de Droit International Public (R.G.D.I.P.), no. 2, 2014, pp. 333-356

21 Objections to *Melloni* mostly centered around the claim that the Court prioritized its interests in the constitutional conflict with Member States' courts over protection of human rights. Besselink, L. F. M., *The parameters of constitutional conflict after Melloni*, European Current Law, *vol*. 10, 2014, p. 1169

22 De Visser, M., *National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a Post-Charter Landscape*, Human Rights Review, *vol*. 15, no. 1, 2014, p. 45

23 Von Papp, K., *A Federal Question Doctrine for EU Fundamental Rights Law: Making Sense of Articles 51 and 53 of the Charter of Fundamental Rights*, *vol*. 43. no. 4, 2018, pp. 526-527

US doctrines on federalism, claiming that the power of Member States to interpret and enforce basic rights in fact benefits "supranational ends".[24]

The outcome in *Melloni* seemed negative to some authors because, as articulated by Torres Pérez, it meant that European integration requires lowering of the level of the constitutional rights protection.[25] Assessing relative weight of arguments put forth in those debates would exceed the aim of this paper by far.

3. *FRANSSON* – A BROAD CONCEPT OF "IMPLEMENTATION OF UNION LAW"

3.1. The facts of the case and the holding

On the very same day on which the judgment in *Melloni* was rendered, a Grand Chamber of the Court rendered a judgment in the case *Åklagaren v. Hans Åkerberg Fransson*.[26] Marek Safjan was the judge rapporteur in both proceedings. In view of the overall direction and reach of the two holdings, the simultaneity of the judgments and the identity of the rapporteur do not seem as a coincidence.

The crux of the Court's reasoning in this judgment does not seem to lie in consideration of the merits of the case, but instead in its jurisdictional part. The case before the CJEU was initiated by a request for preliminary opinion filed by a court in Sweden, the Harapanda District Court, which was facing the question on whether Mr. Åkerberg Fransson could be convicted pursuant to criminal charges for tax frauds for the same actions for which he had been fined by a tax-administration body, in view of the *ne bis in idem* rules of the ECHR and the Charter.[27]

The jurisdiction of the Court was disputed by the Swedish, Czech and Danish governments, Ireland, the government of the Netherlands, as well as by the European Commission, all of which based their objections to the Court's jurisdiction upon the claim that neither the tax penalties imposed on Mr Fransson and the criminal proceedings brought against him that had been the subject-matter of the main proceedings arose from implementation of EU law, so that the Swedish

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[24] Torres Pérez, A., *The federalizing force of the EU Charter of Fundamental Rights*, International Journal of Constitutional Law, *vol*. 15, no. 4, 2017, pp. 1090-1091

[25] Torres Pérez, A., *Constitutional Dialogue on European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door,* European Constitutional Law Review, no. 8, 2012, p. 127

[26] Judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson* C-617/10, [2013] ECR, ECLI:EU:C:2013:105

[27] *Åklagaren v. Hans Åkerberg Fransson, paragraphs* 12-14

courts were not, in respect of subject proceedings, bound by the Charter, in line with Art. 51(1) of the Charter.[28]

The Court, however, ruled in favor of its jurisdiction.[29] It found that

> "tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112/EC… and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter."[30]

The twofold basis for considering the proceedings brought against Mr. Fransson as implementation of EU law – the provisions of the Council Directive 2006/112/EC on the common system of value added tax[31] and Article 325 TFEU – was established by the Court in a particularly interesting indirect manner, by way of conduits.

Firstly, the Court noted that "the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT".[32]

In respect of the Council Directive 2006/112/EC, the Court relied on the duty of loyal cooperation, stipulated in Article 4(3), to pronounce the duty of every Member State to ensure collection of VAT and prevent tax evasion.[33] In doing so, the Court followed the invocation of the duty of loyal cooperation in another judgment, in which it assessed whether Italy had honored its duty to harmonize its laws with an earlier directive introducing VAT.[34] The conduit for connecting the proceedings against Mr. Fransson in the case at hand and the obligation of Member States to counter illegal activities affecting the financial interests of the European Union, by taking the same measures they take to counter fraud their own

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28 *Ibid.*, par. 16

29 *Ibid.*, par 31

30 *Ibid.*, par. 27

31 Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, [2006] *OJ L* 347/1

32 *Åklagaren v. Hans Åkerberg Fransson,* par. 24

33 *Ibid.*, par. 25

34 Judgment of 17 July 2008, *Commission v. Italian Republic* C-132/06, [2008] ECR I-5457, ECLI:EU:C:2008:412

interests, as stipulated in Article 325 TFEU, was the inference of the Court that any diminution of VAT revenues of a Member State affects the Union's budget.[35]

The Court proceeded by attempting to articulate elements of a more general rule, and, at the same, to establish a bridge between the two tenets of its finding:

> "The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion [that tax penalties and criminal proceedings for tax evasion constitute implementation of EU law] into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union."[36]

It should be noted that Advocate General Cruz Villalón had argued against the existence of jurisdiction of the CJEU in this case. In a lengthy reasoning, to which he devoted approximately one third of the entire opinion, he attempted to draw a comprehensive theory of what should be regarded as "scope" and/or "implementation" of EU law.[37] In order to grasp the order of magnitude of the length to which the Court went in broadening the meaning of "implementation of Union law" in the judgment, one may contrast the Court's holding to some of the concluding points of Cruz Villalón's argument on jurisdiction:

> "…It must be recalled that the premiss for finding that the Union has an interest in assuming responsibility for guaranteeing the fundamental right concerned in this case is the degree of connection between Union law, which is in principle being 'implemented', and the exercise of the public authority of the State. In my opinion, that connection is extremely weak and is not, in any event, a sufficient basis for a clearly identifiable interest on the part of the Union in assuming responsibility for guaranteeing that specific fundamental right vis-à-vis the Union."[38]

> "…the provision of false information to the tax authorities by taxable persons is punished in a general way, as an essential prerequisite

[35] *Åklagaren v. Hans Åkerberg Fransson,* par. 26

[36] *Ibid.*, par. 28

[37] Opinion of Advocate General Cruz Villalón, of 12 June 2012, C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2012:340, par. 22-65

[38] *Ibid.*, par. 57

of that system of penalties. It is that part of the Swedish tax system which is used for the purposes of collecting VAT."[39]

"In those terms, the question is whether a State legislative activity based directly on Union law is equivalent to the situation in this case, where national law is used to secure objectives laid down in Union law…"[40]

"… the structure of the Swedish law on penalties which is, as such, completely independent from the collection of VAT,..."[41]

"… it appears to be risky to assert that, by means of a provision such as Article 273 of Directive 2006/112, the legislature was anticipating the transfer of all the constitutional guarantees governing the exercise of the Member States' power to impose penalties – including the collection of VAT – from the Member States to the Union."[42]

3.2. Significance of the judgment

It would be obvious, even to an uninformed reader, that the Court in *Fransson* afforded an exceptionally broad meaning to the concept of "implementation of Union law," and thus, in effect, broadened the scope of Union law. Such action met numerous and loud protests. Perhaps the reaction of the German *Bundessverfassungsgericht* represented the most paradigmatic articulation of such opposition. Already in April 2013, the German Constitutional Court rendered a judgment in which it assessed whether the German Counter-Terrorism Database Act infringed upon fundamental rights guaranteed by the German Constitution and the Charter.[43] That court explicitly referred to *Fransson* by using rather harsh attributes to describe the *nexus* to Union law established in that judgment, and threatened to resort to its *ultra vires* doctrine in case that reasoning in *Fransson* is applied at its face value:

"The ECJ's decision in the case Åkerberg Fransson … does not change this conclusion. …, this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endan-

39 *Ibid.*, par 59

40 *Ibid.*, par. 60

41 *Ibid.*, par. 61

42 *Ibid.*, par. 63

43 BVerfG, Judgment of the First Senate of 24 April 2013 - 1 BvR 1215/07, par. 1-233, ECLI:DE:BVerfG:2013:rs20130424.1bvr121507

> gered the protection and enforcement of the fundamental rights in the Member States .... The decision must thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights…"[44]

As pointed out by Torres Pérez,[45] the CJEU seemed to relativize its *Fransson* position when in the following year it rendered a judgment in the case *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo***.**[46] In the reasoning on its competence for responding to a request for a preliminary opinion by the Regional Administrative Court for Sicily, the Court included the following wording:

> "should be borne in mind that the concept of 'implementing Union law', as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other…"[47]

The Court, furthermore, referred to a line of judgments, preceding *Fransson,* which included the set of criteria for determining "whether national legislation involves the implementation of EU law for purposes of Article 51 of the Charter":[48]

> "… whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it…"[49]

Fransson, however, continued to be referred to by the CJEU itself and cited by many legal scholars.[50] Although in most cases it is not being referred to in con-

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44 *Ibid.*, par. 91

45 Torres Pérez, *op. cit.,* note 24, p. 1084

46 Judgment of 6 March 2014, *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* C-206/13, [2014] ECR, ECLI:EU:C:2014:126

47 *Ibid.*, par. 24

48 *Ibid.*, par. 25

49 *Ibid.*, par. 25

50 "With the Melloni and Akerberg Fransson decisions, handed down the same day - which is certainly no coincidence - the Court of Justice has greatly contributed to the constitution and the structuring of a European constitutional space for fundamental rights," Ritleng, D., *The Contribution of the Court of Justice to the Structuring of the European Space of Fundamental Rights*, New Journal of European Crimi-

nection with the manner in which the meaning of "implementation of EU law" was interpreted in it, that part of the holding preserves the potential to influence future law due to the high profile of the entire judgment.

4. CJEU v. ECTHR

4.1. Opinion 2/13: exclusive competence of the CJEU and autonomy of EU law

The progress of EU accession to the ECHR stalled in December 2014, when the CJEU found the respective draft treaty to be incompatible with EU law.[51] The CJEU based its ruling on a number of reasons, the common denominator of which may be the claim that the draft agreement, by failing to take into account the specific structure of the EU and the specific nature of EU law, contravened the principle of autonomy of EU law, mostly by undermining the exclusive competence of CJEU in respect of interpretation of EU law.

The Court explicitly relied on *Melloni* and *Fransson* when it determined that the draft agreement lacked a provision that would ensure that the powers granted by virtue of the ECHR to the Member States "with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR" be limited to the extent "which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised".[52] In such circumstances, the EU bodies would be subjected to parallel external control of two separate judicial bodies, which would force them to take into account two different sets of interpretations – those of the CJEU and of the ECtHR.[53] The CJEU also found that treating the EU and its Member States as independent contracting parties to the ECHR would undermine the obligation of mutual trust between Member States and consequently also the "underlying balance of the EU and the autonomy of EU law."[54] Furthermore, having regard to the fact that the ECHR would become integral part of EU law, the right of Member States to ask for advisory opinions of the ECtHR, would, in view of the CJEU,

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nal Law*, vol.* 5, issue 4, 2014, p. 507; "…and the related *Melloni* and *Åkerberg Fransson* jurisprudence, which has become part of the primacy architecture of EU law…", Burchardt, D., *Belittling the Primacy of EU Law in Taricco II*, Verfassungsblog.de, 7 December 2017, [URL=https://verfassungsblog.de/belittling-the-primacy-of-eu-law-in-taricco-ii/], accessed 14. April 2020

51 Opinion of the Court 2/13 of 18 December 2014, [2014] ECR, ECLI:EU:C:2014:2454

52 *Ibid.*, par. 189

53 "… any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law…" *Ibid.*, par. 184

54 *Ibid.*, par. 194

undermine autonomy and effectiveness of the preliminary ruling procedure before the CJEU.[55]

4.2. Significance of Opinion 2/13

The Opinion effectively stalled accession of the EU to the ECHR up to the present day. Since it was issued, EU institutions have repeatedly declared their commitment to continuing accession negotiations, as well as to complying with all the objections of the Court. At a meeting of EU institutions and the Council of Europe at the end of 2018 it was stated that "all aspects indicated in Opinion 2/13 have been addressed at expert and Council level." In October 2019, the Commission submitted to the Council written contributions in which it allegedly addressed all the objections raised by the CJEU.[56] In view of the gravity of objections raised by the CJEU and their firm foundations in the constitutional structure of the EU, it is evident that the outcome of such continued negotiations seems rather distant and doubtful.

Opinion 2/13 represents a crown jewell in the long-standing CJEU case law doctrine on autonomy of EU law. The Court seems to have articulated a synthesis of the different aspects of that doctrine, which it had been developing over the past decades in a number of its judgments – autonomy vis-à-vis Member States and international law, in the areas of human rights and external relations.[57]

The opinion has encountered wide-spread critique, primarily coming from authors who believe that constitutional principles of the EU, such as EU law au-

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55 *Ibid.*, par. 199. For a detailed analysis of this aspect of the Opinion see: Petrašević T.; Duić, D., *Opinion 2/13 on the EU Accession to the ECHR*, in: Vinković, M., (ed.), New Developments in the EU Labour, Equality and Human Rights Law, J. J. Strossmayer University of Osijek Faculty of Law, Osijek, 2015, pp. 261-262

56 *Legislative train schedule - Completion of EU accession to the ECHR,* European Parliament, [https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-completion-of-eu-accession-to-the-echr], accessed 14. April 2020

57 On different facets of the doctrine of autonomy of EU law see: Lukić, M., *Autoritet Suda EU ispred pravne sigurnosti - presuda MOX* [Authority of the EU Court of Justice more important than legal security - Mox Plant Judgment], *Anali Pravnog fakulteta u Beogradu* no. 1, 2013, pp. 223-248; Lukić, M., *The Security Council's Targeted Sanctions in the Light of Recent Developments Occurring in the EU Context,* in*:* Malloy, M. P. (ed.), Economic Sanctions*,* Edward Elgar Publishing 2015, Vol. II, pp. 239-50; Lukić, M., *How Long Before Bundle of Treaties Becomes Sovereign? A Legal Perspective on the Choices before the EU*, South Eastern Europe and the European Union - Legal Aspects , SEE/EU Cluster of Excellence in European and International Law *vol.* 1, Verlag Alma Mater, Saarbrücken 2015, pp. 127-137

tonomy and mutual trust, must not stand in the way of human rights protection under the ECHR.[58]

4.3. Holding of Opinion 2/13 applied to BITs: Achmea

The line of reasoning established in *Melloni* and *Fransson* and developed in the Opinion 2/13 has been continued further to an equally important point: by following it in *Achmea*, the CJEU found intra-EU bilateral investment treaties (BITs) to be incompatible with EU law.[59] Acting pursuant to a reference for a preliminary ruling from the German Federal Court of Justice, the Grand Chamber had to consider observations received from sixteen governments of EU Member States. Its decision was at odds with the opinion of AG Wathelet.

The starting point of the court's reasoning was the invocation of the fact that the EU law is based on a set of common values shared by Member States, as well as of "the existence of mutual trust of Member States that those values will be recognized", and of the principle of sincere cooperation, which obliged the Member States "to ensure in their respective territories the application of and respect for EU law."[60] The Grand Chamber referred to the principles of primacy and direct effect in order to describe the EU law as a "structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other".[61] It then concluded that the arbitral tribunal, provided in the BIT between Slowak Republic and the Netherlands, "may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms…".[62] According

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58 As an example of such opinions, see Douglas-Scott, S., *Opinion 2/13 and the 'elephant in the room': A response to Daniel Halberstam*, Verfassungsblog.de, 13 March 2015, [https://verfassungsblog.de/opinion-213-and-the-elephant-in-the-room-a-response-to-daniel-halberstam-2/], accessed 14. April 2020. The critiques in connection with the principle of mutual trust are summarized in Lenaerts, K., *La vie après l'avis: exploring the principle of mutual (yet not blind) trust,* Common Market Law Review, *vol*. 54, 2017, pp. 806-807. See also Krstić, I.; Čučković, B., *EU Accession to the ECHR – Enlarging the Human Rights Protection in Europe*, Annals of the Faculty of Law in Belgrade – Belgrade Law Review, no. 2, 2016, pp. 49-78. For an example of the conflicting relationship between the principles of mutual trust, solidarity and human rights protection in the specific area of migration and asylum law see Lukić, M.; Čučković, B., *Dublin IV Regulation, the Solidarity Principle and Protection of Human Rights – Step(s) Forward or Backward?*, in: Duić, D.; Petrašević, T., (eds.), EU Law in Context – Adjustment to Membership and Challenges of the Enlargement, EU and Comparative Law Issues and Challenges Series, University Josip Juraj Strossmayer, Osijek, 2018, pp. 10-30.

59 Judgment of 6 March 2018, *Slowakische Republik v Achmea BV* C-284/16, [2018] ECR 158, ECLI:EU:C:2018:158

60 *Ibid.*, par. 34

61 *Ibid.*, par. 33

62 *Ibid.*, par. 42

to EU treaties, interpretation and application of EU law formed exclusive realm of the CJEU, to which courts of Member States must submit such issues. Since the arbitral tribunal prescribed in the subject BIT is not a court of a Member State, subject BIT provision incompatible with EU law, i.e. "having an adverse effect on the autonomy of EU law."[63] The decision resulted in a plurilateral treaty, reached by EU Member States on 24 October 2019 and signed by 23 Member States on 5 May 2020, on the termination of intra-EU BITs.[64]

5. EUROPEAN JUDICIAL DIALOGUE CONTINUES: TARRICO I AND II

5.1. Tarrico I: financial interests of the EU prioritized over rights of the accused

In the so-called *Tarrico I* case,[65] a CJEU Grand Chamber dealt with a request for a preliminary ruling from the Tribunale di Cuneo in Italy, pertaining to criminal proceedings against a group of persons accused of participating in a value added tax (VAT) evasion scheme. The question addressed by the CJEU was whether the Italian state, by enacting rules on criminal proceedings which materially limited extension of limitation periods for criminal proceedings, created a *de facto* impunity for tax offenses, which require lengthy proceedings.

The CJEU energetically prioritized effective fulfilment of the Member States' obligations under primary EU law before rights of the accused pursuant to national rules of criminal procedure.

> "A national rule in relation to limitation periods for criminal offences … which provided … that the interruption of criminal proceedings concerning serious fraud in relation to value added tax had the effect of extending the limitation period by only a quarter of its initial duration — is liable to have an adverse effect on fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial

63 *Ibid.*, par. 59

64 *EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties*, [https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en], accessed 07. May 2020

65 Judgment of 8 September 2015, *Ivo Tarrico and Others* C-105/14, ECLI:EU:C:2015:555

> interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify. The national court must give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law ....[66]

The Court cautioned that "the national court must ensure that the fundamental rights of the persons concerned are respected."[67] It specifically addressed the objection, raised by several parties, that the disapplication of the subject national rules would infringe upon the rights of the accused under Art. 49 of the Charter (the principles of legality and proportionality of criminal offences and penalties), and found that there would be no such infringement.[68]

5.2. Tarrico II: pragmatic deference to national courts

A year after the judgment in *Tarrico I* was rendered, the Italian Constitutional Court addressed the CJEU with a request for a preliminary ruling on the basis of questions of constitutionality brought before it by the Corte d'appello di Milano and Corte suprema di cassazione, which pertained to the rule established by the CJEU judgment in *Tarrico I.*[69] The Italian Constitutional Court based its questions on its finding that rules on limitation in Italian criminal procedural law possess substantive rather than procedural nature,[70] and therefore asked the CJEU, *inter alia,* whether Art. 325(1) should have been interpreted as requiring disapplication of national criminal law rules, under the conditions set forth in *Tarrico I,* "even when there is no sufficiently precise legal basis for such disapplication", i.e. when it is not clear that the person committing the infringement could know that EU law required disapplication of subject rules or when it is not clear what "significant number of cases", as prescribed in the *Tarrico I* holding may actually mean, and even if such rules form part of substantive criminal law.[71] The CJEU, however, did point out that the principles of non-retroactivity and legality in criminal law formed part of the constitutional traditions common to the Member States, i.e. general principles of EU law according to Art. 6(3) TEU. By doing so, it ensured that the actual basis for not applying Art. 325(1) TFEU were not only Italian constitutional norms, but also the very principles of EU law.

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66 *Ibid.*, ruling, point 1

67 *Ibid.*, par 53

68 *Ibid.*, paras. 54-56

69 Judgment of 5 December 2017, *M.A.S., M.B.* C-42/17, ECLI:EU:C:2017:936

70 *Ibid.* par. 14

71 *Ibid.*, paras. 16, 17, 20

The Grand Chamber in *Tarrico II* took a deferential course towards the Italian Constitutional Court, since it held that it was up to the national courts to assess whether disapplication of national rules would lead to legal uncertainty, or would breach principles of retroactivity and legality, in which cases the national courts should not disapply subject rules.[72]

6. EVOLUTION, STAGNATION OR REGRESSION?

The judgments of the CJEU that have been the subject of the preceding paragraphs are by no means the only judgments that deal with the scope and depth of the fundamental rights' protection within the EU.[73] They have been selected due to the relative weight they have gained due to subsequent references in CJEU case law, as well as due to the attention paid to them by legal scholars. For these reasons, they have a potential to influence the manner in which EU law and constitutionality are conceived in the future.

In 2013, before the Court rendered the judgments in *Melloni* and *Fransson*, De Witte had assessed that the *controlimiti* doctrine of the Italian Constitutional Court was prevailing, [74] supposedly among legal academics, but also pointed to the resoluteness of the CJEU not to allow that its doctrine of primacy of EU law concedes even to most fundamental norms of national constitutions.[75] De Witte saw cases *Melloni* and *Fransson* as opportunities for the CJEU to engage national constitutional courts in a "structural dialogue" about interpretation of EU law, citing many EU law experts who had been promoting such dialogue as a solution for the apparent conceptual impasse between these instances.[76] According to Lenaerts, "the successful operation of the principle of mutual trust and the effective judicial protection of fundamental rights require the national courts, the ECtHR and the ECJ to engage in a constructive dialogue."[77] As a result of such dialogue, De Visser expressed expectation of occurrence of "substantive convergence and a degree of

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72 *Ibid.*, paras. 58-62

73 In particular, we believe that the judgment in *Zambrano* may have deserved to be included in this review. It presented another bold attempt by the CJEU to promote a wide understanding of the scope of the EU law. The only connection to EU law, on which the CJEU based its competence, in the facts of that case was the EU citizenship of the person(s) involved. Judgment of 8 March 2011, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* C-34/09, [2011] ECR I-01177, ECLI:EU:C:2011:124

74 "there is now a general convergence around the position that Union law may prevail ... possibly even over conflicting detailed rules of national constitution, but not over the fundamental provisions of the constitution," De Witte, *op. cit,.* note 18, pp. 210-211

75 *Ibid.*, p. 211

76 *Ibid.*, p. 211-212

77 Lenaerts, *op. cit.,* note 58, p. 838

spontaneous harmonization between the three catalogues of fundamental rights ... – national constitutions, the ECHR and the EU Charter."[78]

CJEU case law analyzed in the preceding sections encompassed intertwining planes of conflicts – between national and EU, as well as between EU and ECtHR law and competence, and, consequently, between individual and EU systemic interests. It may seem naive, from a pragmatically political perspective, to believe that such systemic and far-reaching conflicts may be resolved solely by way of a reasonable dialogue of legal experts.

Protection of fundamental rights belongs to the constitutional law subject matter for the very same reason for which political governance forms part of that matter – it bridges the divide between law and politics, and is most immediately defined by values of the community which purports to protect them. If constitutionality of the EU has indeed been born, it happened due to several decades of CJEU case law on fundamental freedoms and fundamental rights. Protection of fundamental rights is inseparable from EU constitutionality, it forms its very foundation. According to Article 2 TEU, respect of human rights is one of the values on which the Union is founded. Preserving the ultimate authority in respect of protection of fundamental rights under EU law for the CJEU is, at this phase of development of EU constitutionality, its *conditio sine qua non*. If the EU is based on values, which undisputedly require protection of fundamental rights, then in order to continue to exist, the EU must be able to provide such protection.

The fact that the CJEU in *Achmea* felt the need to justify its wide-reaching holding on the subject BIT by the necessity to prevent the possibility that the arbitral tribunal may be invoked to interpret… "particularly the provisions of EU law concerning the fundamental freedoms". It seems as though the exclusive authority to interpret EU fundamental freedoms was necessary to affirm the argument in favor of the holding.

The CJEU may not make compromises with the ECtHR simply because, at this stage, it must not make compromises with national constitutional courts, at least in relation to the core principle of primacy of EU law and its authority to interpret EU law. Before the CJEU asserts itself as undisputed authority on rights under the Charter within the EU, it will not be able to make any jurisdictional compromise with the ECtHR.

Centralization of protection of human rights within any given community stems almost instinctively from the universal nature of such rights. If principal civiliza-

[78] De Visser, *op. cit.,* note 22, p. 44

tional, social and political values are shared at the Union level, then the Member States should be comfortable with allowing that such values be articulated through a unified system for protection of human rights. A protection that is provided at multiple levels, resulting from multiple charters, which are coordinated through a "structural dialogue" between courts,[79] does not seem to offer a stable and long-term solution, and certainly does not seem optimally suited to the universal nature of fundamental rights.

Juxtaposing interests of individuals to EU constitutionality in this context may easily be misleading. In a longer-term perspective, invidiuals' rights will certianly profit if a comprehensive unified system of protection of fundamental rights is established at EU level. With that aim in mind, minor differences between national constitutional charters and the Charter seem negligible.

This does not mean that national constitutions have become irrelevant. The treaties provide mechanisms for continuous transmission of their substance to the EU law: through obligation of the Union to respect national identities of Member States, "inherent in their fundamental structures, political and constitutional,"[80] in the form of "constitutional traditions common to Member States,"[81] the obligation to interpret fundamental rights under the Charter, "as they result from the constitutional traditions common to the Member States, ... in harmony with those traditions."[82] As Advocate General Bot pointed out in *Melloni,* Article 4(2) TEU is a norm which preserves the core of a Member States' constitution from infringement, since it provides a basis for a Member State to challenge any act of secondary EU law.[83]

The holdings in *Tarrico I* and *Tarrico II* are illustrative of the still ongoing effort on the part of the CJEU to establish all possible aspects of primacy of EU law *vis-à-vis* legal systems of Member States. *Tarrico II* seems to be a pragmatic compromise, whereby the CJEU conceded a small aspect of its exclusive authority on EU law to Italian courts for the sake of affirming the general principle of EU law primacy over national constitutional norms.

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79 Drenovak-Ivanović, M., *The Right to Water and the Right to Use Hydropower: The Case of Serbia and Lessons Learned from the EU*, in: Duić, D.; Petrašević, T. (eds.), EU and comparative law issues and challenges series (ECLIC 3), *vol*. 3, 2019, pp. 214-230

80 Article 4(2), TEU

81 Article 6(3), TEU

82 Article 52(4), the Charter

83 Opinion of Advocate General Bot, of 2 October 2012, C-399/11, *Criminal proceedings against Stefano Melloni*, ECLI:EU:C:2012:600, par. 138-139

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UDK 342.721:061.1(4.67EU)
34(4-67EU)
Review article

THE ROLE OF OPENING CLAUSES IN HARMONIZATION OF EU LAW: EXAMPLE OF THE EU'S GENERAL DATA PROTECTION REGULATION (GDPR)

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ABSTRACT

As the main tool for the achievement of the proper functioning of the internal market, the Union is focused on the process of harmonization. The role of harmonization in the EU's internal market is to remove barriers to trade and to facilitate free movement of goods, persons, services, and capital (as well as payment). This can be achieved in many ways, including through the adoption of harmonization, i.e., approximation measures, such as directives and regulations. The established CJEU case law confirms that the aim of harmonization measures is to 'reduce disparities between legal systems.' This aim's realization very often depends upon the form of the chosen harmonization measure and the level of harmonization the measure is based on (e.g., minimum, maximum, full (targeted) harmonization). However, today, we are faced with changes in the regulatory approach of the EU legislator and these changes are greatly affecting the process of harmonization. Due to the increased level of harmonization, EU directives are starting to appear and function more like EU regulations, and vice versa. Because of numerous optional clauses, clauses of minimal harmonization, and the so-called 'opening clauses', EU regulations are not reducing but enabling 'disparities between legal systems.' As an example, authors are analyzing the EU's General Data Protection Regulation (GDPR) containing more than 69 opening clauses, which play an important role in the process of harmonization and present an instrument of interplay between EU law and Member States' laws.

Therefore, it remains to be answered within the lines of this paper whether the role of opening clauses is in compliance with the aim of harmonization in the EU law.

***Keywords**: General Data Protection Regulation; opening clauses; harmonization; approximation; level of harmonization; internal market; full effect; EU law*

1. INTRODUCTION

There are numerous definitions of the concept of harmonization. However, generally speaking, it describes a process within which different parts of a whole are being aligned with each other.[1] In the context of European Union's (EU) legal framework, it means that the differences between legal orders of Member States are alleviated or removed through approximation of laws. The 'approximation of laws,' as regulated in the Treaty on the Functioning of the European Union (TFEU),[2] follows the objective of establishment and functioning of the internal market. Art. 26(2) TFEU defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties." Therefore, harmonization, i.e., approximation of laws plays an important role in the achievement of one of the Union's main goals, namely, the internal market. The approximation of laws and removal of differences between Member States' legal solutions leads to an increased level of legal certainty for those participating on the internal market.[3] This results in an increase of business transactions and facilitates free movement of goods and services.[4] As emphasized by Advocate General *Stix-Hackl* in her Opinion in the case *Parliament v Council*, the aim of the approximation of laws (within the meaning of *ex* Art. 95 EC; now Art. 114 TFEU) is to "reduce disparities between legal systems."[5]

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1 An in-depth analysis was given by Lohse, E. J., *The Meaning of Harmonisation in the Context of European Community Law − a Process in Need of Definition,* in: Andenas, M. T.; Baasch Andersen, C., (eds.), Theory and Practice of Harmonisation, Edward Elgar, Cheltenham, 2012, pp. 282 *et seq. See* also Klamert, M., *What We Talk About When We Talk About Harmonisation*, Cambridge Yearbook of European Legal Studies, no. 17, 2015, pp. 360 *et seq.*

2 Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1, Part III, Title VII, Chapter 3

3 Mišćenić, E., *Legal Risks in Development of EU Consumer Protection Law,* in: Mišćenić, E.; Raccah A. (eds.), Legal Risks in EU Law, Interdisciplinary Studies on Legal Risk Management and Better Regulation in Europe, Springer International, Cham, 2016, p. 139

4 Halson, R.; Campbell, D., *Harmonisation and its discontents: A transaction costs critique of a European contract law*, in: Devenney, J.; Kenny, M. (eds.), The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos? Cambridge University Press, Cambridge, 2013, pp. 101 *et seq.*

5 Opinion of AG *Stix-Hackl* of 12 July 2005, Case C-436/03, *Parliament v Council* [2006] ECR I-03733, para. 59

However, the concepts surrounding the process of harmonization at the EU level are rather blurry and, despite terminological and substantial differences, the Treaties use the terms 'approximation' and 'harmonization' synonymously.[6] Moreover, in the context of the harmonization process, the completion of the internal market in the European Economic Area (EEA) is not to be equated with the achievement of perfectly unified laws within the Member States, i.e., unification.[7] Such an option is precluded by the principle of conferral regulated in Art. 5(2) of the Treaty on European Union (TEU).[8] By setting the limits to the competences of the Union, this provision also sets the limits to legislative powers of the EU legislator.[9] Furthermore, according to the principle of subsidiarity, the Union can use its legislative powers and 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" (Art. 5(3) TEU). As confirmed by the CJEU in the famous *Tobacco Advertising* case,[10] the adoption of harmonization measures cannot be justified by mere existence of differences between national rules of Member States' laws and the abstract risk of the proper functioning of the internal market.[11]

It is not uncommon for measures of EU secondary law to enable a wide level of discretion to Member States when harmonizing their national laws. This can be expressed, for example, in the form of clauses containing various options for Member States (e.g., optional clauses) or clauses departing from the minimal standard of protection that can be increased at the national level (e.g., minimum harmonization clauses). In doing so, the Union is adopting legislative measures aiming at the harmonization, i.e., approximation of laws, but at the same time allowing the creation of further differences between the laws of Member States.[12] As one recent example of a harmonization measure clearly undermining the aim, i.e., the main goal of harmonization is the famous General Data Protection Regula-

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6 Lohse, *op. cit.*, note 1, pp. 282 *et seq.*

7 On differences between these two notions *see* Gebauer, M, *Unification and Harmonization of Laws*, in: Max Planck Encyclopedias of International Law [MPIL], 2009; Lohse, *op. cit.*, note 1, pp. 282 *et seq.*

8 Consolidated version of the Treaty on European Union [2016] OJ C 202/13

9 Craig, P.; de Burca, G., *EU Law: Text, Cases, and Materials*, Oxford University Press, 6th ed., 2015, pp. 73 *et seq.*

10 ECJ, Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-08419

11 In this case, the ECJ ruled that the *Tobacco Advertising Directive* cannot be adopted on the legal ground of *ex* Art. 95 EC since it does not "genuinely" contribute to the proper functioning of the internal market. For an in-depth analysis *see* Annegret, E., *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation*, Springer International Publishing, Cham, 2018, pp. 51 *et seq*.

12 Mišćenić, *op. cit.,* note 3, p. 150

tion (GDPR),[13] containing more than 69 of the so-called "opening clauses."[14] To this purpose, the authors initially analyzed regulations and directives as the main tools of EU harmonization, then focused on the concept of opening clauses by using GDPR examples and, finally, reflected on the role of opening clauses in the harmonization of EU law.

2. REGULATIONS AND DIRECTIVES AS MEANS OF HARMONIZATION OF EU LAW

Among the sources of EU secondary law (Art. 288 TFEU),[15] the EU regulations and directives are the most frequently used legal instruments of harmonization within the EU legal framework. Pursuant to Art. 288(2) TFEU, regulations have general application, are binding in their entirety and directly applicable in all Member States.[16] It is due to these characteristics that legal scholars place them at the same level of legal hierarchy as national statutory acts of Member States.[17] Since an EU regulation has a general and direct application, it is not necessary to implement it at the level of Member States.[18] However, in some cases, implementation measures are required by EU regulations themselves in order to ensure uniform application across the Union.[19] General and direct applicability of EU regulations can, therefore, result in the exclusion of possibility to apply Member States' national law that is in direct collision with the EU regulation.[20] Provided that the provisions of the regulation are clearly formulated, this secondary law

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13 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, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1 (GDPR)

14 Obwexer, W., *Harmonisierung und Optionalität – stehen Öffnungsklauseln der Verwirklichung des Binnenmarkts entgegen?,* in: König, D.; Uwer, D. (Eds.), Grenzen Europäischer Normgebung, 1. ed., Bucerius Law School Press, Hamburg, 2015, pp. 54 *et seq*.; Laue, P., *Öffnungsklauseln in der DS-GVO – Öffnung wohin? Geltungsbereich einzelstaatlicher (Sonder-)Regelungen*, ZD, C.H. Beck, Munich, 2016, pp. 643 *et seq*.

15 Craig; de Burca, *op. cit.,* note 9, pp. 106 *et seq*.

16 ECJ, Case C-101/76 *Koninklijke Scholten Honig v Council and Commission* [1977] ECR 797, para. 21

17 Lorenzmeier, S., *Europarecht - schnell erfasst*, 5th ed., Springer, Berlin, Heidelberg, 2017, p. 145

18 ECJ, Case C-34/73 *Fratelli Variola SpA. v Amministrazione delle finanze dello Stato* [1973] ECR 98, para. 10

19 E.g. Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L 165/1**;** Commission Implementing Regulation (EU) 2015/1051 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form, and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes [2015] OJ L 171/1

20 Craig; de Burca, *op. cit.,* note 9, p. 105; Lorenzmeier, *op. cit.,* note 17, p. 147

instrument can offer a strong harmonization effect. As stated by the CJEU in the case *Politi v Ministero delle finanze*,[21] "regulations have direct effect and are as such, capable of creating individual rights which national courts must protect."[22] However, this is not always the case since, on many occasions, the provisions of secondary law harmonizing measures, including both regulations and directives, are in the need of further interpretation.[23] When it comes to EU directives, harmonization seems to be of less intensity due to the legal nature and functioning of this harmonization measure. According to its definition from Art. 288(3) TFEU, an EU directive is binding upon Member States with regard to the result to be achieved and leaves a discretion to Member States with respect to the choice of form and methods. Since EU directive must be implemented in every Member State, differences can occur during the approximation process, which undermines the aim of harmonization at EU level.[24]

Although the intensity of harmonization can be higher or lower depending upon the chosen harmonization measure, there is another aspect that can affect the aim of harmonization. This is the level of harmonization that the chosen harmonization measure is based on. The effectiveness of the harmonization process is highly dependent upon the level or grade of harmonization of certain measure. For example, an EU directive can lead to a more intensive harmonization if it has a fully harmonizing effect,[25] while an EU regulation can result in a weak degree of harmonization, if it contains many options or derogation rules. The so-called maximum harmonization approach, also known as 'full,' 'full targeted,' or in some cases called 'complete' harmonization, belongs to the strongest level of harmonization.[26] Although these are substantially and terminologically differentiating notions, both the legal scholars and practice are using these terms to describe the high intensity or level of harmonization of the measure. The maximum or full (targeted) harmonization prevents the creation of further differences between the laws of Member States by preventing them from maintaining or introducing provisions into national laws that diverge from those laid down in the harmonization measure.[27] Its use has in-

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21 ECJ, Case C-43/71 *Politi v Ministero delle finanze* [1971] ECR 1039

22 ECJ, Case C-43/71 *Politi v Ministero delle finanze* [1971] ECR 1039, para. 9

23 Mišćenić, E., *Uniform Interpretation of Article 4(2) of UCT Directive in the Context of Consumer Credit Agreements: Is it possible?* Revue du droit de l'Union européenne, no. 3, pp. 127 *et seq*.

24 Mišćenić, *op. cit.,* note 3, p. 153

25 Müller-Graff, P.-C., *EU Directives as a Means of Private Law Unification, Towards a European Civil Code*, in: Hartkamp, A. *et al*. (eds.), 4th ed., Wolters Kluwer, Alphen aan der Rijen, 2011, p. 149

26 Schröder, M., *EUV/AEUV*, in: Streinz (eds.), 3rd ed., C.H. Beck, Munich, 2018, Art. 114 AEUV, para. 46

27 *See* Mak, V., *Full Harmonization in European Private Law: A Two-Track Concept*, European Review of Private Law, no. 20, 2012, pp. 213 *et seq.*; Mišćenić, *op. cit.,* note 3, p. 147

creased in EU directives from 2000 onwards, as a reaction to the shortcomings of the minimum harmonization approach.[28] The latter has enabled the Member States to introduce or maintain more stringent and protective national rules, thus creating further differences between Member States' laws.[29] From the objectives and the wording of the harmonization measure, it can usually be easy to determine whether the chosen source of EU secondary law is pursuing a minimum, maximum, or full harmonization approach.[30] For example, under the title 'Level of harmonisation,' the wording of Art. 4 of Consumer Rights Directive[31] clearly demonstrates that this harmonization measure follows the full targeted harmonization approach.[32] This can be further supported by several recitals of its preamble explaining the objectives of this EU directive.[33] It is also possible for a harmonization measure, either EU directive or regulation, to have a full harmonization effect with respect to certain provisions, but not all of them.[34] An example of such an EU harmonization measure is the Mortgage Credit Directive.[35] This EU directive, which is based on the minimum harmonization level,[36] fully harmonizes the rules on the annual

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28 Critically on the issue Weatheril, S., *Law and Values in the European Union*, Oxford University Press, 2016, pp. 269 *et seq*. *See* Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM/2011/0635 final - 2011/0284 (COD): "The Union initially started to regulate in the field of contract law by means of minimum harmonisation Directives … The *minimum harmonisation approach* meant that Member States had the possibility to maintain or introduce stricter mandatory requirements than those provided for in the acquis. In practice, this approach has led to divergent solutions in the Member States even in areas which were harmonised at Union level. In contrast, the recently adopted Consumer Rights Directive *fully harmonises* the areas of ..."

29 Weatheril, S., *Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market*, in: Shuibhne N. N.; Gormley L. W. (eds.), From Single Market to Economic Union: Essays in Memory of John A. Usher, Oxford University Press, Oxford, 2012, pp. 175 *et seq*.

30 With the exception of some EU directives such as Product Liability Directive, qualified by the CJEU in case C-183/00, *Gonzales Sanchez*, EU:C:2002:255, paras. 25 and 28 as full harmonization directive. *See* Schröder, *op. cit.* note. 26, para. 46

31 Directive 2011/83/EU 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 [2011] OJ L 304/64 (Consumer Rights Directive)

32 Consumer Rights Directive, Art. 4: "Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive."

33 Consumer Rights Directive, preamble, recitals 5 and 7

34 ECJ, Case C-11/92 *The Queen v Secretary of State for Health, ex parte Gallaher and Others* [1993] ECR I-03545. *See* Schröder, *op. cit.,* note. 26, para. 46

35 Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L 60/34 **(**Mortgage Credit Directive**)**

36 Mortgage Credit Directive, Art. 2

percentage rate and the pre-contractual information duty (European Standardized Information Sheet, ESIS information sheet).[37]

Another interesting example in the context of EU harmonization measures is certainly the famous GDPR, where there is an ongoing debate on the harmonizing effect of its provisions. Although the GDPR is much more detailed than its predecessor, the EU Data Protection Directive (DPD),[38] there is uncertainty about the harmonizing intensity of its provisions.[39] The GDPR deliberately does not regulate specific details and, instead, establishes the rules and basic principles that are intended to ensure a 'uniform' level of data protection across different technologies and during various development stages.[40] However, it allows Member States to maintain or introduce 'sector-specific' laws and exceptions for the public sector and small and medium-sized enterprises.[41] Despite the initial idea of achieving a high level of harmonization by introducing uniform rules for all Member States by means of an EU regulation,[42] the GDPR allows diverging solutions in many of its aspects. In doing so, it creates further inconsistencies between the legal solutions at the level of Member States, thereby contributing to legal uncertainty for those affected by its rules. More than 69 opening clauses, some of which will be presented and analyzed in this paper, open up space for different legal solutions, interpretations, and, eventually, application in practice. Opening clauses also af-

37 *See* Mišćenić, E., *Mortgage Credit Directive (MCD): Are Consumers Finally Getting the Protection They Deserve?* in: Slakoper, Z. (ed.), Liber amicorum in honorem Vilim Gorenc, Faculty of Law, University of Rijeka, 2016, p. 221

38 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 such data [1995] OJ L 281

39 *See* discussion in German legal doctrine on full harmonization: *pro* Ehmann, E.; Selmayr, M. (eds.), *Datenschutz-Grundverordnung: DS-GVO*, 2nd ed., C.H. Beck, Munich, 2018, para. 88; Pötters, S. *Datenschutz-Grundverordnung: DS-GVO*, in: Gola, P (eds.), 2nd ed., C.H. Beck, Munich, 2018, Art. 1, para. 24; *contra* Kühling, J.; Martini, M., *Die Datenschutz-Grundverordnung: Revolution oder Evolution im europäischen und deutschen Datenschutzrecht?*, EuZW, C.H. Beck, Munich, 2016, p. 454; Laue, *op. cit.*, note 14, p. 463; Hofmann, J.; Johannes, P., *DS-GVO: Anleitung zur autonomen Auslegung des Personenbezugs*, ZD, C.H.Beck, Munich, 2017, p. 221; Roßnagel, A., *Umsetzung der Unionsregelungen zum Datenschutz – Erste Erfahrungen mit der Datenschutz-Grundverordnung aus rechtswissenschaftlicher Sicht*, DuD, Springer Gabler, Wiesbaden, 2018, p. 741

40 Ehmann; Selmayr, M.*, op. cit.,* note 39, para. 82

41 GDPR, preamble, recitals 9 and 10. As an example *see* Draft Law of the Federal Government (germ. *Bundesregierung*) to adapt the German Data Protection Law to GDPR (germ. *Entwurf eines Gesetzes zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680, Datenschutz-Anpassungs-und -Umsetzungsgesetz EU – DSAnpUG-EU*), BT-Drs. 18/11325, 24.2.2017, p. 73

42 ECJ, Case C-819/79 *Germany v Commission* [1981] ECR 21, para. 10: "In fact, the provisions of Community regulations must be uniformly applied in all the Member States and have, so far as possible, the same effect throughout the territory of the Community."

fect the legal nature and level of harmonization of the GDPR, which is very often described by legal scholars as a directive wearing the suit of a regulation.[43]

3. DEFINITION AND CONCEPT OF OPENING CLAUSES

Despite the use of opening clauses in harmonization measures of EU secondary law, there is no uniform definition of opening clauses. According to *Müller*, the origin of the notion describing such clauses as 'opening' ones comes from the legal doctrine.[44] The term 'opening' is used to accentuate the imperfection of legal clauses that are in need of further concretization.[45] Opening clauses contained in secondary law harmonization measures are, in principle, allowing or prescribing mandatory derogations for the Member States, thus leading to intensive interaction but also competition between EU law and Member State laws.[46] As properly explained by *Müller*, opening clauses in EU harmonization measures allow the introduction or maintenance of "corresponding, deviating or supplementary" provisions at the national level of Member States.[47] For example, an opening clause can stipulate which provisions and under what conditions are applicable at the national level of Member States within the limits of the scope of application of the relevant EU secondary law act.[48]

The use of opening clauses in an EU harmonization measure affects significantly the level of harmonization of the respective measure. Depending on their content, opening clauses can have a stronger or weaker impact on the harmonization of national laws of Member States, thus strengthening or weakening the very legal nature of the chosen EU harmonization measure. A striking example of an EU regulation, whose legal nature and level of harmonization has been affected by more than 69 opening clauses, is the GDPR. This important issue is vividly discussed both by the legal scholars and practitioners. The result of it is not only the interpretation of the meaning and possible effects of every single opening clause, but also a variety of categories in which these opening clauses can be divided, such

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43 Kühling; Martini, *op. cit.*, note 39, p. 448; Bozkurt, Ö., *EU-DSGVO und Compliance. Rechtliche und wirtschaftliche Herausforderungen*, Igel Verlag RWS, Hamburg, 2018, p. 37

44 Müller, M. *Die Öffnungsklauseln der Datenschutzgrundverordnung – Ein Beitrag zur Europäischen Handlungsformenlehre*, Wissenschaftliche Schriften der WWU, Münster, 2018, p. 51

45 *Ibid.*, p. 52

46 Kühling, J. *et al.*, *Die Datenschutz-Grundverordnung und das nationale Recht – Erste Überlegungen zum innerstaatlichen Regelungsbedarf*, Monsenstein und Vannerdat, Münster, 2016, p. 9

47 Müller, *op. cit.*, note 44, p. 54

48 *Ibid.*, p. 59; Schwartmann, R. *et al., DS-GVO/BDSG, Datenschutz-Grundverordnung Bundesdatenschutzgesetz*, C.F. Müller, Heidelberg, 2018, Art. 6 DSGVO, para. 158

as obligatory i.e. mandatory and facultative, general and specific, genuine and non-genuine, and other sorts of opening clauses under the GDPR.[49]

4. OPENING CLAUSES UNDER THE GENERAL DATA PROTECTION REGULATION (GDPR)

The legal scholars and practitioners are trying to find a way to systemize and divide numerous GDPR opening clauses into certain categories, depending upon their content, legal nature, and level of harmonization.[50] The most accepted distinction in legal doctrine is the one between facultative and mandatory opening clauses.[51] Depending upon their legal nature, many opening clauses in the GDPR can be classified as obligatory, i.e. 'mandatory' or 'facultative' clauses. For example, the content of the clause contained in Art. 54 GDPR, pursuant to which each Member State must introduce the necessary rules to establish a supervisory authority, is described as obligatory by legal doctrine.[52] Therefore, the opening clauses of mandatory nature can regulate at the national level in the form of setting up authorities, assigning responsibilities, or specifying cooperation. On the other hand, the content of the opening clauses of facultative nature does not necessarily need to be observed by Member States, and, in many cases, Member States can depart from the prescribed content.[53] E.g., the third sentence of Art. 8(1) GDPR enables Member States to depart from the prescribed age limit of 16 years for a child's consent in relation to information society services by reducing it to a lower age, provided that such lower age is not below 13 years.[54]

Legal scholars offer another differentiation of opening clauses depending upon the subject matter of respective clauses as to 'general' and 'specific' opening clauses

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49 On various opening clauses *see* Voigt, P.; von dem Bussche, A., *The EU General Data Protection Regulation (GDPR): A Practical Guide*, Springer, Cham, 2017, pp. 219 *et seq*. On different types of opening clauses *see* also Chakarova, K. Y., *General Data Protection Regulation: Challenges Posed by the Opening Clauses and Conflict of Laws Issues*, Stanford-Vienna European Union Law Working Paper no. 41, 2019, pp. 11 *et seq*.

50 *See* Voigt; von dem Bussche, *op. cit.,* note 49, pp. 219 *et seq*.; Voigt, P.; von dem Bussche, A., *EU-Datenschutz-Grundverordnung (DSGVO)*, Springer, Berlin, Heidelberg, 2018, pp. 289 *et seq.*; Chakarova, *op. cit.,* note 49, pp. 11 *et seq*.; Müller, *op. cit*., note 44, pp. 98 *et seq.*; Bozkurt, *op. cit*., note 43, p. 17; Feiler, L.; Forgó N., *EU-DSGVO: EU-Datenschutz-Grundverordnung*, Verlag Österreich, Wien, 2016

51 *See* Kühling *et al., op. cit.,* note 46, p. 9; Bozkurt, *op. cit.*, note 43, p. 18; Schwartmann *et al., op. cit.,* note 48, para. 165

52 Müller, *op. cit.*, note 44, p. 176. According to Art. 54 GDPR each Member State is required to provide by law establishment of each supervisory authority, qualifications and eligibility conditions required for members of these authorities, rules and procedures for their appointment etc.

53 Schwartmann *et al., op. cit.,* note 48, para. 165

54 Bozkurt, *op. cit.*, note 43, p. 18

under the GDPR.[55] If a certain clause offers several options to Member States without limitation in relation to its subject matter, according to this systematization, the clause will be characterized as general. In cases where the opening clause is affecting only a specific subject matter allowing the introduction of minor discrepancies, it will be characterized as specific.[56] For example, it is considered that Art. 23 GDPR, dealing with the restriction of rights of data subjects,[57] or Art. 85 GDPR, on the relation of GDPR requirements with (fundamental) rights to freedom of expression and information, belong to general opening clauses.[58] On the other hand, a more restrictive provision of Art. 87 GDPR is characterized as a specific opening clause since it regulates an implementation by Member States in a special area of national identification numbers or other identifiers of general application.[59] Such a differentiation has also been recognized by the former European Commissioner for Justice, Consumers and Gender Equality, Ms. *Jourová*, in her answer to the parliamentary question from July 2018 on the opening clauses in the GDPR.[60] Here, she recognized that despite the direct applicability of the GDPR, "Member States must take necessary legislative steps, for instance, to set up national supervisory authorities, to choose an accreditation body or to lay down rules for the reconciliation of freedom of expression and data protection." She also accentuated the possibility for Member States "to put in place specific rules for certain specified processing situations (so-called 'specification clauses')", thereby referring to the above mentioned specific clauses. An example of it are opening clauses in the context of employment, where Art. 88 GDPR enables Member States to adopt more specific provisions in the employment context through legislation or collective agreements.[61]

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55 Sharma, S., *Data Privacy and GDPR Handbook*, Wiley, USA, 2019, pp. 290 *et seq.* On the other hand, *Voigt* and *von dem Bussche* propose a classification of the opening clauses according to their subject and content, which partly corresponds to proposed systematization. Voigt; von dem Bussche, *op. cit.* note 50, pp. 290 *et seq*.

56 Kühling, *et al., op. cit.,* note 46, p. 9; Bozkurt, *op. cit.*, note 43, p. 34

57 Under Art. 23 GDPR, Member States can restrict the rights of data subjects under Art. 12–22 GDPR, if conditions and criteria of Art. 23 GDPR are met (especially to safeguard the public interest)

58 Art. 85 GDPR enables to Member States to reconcile requirements of the GDPR with the right to freedom of expression and information. *See* Voigt; von dem Bussche, *op. cit.*, note 50, p. 294

59 According to Art. 87 GDPR, Member States can set specific conditions for the processing of national identification numbers or identifiers of general application

60 European Parliament, Parliamentary questions, Answer given by Ms. *Jourová* on behalf of the Commission, 13 July 2018, [https://www.europarl.europa.eu/doceo/document/P-8-2018-003121-ASW_EN.html] Accessed on 15 March 2020

61 Art. 88 GDPR refers to purposes of recruitment, performance of the employment contract, planning and organizing of work, equality and diversity, health and safety at work. National law provisions of Member States adopted under Art. 88(1) GDPR have to be notified to the Commission (Art. 88(3) GDPR)

There are further attempts of systematization of opening clauses under the GDPR, which follow other division criteria and can result in an overlap with already presented categories. For example, *Müller* proposes a differentiation of opening clauses, depending on whether they provide specification, formation, exceptions, deviations, adjustments, reinforcements or comparable margins of discretion for Member States.[62] In doing so, he creates a whole line of subcategories of clauses to which opening clauses can belong to, such as clauses on reinforcement, alteration, exception, and other sorts of clauses. For example, a reinforcement clause allows Member States to provide a more stringent regime of a certain regulatory area beyond the prescribed rules of the secondary harmonization measure.[63] To such a clause belongs Art. 9(4) GDPR, whose content (facultatively) enables Member States to introduce additional conditions or restrictions in relation to processing of particularly sensitive data, such as genetic, biometric, or health data.[64] On the other hand, Art. 6(2) GDPR would fall under the so-called formation clauses allowing Member States to specify their content at the national level.[65] The content of this provision regulating the lawfulness of processing[66] allows Member States the adoption or maintenance of more specific provisions on which data processing can be lawfully based.[67] Another category of clauses are the so-called referring clauses, which create a link between harmonization measure rules and the national law of Member States by referring to the already existing legal solutions in Member States' national laws.[68] As an example, we refer again to Art. 9 GDPR on the processing of particularly sensitive personal data, where references to Member State national laws can be found in almost all exceptions of Art. 9(2) GDPR.[69] The

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62 Müller, *op. cit.*, note 44, p. 94. A similar differentiation of opening clauses according to their functions, depending on whether they allow Member States to specify, supplement or modify their content, is followed by Kühling; Martini, *et al., op. cit.,* note 46, p. 9

63 Müller, *op. cit.*, note 44, p. 98 (germ. *Verstärkungsklausel*)

64 Additional condition was introduced in German law requiring written consent under § 8(1) of the Genetics Diagnostics Act (germ. *Gendiagnostikgesetz*) of 31 July 2009 (published in the Federal Law Gazette Part I, p. 2529, 3672), revised version published in the Federal Law Gazette Part I, p. 1626 on 20 November 2019. *See* Mester, B., *DSGVO BDSG,* in: Taeger J.; Gabel, D. (eds.), 3rd ed., Deutscher Fachverlag, Frankfurt am Main, 2019, Art. 9, para. 37

65 Müller, *op. cit.*, note 44, p. 99 (germ. *Gestaltungsklausel*)

66 *See* the first judgment of the CJEU interpreting Art. 6 GDPR in Case C-673/17 *Planet49* [2019] OJ C 413. *See* also Opinion of the AG *Szpunar* of 21 March 2019, Case C-673/17, *Planet 49* [2019]

67 Art. 6(2) GDPR: "Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to … by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX". *See* Schwartmann *et al., op. cit.,* note 48, Art. 6 GDPR para. 152

68 Müller, *op. cit.*, note 44, p. 101 (germ. *Verweisungsklauseln*)

69 On more restrictive use of opening clauses *see* Dreyer S.; Schulz W., *The General Data Protection Regulation and Automated Decision-making: Will it deliver?*, Bertelsmann Stiftung, 2019, p. 40

exception clauses encompass rules such as Art. 23 GDPR,[70] according to which Member States may impose legislative restrictions on the rights and obligations of data subjects due to various reasons, including the national or public security, defense, etc.[71] Finally, *Müller* also recognizes the adjustment clauses, which give the Member States more or less discretion for the purpose of their implementation.[72] The author recognize an example of an adjustment clause transplanted from DPD in Art. 84 GDPR, pursuant to which Member States should determine and adopt effective, proportionate, and dissuasive sanctions and measures against the violations of GDPR rules. However, since EU regulations are generally binding and directly applicable, *Müller* considers adjustment clauses to be in direct conflict with the legal nature of EU regulations.[73] Nonetheless, authors of this paper consider that the provisions of EU secondary law act demanding effective enforcement of harmonization measures, of either a regulation or directive, should be categorized as enforcement clauses. Such clauses are typical in EU secondary law and they actually do not request the implementation of the harmonization measures but rather its effective enforcement at the level of Member States.[74] This is in accordance with the definitions of EU directives and regulations as a means of harmonization (Art. 288 TFEU) and the principle of loyalty and sincere cooperation, as defined in Art 4(3) TEU. The latter demands from Member States to cooperate with each other and EU institutions in order to achieve Union goals and to "take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union," including EU regulations and directives as harmonization measures.

5. FINAL REMARKS

Despite the brave attempts of legal scholars to categorize and find the meaning of particular opening clauses in the GDPR, this issue still presents an insufficiently explored matter. A confirmation of this conclusion comes directly from legal practice, as seen in the answer of Ms. *Jourová* to a parliamentary question concerning the interpretation and application of opening clauses under the GDPR.[75] First insights can also be drawn from the national case law of Member States. In Septem-

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70 Müller, *op. cit.*, note 44, p. 104 (germ. *Ausnahmeklauseln*)

71 *See* Voigt; von dem Bussche, *op. cit.,* note 50, p. 291

72 Müller, *op. cit.*, note 44, p. 95 (germ. *Anpassungsklauseln*)

73 *Ibid.*, p. 96.

74 *See* Mišćenić, E., *The Effectiveness of Judicial Enforcement of the EU Consumer Protection Law,* in: Meškić, Z. *et al.* (eds.), Balkan Yearbook of European and International Law, Springer International, Cham, 2020, p. 1 *et seq*.

75 European Parliament, note 60

ber 2018, the German Federal Administrative Court (germ. *Bundesverwaltungsgericht*) adopted a ruling dealing with the margin of discretion of Member States when implementing opening clauses from Art. 6 GDPR into their national law.[76]

Another very important and insufficiently investigated issue is the relation of opening clauses to the harmonization of EU law. As seen within the lines of this paper, the authors examine whether GDRP as an EU regulation genuinely follows the aim of harmonization in EU law. Numerous options and possibilities leaving a wider or narrower margin of discretion to Member States significantly affects the legal nature and the manner of functioning of this particular EU regulation. On the one hand, numerous opening clauses are transforming the GDPR as a regulation into another harmonization measure, namely, an EU directive. On the other hand, opening clauses are supporting the creation of further differences between the laws of Member States,[77] which is not the ultimate goal of an EU regulation or the harmonization of EU law. This can also be supported by first reports on the implementation of the GDPR in EU Member States, pointing to significant discrepancies between legal solutions, which has resulted from the use of the opening clauses.[78]

The creation of diverging legal solutions is at odds with EU principles of subsidiarity and proportionality, which should guarantee appropriate, necessary, and better legislative solutions at the EU level. It is also in direct conflict with the aim of harmonization, i.e., approximation of laws, or in other words, with the goal of removal of all barriers to the internal market. As rightly emphasized by Ms. *Jourová* in her answer to the parliamentary question, "Any measure which would have the result of creating an obstacle to the direct effect of the GDPR or of jeopardizing its simultaneous and uniform application in the EU would be contrary to the Treaties."[79] Different legal solutions at the level of Member States undermine the

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[76] Judgment of Federal Administrative Court (germ. *Bundesverwaltungsgericht*) of 27 September 2018, Az. 7 C 5.17 concerning the right to information regarding an employment of relatives financed by public funds

[77] *See* Chakarova, *op. cit.,* note 49, pp. 43 *et seq;* Feiler, L., Öffnungsklauseln *in der Datenschutz-Grundverordnung – Regelungsspielraum des* österreichischen *Gesetzgebers*, jusIT 2016/93, Lexis Nexis Verlag Austria, Vienna, 2016, pp. 210 *et seq*.

[78] Mc Cullagh K.; Tambou O.; Bourton S. (eds.), *National Adaptations of the GDPR*, Collection Open Access Book, Blogdroiteuropeen, Luxembourg, 2019, pp. 24 *et seq.* On the other hand, the European Commission Report appraises the EU's progress in implementing the GDPR by accentuating that "the data protection framework is in place in Member States". *See* Communication From the Commission to the European Parliament and the Council, *Data protection rules as a trust-enabler in the EU and beyond – taking stock*, COM(2019) 374 final, Brussels, 24 July 2019, p. 2

[79] European Parliament, note 60

legal certainty for those acting on the EU internal market.[80] Bearing in mind the settled CJEU case law on the guarantee of 'full effect' of EU law,[81] through effective and consistent implementation, interpretation and application of harmonized rules, the presented arguments thus lead to a conclusion that the opening clauses of the GDPR are more undermining than supporting the aim of harmonization of EU law.[82]

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80 Mišćenić, *op. cit.* note 3, p. 148

81 ECJ, Case C-166/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, para. 2

82 Similar doubts with respect to research exemptions under the GDPR are expressed by Mondschein, C. F.; Monda, C., *The EU's General Data Protection Regulation (GDPR) in a Research Context*, in: Kubben, P.; Dumontier, M.; Dekker, A., (eds.), Fundamentals of Clinical Data Science, Springer, 2019, p. 60. *See* also Nolan, K., *GDPR: Harmonization or Fragmentation? Applicable Law Problems in EU Data Protection Law*, Berkley Technology Law Journal, 2018. The opposite view was taken by Albrecht, J. P., *How the GDPR Will Change the World*, EDPL, no. 3, 2016, p. 287

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Review article

CHALLENGES OF EUROPEANISATION REGARDING THE PROTECTION OF PASSENGERS' RIGHTS IN THE EVENT OF A TRAIN DELAY IN THE REPUBLIC OF CROATIA

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ABSTRACT

The author analyses the provisions of the European acquis communautaire on the liability of a railway undertaking for damages caused to passengers in the event of a train delay under Regulation (EC) No 1371/2007 on rail passengers' rights and obligations. In particular, reference is made to the recent judgment of the Court of Justice of the European Union (CJEU) in Case C- 509/11 regarding the impossibility of exempting railway undertakings from paying compensation to passengers in the event of a delay caused by force majeure. This paper explores the latest European Commission Proposal of September 2017 for a recast of Regulation (EC) No 1371/2007 and the justification for the introduction of the force majeure clause in Art. 17 of Regulation (EC) No 1371/2007. The newly proposed provision would allow the railway undertaking to be exempt from the liability to pay compensation for a delay if it manages to prove that the delay was caused by severe weather conditions or major natural disasters that jeopardise the safe provision of service and which could not have been foreseen or prevented even by taking all reasonable measures. The paper analyses the provisions of the applicable national legislation, indicating the beginning of a full implementation of Regulation (EC) No 1371/2007 in the Republic of Croatia.

Keywords: *protection of passengers' rights, liability for delays, Regulation (EC) No 1371/2007, Republic of Croatia*

1. INTRODUCTION

Railways are an important part of the EU transport network which, as the foundation of every country's economy, have a significant role in passenger transport. In EU Member States 20% of passengers use rail transport[1] while in 2010 only 7% of inland passenger mobility in EU was related to rail transport.[2] Over the ten years to 2013, and as reported to Eurostat, passenger rail demand in the European Union increased by 61.8 billion passenger-kilometres to 424 billion passenger-kilometres.[3] In 2016, European railways transported 9 billion passengers.[4] In 2018, rail passengers transport in the EU was estimated at 472 billion passenger-kilometres, up 1.5 % from the previous year.[5] Due to the pronounced nature of cross-border rail transport at EU level and the negative consequences of applying different legal provisions on rail passengers' rights and obligations within numerous national legal systems of EU Member States, both on international and national journeys within the EU, this non-unified approach to issues on the protection of passengers' rights in rail transport at European level has contributed to legal uncertainty and has resulted in unequal rights for train passengers travelling in the EU. The exercise of the established passenger rights in rail transport, as well as the constant strengthening of those rights, inevitably represents an additional financial obligation for those carriers that do not fulfil the obligations arising from the concluded transport contract. This paper analyses the provisions on railway undertaking's liability for damages to passengers in case of a train delay, since this represents a failure by the railway undertaking to perform contractual obligations, specifically pointing to its civil and misdemeanour liability in accordance with national and European legal provisions.

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1 See Barbone, L. *et al., VAT-induced distortions in the passenger transport system in the European Union: assessment and option for reform*, Transportation Research Procedia, *vol.* 14, 2016, p. 336

2 See more European Commission, *White Paper: Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system*, 2011, [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0144:FIN:en:PDF], accessed 04. February 2020

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4 European Commission, *Report from the Commission to the European Parliament and the Council on monitoring development of the rail market – Sixth report on monitoring development of the rail market*, 2019, p. 39, [https://ec.europa.eu/transport/sites/transport/files/6th_rmms_report.pdf], accessed 23. May 2020

5 Eurostat, *Railway passenger transport statistics - quarterly and annual data,* 2019, [https://ec.europa.eu/eurostat/statistics-explained/index.php/Railway_passenger_transport_statistics_-_quarterly_and_annual_data#Number_of_passengers_transported_by_rail_increased_in_2018], accessed 23. May 2020. More on the development of railway passenger transport in EU see Stoilova, S., *Study of Railway Passenger Transport in the European Union*, Tehnički vjesnik, *vol.* 25, no. 2, 2018, pp. 587 – 594

2. PROTECTION OF PASSENGERS' RIGHTS IN THE EVENT OF A DELAY UNDER REGULATION (EC) NO 1371/2007

In order to provide better protection of passengers' rights in rail transport, within the context of the common transport policy, on 23 October 2007 the EU adopted Regulation (EC) No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations[6] which entered into force on 3 December 2009. Regulation (EC) No 1371/2007 applies in international and national[7] rail transport in the EU to all rail journeys and services throughout the Community[8] provided by one or more licensed carriers[9] in railway transport, e.g. licensed railway undertakings[10] in accordance with Council Directive 95/18/EC.[11]

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6 Regulation (EC) No 1371/2007 on rail passengers' rights and obligations [2007] OJ L 315/14 – 41 (Regulation (EC) No 1371/2007), entered into force on 3 December 2009

7 National transport within the EU is any transport, whether it is transport within one EU Member State or transport between two or more Member States

8 See more Činčurak Erceg, B.; Vasilj, A., *Current affairs in passengers rights protection in the European Union*, in: Dujić, D.; Petrašević, T. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC 2), 2018, pp. 221 – 222

9 Carrier means the contractual railway undertaking with whom the passenger has concluded the transport contract or a series of successive railway undertakings which are liable on the basis of this contract (Regulation (EC) No 1371/2007, Art. 3(1), point (2))

10 Railway undertaking means a railway undertaking as defined in Art. 2 of Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification [2001] OJ L 75/29-46 (Directive 2001/14/EC) and any other public or private undertaking the activity of which is to provide transport of goods and/or passengers by rail on the basis that the undertaking must ensure traction; this also includes undertakings which provide traction only (Regulation (EC) No 1371/2007, Art. 3(1), point (1)). It is important to note that the Directive 2001/14/EC has not been in force since 16 May 2015 and has been amended by Directive 2012/34/EU on establishing a single European railway area [2012] OJ L 343/32 - 77 (Directive 2012/34/EU) according to which railway undertaking means any public or private undertaking licensed according to this Directive, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only (Directive 2012/34/EU, Art. 3(1), point (1))

11 Regulation (EU) No 1371/2007, Art. 2(1) of Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings [1995] OJ L 143/70 – 74 (Council Directive 95/18/EC), not in force since 16 May 2015 when Directive 2012/34/EU entered into force. The aim of Council Directive 95/18/EC was to break the heterogeneity of national decisions on the licensing and to ensure uniform conditions for market access in the whole EU (Vasilj, A., *Implementation of the railway system of the Republic of Croatia in the EU railway system*, in: Primorac, Ž.; Bussoli, C.; Recker, N. (eds.), Book of Proceedings "16th International Scientific Conference on Economic and Social Development – The Legal Challenges of Modern World", Split, 2016, p. 358), see more Radionov, N., *Hrvatsko željezničko pravo i mjere prilagodbe pravu Europske Unije prema planu provedbe Sporazuma o stabilizaciji i pridruživanju*, Zbornik Pravnog fakulteta u Rijeci, no. 2, 2002, pp. 315 - 316. More on licensing of railway undertakings see Directive 2012/34/EU, Arts. 16 - 25

Regulation (EU) No 1371/2007 sets standards on liability of railway undertaking due to breach of contractual obligation from the concluded transport contract.[12] Based on the transport contract, the railway undertaking is obliged to transport the passenger to a particular station by the type of train and in the class as agreed, according to a pre-announced timetable, respecting the conditions of comfort and hygiene which are considered necessary given the type of train and the length of the journey.[13] The railway undertaking is liable to passengers for damages arising from improper performance of the carriage, including its liability for damages to passengers in the event of a train delay. According to Art. 3(1), point (12) of Regulation (EC) No 1371/2007, delay means the time difference between the time the passenger was scheduled to arrive in accordance with the published timetable and the time of his or her actual or expected arrival. Delays always refer to the delay of the passenger's journey and not to the delay of the train, but in practice, the time of arrival of the train at the final destination (stated on the ticket) will be used to calculate the length of the delay.[14]

Train delays represent the largest number of cases of breach of a contractual obligation by a railway undertaking. The liability of the railway undertaking in respect of a delay, missed connection[15] and cancellation[16] has been regulated in Annex I "Extract from Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV)"[17] of Regulation (EC) No 1371/2007

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12 Transport contract means a contract of carriage (for reward or free of charge) between a railway undertaking or a ticket vendor (any retailer of rail transport services concluding transport contracts and selling tickets on behalf of a railway undertaking or for its own account – Regulation (EU) No 1371/2007, Art. 3(1), point (7) and the passenger for the provision of one or more transport services (Regulation (EC) No 1371/2007, Art. 3(1), point (8))

13 Vasilj, A.; Činčurak Erceg, B., *Prometno pravo i osiguranje*, Pravni fakultet Osijek, 2016, p. 140

14 Communication from the Commission, *Interpretative Guidelines on Regulation (EC) No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations*, 2015, p. 3, [https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:52015XC0704(01)&from=EN], accessed 01. February 2020 (Guidelines 2015)

15 The term "missed connection" is not defined by the European legislature, but in European Commission Report to the European Parliament and the Council, *Report on the Application of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on Rail Passengers' Rights and Obligations*, 2013, [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013DC0587&from=HR], accessed 11. December 2019 (Report from 2013), it is clearly indicated (see paragraph 3) that the term in question should be defined in Regulation (EC) No 1371/2007 in order to contribute to further improvement of its application

16 The term "train cancellation" is not defined but we can apply the definition of a train cancellation according to Jakaša which includes the failure to set the composition according to the timetable so that the train in question does not depart at all or interrupt the journey at an earlier station (Jakaša, B., *Kopneno i zračno saobraćajno pravo*, Informator, Zagreb, 1969, p. 501)

17 Appendix A to the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention Concerning International Carriage

(Title IV "Liability of the Carrier", Chapter II "Liability in case of cancellation, late running of trains or missed connections").[18] The provisions of Art. 32(1) of Annex I to Regulation (EC) No 1371/2007 regulate the liability of a carrier in the event of cancellation, late running of trains (delay) or missed connections, and the aforementioned provisions prescribe the liability of the carrier for loss or damage caused to the passenger[19] resulting from the fact that, by reason of cancellation, the late running of a train or a missed connection, his journey cannot be continued the same day, or that a continuation of the journey the same day could not reasonably be required because of given circumstances. The carrier shall be relieved of this liability, when the cancellation, late running or missed connection is attributable to one of the following causes: a) circumstances not connected with the operation of the railway which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent; b) fault on the part of the passenger; or c) the behaviour of a third party[20] which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent.[21] This is a vis majeure clause, i.e. a complex legal-technical concept consisting of several elements, all of which are cumulatively necessary in this particular case in order to be characterised as such.[22]

Within the provisions of Arts. 15 - 18, Chapter IV "Delays, missed connections and cancellations" of Regulation (EC) No 1371/2007, minimum passenger rights in case of delays, missed connections and cancellations are legally regulated. Where it is reasonably to be expected that the *delay* in the arrival at the final destination

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by Rail of 3 June 1999, Official Gazette, International Agreements, No. 12/2000. On 23 February 2013, the EU accessed to the COTIF. See more Radionov Radenković, N., *Restrukturiranje tržišta željezničkih usluga u Europskoj Uniji i nova Konvencija o željezničkom prijevozu (COTIF 1999)*, Zbornik Pravnog fakulteta u Zagrebu, *vol.* 53, no. 3 - 4, 2003, pp. 851 - 855; Mudrić, M., *Treći željeznički paket: otvaranje tržišta međunarodnog prijevoza putnika te prava i obveze putnika u međunarodnom prijevozu*, in: Sever, D.; Mlinarić, T. J. (eds.), Zbornik referatov 3. Mednarodnega znanstvenega in strokovnega kongresa upravljalcev železniške infrastrukture RIMC, Univerzitetna knjižnica Maribor, 2007, p. 5; Tomić Dalić, V., *Uloga osiguranja u zaštiti prava putnika u željezničkom prijevozu u slučaju oštećenja zdravlja, ozljede ili smrti putnika*, Osiguranje, no. 6, 2015, pp. 48 - 49

18 Regulation (EC) No 1371/2007, Art. 15

19 The damages shall comprise the reasonable costs of accommodation as well as the reasonable costs occasioned by having to notify persons expecting the passenger (Annex I to Regulation (EC) No 1371/2007, Art. 32(1))

20 Another undertaking using the same railway infrastructure shall not be considered as a third party (Annex I to Regulation (EC) No 1371/2007, Art. 32(2), point (c))

21 Annex I to Regulation (EC) No 1371/2007, Art. 32(2)

22 Radionov, N., *Komparativni prikaz odgovornosti prijevoznika za prijevoz stvari cestom i željeznicom – Novo hrvatsko transportno pravo u svjetlu međunarodnih transportnih propisa*, Vladavina prava, *vol.* 4, no. 1, 2000, p. 137

under the transport contract will be more than 60 minutes, the passenger shall immediately have the choice between: a) reimbursement of the full cost of the ticket,[23] under the conditions by which it was paid, for the part or parts of his or her journey not made and for the part or parts already made if the journey is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant, a return service to the first point of departure at the earliest opportunity; or b) continuation or re-routing, under comparable transport conditions, [24] to the final destination at the earliest opportunity or at a later date at the passenger's convenience[25] – Regulation (EC) No 1371/2007, Art. 16.

If the passenger, in case of delay, has not received reimbursement of the full cost of the ticket according to Art. 16 of Regulation (EC) No 1371/2007 and continued the journey despite the delay, the passenger has the right to claim compensation for the delay from the railway undertaking, e.g. compensation of the ticket price (as a type of fixed and standardised financial compensation, the price paid by way of consideration for transport services which were not supplied in accordance with the transport contract)[26] if he or she is facing a delay between the places of departure and destination stated on the ticket (Regulation (EC) No 1371/2007, Art. 17). The minimum compensations for delays[27] are: a) 25 % of the ticket price for a

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[23] The payment of the reimbursement shall be made under the same conditions as the payment for compensation referred to in Art. 17 of Regulation (EC) No 1371/2007. See more Marin, J., *Protection of Passengers' Rights in the European Union*, in: Zanne, M.; Bajec; P. (eds.), Zbornik referatov Pomorstvo, promet in logistika ICTS 2011, Fakultet za pomorstvo in promet Portorož, 2011, pp. 7 - 8

[24] Whether transport conditions are comparable can depend on a number of factors and must be decided on a case-by-case basis. Depending on the circumstances, the following good practices are recommended: a) if possible, passengers are not downgraded to transport facilities of a lower class (where this occurs, passengers such as first class ticket holders should receive reimbursement of the difference of the ticket price); b) where passengers can only be re-routed on another rail carrier or on a transport mode of a higher class or with a higher fare than paid for the original service, re-routing shall be offered without additional costs for the passenger; c) reasonable efforts are made to avoid additional connections; d) when using another rail carrier or an alternative mode of transport for the part of the journey not completed as planned, the total travel time should be as close as possible to the scheduled travel time of the original journey; e) if assistance for disabled persons or persons with reduced mobility was booked for the original journey, assistance should equally be available on the alternative route; f) where available, re-routing accessible to persons with disabilities or reduced mobility should be offered (Guidelines 2015, *op. cit.*, note 14, point 4.2.3.)

[25] See more Petiti Lavall; M. V.; Puetz, A., *Rail Passengers' Rights Under Regulation (EC) No. 1371/2007 and Their Implementation in Spain: Does the Spanish Rail Sector Regulation Comply with the Acquis Communautaire*?, Zbornik Pravnog fakulteta u Zagrebu, *vol.* 66, no. 2 - 3, 2016, pp. 368 - 369

[26] See Case C-509/11 ÖBB*Personenverkehr AG/SchienenControl Kommission, Bundesministerin für Verkehr, Innovation und Technologie* [2013] OJ C 2013:613, par. 38, 45

[27] Compensation for delay shall be calculated in relation to the price which the passenger actually paid for the delayed service (Regulation (EC) No 1371/2007, Art. 17(1)), e.g. it is a minimum compensation that is calculated considering the ticket price

delay of 60 to 119 minutes; b) 50 % of the ticket price for a delay of 120 minutes or more. The compensation of the ticket price shall be paid within one month after the submission of the request for compensation and may be paid in vouchers and/or other services (if the terms are flexible) or in money (at the request of the passenger).[28] Railway undertakings may introduce a minimum threshold under which payments for compensation will not be paid and this threshold shall not exceed EUR 4 (Regulation (EC) No 1371/2007, Art. 17(3)). It is an amount that is a kind of franchise that reduces operating costs and rejects insignificant claims.[29] The passenger shall not have any right to compensation if he is informed of a delay before he buys a ticket, or if a delay (due to continuation on a different service or re-routing) remains below 60 minutes.[30]

Interestingly, the passenger is entitled to a fixed compensation even if the delay is caused by force majeure.[31] Indeed, the European legislature does not envisage the force majeure[32] as a possible reason for the restriction of railway undertakings liability for payment of compensation in case of delay according to Art. 17 of Regulation (EC) No 1371/2007. The reason for this provision is found in the fact that Regulation (EC) No 1371/2007 was adopted as one of the proposed measures of the "Third Railway Package" from 2004 which, in order to establish rights and obligations for international rail passenger and to improve the effectiveness and attractiveness of international rail passenger transport,[33] likewise intended to improve passengers' rights. This is evident from the Proposal of the European Parliament and of the Council on International Rail Passengers' Rights and Obligation from 2004 which provides for European legislature's effort to oblige railway

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28 Regulation (EC) No 1371/2007, Art. 17(2)

29 Radionov, N., Željeznički promet, in: Radionov, N.; Marin, J. (eds.), Europsko prometno pravo, Pravni fakultet u Zagrebu, 2011, p. 114

30 Regulation (EC) No 1371/2007, Art. 17(4)

31 Marin, J., *Osiguranje u funkciji zaštite prava putnika i poslovanja putničkih prijevoznika*, in: Ćorić, S. *et al.* (eds.), Zbornik radova s međunarodne znanstveno-stručne konferencije Dani hrvatskog osiguranja 2014, p. 50

32 Force majeure can be defined as an event that caused the damage, and originates from some cause that is beyond that realm and whose action could not be predicted, avoided or eliminated (Romštajn, I.; Vasilj, A., *Hrvatsko prometno pravo i osiguranje*, Pravni fakultet Osijek, 2006, p. 37) or as abnormal and unforeseeable circumstances beyond the control of the trader concerned, whose consequences could not have been avoided despite the exercise of all due care, so that conduct of the public authorities may, according to the circumstances, constitute a case of force majeure (Opinion of Advocate General Nil Jääskinen, *Opinion in Case C- 509/11*, 2013, ECLI:EU:C:2013:167, par. 31 [http://curia.europa.eu/juris/document/document.jsf?text=&docid=135004&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4414733], accessed 15. December 2019)

33 European Parliament and the Council, Proposal for a Regulation on International Rail Passengers' Rights and Obligations, 2004, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-:52004PC0143], accessed 25. May 2020

undertakings to pay compensation to passengers in case of train delays caused by vis majeure for which, according to CIV Rules, railway undertakings are exempted from liability. On the basis of these provisions, Regulation (EC) No 1371/2007 was adopted, which, in relation to damages resulting from delays, prescribes greater liability of railway undertakings (impossibility of exemption from liability in case of vis majeure) and greater passenger rights.

The concept of force majeure, codified under COTIF-CIV system,[34] can be seen as an unpredictable and unavoidable circumstance beyond the control of the railway undertakings. It is a matter of inadmissibility of railway undertakings to, according to the model of other transport modes and COTIF solutions, include in their general conditions of carriage a provision exempting payment of compensation for delay in cases where the delay in question is caused by force majeure, and as a consequence of this decision passengers have the right for compensation for delay of railway undertakings also in case of a force majeure. Although it is a legal institute which, as a general principle of contract law, provides for the exemption of carriers from liability for damages caused by passenger delays in all transport modes (except rail transport), provision of Art. 17 of Regulation (EC) No 1371/2007 has contributed to different interpretations and the creation of legal uncertainty. In fact, according to Art. 15 of Regulation (EC) No 1371/2007, the liability of railway undertakings in respect of delays, missed connections and cancellations shall be governed by Chapter II, Title IV, Annex I of Regulation (EC) No 1371/2007. The relevant provisions fall within the ambit of Art. 32(2) of the CIV rules which, as part of international law, allows for the exemption of the carrier from liability if the damage resulting from the delay is caused by vis majeure, e.g. circumstances not connected with the operation of the railway which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent. In relation to the relevant provisions of Regulation (EC) No 1371/2007 which increase passenger rights and the fact that the relevant provisions of the CIV Rules (referred to in Regulation (EC) No 1371/2007) prescribe significantly diminished passenger rights, it is important to point out to the fact that the provisions of COTIF-CIV 1999 have been ratified by all EU Member States[35] so the mutual relationship of the COTIF-CIV provisions and provisions of Regulation (EC) No 1371/2007 is resolved in such a way that the COTIF-CIV provisions on a particular issue are primarily applied, while Regulation (EC) No 1371/2007 indepen-

[34] An integral part of the COTIF are and CIV which prescribes the right of railway undertaking to be relieved of liability in case of force majeure - Grabovac, I.; Kaštela, S., *Međunarodni i nacionalni izvori hrvatskoga prometnog prava*, HAZU-Književni krug, Zagreb-Split, 2013, p. 264

[35] Marin, *op. cit.*, note 31, p. 49

dently regulates the responsibility for additional rights that are not regulated in COTIF-CIV.[36] Given that the provisions of Regulation (EC) No 1371/2007 are in force in the EU, a different regulation of the issue of passenger rights covered in Regulation (EC) No 1371/2007 from the one covered in COTIF-CIV, would lead to a conflict between EU secondary legislation and international treaty.[37] As it is often the rule in international legal instruments that, despite the prescribed standards, domestic law is applied if it better protects certain rights (in this case the rights of passengers),[38] in accordance with such an opinion, the provisions of Regulation (EC) No 1371/2007 would take precedence.[39]

The relationship between European legal provisions and CIV Rules, regarding the application of the institute vis majeure in passenger rail transport, was shown in the last European case law. In fact, according to the judgement of the Court of Justice of the European Union (CJEU) in Case C-509/11 railway undertakings are not exempt from the obligation to pay compensation in the event of a delay where the delay is attributable to force majeure. It is the position of CJEU that Regulation (EC) No 1371/2007 does not mention vis majeure at all (nor any other circumstance that could be equated with that institute),[40] on the basis of which the railway undertaking would have the right to be exempt from the refund obligation (price of the paid train ticket) in case of delay. On the contrary, the Court's view is that the European legislature intended to provide protection to passengers by extending the railway undertaking's liability for damages which, according to the CIV Rules, would not be covered in the case of vis majeure. Given the fact that the rights of passengers in rail transport should be protected, as a weaker party to the contract, the CJEU is of the opinion that any other interpretation of Art. 17 of Regulation No 1371/2007 would have the effect of calling into question the essential purpose of protecting the rights of railway passengers.[41] Furthermore, the compensation system provided for by the EU legislature in Art. 17 of Regulation No 1371/2007 cannot be treated in the same way as the railway carrier's liability system under Article 32(1) of the CIV Uniform Rules[42] (while CIV Rules apply to the passenger's right to claim compensation in case of delay, not to the right to claim a lump-sum compensation, e.g. the price of the railway ticket paid by the

36 Grabovac; Kaštela, *op. cit.*, note 34, p. 264

37 Radionov, *op. cit.*, note 29, p. 111

38 This provision corresponds to the provisions of Art. 5 of CIV Rules governing the right of the carrier to assume greater responsibilities and obligations than those provided for in these rules

39 Mudrić, *op. cit.,* note 17, p. 11

40 Par. 50, Case C-509/11

41 Par. 51, Case C-509/11

42 Par. 39, Case C-509/11

passenger, and in respect of which, according to the provisions of Regulation (EC) No 1371/2007, he is entitled to receive a refund), therefore the carrier's grounds of exemption from liability provided for in Article 32(2) of the CIV Uniform Rules cannot be considered applicable in the context of Article 17 of Regulation No 1371/2007.[43] The author agrees with the reasoning of CJEU in Case C-509/11 despite the fact that, in case of vis majeure, rail passengers have the right to claim compensation from the carrier in case of a delay, and the right in question is not exercised by passengers in other transport modes.

Based on the above, in order to establish a balance between strengthening rail passenger rights and reducing the burden on railway undertaking[44] and to make the situation of passengers and carriers uniform in all transport modes, a vis majeure clause is proposed to be implemented in Regulation (EC) No 1371/2007. In fact, ensuring legal clarity is also what is intended by the Proposal for a Regulation of the European Parliament and of the Council on rail passengers' rights and obligations from 2017 for a recast of Regulation (EC) No 1371/2007[45] in which the European Commission proposes the introduction of force majeure clause in Art. 17, which would strike a balance between strengthening rail passenger rights and reducing the burden on railway undertakings.[46] In practice, that should result in a reduction in the financial burden on railway undertakings, but also in the restriction of passengers' entitlement to compensation in case of delay. In the Proposal from 2017, the European Commission proposes the introduction of force majeure clause that applies only in very exceptional situations caused by severe extreme weather conditions or major natural disasters[47] by allowing the railway undertakings to be exempted from the payment of compensation to passengers in case of delay if the delay is due to force majeure, i.e. a case of delay which the railway undertakings did not cause and could not prevent. Although passengers (consumers) are against the introduction of the vis majeure clause,[48] the author supports the efforts of most railway undertakings and Member States, as well as those of

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43 Par. 42, Case C-509/11

44 European Economic and Social Committee, *Opinion on the "Proposal for a regulation of the European Parliament and of the Council on rail passengers' rights and obligations (recast)"*, OJ C 197, 2018. p. 67 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2018.197.01.0066.01.ENG&toc=OJ%3AC%3A2018%3A197%3ATOC], accessed 25. May 2020, (Opinion from 2018)

45 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on rail passengers' rights and obligations from 2017 on amendment of the Regulation (EC) No 1371/2007*, 2017, p. 5, [https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:52017PC0548&from=EN], accessed 13 December 2019 (Proposal from 2017)

46 Opinion from 2018, *op. cit.*, note 44, par. 3.1

47 Proposal from 2017, *op. cit.*, note 45, p. 2

48 Introduction of a force majeure clause in Regulation (EC) No 1371/2007 will have the effect of reducing passengers' rights to compensation, but passengers will still be entitled to assistance and care

the European Commission which aims to ensure legal certainty and harmonised application of the vis majeure clause in all transport modes (maritime, air, rail)[49] because a force majeure clause will ensure legal fairness and proportionality.[50] In my estimation the proposed solution should be formulated in a clear and unambiguous way, because otherwise, the interpretation of the terms "severe extreme weather conditions or major natural disasters", may cause different interpretations and contribute to legal uncertainty. In order to prevent this, in the Preamble of the Proposal from 2017 it is stated that the mentioned event should have the character of an exceptional natural catastrophe, as distinct from normal seasonal weather conditions, such as autumnal storms or regularly occurring urban flooding caused by tides or snowmelt.[51] From this, it can be seen that the definition of these terms is not provided, but instead descriptive guidelines are given as to which cases the said terms may refer to in order to facilitate their application in practice. The decision to apply a narrow definition of vis majeure was made because it establishes a fair balance between the interests of passengers and the railway industry.[52]

According to Art. 18(1) of Regulation (EC) No 1371/2007, in the case of a delay in arrival or departure, passengers shall be kept informed of the situation and of the estimated departure time and estimated arrival time by the railway undertaking or by the station manager as soon as such information is available. In the case of a delay in arrival or departure of more than 60 minutes, passengers shall also be offered free of charge: a) meals and refreshments in reasonable relation to the waiting time[53] (if they are available on the train or in the station, or can reasonably be supplied);[54] b) hotel or other accommodation, and transport between the railway station and place of accommodation, in cases where a stay of one or more nights becomes necessary or an additional stay becomes necessary, where and when phys-

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49 According to the Opinion from 2018, *op. cit.*, note 44, par. 4.1., the introduction of a force majeure clause as such is warranted, in order to align rail with the other modes of transport

50 European Commission, *Commission Staff Working Document Executive Summary of the Impact Assessment - Proposal for a Regulation of the European Parliament and of the Council on rail passengers' rights and obligations*, 2017, p. 2, [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2017:0317:FIN:EN:PDF], accessed 24. May 2020

51 Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council on rail passengers' rights and obligations - Outcome of proceedings*, 2020, par. 21, [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017PC0548&from=EN], accessed 23. May 2020

52 Proposal from 2017, *op. cit.*, note 45, p. 6

53 European Commission considers "in reasonable relation to the waiting time" to mean that railway undertakings should provide passengers with appropriate assistance corresponding to the length of the delay and the time of day (or night) at which it occurs (Guidelines 2015, *op. cit.*, note 14, par. 4.4.1.)

54 The railway undertaking will have to evaluate whether the provision of meals and refreshments is "reasonable", taking into account criteria such as the distance from the place of delivery, the time required for and ease of delivery, and the cost (*Ibid.*, par. 4.4.1.)

ically possible; c) if the train is blocked on the track, transport from the train to the railway station, to the alternative departure point or to the final destination of the service, where and when physically possible.[55] If the railway service cannot be continued anymore, railway undertakings shall organise as soon as possible alternative transport services for passengers.[56]

3. PROTECTION OF PASSENGERS' RIGHTS IN THE EVENT OF A DELAY ACCORDING TO THE PROVISIONS OF RAILWAY TRANSPORT CONTRACTS ACT FROM 1996

More than 20 years ago (1996) in the Republic of Croatia, Railway Transport Contracts Act[57] was passed, governing contracts on passenger[58] transport[59] in domestic rail transport and in international rail transport, unless otherwise provided by an international contract (RTCA, Art. 1). Railway undertaking's[60] liability for damages to the passenger in a case of delay or traffic interruption[61] is governed by the provisions of Art. 16, 18 and 20 RTCA. According to Art. 16 RTCA, the railway undertaking or the person working on the transport at its request is responsible for damages to passengers resulting from a train delay or traffic disruption. The railway undertaking shall not be liable for damage caused by train delays or traffic disruptions if it manages to prove that the train delays or traffic disruptions

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55 Regulation (EC) No 1371/2007, Art. 18(2). It is important to note how, according to the data of the Report from 2013, *op. cit.*, note 15, par. 2.6., more than 40 % of Member States have exempted their domestic services which constitute more than 94 % of passenger rail travel from this article

56 Regulation (EC) No 1371/2007, Art. 18(3)

57 Railway Transport Contracts Act, Official Gazette No. 87/1996, entered into force on 24 October 1996 (RTCA).

58 Passenger is a person who is entitled to transportation by contract (RTCA, Art. 4(1), point (3))

59 In contract on passenger transport the railway undertaking agrees to transport the passenger to the designated station, and the passenger agrees to pay the railway undertaking the appropriate transport compensation (RTCA, Art. 5)

60 The railway undertaking is company HŽ – Croatian Railways and other legal entity performing rail transport (RTCA, Art. 4(1), point (1))

61 If a passenger due to a train delay, for which he is not responsible, during transport loses connection to a port or due to the lack of a train or traffic disruption is prevented from continuing the journey (traffic interruption), he is entitled to: a) to require from the railway undertaking to transport him to the station of destination by the first following train or, if the first following train is not suitable, to otherwise transport it without charge; b) to require from the railway undertaking to return him with his luggage free of charge to the departure station for the first suitable train and to return the paid transport compensation without reduction; c) to cancel the further journey and to require from the railway undertaking to refund the transport compensation without reductions for an undivided part of the journey; d) to request the extension of the period of validity of the transport document for the duration of the circumstances under a); e) to request payment for the overnight stay at the B category hotel or other appropriate facility, if it is possible to continue the journey the next day (RTCA, Art. 14)

were not caused by his intent or gross negligence.[62] The basis of a railway undertaking's liability is its presumed, qualified guilt, with the possibility of discharge if it manages to prove that the damage suffered was the result of a fault which does not cover the railway undertaking's intent or gross negligence. It is important to point out that the provisions of Art. 17 prescribe the exemption of the carrier from liability for damage that may result from a train delay if the cause of that train delay could not have been foreseen, avoided or prevented.

The railway undertaking shall be liable for damages due to train delays or traffic interruptions up to double the amount of the transport compensation if the delay or interruption of the journey was not caused by his intent or gross negligence.[63] It is a case of the limitation of liability, with loss of privilege in the case of qualified guilt when his liability is unlimited up to the full amount of the damage. In fact, if the railway undertaking fails to prove that the damage is not the result of the described behaviour, it will not be able to limit its liability, e.g. it will be liable to the full amount of the damage incurred.[64] Regarding the basis of liability, for damages caused by a train delay or traffic disruption when the so-called further damage[65] arises, the railway undertaking shall not be liable (in principle) if it proves that the delay or traffic interruption was not caused by its intent or gross negligence. If the train delay or traffic interruption is caused by the intent or gross negligence of the railway undertaking, it shall be liable up to the full amount of the damage, unlimited liability.[66]

The passenger loses the right to make a compensation claim for damages due to the train delay or traffic interruption if he does not submit a compensation claim within 30 days from the time the journey was completed or should have been completed (RTCA, Art. 20).

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62 RTCA, Art. 18(1)

63 RTCA, Art. 18(2)

64 See Jakaša, B., *Novi Zakon o ugovorima u željezničkom prometu*, Privreda i pravo, no. 6, 1974, p. 39

65 In the event of delay, the railway undertaking shall only be liable for damage which is normally the foreseeable consequence of the fact of delay. These could be, for example, the additional costs incurred by the passenger as he missed a further connection to his final destination or had to wait unplanned for a continuation of the journey, then the cost of the stay, hotel expenses, food, payment of a higher amount of fare, etc. – Grabovac, I., *Temelj odgovornosti u prometnom pravu*, Književni krug, Split, 2000, p. 96

66 Grabovac, I., *Prijevozno ugovorno pravo Republike Hrvatske*, Književni krug, Split, 1999, p. 135

4. PROTECTION OF PASSENGERS' RIGHTS IN THE EVENT OF A DELAY UNDER THE ACT ON RAILWAY SERVICES MARKET REGULATIONS AND ON RAIL PASSENGERS' RIGHTS PROTECTION FROM 2017

On July 1, 2013 the Republic of Croatia became an EU Member State and from that date the implementation of Regulation (EC) No 1371/2007 to which the Railway Act from 2013[67] directly refers began. According to Art. 62(1) of the Railway Act from 2013, the rights and obligations of rail passengers are regulated by Regulation (EC) No 1371/2007, however, transitional and final provisions (Art. 65(10) Railway Act from 2013) prescribe a deferred application of Arts. 15 -18 of Regulation (EC) No 1371/2007 on minimum passenger rights in case of a delay until 3 December 2014 with the possibility of extending the deferred application (decided by the Minister).[68] Considering that even after 3 December 2014, according to Art.1 of the Decision on the postponement of the period of application of Regulation (EC) No 1371/2007 on rail passengers' rights and obligations,[69] the beginning of the period of application of Arts. 15 - 18 of Regulation (EC) No 1371/2007 was prolonged, i.e. postponed for a further 5 years (until 3 December 2019), on 4 December 2019 the final implementation of the abovementioned provisions began in the Republic of Croatia as well.

With the entry into force of the Act on Railway Services Market Regulations and on Rail Passengers' Rights Protection from 2017[70] the legal framework for the implementation of Regulation (EC) No 1371/2007 in the Republic of Croatia has been established. In Chapter IV of the Act "Protection of Passengers' Rights" the Croatian legislature has prescribed the competence of the national regulatory authority to perform regulatory and other tasks in the field of railway services, e.g. Croatian Regulatory Authority for Network Industries (Regulatory Body) to act in the following matters in the field of the protection of passengers' rights: a) enforcement of Regulation (EC) No 1371/2007; b) acting ex officio in the protection of passengers' rights;[71] c) resolution of a dispute at the request of passen-

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67 Railway Act from 2013, Official Gazette No. 94/2013, 148/2013. On 6 April 2019 entered into force the new Railway Act from 2019, Official Gazette No. 32/2019 and Railway Act from 2013 ceased to apply

68 See more Marin, *op. cit.,* note 31, p. 51

69 Decision on the postponement of the period of application of the Regulation (EC) No 1371/2007 on rail passengers' rights and obligations, Official Gazette No. 120/2014, entered into force on 10 October 2014 (Decision)

70 Act on the Regulation of Railway Services Market and the Protection of Passenger Rights in Rail Transport from 2017, Official Gazette No. 104/2017, entered into force on 2 November 2017 (Act)

71 The authority of the Regulatory Body to act ex officio is standardised by the provision of Art. 29 Act by virtue of which the Regulatory Body has the power to initiate ex officio proceedings and to order

gers regarding the complaint to the railway undertaking's Consumer Complaints Commission (Commission)[72] and d) inspection in the area of protection of passengers' rights, which is performed by Regulatory Body performing the functions as public authority.[73]

The full implementation of Regulation (EC) No 1371/2007 in the Republic of Croatia came only on 4 December 2019, when the provisions of Art. 36 of the Act prescribing misdemeanour liability in the area of protection of passengers' rights in rail transport entered into force. According to Art. 36 (2), points (8 - 9) of the Act, a fine in the amount of 30,000.00 to 100,000.00 HRK shall be imposed on the legal person if (as a) railway undertaking: a) did not immediately provide the passenger with a choice between rights of reimbursement of the full cost of the ticket, continuation or re-routing (Regulation (EC) No 1371/2007, Art. 16) when it was expected that the delay in arriving at the final destination under the contract of carriage would be greater than 60 minutes; and b) the compensation of the ticket price was not paid within 30 days after the submission of the request for compensation (Regulation (EC) No 1371/2007, Art. 17 (2)) in case of unannounced delays more than 60 minutes.

Furthermore, by Art. 36(2), points (10 – 12) of the Act, a fine in the amount of HRK 30.000,00 to HRK 100.000,00 shall be imposed on the legal person if they (as railway undertaking or station manager[74]): a) do not inform passengers about

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railway undertaking, station manager, ticket vendor and tour operator to comply with the obligations laid down in Regulation (EC) No 1371/2007 and other regulations governing passenger rights. In the procedures under consideration, the railway undertaking, station manager, ticket vendor and tour operator are obliged to participate and fully cooperate with the Regulatory Body and submit all necessary information, documentation and statements. According to the imposed measures to the railway undertaking, station manager, ticket vendor and tour operator - these entities are obliged to act

72 The rights of passengers to make a written complaint to railway undertaking are governed by Art. 30 Act. In fact, where a passenger considers that his/her rights as a passenger have been violated, he/she has the right to make a written complaint to the railway undertaking for the protection of his/her rights, which is regulated by Regulation (EC) No 1371/2007, this Act and other regulations governing passenger rights within 30 days of learning about an action, process or omission of an action that the passenger believes violates his or her rights. In respect of a timely filed complaint, railway undertaking is obliged to provide the passenger with a written reasoned decision on the complaint within 30 days from the receipt of the complaint (which must include instructions for further action), and the passenger is entitled within 30 days from the date of delivery written decisions from railway undertaking, submit a complaint to the Commission in accordance with the regulation governing consumer protection. The Commission is obliged to provide a written response to the passenger within 30 days from the day of receiving his complaint, which must include instructions on how to proceed before the Regulatory Body

73 Act, Art. 28

74 Station manager means an organisational entity in a Member State, which has been made responsible for the management of a railway station and which may be the infrastructure manager (Regulation

the situation (delay) and the estimated departure/arrival time as soon as such information were available to railway undertaking (Regulation (EC) No 1371/2007, Art. 18(1)); b) do not offer to passengers provided services free of charge (Regulation (EC) No 1371/2007, Art. 18(2)) and c) do not offer alternative transport services for passengers as soon as possible, if the railway service cannot be continued anymore (Regulation (EC) No 1371/2007, Art. 18(3)). Solutions, featured in Art. 36(2), points (8 – 12) of the Act, entered into force on 4 December 2019[75] presenting measures which strengthen passenger rights in rail transport.

5. CONCLUSION

In a systematic way, this paper analyses the European and Croatian legal provisions on passengers' rights in case of a train delay. The quality of the standardisation and the uniform application of the provisions on rail passengers' rights and obligations at European level is not conducive to the fact that a large number of EU Member States has exempted some provisions of Regulation (EC) No 1371/2007 from application in domestic transport. This resulted in a different legal protection of passengers' rights in some EU Member States over the past10 years (from 3 December 2009 when Regulation (EC) No 1371/2007 entered into force). The paper points to the normative regulation of the liability issue of a railway undertaking for damages to passengers in case of a train delay according to Croatian legal acts: RTCA from 1996, Railway Act from 2013 and Act from 2017. A legal analysis of the provisions in question was presented, with particular emphasis on the extent of the protection of passenger rights in the Republic of Croatia, as a full member of the EU, considering that the Republic of Croatia has delayed the application of Regulation (EC) No 1371/2007 in respect of the liability of the railway undertaking for a train delay until 3 December 2019. The author concludes that the Croatian legal provisions are in line with current international and European legal sources. Specifically, European law has introduced the COTIF-CIV provisions in Annex I to Regulation (EC) No 1371/2007, thereby becoming an integral part of Regulation (EC) No 1371/2007 applicable to national (domestic) and international rail transport of passengers in EU Member States.

Although the provisions of Regulation (EC) No 1371/2007 on the liability of the railway undertaking for damages caused by passenger delays indicate the application of the CIV Rules (which exclude its liability in case of vis majeure), the provisions within Regulation (EC) No 1371/2007 itself do not prescribe the pos-

(EC) No 1371/2007, Art. 3(1), point (5))

75 See Act, Art. 40

sibility of exempting the railway undertaking from liability to make a refund (payment of compensation) to a passenger in the event of a delay resulting from vis majeure. It is possible to say that this can be understood as some form of conflict between the content of provisions of Regulation (EC) No 1371/2007 (which provide greater protection of passenger rights in case of delay as they do not allow for the exemption of the railway undertaking from liability in case of vis majeure) and CIV Rules. However, that was exactly the intention of the European legislature. Indeed, the main goal of adopting Regulation (EC) No 1371/2007 was to ensure greater protection of passenger rights in railway transport, so the intentional non-application of vis majeure clause (which is applied in maritime, land and air transport) should contribute to greater competitiveness of rail transport in relation to other transport modes.

The author has analysed in detail the legal effects of applying the above provisions in practice, especially pointing to the judgement of the CJEU in Case C- 509/11 on the ticket price compensation in the event of a delay whereby the railway undertaking is not allowed to be exempt from its obligation to pay compensation in the event of a delay where the delay is attributable to force majeure. In view of the above, taking into account the justification of harmonisation of passengers' rights in all transport modes and the requirements of legal certainty, the author supports the European Commission's position on the proposed amendments to Regulation (EC) No 1371/2007 regarding the introduction of force majeure clause in Art. 17 of Regulation (EC) No 1371/2007.

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UDK 340.131(497.5)
Review article

THE EU REPORTS AND OTHER SOFT-GOVERNANCE TOOLS ON RULE OF LAW, INDEPENDENCE, QUALITY AND EFFICIENCY OF JUSTICE SYSTEMS – ARE THEY RIGHT ABOUT THE CURRENT STATE OF JUSTICE SYSTEM IN CROATIA?

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ABSTRACT

The EU is founded on the rule of law, which stands for the political and legal concept that embodies many guarantees and principles, including but not limited to having accessible, efficient and independent national justice systems across the EU. However, it is mathematically evident that some national justice systems perform a lot better than others. Moreover, the indicators show that the discrepancies between the justice systems of the EU Member States are so vast so that it brings into question whether the principle of mutual trust that serves as the very basis of numerous procedural documents delivered on the EU level makes sense at all.

In his paper the author addresses various problems of the Croatian system of justice by approaching them from two levels; from the academic point of view and from the public perspective. Both views are contextualized with the findings from the EU Justice Scoreboard and other reports. The trustworthiness of the reports is examined and crucial aspects of the problems within the Croatian justice system identified.

Keywords: *rule of law, independence of judiciary, efficiency of justice systems, civil justice, criminal justice, the EU reports*

1. INTRODUCTION

The EU has many worries and some of these worries are not new like the pandemic of the novel coronavirus or the financial stability and excessive liabilities of Mediterranean countries. The UK has officially left the Union which is very unfortunate, and in some eastern member states the rule of law has been worsening for some time now. Only this year the European Parliament has reacted two times to

warn Hungary and Poland to address a clear risk of a serious breach of the values on which the EU is founded, including but not limited to the independence of the judiciary, the freedom of expression, media freedom, the right to equal treatment etc.[1]

After joining the EU in 2013, Croatia was obligated to uphold its efforts arising out of the accession negotiations, among others, the implementation of its Judicial Reform Strategy.[2] In the Treaty between the Member States of the EU and Croatia it is clearly stated that the Commission shall closely monitor all commitments undertaken by Croatia in the accession negotiations and that the Commission will monitor Croatia's reforms in the area of the judiciary and fundamental rights.[3] The specific commitments delivered in the annex VII of the Treaty particularly relate to improving the current state of the judiciary by strengthening its independence, accountability, impartiality, professionalism as well as by securing the continuation of the fight against corruption and conflict of interest at all levels.

The lack of public trust in the judicial system is certainly not a Croatian phenomenon. Some other countries have had the same problem and there is little doubt as to how good it is for a state to have a functional, efficient and quality justice system. The problem of inefficient judiciary from the perspective of businesses and investors is regularly addressed in different "doing business" and similar reports. While it is hard to rebuff that competitiveness of one country is also linked to the rule of law and effectiveness of judicial system, the truth is that there are so many variables that can influence business performance. The market size, taxes, (in)flexibility of business regulations, capabilities of economic transformation and similar are probably among the most important ones, which, of course, does not mean that enforcing contracts and resolving insolvency do not play a role in benchmarking and tailoring of the final rankings.[4] Otherwise, it would be hard to

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1 See the European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary (2020/2513(RSP)) and the press release from the plenary session of April 17, 2020. available at: [https://www.europarl.europa.eu/news/en/press-room/20200415IPR77109/covid-19-meps-call-for-massive-recovery-package-and-coronavirus-solidarity-fund]. The availability of all the webpages quoted in the references of this paper is last time checked on May 13, 2020. Further comments regarding the date of the last webpage visits will be omitted in all later citations.

2 See Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership (COM(2012) 601 final), p. 6

3 See art. 36 of the Treaty between the EU Member States and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union, Official Journal of the EU L 112/10 of April 24, 2012

4 In the latest WTO's 2020 Doing Business Report Croatia is ranked 51st on the ease of doing business ranking table, along with its neighboring countries Montenegro (50th) and Hungary

explain why countries that are similarly ranked in terms of the rule of law or the independence of the judiciary perform differently when it comes to the economy. For example, Slovakia and Slovenia are significantly outperforming Croatia economically, although the perceived level of the independence of courts and judges among companies, according to the data from the European Justice Scoreboard, suggest that not so long ago all these countries were sharing the bottom of the Scoreboard's tables.[5]

Obviously, "Doing Business" and similar reports that are drafted for business purposes view the problems from an objective perspective. It can be argued that an objective perspective will not be enough to provide us with the correct view of the system which does not mean, as we shall see, that such reports and scoreboards provide false information. What they do is that they primarily look at progress made in the regulatory framework for the business environment. However, considering the effectiveness of the judiciary in performing debt collection and contract enforcement is hardly enough to get a good perception of how things work in reality. The author still remembers the astonishing progress Croatia made in "Doing Business" rankings several years after it introduced pre-insolvency proceedings aiming to give troubled companies a second chance by reducing and writing off debts.[6] The fact is, however, that pre-insolvency proceedings have been one of the major legal scandals since it is widely known that numerous procedural irregularities had been occurring throughout the application of the Financial Operations and Pre-Bankruptcy Settlement Act which was later, in the relevant part, because of the corrupt practices it generated, replaced by the new 2015 Bankruptcy Act. Similar models of benchmarking that mostly rely on the investigation of the regulations can be easily applied to other areas of law but they can also take us into the wrong direction. If debt collection and account freezing proceedings are made efficient, it does not necessarily mean that contract enforcement in ordinary court proceedings works smoothly and without delays. If those committing evil crimes are effectively prosecuted, it does not necessarily mean that corrupt officials and people who are accused of white-collar crimes are brought to justice and trialed swiftly.

(52nd). See p. 4, document available at: [https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf]

5 See the 2017 European Justice Scoreboard, particularly figures no. 52-55, document available at: [https://ec.europa.eu/commission/news/commission-publishes-2017-eu-justice-scoreboard-2017-apr-10_en]

6 Compare Croatia's ranking with respect to resolving insolvency in 2014 Doing Business Report (98th) to the one in Doing Business Report of the subsequent year (56th!)

In contrast to the objective perspective there is a subjective component which, at least when it comes to the independence of the judiciary crucial for securing the rule of law, stands for the right of an individual to have their rights and freedoms determined by an independent judge; it is not a personal privilege of the judges, but justified by the need to enable judges to fulfill their role of the guardians of the rights and freedoms of the people.[7] For the people who must resort to courts to enforce or defend their rights little matters what different reports and scoreboards say about the justice system. Their experience of the justice system and of everything that goes with it is what really matters to them. And that brings us to the very core of the problem because Croatia's situation - or better to say problems - with the rule of law, the independence of the judiciary, corruption etc. are all very well reflected in the latest available reports.

Among these reports, the latest European Justice Scoreboard and World Economic Forum's Global Competitiveness Report 2019. got some limited publicity because they posit Croatia as a country with poorly perceived independence of courts and judges both among the citizens and businesses. These reports are very different in nature and scope, but their aims overlap. Namely, while the title "Global Competitiveness Report" speaks for itself, the primary aim of the European Justice Scoreboard at the time it was presented was to address the problem of the systematic abuses of democratic and rule-of-law principles across the EU member states i.e. to control the compliance of the member states with the founding principles of the EU after accession, but later the rhetoric of the EU Commission has changed and from then on the EU Justice Scoreboard has been used primarily as a tool that links the effectiveness of justice with investment attractiveness and the ability of the member states to guarantee a transparent business climate.[8]

Now, let us briefly pause to take a breath because Croatia's rankings in both reports are devastating. According to the Global Competitiveness Report presented by World Economic Forum, Croatia's judicial independence was ranked 126th out of 141 countries, which is the worst result within the European Union (EU).[9] This finding is plainly confirmed by the European Justice Scoreboard – Croatia is holding the worst position in all the tables that depict the current state of per-

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7 See Report on the independence of the judicial system. Part I: The independence of judges, Adopted by the Venice Commission (European Commission for democracy through law) at its 82nd Plenary Session, Venice, 12-13 March 2010., p. 3

8 See Strelkov, A., *EU Justice Scoreboard: a new policy tool for "deepening "European integration?*, Journal of Contemporary European Studies, *vol.* 27, no. 1, 2018, p. 17

9 See The Global Competitiveness Report 2019., p. 175, [http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf]

ceived independence of courts and judges.[10] The respondents have pointed out that the main reason for earning such a regretful result are the interference or pressure from the government and politicians or the result of economic and other specific interests. Here it is worth mentioning that lately one other report boosted public interest; it's GRECO's (Group of States against Corruption) evaluation report on Croatia.[11] Although it does not deal with the deficiencies of the judicial system itself but with preventing corruption and promoting integrity in central governments and law enforcement agencies, if we take into account that pressures from state officials in conjunction with some other specific, economically and politically motivated interests are cited as the main reason for the lack of public confidence in courts and overall justice system, it is impossible to neglect some of the GRECO's findings, which are supporting the thesis that various corrupt practices are widespread among the people working for the central government.[12] For instance, GRECO is recommending Croatia to regulate situations of conflicts between private interests and official functions; to introduce rules regarding situations when persons entrusted with top executive functions engage in contacts with lobbyists and other third parties who seek to influence governmental legislative and other activities; to introduce rules concerning duty of provisioning sufficient information about the purpose of these contacts be disclosed, such as the identity of the person(s) with whom (or on whose behalf) the meeting(s) took place and the specific subject matter(s), names, functions and possible remunerations of people who are carrying out tasks for government etc.[13] This was important to mention because, as we shall see *infra*, the interference between government officials and people working in advisory or managing capacity can result with legislation that opens up space for various opaque practices, which can heavily undermine independence of courts obliged to duly follow laws passed by politicians.

Many issues that are or will be mentioned in the paper deserve a separate and more detailed elaboration, but the author's intention is to make this paper as concise as possible. Introduction will be followed by the section in which we shall try to identify reasons which, we presume, contribute to the bad perception of the justice system in the public. The reasons and cases we are going to emphasize have all been extensively discussed in Croatia's media space and some of them, without any doubt, have resulted in resentment among people. No wonder that cases that

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10 See The 2019 European Justice Scoreboard, p. 44-46, document available at: [https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf]

11 See GRECO's evaluation report on Croatia adopted on December 6, 2019. at GRECO's Plenary Meeting in Strasbourg, document available at: [https://pravosudje.gov.hr/antikorupcija-6154/6154]

12 See GRECO's recommendations and follow-up at p. 53-55

13 *Ibid*.

provoke interest are often criminal matters and issues that can be classified as top stories from the social and political life. But we shall also be mentioning other issues and problems, those of civil law and commercial nature. However, we will limit our discussion here only to issues that are supposedly known to wider public, not considering whether they had got broad media coverage like some criminal matters did. It is also true that many headline-worthy stories escape the radar of the public.

In the third part we shall try to present another dimension of the problem. Some new moments will be brought to light. For instance, in Croatia it is often hard to ascertain what shall be the outcome of a court action regardless of the existing national and international caselaw. Even experienced lawyers will sometimes have problems projecting the outcome, even if the issue at question does not fall beyond the area of their expertise. Overcoming this problem in the future will be one of the foremost judicial tasks, since having a justice system in which party to the proceedings cannot rely on the logical interpretation of laws and case law is deeply confronting the principle of legal certainty which is well argued and firmly defended by the European Court of Human Rights.

2. DEFICIENCIES OF THE JUSTICE SYSTEM: A VIEW FROM THE PUBLIC PERSPECTIVE

We all know that most of the court hearings are open to the public and that the requirement of publicity presents an important part of the fair trial guarantees.[14] The sound administration of justice with public scrutiny helps building confidence in the justice system and it ensures that fact finding and assessment of facts is done properly. Ironically, even the existence of the internet, the press and other mass media cannot prevent bad adjudication, since the number of court proceedings is vast and not all cases are traceable and interesting. However, occasionally, and this usually happens with criminal trials and some other types of proceedings (e.g. bankruptcy proceedings and evictions) news from the courtrooms reach the headlines more easily.

Croatia's fight against corruption had its peak when Croatia's former prime minister Ivo Sanader was brought to trial for corruption together with his former, then and now ruling, party in Croatia - Hrvatska demokratska zajednica (Croatian Democratic Union - CDU). Both were indicted for various kinds of corrupt activities, including the party funding. It is hard to enumerate all the indictments

[14] More about fair trial guarantees see in Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb), Council of Europe, version last updated to August 31, 2019

against Ivo Sanader. As it now stands, it seems that there are five separate indictments altogether. The first one was brought in 2011 and all others soon afterwards. The peculiarity is that only one trial resulted in a conviction, while all other trials are still on-going including the one against his former party. Sicknesses, deaths, the impossibility of reaching witnesses and other defendants, filing motions to recuse a judge or an entire judicial council, all resulting with numerous adjournments, have marked all the trials against our former prime minister. As the submission of constitutional complaints is a regular occurrence in all proceedings, it is not unusual that it was brought also in one of the most prominent cases against Mr. Sanader, the one with an important foreign element.[15] The result of the procedure before the Constitutional Court was quashing of the Supreme Court ruling and remitting of the case for a retrial which in the first instance finally ended in December 2019, resulting with the conviction of Mr. Sanader and Zsolt Hernadi, the former CEO of the Hungarian big oil company MOL with whom Mr. Sanader allegedly made a deal regarding the transfer of the management rights over the MOL's Croatian counterpart INA. It is worth saying that Mr. Hernadi has never been extradited to Croatia despite the ruling of the Court of Justice of the European Union according to which judicial authorities of the Member States are required to adopt a decision on any European arrest warrant communicated to them.[16] The mere fact that the cases against our former prime minister, no matter how complicated they are in terms of facts, last for almost a decade certainly raises a question about the efficiency of the Croatian justice system.

One other case which has shocked the public is the case of Darko Kovacević, a young man nicknamed Daruvarac, who brutally beat up a young girl in a café. All was recorded by the CCTV and the video of violence started to circulate on the internet soon after Daruvarac got released from custody due to expiration of the time limits prescribed by the Criminal Procedure Act. When the information about the case reached the headlines, people quickly became repulsed with the way the case was handled both by the prosecutor and the court. Even protests were held in front of the court building. The consequence of the public pressure was that Daruvarac got a speedy trial (only one trial day in the first instance court), subsequent quick confirmation of the 1st instance judgement with only slight reduction of the five-year sentence and finally the imprisonment of the harasser.

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15 In more detail about the Sanader trial and the case of the alleged bribery of the MOL director see PCA Case No. 2014-15, the final award in the matter of an arbitration under the UNCITRAL Rules between the Republic of Croatia and MOL Hungarian Oil and Gas PLC. of December 23, 2016

16 See Court of Justice of the European Union Press Release No 118/18 (Judgement in Case C-268/17), Luxembourg, 25 July 2018 [https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-07/cp180118en.pdf]

It is hard to tell with certainty, but it is likely that this case would probably get prolonged without the pressure on courts and prosecutors that started to flow simultaneously from various sides – the public, NGOs etc.[17]

Fleeing to Bosnia and Herzegovina (B&H) before a sentencing verdict is pronounced is another popular action of defendants who hold citizenship of B&H. The latest case of the football boss Zdravko Mamić was very much followed by the media and the public. Since an extradition contract between B&H and Croatia could not be applied retroactively and the charges against Mamic date back to before the contract was signed and went into force, the court of Bosnia and Hercegovina, as Total News Croatia reports for English speaking audience, has delivered a final ruling banning the extradition of Zdravko Mamić to Croatia because legal conditions for such a move have not been met. It is unknown how many people charged with criminal offences in Croatia had taken advantage of the dual citizenship and dysfunctional extradition agreement, but the case of Mamić is certainly not the only such case up to date.[18]

Other areas of law are not free of public insight through media, either. An interesting fact is that two ministers in two different governments were forced to resign because of irregularities connected to bankruptcy proceedings. The first is the case of Slavko Linić, then minister of finance who, reportedly, in the name of the state purchased the property from a bankrupt enterprise that was later found to had been valuated significantly less than what had been paid for it.[19] During Slavko Linić's term in office (2011-2014) Croatia was undergoing an economic crisis, which needed adequate legislative reactions and as part of the legislative package intended to reduce illiquidity within the private sector he brought forth a new system of pre-bankruptcy settlements, which was at that time regulated by the Financial operations and pre-bankruptcy settlements act. The main problem with the system was that it did not require court examination of the trustworthiness of claims reported during the first stage of proceedings, which was under the patronage of the state-controlled body called Financial Agency (FINA). The problem was not with the hybrid system itself. The European Commission com-

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17 In the Report of the President of the Supreme Court of the Republic of Croatia to the Croatian Parliament of 2017. (the Report 2017.) there is a poll conducted among Croatian judges regarding the level of inappropriate influence of media on judges and court proceedings in Croatia. It tells us that only 24% of judges disagree with thesis that the media does not influence work of judges. See the Report 2017., p. 94

18 See reports of the Total News Croatia available at: [https://www.total-croatia-news.com/politics/37370-zdravko-mamic]; [https://www.total-croatia-news.com/politics/38609-zdravko-mamic]

19 See the text available at: [https://www.reuters.com/article/us-croatia-financeminister-sacking/croatian-pm-sacks-finance-minister-over-property-purchase-idUSBREA450ED20140506]

municated in its recommendations that restructuring mechanisms should include flexible and low-cost proceedings as well as that limiting court formalities only to where they are necessary is of crucial importance for creating a functional system.[20] However, in practice things did not work well because creditors were not provided with guarantees that the claims are established fairly by independent and impartial committees while the courts were only rubber stamping decisions reached before the FINA by the majority creditors.[21] The other case concerning the government's involvement in bankruptcy proceedings occurred in early 2017, when the largest private holding food and retail company in Croatia called Agrokor went bankrupt and the government decided to enact a new law called the Law on Extraordinary Administration Proceeding in Companies of Systemic Importance for the Republic of Croatia.[22] The reason for the enactment of the new law lies with the assertion that such restructuring could not be carried out pursuant to the existing Bankruptcy code of 2015.[23] Soon after it was published, it became clear from the analysis that the law has many shortcomings and vague provisions as well as that the involvement of the state in the process of administration of Agrokor is substantial. The Commercial Court was once again posited as a body which is not supposed to question, but only confirm decisions of the government. For instance, the extraordinary commissioner, as a person who has the rights and obligations of a debtor's organ, as well as his deputies are appointed by the Court on the proposal of the government of the Republic of Croatia,[24] the temporary creditors' committee (which at the end became the permanent creditors' committee that adopted the draft of the settlement) was appointed by the court on the proposal of the extraordinary commissioner etc. In any case, while little focus has been put on the substance of the law, another problem came to focus. It turned out from the emails published on the web that the law, which passed all the legislative procedures literally over night was drafted by private law offices closely connected to the then Deputy Prime Minister Martina Dalić. The allegation was also that people – the members of the so-called "Borg" group later worked as highly

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20 See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee -A new European approach to business failure and insolvency, Strasbourg, 12.12.2012, COM(2012) 742 final

21 In more detail about the problem see Jelinic, Z., *Fighting recession at the expense of access to justice – the case of Croatian Financial Operations and Pre-Bankruptcy Settlements Act*, Journal of the Faculty of Law Rijeka, *vol.* 38, no. 1, 2017, p. 223-239

22 See decision of the High Court of Justice, Chancery Division, Companies Court, Case No: CR-2017-005571 in the matter of Agrokor d.d. and in the matter of the cross-border insolvency regulations 2006., p. 2

23 *Ibid*.

24 Corresponding provision is that the Court may remove extraordinary commissioner and appoint a new at any time on the proposal of the government of the Republic of Croatia

paid consultants on the restructuring of the indebted company.[25] All this broke as a major scandal because of which Ms Dalic had to give up her office. Later, Ms Dalić wrote a book in which she insists that there was no corrupt activity involved in the government's effort to save Agrokor.[26]

The latest EU Country Report Croatia 2020 comments that despite progress in expanding electronic communication in courts the 2020, EU Justice Scoreboard still shows that backlogs and the length of court proceedings remain among the highest in the EU (around 855 and 735 days for litigious civil and commercial cases, while data for criminal cases shows that the length of criminal proceedings increased in first-instance cases at Municipal and County courts to 678 and 930 days on average, respectively!).[27] Notwithstanding that backlogs of the oldest pending cases are showing signs of steady decrease in almost all legal spheres, it is a big question whether such a positive trend will continue because, as correctly identified by the writers of the report, the first-instance civil courts are currently facing an exceptional influx of cases concerning Swiss Franc (CHF) denominated loans due to expiration of the statutory limitation period for claiming damages.[28]

All these cases (and we are talking about a couple of tens of thousands of cases that came to courts practically overnight) concern disputes between parties regarding the loan contracts and numerous court hearings have been already scheduled (at the moment of writing this paper all hearings at the courts are postponed due to the corona virus outbreak). There are several problems with the entire CHF story, but two of them stand out; the first one is that the influx of the new mass of cases will slow down the work on reducing the backlogs and the second one is that it is still unclear whether the first instance courts now have a clear caselaw guidance apropos the legal issues at stake. No matter how things end up and whether consumers receive fair compensations for overpaid installments or not it is now evident that this judicial saga will not end any time soon. It started in 2012 when the authorized CPA (Consumer Protection Association) filed a collective injunction lawsuit against the banks before the Zagreb Commercial Court. The first instance judgement from 2013, which was delivered relatively quickly by one very dedicated judge, was favorable for consumers – the banks were ordered to restrain from further violations of consumer rights and it was established that

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25 See the text available at: [https://balkaninsight.com/2018/10/30/former-croatian-economy-minister-declared-the-collapse-of-crony-capitalism-10-30-2018/]

26 *Ibid*.

27 See EU Country Report Croatia 2020 - European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011 (COM/2020 150 final) of February 26, 2020., p. 51-52

28 *Ibid*.

contract provisions on variable interest rates as well as the CHF currency clause provision were null and void,[29] hence resulting with significant imbalance in the parties' rights and obligations to the detriment of the consumer.[30] A year later the first instance judgement was reversed and confirmed only in the part that referred to the problem of variable interest rate.[31] Naturally, a recourse to the Supreme Court followed, as neither parties to the proceedings were satisfied. The Supreme Court has relatively quickly rebuffed all the revision appeals, thus putting the case to an end.[32] But the end is sometimes the new beginning, and this is rather often case in Croatia when it comes to important cases, because almost regularly court decisions are challenged before the Constitutional Court. In this particular case the Constitutional Court said that the Supreme Court failed to adequately substantiate its reasoning why the intelligibility and fairness test should be applicable and relevant only in relation to the variable interest rate clauses, but not in relation to the currency clauses.[33] In a retrial proceeding the Supreme Court accepted the consumers' revision, partially quashed the High Commercial Court judgement and remitted the case for another retrial.[34] Afterwards, the judges of the High Commercial Court did not have too many options – they had to duly follow the understandings from the previous judgements, which essentially led to the full confirmation of the first instance judgement and rejection of all the appeals filed by the banks.[35] In the revision process that followed before the Supreme Court all the revisions filed by the banks were dismissed and in September 2019 we finally

[29] The currency clause has been introduced in Civil Obligations Act in 1994 as an instrument intended to provide Croatian currency kuna (HRK) with credibility. First two paragraphs of the art. 22 of the Civil Obligations Act (Official Gazette no. 35/2005) read as follows: A provision in a contract is allowed according to which the value of the contractual obligation in the currency of the Republic of Croatia shall be calculated on the basis of the value of gold or the exchange rate of the currency of the Republic of Croatia against a foreign currency. (2) In such a case, unless the parties agree another exchange rate, the obligation shall be performed in the currency of the Republic of Croatia based on the selling exchange rate published by the foreign exchange or the Croatian National Bank that is valid on the date of maturity or on the date of payment as required by the creditor. the value of Croatian currency against the Euro

[30] See the judgement of the Zagreb Commercial Court no. P-1401/2012. of July 4, 2013

[31] See the judgement of the High Commercial Court no. Pž-7129/13-4. of June 13, 2014

[32] See the judgement of the Supreme Court of the Republic of Croatia no. Rev 249/14-2 of April 9, 2015

[33] See the Wolf-Theiss report available at: [https://www.lexology.com/library/detail.aspx?g=-fa0be6bb-abc4-410d-988b-ce74f5e95ad8]. See also the ruling of the Constitutional Court no. U-III-2521/2015 of December 13, 2016

[34] See the judgement of the Supreme Court of the Republic of Croatia no. Rev 575/16-5 of October 3, 2017

[35] See the judgement of the High Commercial Court no. Pž-6632/2017-10 of June 14, 2018

got the final decision which could serve as the basis for filing of individual compensatory lawsuits.[36]

Just as every good cake must have a nice topping, every good (judicial) story must have a complication. Namely, in 2015, an election year, the government was urged to do something with the problem of CHF denominated loans and it decided to pass the amendments to the Consumer Credit Act which enabled consumers to convert their CHF loans to Euro loans (Croatian currency is pegged to € and fluctuations between the kuna and € are very limited which is not the case with other currencies such as the US dollar or the CHF which appreciated over 50% against the kuna). As expected, numerous consumers opted for conversion to lower their installments. The conversion was done by annexes to the main loan contract and following the conversion some courts contended that consumers who converted their loans are precluded from seeking declaration of nullity of such loans, which essentially means that consumers are entitled to seek reimbursements only for the period up to the contract conversion.[37] The newest development in this respect is only a few months old. In the pilot proceedings conducted in accordance with the Law on amendments of the Civil Procedure Act from 2019 the Supreme Court ruled that the conversion annex is valid even if the essential provisions of the main contract regarding the currency clause and variable interest rate are null and void![38] This stance of the Supreme Court, that now serves as the precedent, significantly limits the value of compensations the consumers will be entitled to seek in ongoing court proceedings. No matter how everything develops, the bottom line is that it is easy to envisage that individually filed court actions will be leavening in courts for the next few years. Conducting hearings, waiting for experts' financial analysis, resorting to higher courts etc. will, for sure, feature in most of the CHF proceedings before Croatian courts.

Obviously, the old legal maxims "justice delayed is justice denied" and "Fiat iustitia, et pereat mundus"[39] do not work in Croatia as they should. Although some would argue that elsewhere is the same, the fact is that whenever high stakes are in the game in the court proceedings in Croatia, it can be expected that justice will be delayed, if not denied.

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36 See the judgement of the Supreme Court of the Republic of Croatia no. Rev-2221/2018. of September 3, 2019

37 See the Wolf Theiss insider report of July 2019, document available at: [https://www.wolftheiss.com/fileadmin/content/6_news/clientAlerts/2019/2019_Q3/19_07_04_NL_DR_Insider_Vienna.pdf]

38 See the ruling of the Supreme Court no. Gos 1/2019-36 of March 4, 2020. See also information available at: [https://inter.capital/flash-news/supreme-court-rules-the-chf-conversion-lawful-2/]

39 Let justice be done, though the world perish

Not all functions of the justice system show signs of deficiency, but they have some other shortcomings that influence the public opinion. The cost of legal proceedings is certainly one of them, although, in contrast to the neighboring Slovenia where public confidence in judiciary is being researched from 2015 onwards, the reasons for the lack of public confidence in Croatian judiciary have never been systematically questioned. The Slovenian report (Zadovoljstvo javnosti z delovanjem sodišč v Republiki Sloveniji) suggests that parties to the court proceedings primarily direct their concerns to the issues of the efficiency of the justice system, the fairness of proceedings, the quality of legal reasoning; while issues such as the costs of proceedings play a less significant role in the overall satisfaction with the justice system.[40] In Croatia, like in many other countries, the costs of proceedings can be very high in both civil and criminal proceedings. Of course, rules on cost shifting (the loser pays rule) and existence of tariffs sometimes helps with predicting what costs will occur and how much of them will be recoverable, but it is also important to understand that predicting the final outcome (unsettled case law still presents a big problem) or estimating how long it will take to win a case (the proceedings often last very long) may turn out to be very problematic. Nevertheless, in contrast to the regular litigious proceedings, the system of out of court debt collection has been made very effective during the past ten years. Anyone able to present an authentic document showing the existence of a debt (accounting documents, receipt etc.) can propose before a public notary the issuance of the writ of execution. Once the writ is served the party can lodge an appeal against it, which will usually take the case to court. However, not many people appeal the orders and once they become final the creditors apply to the Financial Agency, which does all the work concerning cash detention and seizure, account freezing etc. There are many problems with the present system. One is that it is not applicable to foreign citizens, because in Zulfirkapašić and Pula Parking cases the European Court of Justice has found that the Croatian notaries cannot be deemed to be "courts" within the meaning of respective European regulations, which essentially means that the documents the notaries issue in enforcement proceedings cannot be enforced as judicial decisions.[41] There are rumors that the role of public notaries in enforcement proceedings will change soon in a somewhat bizarre way – they will be assisting the courts in the preparation of the draft versions of the writs of execution, which will be electronically communicated and finally issued by the courts. Obviously, the ruling elites and the politics are making efforts to keep the

[40] See Bratkovic, M., *Građansko pravosuđe u službi građana (Civil Justice System in the Service of Citizens)*, collection of papers presented at the round table organized by the Croatian Academy for Science and Arts on March 8, 2018, Barbić, J. (eds.), Zagreb, 2019, p. 163-164

[41] See press release no. 25/17 of March 9, 2017. of the European Court of Justice regarding judgments delivered in the cases C-484/15 and C-551/15

notaries within the system of debt collection at all cost. The issue that is behind the problem explains why this is the case. Most people face debt collection proceedings due to small debts. However, different tasks must be done during debt collection proceeding; lawyers firstly start the action, notaries then issue the writ, the writ then needs to be served, the finality and enforceability of the order need to be affirmed and there are some other activities that are usually charged when attacking a debtor's account. All these actions have their statutory prices and when all the fees are jointly calculated their value often significantly exceeds the value of the claim, in cases of small debts possibly up to seven or eight times. As hundreds of thousands of people have experienced the multiplication of the due amount by adding the costs to the main debt, it is no wonder that people have been showing anger at the system, often describing everything as a product of strong interference of private interests with corrupt politics and a rotten justice system. For curiosity's sake, it should be mentioned that a rough calculation shows that appealing the writ of execution, directing the case to ordinary litigation proceedings and finally failing to win the case in the first instance may cost less in terms of the legal fees awarded to the winning party than doing nothing and letting the enforcement proceed through the system, this partly because the Financial Agency also charges its own fees for the detention and seizure of cash.[42]

3. DEFICIENCIES OF THE JUSTICE SYSTEM FROM THE ACADEMIC POINT OF VIEW

It is not surprising that from the perspective of the mass media the facts worthy of attention are different scandals like lying in court proceedings (happens regularly with witnesses), the Chief State Attorney's membership in the Masonic lodge and similar. Other legal issues and problems are not known to the wider public either because they are overly complicated to explain or simply they do not have the power of attracting attention. One issue which falls within the latter group relates to criminal proceedings. There is no doubt that without employing various kinds of surveillance measures (phone tapping and similar) it would be hard for the authorities to fight crime. The Criminal Procedure Act is quite clear about the orders and the latest version of the relevant rule reads as follows; If an

[42] Paying the due amount right after the writ of execution is served releases the debtor from the duty of paying the costs of the enforcement proceedings only partially since some costs occur automatically (lawyers and notaries' fees plus some other accompanying costs). About this problem and some other problems relating to the out of court enforcement proceedings see Jelinic, Z., *Sustav nagrađivanja i naknađivanja troškova postupka kao prepreka reformi pravila o utvrđivanju i prisilnoj naplati tražbina (The legal regime for remuneration of private legal professions as an obstacle to reform the system of uncontested debt collection)*, Conference proceedings Freedom to provide services and legal certainty, Kragujevac, 2019, p. 907-935

investigation by other means would either not be possible or would be extremely difficult, upon a request by the State Attorney the investigating judge can, where there is reasonable suspicion that an individual, acting alone or jointly with others, has committed one of the offences….by a written and reasoned order authorize the carrying out of the special measures temporarily restricting the constitutional rights of citizens…[43] The problem of secret surveillance can emerge in various stages of criminal proceedings (including the stage of the confirmation of indictment and proceedings before the trial bench) and the issue at stake here is the use of unlawfully obtained evidence – it is a question whether evidence obtained through tapping and other mechanisms of secret surveillance is lawful if the investigation judge does not provide reasons in his order at all or if he only does a "copy-paste" of the statement of reasons as sketched in the request of the State Attorney. The problem, which is here only concisely explained, has been many times discussed by the Constitutional Court, the Supreme Court and the European Court of Human Rights. In Dragojevic case the European Court of Human Rights has held that in a situation where the legislature envisaged prior detailed judicial scrutiny of the proportionality of the use of secret surveillance measures, a circumvention of this requirement by retrospective justification, introduced by the courts, can hardly provide adequate and sufficient safeguards against potential abuse since it opens the door to arbitrariness by allowing the implementation of secret surveillance contrary to the procedure envisaged by the relevant law.[44] The problem with the way the Croatian investigation judges deal with the requests for the use of secret surveillance measures lies with the fact that they were in the past rarely providing any kind of substantiation in their orders. They would only refer to the existence of the request, copy-paste the statements of the State Attorney's Office and make a reference to the statutory phrase that "the investigation could not be conducted by other means or that it would be extremely difficult".[45] When the investigation judge's order does not have any particular reasoning other than the one from the request, it is factually impossible to ascertain whether any kind of examination of the specific facts of the case and of the attached materials was conducted by the judge.

It follows from the foregoing that for ordering a secret surveillance measures it suffice to issue a request with virtually any kind of explanation (for instance that there is information that a person is corrupt or involved in some other kind of

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43 See art. 332 of the Criminal Procedure Act (OJ no. 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017, 126/2019, 126/2019)

44 See Dragojević vs. Croatia, judgement of the European Court on Human Rights of January 15, 2015. (application no. 68955/11), p. 28

45 See Dragojević vs. Croatia, p. 26-27

crime) and the investigation judges will honor such a request without making any kind analysis of the attached materials neither will the order contain any reasoning other than the one provided by the State Attorney's Office. According to the caselaw of the European Court of Human Rights such procedures for ordering and supervising the implementation of secret surveillance measures do not show compliance with the requirements of lawfulness, nor are they adequate to keep the interference with the applicant's right to respect for his private life and correspondence to what is "necessary in a democratic society".[46] Whereas the jurisprudence of the European Court of Human Rights is quite clear on the matter, the Supreme Court of the Republic of Croatia is still showing doubts regarding the level of scrutiny of the investigation judges when ordering secret surveillance. Some judicial panels adhere to the caselaw of the European Court of Human Rights and Constitutional Court while some others have different lines of thinking. Besides they are fundamentally contrary to the established domestic and international caselaw, the reasons they provide in their orders are somewhat hard to understand when analyzing the relevant rulings.[47] The problem is even more intriguing if we take into account that the Constitution of the Republic of Croatia positions the Supreme Court as the highest court of law burdened with the task to ensure the uniform application of laws and equality of all before the law.[48] But the Supreme Court is hardly fulfilling its constitutional function. The problems in criminal legal sphere apart, civil law and law of civil procedure are not immune to inconsistent approaches in the case law. The author still vividly remembers that the Supreme Court was dismissing as inadmissible the motions for revision, because it held that only if there is an inconsistency in the case law of two separate county courts, the legal matter can be examined by the Supreme Court panel – otherwise, inconsistency in the case law of one county court cannot serve as a justified reason for the Supreme Court's reexamination of the case, even if all necessary procedural conditions for submitting a Supreme Court appeal are fulfilled.[49]

The work on the latest amendments to the Civil Procedure Act has finally opened up the discussion about the role of the Supreme Court within the Croatian justice

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46 Ibid. See also the cases of Basic v. Croatia, judgement of October 25, 2016. (application no. 22251/13), Bosak and Others v. Croatia (applications no. 40429/14, 41536/14, 42804/14, 58379/14)

47 See, for instance, the ruling of the Supreme Court of the Republic of Croatian in cases no. Kž-Us 84/2019/4, Kž-Us 51/2019-4, Kž-Us 8/2018-6, Kž-Us 131/2017-5, Kž-Us 116/2017-4. See also the ruling of the Croatian Constitutional Court in cases no. U-III-857/2008, U-III-1360/2014. So far none of these decisions have been translated into English.

48 See art. 116 of the Constitution of the Republic of Croatia

49 See decisions of the Supreme Court no. Rev 361/2010-2, Rev 1688/2013-3, Rev 472/2014-2

system.[50] Until last year the Civil Procedure Act allowed unrestricted access to the Supreme Court – the result was the huge inflow of various kinds of cases. The information from the report of the President of the Supreme Court on the current state of the judicial system shows that the peak in the number of cases occurred in 2016, when more than 18000 cases waited for consideration (of course, most of the pending cases are civil matters).[51] As there is little doubt that such a heavy workload presents a serious obstacle to the fulfilment of the Supreme Court's public function, i.e. safeguarding and promoting the public interest by ensuring the uniformity of case law, the development of law, and offering guidance to lower courts and thus ensuring predictability in the application of law,[52] intense discussion on what should be done to overcome the problem was initiated within the working group for amendments of the Civil Procedure Act. The basic idea was to introduce the leave to appeal system similar or better to say - almost identical to the solution from the Slovenian Civil Procedure Act (Zakon o pravdnem postupku[53]) and abandoning the model allowing various reasons and grounds for seeking the review of the judgements and decisions rendered in a second instance; the amount in controversy, the type of the case in question (for instance labor disputes are still regarded as disputes deserving the Supreme Court's attention) plus what we used to have in place is the system which allowed the parties to seek the review appeal without any kind of prior authorization that a case in question is of "fundamental significance" for resolving a dispute and for ensuring the equality of all citizens before the law by securing the application of the unified case law (in German law that has always served as an ideal: "grundsätzliche Bedeutung").[54] That is to say, having the proper procedural mechanism is crucial for the proper exercise of the supreme court's constitutional role. As pointed out by Galič, the authority of the supreme court in providing guidance and developing law is un-

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50 Amendments to the Civil Procedure Act (OJ no. 70/2019) came into force on September 1, 2019. The author was the member of the working group for preparation of the draft amendments to the Civil Procedure Act in 2017-2019

51 See the Report on the current state of judiciary for the year 2018. available at: [http://www.vsrh.hr/custompages/static/HRV/files/Izvjesca/Izvjesce_predsjednika_VSRH_2018.pdf] (like most of the other national documents and reports this document is available in Croatian only)

52 See Galič, A., *A civil perspective on the supreme courts and its functions, paper presented at the conference: The Functions of the Supreme Court – issues of process and administration of justice*, Warsaw, 11-14 June 2014., p. 4, available at: [http://colloquium2014.uw.edu.pl/wp-content/uploads/sites/21/2014/01/Ales-Galic.pdf]

53 See Slovenian Civil Procedure Act (Zakon o pravdnem postopku) art. 367-384

54 About the 2001 German civil procedure reforms see, e.g. Murray, P. L.; Stürner, R., *German Civil Justice*, Carolina Academic Press, 2004, p. 386-405

dermined if "too many cases are dealt with and the overall thrust of decided cases is thereby perhaps obscured rather than clarified".[55]

Although it is reasonable to expect that the consensus about the reforms should be relatively easy to reach when there is strong evidence about the necessity of the reform as well as rather positive foreign experiences regarding unifications and rationalization of the justice system if the new system of the review appeal is accepted and introduced, the work on the amendments to the Croatian Civil Procedure Act stretched over more than four years since not all members of the working group have been showing readiness to support the transition to the leave to appeal regime.[56] There is little doubt about the core reason for the resistance to the change. The distrust in the work of the Supreme Court and the criteria it employs when making the screening of the review appeals has grown so big over time that no trustworthy system of frontline review could be envisioned that will ensure that the Supreme Court rejects as inadmissible only appeals which truly do not deserve its consideration. The problem of non-transparent case law (that problem is slowly being addressed by renewing the case law search engines) and the disposal of a substantial number of applications by summary decisions have certainly contributed to the impression that the Supreme Court's panels are only superficially examining appeals. On the other hand, the Supreme Court's argumentation was that lawyers and state attorneys are not capable of correctly forming a fundamental question of law in their appeals i.e. a question that would deserve the Supreme Court's assessment. The fact is that there is a strong mistrust among the legal professionals in the way the Supreme Court handles the cases. This problem can be associated with another indicator from the 2018 European Justice Scoreboard that shows that even Croatian judges do not have a positive perception of the independence of Croatian courts.[57] It is then reasonable to ask ourselves why would some other "players" within the justice system like lawyers and state attorneys have a better perception of the current state of the justice system, especially if we take into account that they have a direct insight into the processes before the Croatian courts. Other available data also suggest that some serious problems exist with respect to the structural judicial independence (important for dispelling any reasonable doubt in the minds of individuals as to the imperviousness of that court to external factors

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55 Galič, *op. cit.*, note 52, p. 10-11

56 See, for instance, the media report from the conference held at the premises of the Croatian Bar Association in Zagreb in early 2018. available at: [http://www.hok-cba.hr/hr/okrugli-stol-nacrt-prijedloga-zakona-o-izmjenama-i-dopunama-zakona-o-parnicnom-postupku-hocemo-li] (in Croatian). The strongest opposition to the introduction of the new appeal regime was coming from the representatives of the Croatian Bar Association and the State's Attorney Office of the Republic of Croatia

57 See the 2018 EU Justice Scoreboard, p. 44 (judges' perception of judicial independence in 2017)

and its neutrality with respect to the interests before it[58]), particularly regarding the appointment of judges. The questionnaire of the European Judicial Network from 2017 contains two worrisome, without any doubt still relevant graphs; 43% of the surveyed judges (119 judges participated the survey) have said that they believe that prior achievements, accomplishments and experience did not play a decisive role in the process of selection of candidates for the judicial office in courts (32% not sure, 25% disagreed) and as many as 55% of the surveyed judges said they think that the promotion of judges is biased and not based on objective criteria (only 18% of the surveyed judges opposed).[59] These were, indeed, very bad indicators of the level of structural independence of the Croatian judiciary. But the fact is also that reforms are constantly under way and some would argue that certain improvements have been made regarding the criteria for the selection and promotion of judges.[60] In any case, whether all this has minimized the risks of improper political influence, especially when it comes to the appointment of the highest position(s) in the judiciary remains to be explored.[61]

Croatia is reforming its laws regularly and occasionally meaningful changes are made to laws crucial for the proper functioning of the justice system. A search shows that the number of legislative and Constitutional Court's interventions to the Civil Procedure Act and Criminal Procedure Act, the Law on Courts, the Enforcement Act, the Law on State Judiciary Council as well as to other laws regulating civil and criminal justice since 2013 and the moment of accession to the EU is significant. Often major changes are hidden in bylaws and often they, like some other changes, do not produce the desired, if any, result. For instance, the jurisdiction of the 2nd instance county courts has been changed in 2015 by the Ordinance on the eFile system in a way that secures equal electronic distribution of the appeals lodged against the 1st instance judgements, all to make the system faster and more efficient in delivering the final ruling. Still, a widely accepted presumption among lawyers is that the new system of case distribution has negatively influenced the quality of judicial decisions and resulted in the further non-uniformity in the case law. This is a huge problem, probably greater than the problem of the efficiency in delivering the final judgements. Waiting a year or two for the 2nd instance court ruling should be far more acceptable than having a system that produces bad final judgments which then stand in contradiction to the relevant

58 See the 2019 EU Justice Scoreboard, p. 47

59 See the Report of the President of the Supreme Court of the Republic of Croatia 2017, p. 93-94

60 The 2010 Law on the State Judiciary Council has been repetitively amended in 2018

61 See the GRECO's (Group of States against Corruption) Fourth evaluation round report on Croatia (adopted on June 20, 2014) titled Corruption prevention in respect of members of parliament, judges and prosecutors, paragraphs 74-93

domestic and international case law. Despite the legislative framework improving a bit, nobody should expect that the Supreme Court will any time soon become effective in securing the implementation of its constitutional function. While it is evident that the ceaseless dealing with the backlogs slows down the system, it should also be researched to what degree personal and managerial capabilities of the presidents of the courts influence the effectiveness of good supervisory control and effective court management. Possibly one of the answers to the overly inefficient Croatian system of justice lies with that particular aspect.

The reforms Croatia is undertaking in various fields are undoubtedly influenced by the findings of the EU and the Council of Europe. A closer look reveals that there are so many strategies and reforms touching upon all fields of government, so it is no wonder that only in the field of judiciary there are several strategies, action plans and many reports produced either by the Government, courts, state attorney's office or other domestic and international bodies.[62]

Much more space is needed to touch upon problems whose solutions would have the potential of improving the independence, professionalism and efficiency of the justice system, thus improving the rule of law in Croatia. Some years ago, Uzelac has rightly pointed out that the sensitive machinery of state judiciary is hard to construct – it takes time and effort to educate and train the judges, organize courts and put everything into a workable whole that can in an adequate way respond to challenges of the constant inflow of cases.[63] Once this machinery breaks down, it is quite difficult to repair it.[64] If we take into account the numerous reforms and fixes, one might say that the Croatian system has been on repair for quite a while. But this is not an ordinary type of repair. It is a transformational repair, meaning that the Croatian justice system needs a qualitative repair. And a qualitative repair means that we have to ask ourselves what stands behind the words "independence" and "professionalism". While the independence of judges and prosecutors principally relates to integrity which stands for a moral soundness, the crucial aspects of professionalism are intellectual capacity, legal literacy and passion for the job. Obviously, changing legal rules, introducing new laws and regulations and following recommendations of the GRECO, the Council of Europe, the EU and all others

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62 See information available on the website of the Croatian Ministry of Justice regarding the plans of reforms proposed by the Government, [https://pravosudje.gov.hr/pristup-informacijama-6341/strategije-planovi-i-izvjesca/razvoj-pravosudja/6724]. An outline of the Judicial Reform Strategy for the period 2013-2018 together with the outline of the Action Plan for the implementation of strategic guidelines is available at: [https://rm.coe.int/judicial-reform-strategy-and-action-plan-in-croatia/168078f1d8]

63 See Uzelac, A., *Role and Status of Judges*, p. 32, paper available online at: [http://www.alanuzelac.from.hr/pubs/A01Role%20and%20Status.pdf]

64 *Ibid*.

is much easier than changing the structures that are predominantly in control of all the reform processes.

While it remains to be seen how it will all develop, we must not forget that potentials and especially human resources are vast. Despite all the terrible things it has brought, the coronavirus crisis has at least explicated the capabilities and importance of digital technology to everyone working for the justice or any other state-funded system. Hence, the transition from the "analogue" to "digital" should go smoothly because the justice system has good capacity in terms of human resources to tackle the process of transition in an effective manner. On December 31, 2019 Croatia with merely four million inhabitants had 1712 professional judges and 635 public prosecutors, while the overall number of non-judge judicial staff is big too - according to the latest information 7770 people assist judges and prosecutors in various decision making, administrative and technical issues and processes.[65] 2018 CEPEJ Report (2016 data) reveals that in terms of numbers of judicial staff Croatia is on the forefront of the Member States of the Council of Europe.[66] Indeed, numbers sometimes tell a lot.

4. INSTEAD OF CONCLUSION

The EU reports and other soft-governance tools on the rule of law, independence, quality and efficiency of justice systems are valuable tools helping anyone wishing to sketch a picture about a national justice system. They cannot be used to form conclusions about the way some particular issues and cases are to be handled, but the quality of the data they provide is generally good. No one can deny that the backlogs before Croatian courts are substantial, that court proceedings remain long, that progress in actual reforms is slow or that the confidence of the public and businesses in the justice system is upsetting, especially regarding its independence and the quality of decisions it renders. To put it simply, the true sign of improvement will be once the scores of the Croatian justice system become better.

To avoid repeating conclusions from the previous text, maybe here at the end the best is to conclude with something worth remembering and a part of the speech that Margaret Thatcher delivered at the meeting of the European Foundation (Freedom, Economic Liberty and the Rule of Law) on October 1, 1996

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[65] See the Report on the rule of law in the Republic of Croatia for the purpose of preparing the Annual Report of the European Commission on the rule of law in the Member States of the European Union adopted on the May 9, 2020. by the Government of the Republic of Croatia, p. 13 (the document is in Croatian, available at: [https://vlada.gov.hr/sjednice/229-sjednica-vlade-republike-hrvatske-29424/29424]

[66] See 2018 CEPEJ Report (2016 data), p. 101 etc.

is certainly something that can be easily contextualized with some of the issues discussed previously in the text.

"What now? We have been used to freedom for a long time. You know we can't have freedom without a rule of law. This is a thing I'm always saying to countries who come out of tyranny. You can't have unconstrained freedom, you have to have a rule of law. And you know, my friends, the most difficult thing is to explain what a rule of law is, as distinct from just an oppressive law. They say, well we've got a lot of regulations, the government makes them, the government dictates to us. That's not what a rule of law is, I say. It's having wise judges who decide fairly and whose decisions are taken and honoured. It's having your laws made in a parliament which is accountable to the people and which you know are going to be honourably administered. That's why we don't just call it law, we call it a rule of law. You cannot have freedom without a rule of law, and that is the most difficult thing, I think, to get into countries that have never known it. And if you don't have it, what you tend to get is corruption and that is death to freedom, it's death to truth, it's death to honour, it's death to democracy."[67]

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UDK 349.6(4-76EU):342.72
Original scientific paper

THE MISSING LINK: ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

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ABSTRACT

It is widely recognized that environmental protection, social benefits and economic issues must go hand in hand. In the European Union, Environment Action Programmes (EAPs) have guided the development of EU environmental policy since the 1970s, and they have strengthened the achievement of environmental goals and the integration of environmental interests in other EU policy areas. Given their joint responsibility, EU environmental policy provides added value both for the EU and its Member States.

Until the end of 2020 the 7th EAP is the agreed framework of environmental policy-making, and discussions are underway on developing the 8th EAP. Between 2014 and 2020, some progress has been made towards achieving the goals of the programme. For example, the 7th EAP provided more predictability of environmental policy and facilitated Member States' policy coordination. Nevertheless, the evaluation of the 7th EAP proves that EU legislation is going in the right direction, but the impacts cannot be seen with actions on the ground.

The environmental acquis of the EU continues to grow, but the efforts are insufficient to implement it. Broad difficulties with the coherent implementation of environmental policy can be perceived at national level, too. That is the main reason why different stakeholders (particularly environmental NGOs) play a decisive role in environmental policy-making, implementation and enforcement. The evidence base indicates that the involvement of the members of the public can reduce the enforcement deficit of EU environmental law, but more needs to be done at all levels.

In 1998, the EU and all the Member States signed the Aarhus Convention on environmental rights, including access to justice in environmental matters. On 17 March 2017, the Compliance Committee (ACCC) found the EU to be in violation of the Convention by failing to provide members of the public with access to the EU courts. On the other side, the Commission adopted a proposal on access to justice in environmental matters in 2003, but the proposal did not gather sufficient support from the national governments. The Commission therefore withdrew the proposal in 2014. Nonetheless, the Commission has delayed remedying this issue, even contrary to calls by international bodies and its fellow institutions.

In October 2019, the European Council called upon the Commission to present at the latest by early 2020 an ambitious and focused proposal for the 8th EAP (2021-2030), and underlined that the new programme must address environmental governance, such as public participation and access to justice. Hopefully, the missing link of EU environmental legislation will be resolved by the EU institutions as soon as possible.

***Keywords**: environmental rights, Aarhus Convention, access to justice*

1. INTRODUCTION

In 2020, Europe faces environmental challenges of unprecedented scale and urgency. As a pioneer of industrialisation, Europe has played a pivotal role in shaping global changes. Today, global trends such as diverging population trends and increasingly severe consequences of climate change are intensifying many challenges in Europe, while rapid technological change brings new risks and uncertainties.[1] Looking ahead, these developments look set to continue increasing pressures on the environment. Making sense European environment's state, trends and prospects requires an integrated approach that acknowledges the complex drivers and implications of environmental change. Urgent sustainability challenges and barriers require systemic solutions, but our systems are characterised by path-dependency, linked to the fact that system elements (infrastructures, technologies, knowledge, etc.) have often developed together over decades.

The call for fundamental transitions is not new. The European Environment Agency (EEA)[2] has regularly made such call in its state and outlook reports (SOERs). The 6th SOER identifies serious gaps between the state of the European environment and existing EU policy targets. This 2020 edition aims to inform discussions on the EU's 2030 policies, including trajectories to 2050 and beyond.[3] It can be seen that many environmental trends in the EU continue to be a cause for concern,[4] not least due to insufficient implementation of environmental legislation. EU environmental law, despite being one of the most comprehensive of

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1 Changing disease burdens and risks of pandemics are also good examples. On 2030 January, the WHO Director-General declared the novel coronavirus (2019-nCOV) outbreak a public health emergency of international concern. The coronavirus disease (COVID-19) impacts the global population in drastic ways, and strains health systems worldwide

2 In close collaboration with the European Environmental Information and Observation Network (Eionet) and its 32 member countries, the EEA provides sound and independent information on the environment to support European environmental governance, and inform the general public

3 The European environment – state and outlook, *Knowledge for transition to a sustainable Europe,* European Environment Agency, 2019, p. 7, [https://www.eea.europa.eu/soer], accessed 23. March 2020

4 SOERs show serious implementation gaps in key areas, such as biodiversity, water, air and waste

the world,[5] is still not properly enforced and implemented. Weak implementation of environmental legislation generates high economic, societal and environmental costs, and it creates an uneven playing field for businesses.[6] The total costs of current implementation gaps are estimated at around EUR 55 billion annually.[7]

The understanding of systemic change has important implications for environmental governance as well. Environmental governance in the EU is not limited to the interventions of the EU institutions and the EU Member States. Environmental challenges call for a 'whole-of-society' approach in which all citizens and their organisations have a role to play. Europeans are highly supportive of environmental protection. As annual Eurobarometer surveys show, there is strong support for the role of EU legislation in protecting the environment,[8] and this allows more proactive environmental interventions and closer engagement of citizens in supporting the actions of EU institutions and Member States. Citizens' expectations for living in a healthy environment must be met, and this will require renewed focus on implementation as a cornerstone of environmental policies.

2. THE PUBLIC PARTICIPATION PRINCIPLE

Public participation is an important theme of contemporary environmental policy and law at all levels. The protection of the environment is mostly a matter of common or public concern. Environmental problems directly affect every individual, community, group, association and other organisation. Degradation and deterioration of the environment, and measures to counter it, have an impact not only on human health and well-being, but also the general quality of life.

It is a fundamental shortcoming that environmental concerns are systematically underrepresented. The environment itself has no voice and nor do future generations.[9] Therefore, instruments, procedures and mechanisms need to be developed

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5 In the past 50 years the EU has adopted a substantial and diverse range of environmental measures aimed at improving the quality of the European environment. The body of environmental legislation has grown significantly since the second half of the 1960s

6 For example, illegal waste operators can under-cut legitimate waste industry by disposing of waste at illegal sites.

7 COWI and Eunomia, *Study: The costs of not implementing EU environmental law,* Final Report, 2019, [https://ec.europa.eu/environment/eir/pdf/study_costs_not_implementing_env_law.pdf], accessed 21. March 2020

8 Special Eurobarometer 501: *Attitudes of European citizens towards the Environment,* Summary, December 2019, p. 28, [https://data.europa.eu/euodp/en/data/dataset/S2257_92_4_501_ENG], accessed 18. March 2020

9 As Advocate General Sharpston noted at the hearing in the Trianel Case before the Court of Justice of the EU (C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*

to allow as broad a discussion on environmental issues as possible. It is widely recognized that the involvement of the public in environmental matters is essential to the promotion of sustainable development, democracy and a healthy environment. If the members of the public can make more effective use of their democratic rights of participation in the field of environmental protection, public participation leads to an improved openness of governance, more extensive rights of the members of the public, and through all these, greater public awareness on environmental issues, encouraging citizens to rethink their behaviours and lifestyles.

Individuals and their organisations acting in the public interest, such as in relation to the environment, contribute to the improvement of the level of environmental protection. They have to work together to find meaningful solutions to today's environmental problems, including citizens, communities and their associations. Participatory democracy is a pre-requisite for the realisation of sustainable development,[10] and participatory mechanisms establish a reliable basis for making better decisions that benefit all stakeholders, since it is generally supposed that a wider range of considerations can be taken into account.[11] Additionally, public participation methods improve the legitimacy of decision-making as, *inter alia,* the participation of citizens can potentially make decisions more democratic.[12] Finally, the members of the public have a crucial role to play to close the implementation gap. The practical and effective application of existing rules is one of the most serious challenges that environmental laws face today.

In theory, all members of society can contribute to the development of environmental policy and law. The can serve as the 'eyes and ears' of specialized monitoring institutions and other state organs. People can participate in decision-making as individuals or organised in associations and other non-governmental organisations (NGOs) for environmental protection. Owing to the complexity of environmental issues, their greater expertise and organised efforts, environmental NGOs are in a better position to enforce the interests of the public than those of individuals. They are the products of "social self-organisation" emancipating civic values

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eV v Bezirksregierung Arnsberg EU:C:2011:289), 'the fish cannot go to court'

10 Agenda 21 also stated that "one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making"; see Cameron, J.; MacKenzie, R., *Access to Environmental Justice and Procedural Rights in International Institutions,* in: Boyle, A. E.; Anderson M. R. (eds.), Human Rights Approaches to Environmental Protection, Oxford University Press, 1996, p. 151

11 Richardson B. J.; Razzaque, J., *Public Participation in Environmental Decision-Making,* in: Richardson, B. J.; Wood, S. (eds.), Environmental Law for Sustainability, Hart Publishing, Oxford, 2006, p. 165

12 Ebbesson, J., *The Notion of Public Participation in International Environmental Law,* Yearbook of International Environmental Law, *vol.* 8, 1997, pp. 75-81

and grassroots activities, protecting pluralism and diversity in society, providing services with flexibility, establishing the mechanisms by which the government and the market can be held accountable by the public, and pursuing a change in the collective mentality.

Public participation cannot be imagined without active citizens and their organisations. The lack of financial and human resources, and insufficient capacity-building also raise numerous problems. The risk remains that public participation is only *pro forma*, without a serious chance for the citizens to influence environmental decision-making. Truly available rights can motivate and empower people to participate in decision-making in an informed and meaningful manner. The greatest challenge has always been to ensure political support among countries for the adoption of a legally binding instrument at international level.

3. THE AARHUS CONVENTION

More than 20 years after its adoption in 1998, the Aarhus Convention[13] remains a leading model example of the application of the concept "environmental democracy" as enshrined in Principle 10 of the Rio Declaration on Environment and Development. When the Convention entered into force in 2001, the former Secretary-General of the United Nations, Kofi Annan called "the Aarhus Convention the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations".[14] The Convention was open to ratification (acceptance, approval or accession) by States and by regional economic integration organisations.[15]

The adoption of the Aarhus Convention marked a milestone in the development of 'environmental rights'.[16] This moment was a historical landmark and an unprecedented example of the international community's quest towards more effective protection of the environment. As a fundamental step forward in the protection of the right of every person to a clean and healthy environment, it also demonstrated

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13 Convention on Access to Information, Public Participation in Decision-making and Access to Justice; the text of the Convention is available at [http://www.unece.org/env/pp], accessed 02. March 2020

14 [https://www.unece.org/env/pp/statements.05.11.html], accessed 02. March 2020

15 The 'REIO clause' recognizes the scope of the EU's activities at international level; see Odermatt, J., *The Development of Customary International Law by International Organizations,* International and Comparative Law Quarterly, *vol.* 22, Issue 2, 2017,, p. 18

16 It is worth recalling that the adoption of the Aarhus Convention was the result of an extraordinary experiment in multilateral cooperation between governments and environmental NGOs. The Convention negotiations were open to the participation of NGOs, and they served, in many cases, as the driving force behind the negotiations

the commitment of the international community to involving people in decisions that affect their daily lives.

The Convention does not create a substantive right to a clean and/or healthy environment. Rather, it concentrates on the procedural dimensions to assert the right "to live in an environment adequate to [...] health and well-being".[17] With other words, the main function of procedural law is to be a provider for substantive law, aiming at its full effect and enforcement.[18] The basic concept of the Convention is that wherever public authority is exercised, there should be right for individuals and NGOs. When public authorities fail to respect rights and obligations under environmental laws, the public can hold them accountable.

Currently, the most advanced instrument on environmental rights is still the regional Aarhus Convention. It is a legally binding international agreement establishing concrete rights of citizens to get engaged into environmental policymaking and enforcement. The Convention gives the right to the members of the public not only to be informed about environmental issues and have access to environmental information, but also to be involved in decision-making procedures and have access to justice in environmental matters. The Compliance Committee of the Aarhus Convention (ACCC) has developed a significant practice in relation to all three 'pillars' of the Convention which are the main elements of Principle 10 of the Rio Declaration as well. The findings of the Compliance Committee provide important guidance for governments, academia, practitioners, and civil society on how to shape future instruments and enforce current ones.[19]

The Parties to the Aarhus Convention are required to make the necessary decisions so that public authorities[20] will contribute to environmental rights to become effective. The practical application of the Convention and its principles takes time and requires a change of behaviour of many, citizens and environmental NGOs, public administrations and national authorities, courts and tribunals. The real challenge is to avoid a gap between the spirit of the Aarhus Convention and the day-to-day practice on the ground.

The great value of the Convention is not only in the integration of human right and the environment, but also in the model it provides for similar action in other

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17 See paragraph 7 of the Preamble

18 Darpö, J., *Principle 10 and access to justice,* in: Krämer, L.; Orlando, E. (eds.), Elgar Encyclopedia of Environmental Law, Edward Elgar Publishing, 2018, p. 400

19 Andrusevych, A.; Caroline Jo, C., *Sustainable development concerns at the Aarhus Convention Compliance Committee,* in: Cordonnier Segger, M.-C. (ed.): Sustainable Development Principles in the Decisions of International Courts and Tribunals, Routledge, 2017, p. 737

20 The Aarhus Convention defines public authorities in a broad and functional way

regions of the world. It has served in many countries as a stimulation to make environmental laws even more democratic. Additionally, on 4 March 2018, member states of the UN Economic Commission for Latin America and the Caribbean (ECLAC), focusing on the implementation of Principle 10 of the Rio Declaration, adopted a new treaty, entitled Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean. The Agreement was formally adopted at Escazú, Costa Rica, with the active participation of eight Caribbean countries. It is open for signature until 26 September 2020, and is subject to the ratification, acceptance or approval of 33 countries.[21] It is the only binding international treaty stemming from the UN Conference on Sustainable Development (Rio+20), the first regional environmental agreement in that region, and the first in the world containing specific provisions on environmental human rights defenders.

4. ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

The right to an effective remedy is a generally accepted principle of modern legal systems, and it is enshrined in international treaties as well as national constitutions. Sustainable Development Goal (SDG) 16 in the United Nations 2030 Agenda for Sustainable Future (Agenda 2030) also aims to provide access to justice for all and build effective, accountable and inclusive institutions at all levels.[22] At EU level, the right to an effective remedy is laid down in Article 47 of the Charter of Fundamental Rights. This gives rise to an obligation on the part of the Member States to provide, in accordance with Article 19(1) TEU, remedies sufficient to ensure effective legal protection in the fields covered by EU law.

Rights can only be effective and implementable if there are adequate and sufficient redress mechanisms to uphold them when they are omitted or violated. The right of access to justice is the backbone of environmental rights. The importance of wider public participation in shaping environmental policy and the advantages of better access to courts for citizens and their organisations are widely recognized. The empowerment of the public in the context of sustainable development requires access to effective judicial and/or administrative procedures to challenge measures and to claim compensation.

Access to justice in environmental matters is a fundamental means through which citizens and non-governmental organisations (NGOs) can support the enforcement and the implementation of policies and laws to protect the environment.

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21 The Agreement shall be ratified by 11 countries to enter into force

22 [https://www.un.org/ruleoflaw/sdg-16/], accessed 02. April 2020

Without the timely and equitable implementation of access to justice, the rights under the Aarhus Convention will only remain promises. Environmental rights are interrelated and interdependent; in the context of Principle 10, access to justice has been understood broadly to encompass not only access to courts, but also to other non-judicial or administrative means and alternative dispute resolution mechanisms.[23] Where environmental complaints or petitions are not dealt with through administrative procedures, legal action is available as a last resort in solving environmental disputes.[24]

The key relevant provision of the Aarhus Convention is Article 9. This article sets key obligations in three major areas:

i. access to justice to challenge violations of access to environmental information requirements;[25]

ii. access to justice to challenge procedural or substantive legality of a decision, act or omission subject to public participation procedures,[26]

iii. access to justice to challenge acts or omissions by private persons or public authorities which contravene provisions of its national law relating to the environment.[27]

Unlike most of the provisions of the Aarhus Convention, Article 9(3) applies not merely to the acts and omissions of public authorities, but also to those of private persons. According to the Implementation Guide to the Convention, Article 9(3) has been introduced to give citizens standing to go to court or another review body to enforce environmental law.[28] This provision appears to be the most complicated element of the Convention. Difficulties arise regarding its interpretation and the diversity of legal systems where this provision is supposed to apply.

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23 Ensuring environmental access rights in the Caribbean: analysis of selected case-law (LC/TS.2018/31/Rev.1), ECLAC and CCJ Academy of Law, Santiago, 2018, p. 43, [https://www.cepal.org/en/publications/43549-ensuring-environmental-access-rights-caribbean-analysis-selected-case-law], accessed 05. March 2020

24 Until now, there has been limited progress on the promotion of non-judicial dispute resolution as a means of finding effective solutions for disputes in the environmental field

25 Article 9(1)

26 Article 9(2): "Each Party shall, within the framework of its national legislation, ensure that member of the public concerned [...] have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantial and procedural legality of any decision, act or omission subject to the provisions of [...] this Convention"

27 Article 9(3)

28 Stec, S.; Casey-Lefkowitz, S., *The Aarhus Convention, An Implementation Guide,* United Nations, New York and Geneva, 2000, p. 130

There is a misconception that the Aarhus Convention has to some degree provided a form of popular action *(actio popularis)* for environmental NGOs.[29] The Convention did not introduce an *actio popularis* in environmental matters, but strengthened the status of environmental NGOs. Environmental NGOs having the status of the 'public concerned'[30] are always deemed to have sufficient interest and to have rights capable of being impaired for the purpose of Article 9(2). The aim of this decision was to create an intermediate solution between the wide approach of an *actio popularis* and the strict approach according to which only those who are directly and/or individually concerned can have the right of access to justice.

5. THE AARHUS CONVENTION IN EU LAW

Within the EU, environment action programmes (EAPs) constitute the framework for the Union's environmental policy. Just like its predecessors,[31] the Seventh Environmental Action Programme (7th EAP) of the EU stresses the importance of public participation in environmental matters. In 1990, the Dublin European Council stressed that Community environmental legislation would only be effective if fully implemented and enforced by Member States. The European Commission acknowledged these shortcomings and repeatedly stressed the importance of public involvement in the enforcement of environmental law.

EU legislation in the field of the environment aims to preserve and improve the quality of the environment, and to protect human health. The objective of the Aarhus Convention is consistent with the objectives of EU environmental policy, listed in Article 174 TFEU. By ratifying the Aarhus Convention, the EU demonstrated its commitment at international level to ensuring adequate involvement of the public, and to guaranteeing broad access rights in environmental matters. When these rights and requirements are not applied consistently across the EU, progress may be hindered in achieving the EU's environmental objectives and present citizens from enjoying the full benefits of EU environmental laws.

As we mentioned, the European Community signed the Aarhus Convention on 25 June 1998, and approved it on 17 February 2005, just before the second Meet-

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29 See the Opinion of AG Hogan in Case C-535/18 *IL and Others v Land Nordrhein-Westphalen* EU:C:2019:957, para. 34

30 The 'public concerned' is defined in Article 2(5) as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making"

31 Decision No 1600/2002/EC laying down the Sixth Community Environment Action Programme [2002] OJ L 242/1, Fifth Community Action Programme for the Environment [1993] OJ C 138/1, Fourth Community Action Programme for the Environment [1987] OJ C 328/1

ing of the Parties (MOP).[32] In the meantime, relevant Community legislation was being made consistent with the Aarhus Convention. As the Commission noted, the Convention was the first international instrument which applied to the EU institutions and called it a "major political and legal development".[33] It is clear that the Convention forms an integral part of the EU legal order,[34] and it is binding upon the institutions of the EU and on its Member States pursuant to Article 216(2) TFEU. In accordance with settled case-law, mixed agreements concluded by the EU, its Member States and non-member countries have the same status in the legal order of the Union as purely EU agreements in so far as the provisions fall within the scope of Union competence.[35]

The EU has already adopted a comprehensive set of legislation, which is evolving and relates to not only its own institutions and bodies, but also the public authorities in the Member States. Not only judicial protection, but also access to information and participation procedures at EU and national levels has been amended to meet the Aarhus commitments. Directive 2000/60/EC establishing a framework for Community action in the field of water policy[36] and Directive 2001/42/EC on the assessment of the effects certain plans and programmes on the environment[37] were already adopted in line with the Aarhus Convention, but some, mainly older, environment-related Directives needed amendment to improve or include public participation provisions. Directive 2003/4/EC on public access to environmental information[38] also paved the way towards the conclusion of the Aarhus Convention by implementing the obligations arising from the first pillar of the Convention (access to information) into EU law. The Commission made proposals for another directive on public participation in the drawing up of plans and programmes relating to the environment and amending Directives 85/337/EEC and 96/61/EC.[39]

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32 Council Decision 2005/370/EC [2005] OJ L 124/1

33 European Commission press statement, 23 June 1998

34 Case C-470/16 *North East Pylon Pressure Campaign Limited and Maura Sheehy v An Bord Pleanála and Others* EU:C:2018:185, para. 46

35 See Case Meryem Demirel v Stadt Schwäbisch Gmünd (C-12/86, EU:C:1987:400, 9)

36 [2000] OJ L 327/1

37 [2001] OJ L 197/ 30

38 [2003] OJ L 41/26

39 Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17

On 24 October 2003 the Commission adopted an 'Aarhus package' of three legislative proposals to align Community legislation with the requirements of the Convention. The legislative package consisted of three different proposals:

i. Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies,[40]

ii. Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters,[41]

iii. Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making and access to justice regarding environmental matters.[42]

Legislative acts adopted by the EU institutions (both Directives and the 'Aarhus Regulation'[43]) contain provisions on access to justice. This means that in the fields covered by Article 9(3) of the Convention, the EU has exercised its powers and adopted provisions to implement the obligations, which derive from it.[44]

6. ARTICLE 263 TFEU AND CASE ACCC/C/2008/32

Environmental concerns are traditionally viewed as an area appropriate for intervention by governments and/or international organisations, but cannot readily be conceived of as a right directly enforceable before the courts. It is well-known that the rules on legal standing *(locus standi)* for annulment actions brought by private persons enshrined in Article 230 of the EC Treaty were regarded as excessively restrictive. The Treaty of Lisbon tried to address this problem by adding a final limb that is now Article 263(4) TFEU,[45] but the current situation is still that

40 COM(2003) 622

41 COM(2003) 624

42 COM(2003) 625

43 Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13

44 Pánovics, A.; Odobaša, R., *Environmental rights in the context of three legal systems – stepping into the EU legislature's shoes?,* in: Drinóczi, T. *et al.* (eds.), Contemporary legal challenges: EU – Hungary – Croatia, Faculty of Law, University of Pécs and Faculty of Law, J. J. Strossmayer University of Osijek, Pécs – Osijek, 2012, pp. 732-733

45 Oliver, P., *Access to Information and to Justice in EU Environmental Law: The Aarhus Convention,* Fordham International Law Journal, *vol.* 36, Issue 5, 2013, p. 1461

environmental NGOs generally do not have legal standing in front of the Court of Justice of the EU.[46]

Regarding the Aarhus Regulation, it deals with all three pillars of the Convention in one piece of legislation, and it covers any public institution, body, office or agency established by, or on the bases of, the EU Treaties.[47] Under Article 2 of the Regulation, an 'applicant' means any natural or legal person requesting environmental information, and 'the public' means one or more natural or legal persons, and associations, organisations or groups of such persons. Under Article 10(1), any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the EU institution or body which has adopted an administrative act under environmental law. An 'administrative act' is defined as any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects.[48] Article 11(1) lays down four conditions in that regard. According to the first condition, the NGO in question must be an independent non-profit-making legal person in accordance with a Member States' national law or practice.[49] Moreover, the NGO must have the primary stated objective of promoting environmental protection, there is a need for an existence for more than two years as an active NGO, and the subject-matter in respect of which the request for internal review is made has to be covered by its objective and activities.[50]

Unfortunately, the internal review procedure set out by the Aarhus Regulation has been interpreted restrictively by the EU institutions. The Regulation could not successfully combine requirements of Article 9(3) of the Convention with Article 263(4) TFEU, in particular, how to assure that environmental organisations can file lawsuits in the public interest, while not being 'directly and individually concerned'.[51] Access to judicial review has remained possible only in accordance

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46 Pánovics, A., *The Paraquat Cases – Why is Article 230 Interpreted against European Environment Protection Organisations?,* JURA, 2007, no. 2, p. 122

47 Article 2 (1) (c)

48 Article 2 (1) (g)

49 It is settled case-law that under the EU judicial system, an applicant is a legal person if, at the latest by the expiry of the period prescribed for proceedings to be instituted, it has acquired legal personality, in accordance with the law governing its constitution, or if it has been treated as an independent legal entity by the EU institutions; see Case T-168/13 *European Platform Against Windfarms (EPAW) v European Commission* EU:T:2014:47, par. 23

50 See points Article11 (1) (b)-(d)

51 Jendrośka, J., *Public Information and Participation in EC Environmental Law,* in: Macrory, R. (ed.), Reflections on 30 Years of EU Environmental Law – A High Level of Protection?, The Avosetta Series (7), Europa Law Publishing, 2006, p. 83

with the Articles of the EC Treaty.[52] This means that currently, the Aarhus Regulation does not guarantee adequate access to the Court of Justice of the EU.

In Case *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission*[53] the General Court found that the Aarhus Regulation, by excluding general EU acts from the scope of internal review, was in breach of Article 9(3) of the Convention, but the Court of Justice overruled the General Court by holding that the Aarhus Regulation could not be reviewed in light of the Convention.[54] With its refusal to use Article 9(3) as a reference criterion for the purpose of reviewing the EU's compliance with its international obligations, the Court of Justice avoided tackling the unsatisfactory level of judicial protection in environmental cases at Union level.

In March 2017, after extensive and detailed consideration of a communication that was submitted by an environmental NGO[55] in 2008, the Compliance Committee of the Aarhus Convention found that the European Union was in non-compliance with the Convention due to the very limited possibilities for citizens and NGOs to have access to justice at EU level and to bring cases before the Court of Justice of the EU. The findings and the recommendations of the ACCC, while non-binding in themselves, have not made matters less complicated by reiterating the substantive shortcomings of the EU legal system in view of the requirements of the Aarhus Convention.[56]

The effectiveness of the ACCC relies heavily on cooperation by the Party experiencing difficulties in complying. Upon recommendations of the Compliance Committee, the MOP makes final decisions on compliance issues.[57] The ACCC's power to adapt recommendations directly towards the Parties to the Convention is severely limited by the requirement of consent by the latter.[58] At MOP-6, the

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52 See Article 12 of the Aarhus Regulation

53 Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission* EU:T:2012:300

54 Joined Cases C-404/12 P and C-405/12 P *Concil and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe* EU:C:2015:5

55 ClientEarth is a charity that uses the power of law to protect the environment, by making sure laws are effective and enforcing them rigorously. It has over 160 staff working on projects in more than 50 countries

56 Shoukens, H., *Access to Justice before EU Courts in Environmental Cases against the Backdrop of the Aarhus Convention: Balancing Pathological Stubbornness and Cognitive Dissonance?,* in: Voigt, C. (ed.), International Judicial Practice on the Environment: Questions of Legitimacy, Cambridge University Press, 2019, p. 109

57 The findings of the ACCC have to be endorsed by the Meetings of the Parties (MOPs).

58 Pitea, C., *Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*,

Parties to the Convention – including the EU – discussed adopting the findings of the ACCC, and rejected the EU's proposal not to adopt the findings that the EU is breaching the Convention by preventing the members of the public from challenging the EU institutions' environmental decisions in court. The EU has been heavily criticized for its failure to accept an international panel's ruling; environmental NGOs expressed their deep concern at the response of the EU to the findings of the ACCC.[59] As no other Parties supported the position of the EU, the resulting stand-off let to the matter being postponed to the next session of the MOP.[60]

7. THE PROPOSAL FOR A NEW DIRECTIVE ON ACCESS TO JUSTICE

Despite of the fact that the authors of the EU Treaties enacted not only Article 263(4) TFEU but also Article 19(1) TEU, obliging national courts[61] to provide sufficient remedies to ensure an effective judicial remedy, a more general provision on access to justice covering all environmental matters, transposing the requirements of Article 9(3) is currently lacking. In 2003, the proposal of the European Commission set out a framework of minimum standards on legal standing that allowed the maintenance of national systems providing for broader legal standing. These minimum requirements were intended both to promote compliance with the Aarhus Convention and to harmonise legislation in the Member States, with a view to preventing situations of inequality between economic operators and national authorities. However, the proposal did not gather sufficient support from the representatives of the Member States in the Council. Finally, the Commission withdrew the proposal in 2014.[62] This is the main reason why specific provisions aimed at ensuring reasonable access to justice are currently restricted to a few areas of EU environmental law.[63]

It is necessary to consider the implementation of Article 9(3) at national level separately from implementation with regard to the acts of the EU institutions and

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in: Treves, T. *et al.* (eds.), Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements, T.M.C. Asser Press, The Hague, 2009, p. 241

59 [http://eeb.org/eu-slammed-for-lack-of-respect-for-rule-of-law-on-environmental-justice/], accessed 18. March 2020

60 Pánovics, A., *Case ACCC/C/2008/32 and Non-compliance of the EU with the Aarhus Convention,* Pécs Journal of International and European Law, no. 2, 2017, p. 17

61 National courts are to be approached as 'ordinary courts' for implementing and enforcing EU law within the legal systems of the Member States

62 Withdrawal of obsolete Commission proposals [2014] OJ C 153/3

63 COM(2012) 95 final, p. 9

bodies. Both the Aarhus Convention and EU legislation allow Member States to afford standing to environmental NGOs only if they fulfil certain criteria. EU Member States belong to different traditions with some of them granting a broad access to justice (including *actio popularis* that gives the possibility to everybody to act in favour of the environment); others have a more limited approach. The majority of the Member States continue to require an 'interest' of the applicant for seeking judicial redress. Upon signature of the Aarhus Convention, the European Union made a declaration that EU Member States will remain responsible for the performance of obligations until Article 9(3) concerning acts and omissions by private persons or public authorities other than the EU institutions and bodies, until the adoption of EU legislation covering these obligations. As a result, the admissibility of legal actions commenced by NGOs is in nearly all Member States contingent upon additional standing requirements. Some Member States set stringent criteria requiring, for example, a minimum number of members or that an NGO has pursued its environmental objectives for a certain period of time.

Since the 1990s, national courts have been asking the Court of Justice to clarify how they should deal with the different guarantees of access to justice. In the famous Slovak Bears (VLK) case, the Court of Justice has held that "a specific issue which has not yet been the subject of EU legislation is part of EU law, where that issue is regulated in agreements concluded by the European Union and the Member States and it concerns a field in large measure covered by it". Furthermore, the Court confirmed that national courts must interpret access to justice rules in a way which is compliant with the Aarhus Convention.[64] By denying direct effect to Article 9(3), the Court of Justice failed to fully empower environmental NGOs to enforce this provision before the national courts, and instead relied on the cooperation of the national courts to interpret national procedural law in a way which could realise the objectives of the Aarhus Convention.[65]

In 2012, a study discussed four options to consider for future actions. The first option was to enact a new directive reflecting the legal regime of the Member States concerning the *locus standi* of environmental NGOs and the case-law of the Court of Justice of the EU. The second option was to reiterate the original proposal of the Commission. Third, the use of soft law instruments to promote collaboration between national courts, possibly supplemented by guidelines. Finally, the

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64 Case C-204/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125, paras. 36 and 51

65 Eliantonio, M., *The role of NGOs in environmental implementation conflicts: 'stuck in the middle' between infringement proceedings and preliminary rulings?,* Journal of European Integration, *vol.* 40, no. 6, 2018, p. 760

infringement proceeding was suggested as a tool to promote compliance with the requirements of the Court's case-law.

On 28 April 2017, the Commission adopted an interpretative guidance document that brings together and explains 38 rulings of the Court of Justice in order to help individuals, NGOs, businesses, public administrators and national courts understand access to justice in environmental matters.[66] The scope of the 'Notice'[67] is limited to access to justice in relation to decisions, acts and omissions by public authorities of the Member States.[68] It does not concern the judicial review of acts of the EU institutions. In this way, Member States and their judiciaries may better understand the content and significance of the Court's new case-law. In 2019, DG Environment published a Citizen's Guide on access to justice in environmental matters.[69]

According to access to justice in environmental matters, the evaluation of the 7th EAP concludes that "significant barriers still exist in several Member States", and "the emerging evidence base indicates that more needs to be done at Member State level".[70] It seems to be evident that the adoption of a new directive defining the conditions for effective as well as efficient access to national courts in respect of all areas of EU environmental law would contribute to facilitating access to justice at national level, and stimulating cooperation and dialogue between national authorities and courts. A directive on access to justice in environmental matters would mean a harmonized regime of access to justice in all Member States and would guarantee the same rights to the members of the public throughout the European Union.

8. ACCESS TO JUSTICE IN CLIMATE CHANGE LITIGATION

At international level, the Paris Agreement has been established as the core element of the climate change governance framework. It resembles a central legal management for global efforts concerning climate change mitigation and adaptation.[71] Despite of the fact that access to justice is absent from the international

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66 C(2017) 2616 final [2017] OJ C 275/1

67 This is the first ever interpretative communication in EU environmental law

68 National authorities are a key to the delivery of EU environmental legislation and the achievement of tangible results

69 [https://ec.europa.eu/environment/aarhus/pdf/guide/ENV-18-004_guide_EN_web.pdf], accessed 12. April 2020

70 SWD(2019) 181, PART 2/2, p. 198

71 Wegener, L., *Can the Paris Agreement Help Climate Change Litigation and Vice Versa?,* Transnational Environmental Law, *vol.* 9, Issue 1, 2020, p. 19

climate change treaty regime, judicial activism appears to be emerging in national climate change cases.[72] Until recently, more activist types of legal actions in climate cases had little chance of success in view of the rigid standing rules that often prevailed before the courts in the context of public interest litigation. The past few years have seen a remarkable shift in the jurisprudential approach to the traditional standing requirements in environmental cases, which seem to offer more perspective for judicial activism in the realm of climate litigation. Faced with the severe impacts of climate change, the members of the public might be found increasingly willing to sue their governments over the failure to adopt adequate and ambitious programmes.

On 20 December 2019, the Dutch Supreme Court upheld the previous decisions in the Urgenda Climate Case,[73] finding that the Dutch government has obligations to urgently and significantly reduce emissions in line with its human rights obligations. On the basis of the rather broadly formulated 'duty of care' contained in the Dutch Civil Code, the Dutch government was ordered to step up its efforts in combating climate change in the ground-breaking Urgenda ruling. This was the first case in the world in which citizens[74] established that their government had a legal duty to prevent dangerous climate change. Since the Dutch case, climate change cases have been filed worldwide, demonstrating the power of holding governments accountable in court.

As of today, similar actions have not received a favourable treatment before the CJEU, in particular because of its restrictive and conservative jurisprudence in terms of the individual concern criterion, known as 'the Plaumann test'. In May 2018, several families brought an action before the General Court for annulment and compensation for insufficient measures to combat climate change ("The People's Climate Case").[75] The applicants challenged parts of several pieces of EU legislation to comply with the nationally determined contributions (NDCs) under the Paris Agreement, asking the General Court to rule on the protection of their fundamental rights such as the right to life, health, occupation and property. As might be expected, the General Court ruled, in its order of 8 May 2019, that the

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72 Colombo, E., *(Un)comfortably Numb: The Role National Courts for Access to Justice in Climate Matters,* in: Jendrośka, J.; Bar, M. (eds.), Procedural Environmental Rights, Principle X in Theory and Practice, European Environmental Law Forum Series, Volume 4, Intersentia Ltd, Cambridge – Antwerp – Portland, 2017, p. 437

73 An English translation of the judgment is available here: [https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf], accessed 01. May 2020

74 The Urgenda Foundation represented 886 plaintiffs

75 Case T-330/18 *Armando Carvalho and Others v European Parliament and Council of the EU* EU:T:2019:324

action was inadmissible.[76] This ruling reasserts the settled case-law of the Court of Justice of the EU, and confirms the long-standing irony that, under the current interpretation of Article 263(4) TFEU, the more widespread the harmful effects of an EU act, the more restricted the access to justice. The more serious the damage and the higher the number of affected persons, the less judicial protection is available.[77]

Against this backdrop, environmental enforcement through court proceedings comes into the picture as an attractive alternative. Taking into account the progressive case-law evolutions in the context of clean air litigation both before the CJEU and national courts,[78] it appears no longer unthinkable to bring forward complex issues like climate claims in court.

9. CONCLUSION

Over the years, the Aarhus Convention and the European Union have mutually reinforced and developed each other. The interplay between EU law and the Convention have been subject to numerous accounts in academic literature, including the double standards applied by the EU institutions in this area.[79] The present situation in EU law as far as access to justice in environmental matters is rather complex. EU legal instruments in force do not cover fully the implementation of the obligation resulting from Article 9(3) of the Convention.

In September 2017, the European Parliament called on the Commission to come forward with a new legislative proposal on minimum standards for access to judicial review, and expressed its preference for amending the Aarhus Regulation.[80] On 11 June 2018, the Council of the EU requested the Commission under Article 241 TFEU to submit a study on the Union's options for addressing the findings of the ACCC.[81] The Commission has evaluated the current situation and assessed options to address compliance to underpin possible decision-making. A new initiative of the Commission aims to amend EU rules to environmental associations who have concerns about an action (or lack of it) by EU institutions or bodies. On

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76 An appeal is currently pending before the Court of Justice (see Case C-565/19 P)

77 [https://www.clientearth.org/the-general-court-rejects-the-people-climate-case-as-inadmissible/], accessed 28 March 2020

78 See in this regard, for instance, Case C-752/18 *Deutsche Umwelthilfe eV v Freistaat Bayern* EU:C:2019:1114

79 Krämer, L., *Access to Environmental Justice: the Double Standards of the ECJ*, Journal of European Environmental & Planning Law, *vol.* 14, Issue 2, 2017, pp. 159-185

80 P8_TA(2017)0441

81 9422/18

6 March 2020, the Commission published a Roadmap proposing an amendment of the Arhus Regulation. The proposal for a new regulation "should also improve access to national courts, in all EU countries".[82]

SOER 2020 shows that despite the relative success of EU environmental policy,[83] the outlook for the European environment is discouraging. Taking into account the overarching vision and complementing policy targets set out in the 7th EAP, it is clear that the EU is not making enough progress in addressing environmental challenges. There is a need to strengthen the implementation of environmental policy to achieve its full benefits. The lack of legal standing of private persons before the Court of Justice remains part of the democratic deficit of the EU. The Court of Justice needs to address this deficit, and the adoption of a new directive on access to justice could create space for governments to bring a new scale of ambition to environmental policies and actions. Europe must seize the opportunities, using every means available to deliver transformative changes in the coming decade, including new ways to leverage the powers of citizens and environmental NGOs.

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UDK 347.129: 341.645(4)
Original scientific paper

THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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ABSTRACT

Some of the rights enshrined in the ECHR are absolute (the prohibition of torture (Article 3), the prohibition of slavery and forced labor (Article 4)). It means that they can under no circumstances be restricted or reduced.

All other rights may be partially restricted under the terms of Art. 15 of the ECHR, in cases of social urgency – martial / emergency within the limits necessary to prevent the threat to the life of the nation. Some ECHR articles explicitly state the conditions for restrictions on human rights and freedoms. So, the right to privacy (Art. 8), freedom of thought, conscience and religion (Art. 9), freedom of expression (Art. 10) and freedom of assembly (Art. 11) may be restricted, if required by the law and is necessary in a democratic society.

Thus, conventional rights may also have inherent limitations. In particular, in some cases, the rights guaranteed by the various articles of the ECHR collide.

Therefore, the main objective of this paper is to research the essence and core elements of the principle of proportionality in the jurisprudence of the ECtHR.

To evaluate the proportionality of an interference with a right or freedom, it is necessary to determine its impact on the law, the causes of the interference, its results, the importance of local circumstances, and the complexity of objective evaluation of relevant rights and interests. It is the states that must justify such intervention. Herewith, the reasons should be 'substantial and sufficient', the need for the restriction 'established by the law', the exceptions 'clearly stated', and the interference must comply with 'urgent social need'.

According to the principle of proportionality, all legal actions and state decisions must be established by the law, necessary, relevant (suitable) and least restricts the right of the individual. In addition, the proportionality test must ensure that a person's loss from the restriction of the right is commensurate with the benefit from the aim pursued. The balance is fair, if the restriction does not encroach on the very essence of the right and does not cause its real content to be lost.

In assessing the proportionality of a state's interference, the ECtHR applies the doctrine of the margin of appreciation, which can be broad or narrow.

Thus, the principle of proportionality, which is closely linked to the principle of effective protection, significantly influences the case law of the ECtHR. Most of the disputes over proportionality arise in the context of human rights restrictions guaranteed by Articles 8 (2) – 11 (2) of the ECHR.

Therefore, the principle of proportionality requires national public authorities to strike a fair balance between competing public and private interests at stake. The ECtHR assesses such factors, as the importance of competing interests, objectivity (adequacy, reasonableness) of the restriction, the existence of consensus among Council of Europe member States on the issue under consideration.

Keywords: *European Court of Human Rights, limitations on human rights, democratic necessity test, principle of proportionality, margin of appreciation, consensus*

1. INTRODUCTION

The principle of proportionality is extremely important for the effective protection of human rights in practice, as it concerns any interference with or restriction of human rights, primarily, by a state. This principle follows that any action by a state that in one way or another affects human rights must be necessary, expedient (appropriate), and reasonably justified by a state in each case. Thus, the principle of proportionality imposes a positive obligation on public authorities to prove the need for their actions, which restrict human rights. Therefore, any actions or measures that a state takes to achieve its legitimate aim and which interfere in some way with human rights and freedoms must pass the so-called proportionality test, which was originally developed in the German legal doctrine1.

On the other hand, the principle of proportionality is an integral tool of a judge, who, when resolving a dispute, usually deals with various human rights, as well as interests, including private and public ones, which come into conflict. In such cases, in order to strike a fair balance, a judge weighs these rights and interests and, ultimately, gives priority to one of them. In any case, a court decision must be reasonable and fair. In this context I bear in mind neither formal justice, which can be essentially understood as equality before the law and the court, nor procedural justice (fairness regarding outcomes), but, *prima facie*, material (substantive) justice that concerns the justice or injustice of the content of rules or laws. So, it is substantive justice that is manifested in the principle of proportionality (such as, for example, the proportionality of the gravity of the offense and the specific type and measure of legal liability for its commission).

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[1] Möller, K., *Proportionality: Challenging the critics*, International Journal of Constitutional Law, *vol.* 10, issue 3, 2012, pp. 709 – 731

Consequently, in seeking to achieve a fair balance, a court always balances between different rights and issues at stake. Of course, one can argue about the existence of objective justice and truth, but nonetheless in every case the main task of a court is to find the solution to the issue that would be justified in terms of the optimal balance of various human rights and interests in modern society, which is developing dynamically and requires constant updating of approaches, including law enforcement. Thereby, the principle of proportionality underlies the application of law, whose main ultimate goal is to protect human rights.

Based on the foregoing, it can be noted that the principle of proportionality is multidimensional. Moreover, it is a general principle of law ('optimization requirement'2) that includes key ideas of law (*prima facie* requirements3). However, the application of the principle of proportionality is not always so obvious. It depends on many factors. First and foremost, the interpretation and argumentation of the court depends on the specific type of human rights and interests at stake, and also, if we study the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR), on the presence or absence of consensus among the member states of the Council of Europe regarding the issue under consideration. This involves the so-called doctrine of the margin of appreciation (free discretion) of a state, which can be wide or narrow. According to it, the ECtHR gives priority to the state's assessment, interpretation of certain events, facts, actions, situations and any other phenomena within its own jurisdiction4. The width of the margin depends on the interests at stake, the context of the interference, the impact of a possible consensus in such matters, the aim pursued by the interference, the degree of proportionality of it, *etc*.5 The doctrine is further of practical importance in the context of the interpretation of the permissible limitations on human rights6.

2. PERMISSIBLE LIMITATIONS ON HUMAN RIGHTS

Under the European Convention on Human Rights (hereinafter: ECHR) any specific interference with human rights is permissible only if it is necessary in pursuit

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2 Alexy, R., *Constitutional Rights, Balancing and Rationality*, Ratio Juris, *vol.* 16, 2003, pp. 131 – 140

3 Alexy, R., *Formal principles: Some replies to critics*, International Journal of Constitutional Law, *vol.* 12, issue 3, 2014, pp. 511 – 524

4 Judgment *Handyside v. the United Kingdom* (1976), Application no. 5493/72, par. 48, 49, [http://hudoc.echr.coe.int/eng?i=001-57499], accessed 20. March 2020

5 Spielmann, D., *Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, Cambridge Yearbook of European Legal Studies, *vol.*. 14, 2012, pp. 381 – 418

6 McGoldrick, D., *A defence of the margin of appreciation and an argument for its application by the Human Rights Committee*, International and Comparative Law Quarterly, *vol.* 65, issue 1, 2016, pp. 21 – 60

of one of the legitimate aims listed in the ECHR7. The degree of such interference depends on the specific right. Therefore, absolute human rights (prohibition of torture, slavery and forced labor) cannot be limited. When it comes to the fundamental and non-derogable right to life (Art. 2)8, the grounds for the interference are significantly limited. In particular, according to Article 2 of the ECHR, any deprivation of life may be justified as a result of the use of force, if it is absolutely necessary and only on the exhaustive grounds, namely: in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection.9

Other rights and freedoms (non-absolute, qualified human rights), such as the right to respect for private and family life (Art. 8), freedom of thought, conscience and religion (Art. 9), freedom of expression (Art. 10), freedom of assembly and association (Art. 11) may be restricted in accordance with the law when it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.10

Moreover, Article 10 of the ECHR enshrines along with the restrictions already listed, such additional grounds for restrictions, as the interest of territorial integrity, the prevention of disclosure of information received in confidence, as well as the maintenance of the authority and the impartiality of the judiciary.11

In addition, Art. 15 *de facto* allows countries to derogate from their convention obligations in the event of war or other public emergency threatening the life of the nation to the extent strictly required by the exigencies of the situation, and in consistence with their other obligations under international law.12 In this case, international humanitarian law comes into force.

Thereby, the question arises as to the criteria according to which these restrictions should be determined and applied in practice, since the analysis of the fixed restrictions shows that their meaning and, accordingly, interpretation may vary due

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7 Article 18 ECHR

8 Judgment *McCann and Others v. the United Kingdom* (1995), Application no. 18984/91, par. 147, [http://hudoc.echr.coe.int/eng?i=001-57943], accessed 20. March 2020

9 Article 2 par. 2 ECHR

10 Articles 8 – 11 ECHR

11 Article 10 ECHR

12 Article 15 ECHR

to numerous factors. And it is the ECtHR in its jurisprudence that clarifies the very essence and content of these restrictions.

In the present paper, I would like to concentrate on such vague concepts, as 'prescribed by law' and 'necessity in a democratic society', which requires an assessment of their proportionality and, thus, directly depend on the margin of appreciation afforded to a state.

2.1. 'Legal' interference with human rights and freedoms

As stated above, any interference with or restriction of human rights must be 'in accordance with the law' or 'prescribed by law'.13 In its jurisprudence the ECtHR provides explanation of such 'legal' interference with specific human rights and freedoms. In particular, in the case of *Huvig v. France* (1990) it points out that "the expression 'in accordance with the law', within the meaning of Article 8 § 2 (art. 8-2), requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law".14 The ECtHR further underlines that the consequences need not be foreseeable with absolute certainty, since "it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice".15 The degree of precision required of the 'law' depends on the particular subject-matter.16

The ECtHR "has always understood the term 'law' in its 'substantive' sense, not its 'formal' one; it has included both enactments of lower rank than statutes … and unwritten law. …In a sphere covered by the written law, the 'law' is the enactment in force as the competent courts have interpreted it in the light, if necessary, of any new practical developments".17

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13 Articles 8 – 11 ECHR

14 Judgment *Huvig v. France* (1990), Application no. 11105/84, par. 26, [http://hudoc.echr.coe.int/eng?i=001-57627], accessed 20. March 2020

15 Judgment *The Sunday Times v. the United Kingdom* (1979), Application no. 6538/74, par. 49, [http://hudoc.echr.coe.int/eng?i=001-57584], accessed 20. March 2020

16 Judgment *Malone v. the United Kingdom* (1984), Application no. 8691/79, par. 68, [http://hudoc.echr.coe.int/eng?i=001-57533], accessed 20. March 2020

17 Judgment *Kruslin v. France* (1990), Application no. 11801/85, par. 29, [http://hudoc.echr.coe.int/eng?i=001-57626], accessed 20. March 2020

Indeed, the law must "indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities" in order to provide the enjoyment of the minimum degree of protection of the citizens under the rule of law in a democratic society,18 while respecting the legitimate aim of such measure, that would give the individual adequate protection against arbitrary interference.19 On the other hand, the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law.20 It may be enshrined in the secondary law (delegated or subordinate legislation, which is created by ministers or other bodies, *e.g.*, decrees, orders, decisions, instructions, directives, regulations, *etc*.).

Thus, the 'accessibility' requires the law to be brought to the public attention, that is, the public proclamation (promulgation) of laws and their publication, with a view to familiarize individuals with their content and, subsequently, the possibility to foresee the consequences in case of application of a certain law.

Regarding the requirement of the law's 'foreseeability' as to the meaning, nature and the scope of the applicable measures, the ECtHR emphasizes that "the phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention…"21 For instance, concerning the right to respect for private and family life (Art. 8), there must be a measure of legal protection in national law against arbitrary interferences by public authorities, especially where executive power is exercised in secret. In any case, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances and the conditions on which public authorities are empowered to interfere with the rights.22

The scope of the 'foreseeability' and 'accessibility' depends on the content of the instrument in issue, the sphere of regulation, the number and status of those to whom it is addressed.23

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18 Judgment *Huvig v. France* (1990), *op. cit.*, note 6, par. 35

19 Judgment *Malone v. the United Kingdom* (1984), *op. cit.*, note 8, par. 68

20 Judgment *Silver and Others v. the United Kingdom* (1983), Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, par. 88, [http://hudoc.echr.coe.int/eng?i=001-57577], accessed 20. March 2020

21 Judgment *Malone v. the United Kingdom* (1984), *op. cit.*, note 8, par. 67

22 Judgment *Kruslin v. France* (1990), *op. cit.*, note 9, par. 29

23 Judgment *Groppera Radio AG and Others v. Switzerland* (1990), Application no. 10890/84, par. 68, [http://hudoc.echr.coe.int/eng?i=001-57623], accessed 20. March 2020

2.2. Democratic necessity test

Since any interference with human rights (in particular, with rights guaranteed by Articles 8 – 11 of the ECHR) must be 'necessary in a democratic society', it is advisable to define this concept. Moreover, the ECtHR in its practice has developed certain criteria for assessing such necessity, – the so-called democratic necessity test.

It is extremely difficult to test the persuasiveness of any defence position of a state, so, the main objective of this test is to "ensure that it complies with the genuine interests of democracy and is not merely political expediency in disguise".24

The ECtHR highlights that "not only is political democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society. ...By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from 'democratic society'…"25 In its practice, the ECtHR refers to such basic elements of a 'democratic society', as pluralism, tolerance and broadmindedness. It also points out that "democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position…"26

Based on the case law of the ECtHR, the so-called absolute (strict) necessity test and the persuasive (general) test on necessity ('the convincing necessity') can be distinguished. Herewith, the application of a certain approach depends on the specific type of human rights. Thus, when it comes to the deprivation of life, the democratic necessity test is very strict. In turn, by referring to the rights guaranteed in Articles 8 – 11, the persuasive test on necessity must be applied.

2.2.1. *Standard of 'absolute necessity'*

As stated the ECtHR, the term 'deprivation of life' "indicates that a stricter and more compelling test of necessity must be employed by the Court, if compared with that normally applicable when determining whether State action is 'necessary in a democratic society' under paragraphs 2 of Articles 8 to 11 of the Convention.

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24 Greer, S., *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, 1997, p. 14

25 Judgment *Gorzelik and Others v. Poland* (2004), Application no. 44158/98, par. 89, [http://hudoc.echr.coe.int/eng?i=001-61637], accessed 20. March 2020

26 *Ibid*., par. 90

Consequently, the force used must be strictly proportionate to the achievement of the permitted aims…"27

Moreover, the ECtHR points out that "any use of force must be no more than 'absolutely necessary' for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). …The authorities must take appropriate care to ensure that any risk to life is minimised. The Court must also examine whether the authorities were not negligent in their choice of action. … The same applies to an attack where the victim survives but which, because of the lethal force used, amounted to attempted murder…"28

In this, "the circumstances in which deprivation of life may be justified must be strictly construed. … In particular, the Court has held that the opening of fire should, whenever possible, be preceded by warning shots... The use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others…"29

Effective respect for human rights requires that policing operations be sufficiently regulated by national legislation, the existence of a system of adequate and effective safeguards against arbitrariness and abuse of force, even against avoidable accident.30 "Members of the security forces should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect. … In particular, law enforcement agents must be trained to assess whether or not there is an absolute necessity to use firearms, not only on the basis of the letter of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value…"31

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27 Judgment *Finogenov and Others v. Russia* (2012), Application nos. 18299/03 and 27311/03, par. 210, [http://hudoc.echr.coe.int/eng?i=001-108231], accessed 20. March 2020

28 Judgment *Isayeva, Yusupova and Bazayeva v. Russia* (2005), Application nos. 57947/00, 57948/00 and 57949/00, par. 169, 171, [http://hudoc.echr.coe.int/eng?i=001-68379], accessed 20. March 2020

29 Judgment *Giuliani and Gaggio v. Italy* (2011), Application no 23458/02, par. 177, 178, [http://hudoc.echr.coe.int/eng?i=001-104098], accessed 20. March 2020

30 *Ibid*., par. 162

31 *Ibid*., par. 162, 163

Hence, the ECtHR emphasizes that when lethal force is used by a state, it must take into consideration and assess various aspects, such as the actions of the agents of a state who actually administered the force, all the surrounding circumstances, including the relevant legal or regulatory framework in place, the planning and control of the actions under examination.32

Nevertheless, the ECtHR may occasionally depart from the standard of 'absolute necessity', particularly, in cases where certain aspects of the situation lie far beyond its expertise, where the national authorities had to act under tremendous time pressure, and where their control of the situation was minimal.33 Meanwhile, "the more predictable a hazard, the greater the obligation to protect against it".34

2.2.2. *Persuasive (convincing) test on necessity*

Regarding the rights guaranteed by Articles 8 – 11 of the ECHR, the necessity test is persuasive. In particular, the ECtHR stresses that the freedom of expression "constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established"35.

Following the practice of the ECtHR, the convincing necessity test requires establishing the existence of a 'pressing social need' and 'relevant and sufficient' reasons for interference with human rights and freedoms enshrined in Articles 8 – 11. Such interference also must be 'proportionate to the legitimate aim' pursued by public authorities.36

Thus, in the case of *The Sunday Times v. the United Kingdom* (no. 2) the ECtHR explained that "the adjective 'necessary', within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a 'pressing social need'. The Contracting States

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32 *Ibid*., par. 164

33 *Ibid*., par. 211

34 Judgment *Kavaklıoğlu and Others v. Turkey* (2016), Application no. 15397/02, par. 176, [http://hudoc.echr.coe.int/eng?i=001-157821], accessed 20. March 2020

35 Judgment *Observer and Guardian v. the United Kingdom* (1991), Application no. 13585/88, par. 59 (a), [http://hudoc.echr.coe.int/eng?i=001-57705], accessed 20. March 2020

36 Judgment *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France* (2018), Application nos. 48151/11 and 77769/13, par. 167, [http://hudoc.echr.coe.int/eng?i=001-180442], accessed 20. March 2020

have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10 (art. 10)".37 The main task of the ECtHR is "to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'".38

The ECtHR also emphasizes that the adjective 'necessary', within the meaning of Article 10 (2), is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable', and that it implies the existence of a 'pressing social need'. In this context, the domestic authorities enjoy a wide margin of appreciation.39 The ECtHR stated: "… It is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context".40

However, despite the established judicial practice of applying this test, its criteria are still quite ambiguous. Therefore, the legal doctrine repeatedly draws attention to the need to improve it. It would be advisable the test for fair balance to be systematically preceded by a means-ends test.41 The test of means and ends would allow the ECtHR to examine the justification of the reasonableness of the choice of means, which is a substantial element of the reasonableness of an interference with human rights. Its application could also be helpful in terms of avoiding the difficulties related to balancing review. Moreover, if the ECtHR would find that the means or measures chosen by a state were unsuitable or unnecessary, there would be no further need to investigate whether, after all, the national authorities did strike a fair (reasonable) balance.42

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37 Judgment *The Sunday Times v. the United Kingdom (no. 2)* (1991), Application no. 13166/87, par. 50 (c), [http://hudoc.echr.coe.int/eng?i=001-57708], accessed 20. March 2020

38 *Ibid*., par. 50 (d)

39 Judgment *The Sunday Times v. the United Kingdom* (1979), *op. cit*., note 15, par. 59

40 Judgment *Handyside v. the United Kingdom* (1976), *op. cit*., note 4, par. 48

41 Gerards, J., *How to improve the necessity test of the European Court of Human Rights*, International Journal of Constitutional Law, *vol*. 11, issue 2, 2013, pp. 466 – 490

42 *Ibid*., p. 488

3. TEST OF PROPORTIONALITY

According to the principle of proportionality, all legal actions and decisions taken by public authorities must be relevant (suitable), that is the appropriateness of the measure intended to achieve the legitimate aim pursued by public authority. It also includes a ban on using prohibited means, such as torture, and the assessment of the legitimacy of the purpose of taken measure that must derives from the constitution and the laws. Moreover, public authorities must provide sufficient justification for applying a certain measure and its necessity to achieve a specific goal. Hence, the second important requirement for the state actions is the need to apply the measure that least restricts the right of the individual. Finally, the third criterion is the so-called proportionality in the narrow sense, namely the proportionality of the loss incurred by the infringement of the right to the benefit from the goal achieved, – balancing principle (German model)43. At the same time, some scholars note that the ECtHR pays the most attention to the proportionality in the narrow sense.44

The proportionality test also involves a comparative analysis of the intensity of the intervention with the goal being pursued. In this process the legal and moral values of the society are taken into account, the rights, interests and objectives of the parties are weighed. Based on this, the balance is fair provided that the restriction does not encroach on the very essence of the right and does not lead to the loss of its real content. In this regard, the ECtHR emphasizes: "It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired".45

Even so, the application of the above requirements causes certain difficulties in practice, since their formulation is quite vague. Therefore, in its case law the ECtHR developed additional criteria to strike a balance between private and public interests, specifically the extent to which both the public authorities and the individual acted in good faith, the foreseeability of the state action and the legitimacy of the individual's expectations.46 Thus, in the case of *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (2014), the ECtHR didn't find a violation of Article 11 (freedom of assembly and association) and pointed

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43 Alexy, *op. cit.*, note 3, pp. 511 – 524

44 Huber, P., M., *The principle of Proportionality*, in: Schroeder, W. (ed.), Strengthening the rule of law in Europe: from a common concept to mechanisms of implementation, Hart Publishing, Oxford and Portland, Oregon, 2016, pp. 98 – 112

45 Judgment *Prince Hans-Adam II of Liechtenstein v. Germany* (2001), Application no. 42527/98, par. 44, [http://hudoc.echr.coe.int/eng?i=001-59591], accessed 20. March 2020

46 Popelier, P.; Van De Heyning, C., *Procedural rationality: giving teeth to the proportionality analysis,* European Constitutional Law Review, No. 9 (2), 2013, pp. 230 – 262

out: "The Government have argued that the 'pressing social need' for maintaining the statutory ban on secondary strikes is to shield the domestic economy from the disruptive effects of such industrial action, which, if permitted, would pose a risk to the country's economic recovery. In the sphere of social and economic policy, which must be taken to include a country's industrial-relations policy, the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'... Moreover, the Court has recognised the 'special weight' to be accorded to the role of the domestic policy-maker in matters of general policy on which opinions within a democratic society may reasonably differ widely… The ban on secondary action has remained intact for over twenty years, notwithstanding two changes of government during that time. This denotes a democratic consensus in support of it, and an acceptance of the reasons for it, which span a broad spectrum of political opinion in the United Kingdom. These considerations lead the Court to conclude that in their assessment of how the broader public interest is best served in their country in the often charged political, social and economic context of industrial relations, the domestic legislative authorities relied on reasons that were both relevant and sufficient for the purposes of Article 11".47 Moreover, it stressed: "As has been recognised in the case-law, it is legitimate for the authorities to be guided by considerations of feasibility, as well as of the practical difficulties – which, for some legislative schemes, may well be large-scale – to which an individuated approach could give rise, such as uncertainty, endless litigation, disproportionate public expenditure to the detriment of the taxpayer and possibly arbitrariness".48

Nevertheless, despite the well-established criteria for the proportionality test, their implementation ultimately depends on the width of the margin of appreciation granted by the ECtHR to a state. It is the assessment of discretionary powers left to public authorities that plays a core role in verifying the compliance with or violation of the principle of proportionality by domestic authorities.

4. MARGIN OF APPRECIATION

The doctrine of the margin of appreciation was elaborated in the case law of the ECtHR. In fact, it is a key tool of the ECtHR that allows it, on the one hand, to impose an autonomous interpretation of conventional rights by the ECtHR on domestic authorities and, on the other hand, to limit its interference with the in-

47 Judgment *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (2014), Application no. 31045/10, par. 99, [http://hudoc.echr.coe.int/eng?i=001-142192], accessed 20. March 2020

48 *Ibid*., par. 103

terpretation provided by national courts.[49] Accordingly, by granting a state wider or narrower margin of appreciation, the ECtHR takes into consideration the following criteria: 1) the subsidiarity nature of the ECHR. 2) A fair balance between the effective protection and the sovereignty of a state (reasonable distribution of powers between the supranational and national level). In particular, the ECtHR has repeatedly emphasized that domestic authorities are better placed to assess certain elements of the proportionality test and settle a dispute. 3) Diversity of social and political contentions of the 'good society' among different states that affects the balance between individual rights guaranteed by the ECHR and the conception of public good in various contexts and societies.[50]

Thereby, the margin allowed will be relatively narrow or significantly restricted where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights and where a particularly important facet of an individual's existence or identity is at stake. The margin will be wider if the case raises sensitive moral or ethical issue.[51]

Herewith, some researchers suppose that the 'institutionally sensitive' approach can be applied, in which the legislative bodies will have wider margin of appreciation than the executive ones.[52] For instance, in the *Hatton and Others v. the United Kingdom* [GC] judgment (2003), the ECtHR referred to the 'direct democratic legitimation' of legislature and emphasized the subsidiarity nature of the ECHR. It stressed that "the national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions".[53]

Hence, the width of the margin of appreciation will vary according to the nature of the right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions.[54]

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[49] Huscroft, G., *Proportionality and the Relevance of Interpretation*, in: Huscroft, G.; Miller, B. W.; Webber, G.(eds.), Proportionality and the rule of law: Rights, Justification, Reasoning, Cambridge University Press, New York, 2014, pp. 186 – 202

[50] Popelier; Van De Heyning, *op. cit.*, note 46, p. 231

[51] Judgment *Dubská and Krejzová v. the Czech Republic* (2016), Application nos. 28859/11 and 28473/12, par. 178, [http://hudoc.echr.coe.int/eng?i=001-168066], accessed 20. March 2020

[52] Popelier; Van De Heyning, *op. cit.*, note 46, p. 232

[53] Judgment *Hatton and Others v. the United Kingdom* [GC] (2003), Application no. 36022/97, par. 97, [http://hudoc.echr.coe.int/eng?i=001-61188], accessed 20. March 2020

[54] Judgment *Chapman v. the United Kingdom* (2001), Application no. 27238/95, par. 91, [http://hudoc.echr.coe.int/eng?i=001-59154], accessed 20. March 2020

Therefore, the width of the margin of appreciation depends on the presence or absence of the European consensus on a particular issue and on the specific type of human rights. In particular, when it comes to absolute rights, the margin is narrow. Moreover, if there is a consensus among member states of the Council of Europe on a particular issue, the margin of appreciation is narrow too, and *vice versa*. At the same time, if the issue concerns complex moral and ethical issues on which there is no consensus, then the margin of a state's discretion is quite wide.

4.1. Absolute human rights and right to life

4.1.1. *Prohibition of torture*

In the case of *O'Keeffe v. Ireland* (2014) the ECtHR highlighted that "Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment".55 It imposes positive obligations on a state and requires a state to take all possible and reasonable measures to provide effective protection and "to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals".56

In addition, Article 3 of the ECHR imposes an obligation on a state not to extradite a person who may be subjected to torture in the requested state. Thus, in the *Trabelsi v. Belgium* judgment (2015), the applicant complained that his extradition to the United States of America exposed him to treatment incompatible with Article 3. He contended that offences, on the basis of which his extradition had been granted, carried a maximum life prison sentence which was irreducible, and that if he were convicted he would have no prospect of ever being released.57 So, the ECtHR considered that "under well-established case-law, protection against the treatment prohibited under Article 3 is absolute, and as a result the extradition of a person by a Contracting State can raise problems under this provision and therefore engage the responsibility of the State in question under the Convention, where there are serious grounds to believe that if the person is extradited to the requesting country he would run the real risk of being subjected to treatment contrary to Article 3…, the Court reiterates that it is acutely conscious of the difficulties faced by States in protecting their populations against terrorist violence,

55 Judgment *O'Keeffe v. Ireland* (2014), Application no. 35810/09, par. 144, [http://hudoc.echr.coe.int/eng?i=001-140235], accessed 20. March 2020

56 *Ibid.*

57 Judgment *Trabelsi v. Belgium* (2015), Application no. 140/10, par. 116 – 118, [http://hudoc.echr.coe.int/eng?i=001-146372], accessed 20. March 2020

which constitutes, in itself, a grave threat to human rights. It is therefore careful not to underestimate the extent of the danger represented by terrorism and the threat it poses to society... It considers it legitimate, in the face of such a threat, for Contracting States to take a firm stand against those who contribute to terrorist acts (*ibid*). Lastly, the Court does not lose sight of the fundamental aim of extradition, which is to prevent fugitive offenders from evading justice, nor the beneficial purpose which it pursues for all States in a context where crime is taking on a larger international dimension… However, none of these factors have any effect on the absolute nature of Article 3. As the Court has affirmed on several occasions, this rule brooks no exception".58

Hence, Article 3 of the ECHR "prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour".59

4.1.2. *Right to life*

In the case of *Isayeva, Yusupova and Bazayeva v. Russia* (2005) the ECtHR points out that "Article 2, which safeguards the right to life and sets out the circumstances where deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which in peacetime no derogation is permitted under Article 15. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. … The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case... Nonetheless, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny… even if certain domestic proceedings and investigations have already taken place".60

In the *Giuliani and Gaggio v. Italy* judgment (2011), concerning the circumstances in which deprivation of life may be justified, the ECtHR emphasized: "In line with the principle of strict proportionality inherent in Article 2… the national legal framework must make recourse to firearms dependent on a careful assessment of the situation... Furthermore, the national law regulating policing operations

58 *Ibid.*

59 Judgment *Babar Ahmad and Others v. the United Kingdom* (2012), Application nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, par. 200, [http://hudoc.echr.coe.int/eng?i=001-110267], accessed 20. March 2020

60 Judgment *Isayeva, Yusupova and Bazayeva v. Russia* (2005), *op. cit.*, note 28, par. 168, 169, 171, 173

must secure a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident...”61

Nevertheless, in the case of *Evans v. the United Kingdom* (2007), it found no violation of Article 2 (right to life) and granted a state a wide margin of appreciation. Herewith, the ECtHR points out that “in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere”.62 Earlier in its jurisprudence the ECtHR stated that there was no consensus on the common understanding of the concept of ‘moral’ in Europe and “it is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code”.63 Accordingly, the ECtHR primarily assesses whether there is a consensus on a particular issue.

The same applies to the so-called ‘right to death’ and the question of whether the right to life also includes the possibility of determining the time and method of death. In this context, the ECtHR’s practice is quite uniform. Namely, it emphasizes that since there is no consensus on this question, states are afforded a wide discretion. So, in the case of *Lambert and Others v. France* (2015), regarding the permission to withdraw the artificial life-sustaining treatment, “the Court reiterates that Article 2 ranks as one of the most fundamental provisions in the Convention, one which, in peace time, admits of no derogation under Article 15, and that it construes strictly the exceptions defined therein… However, in the context of the State’s positive obligations, when addressing complex scientific, legal and ethical issues concerning in particular the beginning or the end of life, and in the absence of consensus among the member States, the Court has recognised that the latter have a certain margin of appreciation”.64

A state has also a wide margin of appreciation in determining and legislative regulation at the national level of assisted suicide.65 “Comparative research shows that the majority of Member States do not allow any form of assistance to suicide...

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61 Judgment *Giuliani and Gaggio v. Italy* (2011), *op. cit*., note 29, par. 209

62 Judgment *Evans v. the United Kingdom* (2007), Application no. 6339/05, par. 54, [http://hudoc.echr.coe.int/eng?i=001-80046], accessed 20. March 2020

63 Judgment *Vo v. France* (2004), Application no. 53924/00, par. 82, [http://hudoc.echr.coe.int/eng?i=001-61887], accessed 20. March 2020

64 Judgment *Lambert and Others v. France* (2015), Application no. 46043/14, par. 144, [http://hudoc.echr.coe.int/eng?i=001-155352], accessed 20. March 2020

65 Judgment *Haas v. Switzerland* (2011), Application no. 31322/07, par. 54, 55 [http://hudoc.echr.coe.int/eng?i=001-102940], accessed 20. March 2020

Only four States examined allowed medical practitioners to prescribe a lethal drug in order to enable a patient to end his or her life. It follows that the State Parties to the Convention are far from reaching a consensus in this respect, which points towards a considerable margin of appreciation enjoyed by the State in this context…"66

4.2. Non-absolute human rights and freedoms

When it comes to the other, non-absolute human rights and freedoms, the states usually enjoy a wide margin of appreciation, unless there is consensus on a specific issue. At the same time, the ECtHR has elaborated some criteria, factors that affect the determination of the width of the margin of appreciation, depending on the particular human right at stake.

Thereby, the margin of appreciation is wide in the sphere of social and economic rights, in determining economic well-being of a country. For example, in the *James and Others v. the United Kingdom* judgment (1986), the ECtHR found it natural that the margin of appreciation "available to the legislature in implementing social and economic policies should be a wide one".67 It stressed: "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'".68 Thus, "… the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation".69

In the case of *S.A.S. v. France* (2014), concerning the blanket ban on the wearing of the full-face veil in public places, the ECtHR pointed out that regarding Art. 8 (right to respect for private and family life) and Art. 9 (freedom of thought, conscience and religion), there was no consensus in Europe as to whether or not there should be such a ban. Consequently, in search for a fair balance states enjoy a wide margin of appreciation. In the present case, the ECtHR concluded that the ban imposed by national law could be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the

66 Judgment *Koch v. Germany* (2012), Application no. 497/09, par. 70 [http://hudoc.echr.coe.int/eng?i=001-112282], accessed 20. March 2020

67 Judgment *James and Others v. the United Kingdom* (1986), Application no. 8793/79, par. 46, [http://hudoc.echr.coe.int/eng?i=001-57507], accessed 20. March 2020

68 *Ibid*., par. 46

69 Judgment *Dubská and Krejzová v. the Czech Republic* (2016), *op. cit*., note 51, par. 179

'protection of the rights and freedoms of others'. So, the impugned limitation can be regarded as 'necessary in a democratic society'.70

In respect of the freedom of expression, the breadth of the margin depends on the type of speech at issue. "Whilst there is little scope under Article 10 § 2 of the Convention for restrictions on political speech…, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion... Similarly, States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising".71

In assessing the lawfulness of the interference under Art. 10, the ECtHR analyzes such interference in the light of the case as a whole, including the form, the content and the context in which the impugned statements were made.72 Hence, it evaluates not only the substance of the ideas and information expressed, but also the form in which they are conveyed.73

In cases of balancing the right to privacy (Art. 8) and the right to freedom of expression (Art. 10), the ECtHR reiterates that these rights deserve equal respect. Accordingly, the margin of appreciation should be the same in both situations.74 In doing so, the following relevant criteria must be taken into account: contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; the content; the form; the consequences of the publication; the circumstances in which photographs were taken; the way in which the information was obtained and its veracity; and the gravity of the penalty imposed on the journalists or publishers.75

4.3. CONSENSUS

It has been revealed that the presence or absence of the so-called European consensus on a particular issue significantly affects the determination of the width of the

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70 Judgment *S.A.S. v. France* (2014), Application no. 43835/11, par. 157 – 159, [http://hudoc.echr.coe.int/eng?i=001-145466], accessed 20. March 2020

71 Judgment *Mouvement raëlien suisse v. Switzerland* (2012), Application no. 16354/06, par. 61, [http://hudoc.echr.coe.int/eng?i=001-112165], accessed 20. March 2020

72 Judgment *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (2017), Application no. 17224/11, par. 78, [http://hudoc.echr.coe.int/eng?i=001-175180], accessed 20. March 2020

73 Judgment *Pentikäinen v. Finland* (2015), Application no. 11882/10, par. 87, [http://hudoc.echr.coe.int/eng?i=001-158279], accessed 20. March 2020

74 Judgment *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (2017), Application no. 931/13, par. 163, [http://hudoc.echr.coe.int/eng?i=001-175121], accessed 20. March 2020

75 *Ibid*., par. 165

margin of appreciation granted by the ECtHR to domestic authorities. As a rule, if consensus exists, a narrow margin of appreciation will be afforded to a state, and *vice versa*. At the same time, in its case law the ECtHR has repeatedly emphasized that, if the case concerns sensitive moral or ethical issues, the margin will be wider. Given that human rights and freedoms should be interpreted dynamically in view of the progress of science, medicine and society, the practice of the ECtHR is also developing. In this context, an existing consensus encourages the evolution of autonomous interpretation of certain concepts by the ECtHR, such as family life, for example, that also significantly narrows a discretionary power of a state. Accordingly, the question arises of in which areas the consensus exists, and in which there is still no unified approach.

Thus, as has already been established, there is currently no consensus on the issues, such as the beginning and the end of life (*in vitro* fertilization, home birth,[76] abortion, assisted suicide, euthanasia, *etc.*), the recognition of the right of an accused to defend him or herself without the assistance of a registered lawyer (Art. 6, par. 3 (c)),[77] life imprisonment,[78] the concepts of moral, religion (in particular, a ban on wearing of the full-face veil in public places or the presence of religious symbols in state schools), public interest, national security, public safety, economic well-being, the pressing social need *et al.*

Therefore, in the case of *Hämäläinen v. Finland* (2014), the ECtHR did not find any consensus on allowing same-sex marriages, gender recognition and the right of transsexuals to marry.[79] There is also no consensus on the second-parent adoption by same-sex couples.[80] Nevertheless, it notes that despite the lack of consensus, a clear trend is currently emerging to the introduction of different forms of legal recognition of same-sex relationships.[81]

Accordingly, the ECtHR stresses that "when it comes to issues of discrimination on the grounds of sex or sexual orientation to be examined under Article 14, the

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76 Judgment *Dubská and Krejzová v. the Czech Republic* (2016), *op. cit.*, note 51, par. 183

77 Judgment *Correia de Matos v. Portugal* (2018), Application no. 56402/12, par. 137, [http://hudoc.echr.coe.int/eng?i=001-182243], accessed 20. March 2020

78 Judgment *Khamtokhu and Aksenchik v. Russia* (2017), Application nos. 60367/08 and 961/11, par. 85, [http://hudoc.echr.coe.int/eng?i=001-170663], accessed 20. March 2020

79 Judgment *Hämäläinen v. Finland* (2014), Application no. 37359/09, par. 74, [http://hudoc.echr.coe.int/eng?i=001-145768], accessed 20. March 2020

80 Judgment *X and Others v. Austria* (2013), Application no. 19010/07, par. 147, [http://hudoc.echr.coe.int/eng?i=001-116735], accessed 20. March 2020

81 Judgment *Vallianatos and Others v. Greece* (2013), Application nos. 29381/09 and 32684/09, par. 91, [http://hudoc.echr.coe.int/eng?i=001-128294], accessed 20. March 2020

State's margin of appreciation is narrow".82 It further emphasizes that "the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention... In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. For example, States are prevented from imposing traditions that derive from the man's primordial role and the woman's secondary role in the family…"83

Regarding the freedom of expression, there is no consensus, *inter alia*, on how to regulate paid political advertising in broadcasting. This lack of consensus also broadens the margin of appreciation over the restrictions on public interest expression.84 However, the ECtHR confirms the consensus on the need to recognize an individual right of access to state-held information in order to enable the public to "scrutinize and form an opinion on any matters of public interest, including on the manner of functioning of public authorities in a democratic society", that is an integral part of the freedom of expression.85 In addition, it highlights that "the Internet has now become one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest…"86

On the other hand, consensus exists on the definition of concepts, such as torture, inhuman or degrading treatment or punishment, the law, rule of law,87 private and family life, home, data protection. There is also a 'virtually general consensus' on the recognition in the majority of national legislations and practice the right to conscientious objection.88

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82 Judgment *X and Others v. Austria* (2013), *op. cit*., note 80, par. 148

83 Judgment *Konstantin Markin v. Russia* (2012), Application no. 30078/06, par. 127, [http://hudoc.echr.coe.int/eng?i=001-109868], accessed 20. March 2020

84 Judgment *Animal Defenders International v. the United Kingdom* (2013), Application no. 48876/08, par. 123, [http://hudoc.echr.coe.int/eng?i=001-119244], accessed 20. March 2020

85 Judgment *Magyar Helsinki Bizottság v. Hungary* (2016), Application no. 18030/11, par. 139, [http://hudoc.echr.coe.int/eng?i=001-167828], accessed 20. March 2020

86 Judgment *Cengiz and Others v. Turkey* (2016), Application nos. 48226/10 and 14027/11, par. 49, [http://hudoc.echr.coe.int/eng?i=001-159188], accessed 20. March 2020

87 Nußberger, A., *The European Court of Human Rights and rule of law – a tale of hopes and disillusions*, in: Zubik, M. (ed.), Human rights in contemporary world: Essays in Honour of Professor Leszek Garlicki, Wydawnictwo Sejmowe, Warszawa, 2017, pp. 162 – 173

88 Judgment *Bayatyan v. Armenia* (2011), Application no. 23459/03, par. 103, 108, [http://hudoc.echr.coe.int/eng?i=001-105611], accessed 20. March 2020

In the judgment of *A, B and C v. Ireland* (2010), the ECtHR states, that the notion of 'private life' within the meaning of Art. 8 is a broad concept which encompasses, *prima facie*, the right to personal autonomy and personal development. It concerns such subjects, as gender identification, sexual orientation and sexual life, a person's physical and psychological integrity, as well as decisions both to have and not to have a child or to become genetic parents.89

The concept of 'private life' is initially understood as the right to privacy, that is the right to live, as far as one wishes, protected from publicity or the right to live privately, away from unwanted attention. It protects the right to personal development (in terms of personality or personal autonomy) and encompasses the right for each individual to establish and develop relationships with other people and with the outside world, – the right to a 'private social life' that may also include professional activities or activities taking place in a public context.90

Moreover, the ECtHR reiterates that the concept of 'private life' is not susceptible to exhaustive definition and "covers the physical and psychological integrity of a person and can therefore embrace multiple aspects of a person's identity, such as gender identification and sexual orientation, name or elements relating to a person's right to their image. The concept covers personal information which individuals can legitimately expect should not be published without their consent… "91 Therefore, "the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. … Article 8 of the Convention thus provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, are collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights may be engaged".92

However, "an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life. Moreover, Article 8 cannot be relied on in order to complain

89 Judgment *A, B and C v. Ireland* (2010), Application no. 25579/05, par. 212, [http://hudoc.echr.coe.int/eng?i=001-102332], accessed 20. March 2020

90 Judgment *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France* (2018), *op. cit.*, note 36, par. 152, 153

91 Judgment *M.L. and W.W. v. Germany* (2018), Application nos. 60798/10 and 65599/10, par. 86, [http://hudoc.echr.coe.int/eng?i=001-183947], accessed 20. March 2020

92 Judgment *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (2017), Application no. 931/13, par. 137, [http://hudoc.echr.coe.int/eng?i=001-175121], accessed 20. March 2020

of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence…"93

The ECtHR has also emphasized that the Internet as a special source of information differs from the print media, especially regarding its capacity to store and transmit information. Hence, the risk of harm posed by the content and communications on the Internet to the enjoyment of human rights and freedoms, particularly the right to respect for private life, is significantly higher than the risk posed by the press, particularly due to the importance of search engines.94 Nevertheless, the ECtHR underlines that "the balancing of the interests at stake may result in different outcomes depending on whether a request for deletion concerns the original publisher of the information, whose activity is generally at the heart of what freedom of expression is intended to protect, or a search engine whose main interest is not in publishing the initial information about the person concerned, but in particular in facilitating identification of any available information on that person and establishing a profile of him or her".95

At the same time, the ECtHR maintains that the legislation regulating the interruption of pregnancy touches upon the sphere of the private life of a woman "cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman's private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing foetus. The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child".96

The ECtHR also considered that there was a consensus amongst a substantial majority of the member states of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law.97 However, it "does not consider that this consensus decisively narrows the broad margin of appreciation of the State. ...this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention".98

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93 Judgment *M.L. and W.W. v. Germany* (2018), *op. cit.*, note 91, par. 88

94 *Ibid.*, par. 91

95 *Ibid.*, par. 97

96 Judgment *A, B and C v. Ireland* (2010), *op. cit.*, note 89, par. 213

97 *Ibid.,* par. 235

98 *Ibid.,* par. 236, 237

The concept of 'home' in the context of Art. 8 is an autonomous one, which does not depend on classification under national law, but is defined by reference to the factual circumstances, namely the 'existence of sufficient and continuous links with a specific place'. In this sense, a home is the place, the physically defined area, where private and family life develops. On this basis, an individual has a right to respect for his home that includes not only the right to the actual physical area, but also the quiet enjoyment of that area. In particular, it is protected from concrete or physical breaches, such as unauthorized entry into a person's home. In addition, the notion of 'home' may be equally applied to a holiday home. As for an artist's dressing room or a hotel room, the ECtHR has not ruled out that they may be considered as a 'home'. Nevertheless, the concept of home is not confined to places of residence where private life is conducted. Consequently, it encompasses professional premises as well, that is especially important for the protection of individuals against arbitrary interference by public authorities.99

Regarding the notion of 'family life' in Art. 8, the ECtHR stresses that it encompasses not only families based on marriage, but also other *de facto* relationships. Thus, attention must be drawn to such relevant factors, as whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.100

Concerning the family life of a child, the ECtHR "reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance..."101 In the process of balancing between the interests of parents and the interests of a child "a particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents…"102 On the other side, "when a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited"103.

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99 Judgment *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France* (2018), *op. cit.*, note 36, par. 154

100 Judgment *X, Y and Z v. the United Kingdom* (1997), Application no. 21830/9336, par. 36, [http://hudoc.echr.coe.int/eng?i=001-58032], accessed 20. March 2020

101 Judgment *Strand Lobben and Others v. Norway* (2019), Application no. 37283/13, par. 204, 206, [http://hudoc.echr.coe.int/eng?i=001-195909], accessed 20. March 2020

102 *Ibid.,* par. 208

103 *Ibid.*

With regard to the manner in which the social relationship between a child conceived by artificial insemination by donor and the person who performed the role of father should be reflected in law, the ECtHR didn't observe the existing consensus. In particular, there was no consensus on the matter whether the interests of a child were best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity.104

5. CONCLUSIONS

Under the principle of proportionality each legal interference with human rights and freedoms must meet the following criteria: relevancy – the appropriateness of the means intended to achieve legal aim to the purpose (the use of prohibited means, such as torture, is banned; assessment of the legitimacy of the purpose of the mean must be derived from the constitution and the laws; proper validity of appropriate mean and its necessity to achieve the goal, – substantive rationality); necessity – the use of such mean that least restricts the right of the individual; proportionality in the narrow sense: the proportionality of a person's loss (harm) from the restriction of the right to the benefit gained from the goal pursued, – the principle of balancing (procedural rationality).

The permissible limitations on human rights must be prescribed by the law and be necessary in a democratic society. The quality of the law requires it to be accessible and foreseeable. The concept of the law (in its substantive sense) may encompass the secondary and unwritten law.

In turn, the concept of democratic society refers to its basic elements, such as pluralism, tolerance and broadmindedness. In order to strike a fair balance, the ECtHR applies strict (in respect of absolute rights) and persuasive (convincing) democratic necessity tests.

Under the strict necessity test, any interference with human rights must be strictly proportionate to the achievement of the permitted aims. In this regard, the states generally enjoy a narrow margin of appreciation.

The convincing test on necessity requires the establishment of the existence of a real pressing social need as well as relevant and sufficient reasons for the interference with human rights and freedoms that must be convincingly shown by domestic authorities. Therefore, the margin afforded is wider.

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104 Judgment *S.H. and Others v. Austria* (2011), Application no. 57813/00, par. 83, [http://hudoc.echr.coe.int/eng?i=001-107325], accessed 20. March 2020

The scope and the width of the margin of appreciation depends on the nature of the right in issue, its importance for the individual, and the nature of the aim pursued by the restrictions.

In case of positive obligations of a state, it would rather have a wide margin of appreciation. When it comes to negative obligations, a margin is quite narrow. It also concerns the interpretation by domestic authorities of such ambiguous concepts, as national security, public safety, economic well-being, morality, democracy *et al*. On the one hand, it is justified by the principle of non-interference in state sovereignty (based on the demand for pluralism in a democratic society) and, on the other, by the lack of consensus among the Council of Europe member states on some morally and ethically sensitive issues.

Therefore, the presence of the European consensus on a particular issue plays a key role in assessing the margin of appreciation. If consensus exists, the margin is narrow. If the issue concerns complex moral or ethical questions on which there is no consensus, the margin is wide.

The evolution of consensus contributes to the development of dynamic interpretation of human rights, as well as autonomous concepts elaborated in the case law of the ECtHR. These concepts (*e.g.*, private and family life, home, rule of law, the law, torture, data protection, *etc*.) significantly narrow the margin of free discretion of a state.

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17. *Gorzelik and Others v. Poland* (2004), No. 44158/98
18. *Vo v. France* (2004), No. 53924/00
19. *Isayeva, Yusupova and Bazayeva v. Russia* (2005), Nos. 57947/00, 57948/00 and 57949/00
20. *Evans v. the United Kingdom* (2007), No. 6339/05
21. *A, B and C v. Ireland* (2010), No. 25579/05
22. *Giuliani and Gaggio v. Italy* (2011), No 23458/02

23. *Bayatyan v. Armenia* (2011), No. 23459/03
24. *Haas v. Switzerland* (2011), No. 31322/07
25. *S.H. and Others v. Austria* (2011), No. 57813/00
26. *Koch v. Germany* (2012), No. 497/09
27. *Mouvement raëlien suisse v. Switzerland* (2012), No. 16354/06
28. *Finogenov and Others v. Russia* (2012), Nos. 18299/03 and 27311/03
29. *Babar Ahmad and Others v. the United Kingdom* (2012), Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09
30. *Konstantin Markin v. Russia* (2012), No. 30078/06
31. *X and Others v. Austria* (2013), No. 19010/07
32. *Vallianatos and Others v. Greece* (2013), Nos. 29381/09 and 32684/09
33. *Animal Defenders International v. the United Kingdom* (2013), No. 48876/08
34. *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (2014), No. 31045/10
35. *O'Keeffe v. Ireland* (2014), No. 35810/09
36. *Hämäläinen v. Finland* (2014), No. 37359/09
37. *S.A.S. v. France* (2014), No. 43835/11
38. *Trabelsi v. Belgium* (2015), No. 140/10
39. *Pentikäinen v. Finland* (2015), No. 11882/10
40. *Lambert and Others v. France* (2015), No. 46043/14
41. *Kavaklıoğlu and Others v. Turkey* (2016), No. 15397/02
42. *Magyar Helsinki Bizottság v. Hungary* (2016), No. 18030/11
43. *Dubská and Krejzová v. the Czech Republic* (2016), Nos. 28859/11 and 28473/12
44. *Cengiz and Others v. Turkey* (2016), Nos. 48226/10 and 14027/11
45. *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (2017), No. 931/13
46. *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (2017), No. 17224/11
47. *Khamtokhu and Aksenchik v. Russia* (2017), Nos. 60367/08 and 961/11
48. *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France* (2018), Nos. 48151/11 and 77769/13
49. *Correia de Matos v. Portugal* (2018), No. 56402/12
50. *M.L. and W.W. v. Germany* (2018), Nos. 60798/10 and 65599/10
51. *Strand Lobben and Others v. Norway* (2019), No. 37283/13

UDK 341.231.14:341.43
Original scientific paper

RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES ON EU BORDERS: A CASE STUDY OF THE CONTRACTS OF THE EUROPEAN ASYLUM SUPPORT OFFICE*

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ABSTRACT

The present contribution addresses the question of attribution of private conduct to international organizations, more specifically whether the conduct of private military and security companies can be equated with that of the European Union in connection with migration and border control. The paper also incorporates the analysis of two contracts concluded between a private company and the European Asylum Support Office for provision of security services for the premises of the institution and for hotspots in Greece. The main findings of the paper are that while there are a number of ways to attribute the conduct of private entities to international organizations such as exercising elements of governmental authority or effective control over specific operations of private persons, there are inherent difficulties within the procedural aspects of proving such an attributional link. In addition to this, in spite of contrary scholarly opinion, this paper asserts that private military and security companies do not play a significant role in implementing the European Agenda on Migration, at least on the EU level. Conversely, the services they provide are not unique to migration control, but necessary for the effective operation of EASO. The attribution of the examined conduct is not possible through exercising elements of governmental authority, and proving effective control for a specific operation would also encounter considerable difficulties.

Keywords: *private military and security companies, European Union, European Asylum Support Office, attribution, internationally wrongful acts*

* The present author would like to thank Ágoston Mohay (University of Pécs) for the fruitful discussions and excellent suggestions. The peresent contribution was made possible by the László János Research Scholarship awarded by the University of Pécs, and the Outstanding Scientific and Arts Scholarship awarded by the Doctoral Student Association of the University of Pécs

1. INTRODUCTION

The European Union (hereinafter: EU or Union) has experienced an unprecedented number of asylum seekers and migrants coming from various locations from the Middle East and Africa. Some refer to this increase in migration as the 'Migration Crisis of 2015'.[1] The Union's asylum system has been under heavy pressure ever since, which revealed the inherent weaknesses within the system.[2] Attempting to find a solution to the difficulties arisen, EU has adopted legal instruments,[3] struck international agreements such as the EU-Turkey deal[4] and created the European Agenda on Migration.[5] Daria Davitti in her excellent analysis on the subject claims that this document is shaped and implemented by private military and security companies (hereinafter: PMSCs).[6]

For the purposes of the present contribution, PMSCs are defined as "private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel."[7] This definition is

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1 *Migrant crisis: One million enter Europe in 2015*, BBC News, [https://www.bbc.com/news/world-europe-35158769], Accessed 13 April 2020. See also Henley J., *What is the current state of the migration crisis in Europe?* The Guardian, [https://www.theguardian.com/world/2018/jun/15/what-current-scale-migration-crisis-europe-future-outlook], Accessed 13 April 2020

2 Beirens H., *Cracked Foundation, Uncertain Future – Structural weaknesses in the Common European Asylum System*, Migration Policy Institute Europe, [https://www.migrationpolicy.org/sites/default/files/publications/CEAS-StructuralWeaknesses_Final.pdf], Accessed 13 April 2020

3 E.g. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180, 29.6.2013, p. 31 – 59

4 See Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization, [2014] OJ L 134, 7.5.2014, p. 3 – 27. Although it needs to be mentioned that this 'deal' has no stable footing in contemporary international relations. Recep Tayyip Erdoğan Turkish president 'encouraged' thousands of refugees currently living in Turkey to move towards Europe. The incident ended with the EU providing financial support for the regime of Erdoğan. See Wintour P.; Smith H.: *Erdoğan in talks with European leaders over refugee cash for Turkey*, The Guardian. [https://www.theguardian.com/world/2020/mar/17/erdogan-in-talks-with-european-leaders-over-refugee-cash-for-turkey], Accessed 13 April 2020

5 Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration, COM(2015) 240, Brussels, 13 May 2015

6 Davitti, D., *The Rise of Private Military and Security Companies in European Union Migration Policies: Implications under the UNGPs*, Business and Human Rights Journal, *vol*. 4, no. 1, 2018, pp. 37 – 42

7 The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, 2008, Preface 9. a)

provided by the so-called 'Montreaux Document' from 2008 that was created on the initiative of Switzerland and the International Committee of the Red Cross in cooperation with 17 states, non-governmental organization, the industry as well as academic circles. This document is a collection of soft law, good practices as well as customary international law considered to be binding on states.[8] It needs to be mentioned that no universally accepted definition for PMSCs can be identified,[9] although various attempts to describe these businesses appear in the works of commentators as well as in international documents.[10]

PMSCs usually appear in academic articles in connection with international humanitarian law.[11] This is in line with the most significant use of PMSCs, which customarily occurs in the context of armed conflicts[12] and in peace-keeping operations.[13] In the same vein, the use of PMSCs in the EU were mainly restricted to the

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8 *ibid.* p. 31

9 Szalai, A., *A katonai magánvállalatok részvétele és jogállása a fegyveres konfliktusokban*, FÖLDrész – Nemzetközi és Európai Jogi Szemle, *vol.* 3, no. 1 – 2, 2010, p. 38

10 The 'tone' of the definition might be tailored in light of services these businesses prove. For scholarship see See e.g. Cameron, L.; Chetail, V., *Privatizing War – Private Military and Security Companies under Public International Law*, Cambridge University Press, Cambridge, New York, 2013, pp. 1 – 2 or Janaby, M. G., *The Legal Regime Applicable to Private Military and Security Company Personnel in Armed Conflicts*, Springer, Cham, 2016, pp. 1 – 4. For international documents see e.g. International Code of Conduct for Private Security Service Providers, 9 November 2010, which is a code of conduct for business enterprises, who voluntary choose to follow the rules laid down within the document. For another definition, see Article 2 of the Draft Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, A/HRC/12/25, 5 July 2010

11 See e.g. Schmitt, M. N., *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, Chicago Journal of International Law, *vol.* 5, no. 2, 2005, pp. 511 – 546. del Prado, J. L. G., *The Ineffectiveness of the Current Definition of a "Mercenary" in International Humanitarian and Criminal Law*, in: Torroja, H. (ed.), Public International Law and Human Rights Violations by Private Military and Security Companies, Springer, Cham, 2017, pp. 59 – 81. Foong, A., The Privatization of War: From Privateers and Mercenaries to Private Military and Security Companies, Asia Pacific Yearbook of International Humanitarian Law, *vol.* 4, 2008 – 2011, pp. 210 – 244. When it comes to armed conflicts, the question arises whether there is a connection between PMSCs and mercenaries. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989. determines in Article 1 who can be considered to be a mercenary. Based on the criteria the present paper argues, that the criteria for mercenaries is too narrow to incorporate all members of PMSCs. However, in some cases there can be an overlap between the two categories, which could have serious legal consequences for the state employing a PMSCs

12 On the conduct of non-state actors such as PMSCs in Afghanistan and Syria see e.g. Laborie, M., *Afghanistan and Syria: Nonstate Actors and Their Negative Impact on Human Security*, in: Torroja, H. (ed.), Public International Law and Human Rights Violations by Private Military and Security Companies, Springer, Cham, 2017, pp. 7 – 29

13 Crowe, J.; John, A., *The Status of Private Military Security Companies in United Nations Peacekeeping Operations under the International Law of Armed Conflict*, Melbourne Journal of International Law, *vol.*

protection of EUPOL headquarters in Afghanistan, the mission in the Democratic Republic of Congo, and the EULEX mission in Kosovo.[14] On the other hand, PMSCs also appeared in another context in the last two decades, namely migration and border control. The company G4S for example has been contracted to be involved in border control along the United States – Mexico border. The same company was commissioned with running detention facilities by Australia. The United Kingdom also made a contract with G4S for the annual transfer of asylum seekers between detention and removal facilitates and the operation of such centers.[15] PMSCs also appeared in connection with EU research projects as well, namely the European External Border Surveillance System (EUROSUR) and Frontex's (European Border and Coast Guard Agency) drone workshops.[16] Litigation in Australia in connection with alleged human rights violations in PMSCs run detention centers[17] and the intertwining of PMSCs with the European Agenda on Migration [most prominently contracts that had been concluded between G4S and the European Asylum Support Office (hereinafter: EASO)] and the activities of some Member States led a number of commentators to believe that the EU might also be engaged in a similar outsourcing of border and migration control to PMSCs; suggesting that such business relations are in place[18] and alleged interference with rights of asylum seekers in connection with this phenomenon has already emerged.[19]

In case the Union outsources border and migration related activities to PMSCs, an important question arises: namely, who will be responsible for the conduct of such business enterprises? This contribution examines the responsibility of international organizations for internationally wrongful acts in connection with attribution of private conduct (Part II). In turn, the paper will analyze whether the EU indeed outsources such activities. The paper will look into the contracts concluded between EASO and G4S which will shed light on the true nature of such

18, no. 1, 2017, pp. 16 – 44

14 European Parliament: The Role of private security companies (PSCs) in CSDP missions and operations. Directorate-General for External Policies of the Union, Directorate B, Policy Department, 2011

15 Lemberg-Pedersen, M., *Private security companies and the European borderscapes*, in: Gammeltoft-Hansen, T.; Nyberg, N. (eds.), The Migration Industry and the Commercilizations of International Migration, Routledge, London, 2013, pp. 154, 156

16 *ibid*. p. 156 – 157, 165

17 Kamasaee v Commonwealth of Australia & Ors (Approval of settlement) [2017] VSC 537. For an analysis see Holly, G., *Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: Kamasaee v Commonwealth*, Melbourne Journal of International Law, *vol*. 19, no. 1, 2018, pp. 52 – 83

18 Davitti, *op. cit.,* note 6, pp. 41 and 50. Lemberg-Pedersen, *op. cit.,* note 15, p. 166

19 Lethbridge, J., *Privatisation of Migration and Refugee Services and Other Forms of State Disengagement*, Public Services International [http://www.world-psi.org/en/privatisation-migration-refugee-services-other-forms-state-disengagement], Accessed 13 April 2020

agreements and investigates the alleged human right violations that had occurred within the framework of this contract (Part III). Finally, the paper concludes that contemporary outsourcing of border and migration control cannot be determined on a factual basis on behalf of the EU: only providing security services for Union staff can be identified, which is necessary for every public institution to operate efficiently, and is hardly unique to migration or border control. This leaves the examination of attribution of PMSCs' conduct committing serious human rights violations merely a theoretical exercise, the results can however, be used in other areas as well. In the meantime, regulation might be required at the EU level for contracting PMSCs – and even though at the time of writing this is most prominent in the context of the Common Foreign and Security Policy, in case there will be a shift of policy within border and migration control, the same legislation could also become relevant in the Area of Freedom, Security and Justice (Part IV).

2. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS FOR INTERNATIONALLY WRONGFUL ACTS

This part of the analysis will serve as an introduction to the responsibility of international organizations for internationally wrongful acts. The basis of the examination is a hypothetical scenario in which a private company, namely a PMSC hired by an international organization, the European Union, is committing a human rights violation. There are two possible avenues liability can take. The first is when the private conduct is indeed attributable to the international organization (Section 1.). The second road responsibility can take is through the positive obligations stemming from international human rights law,[20] which is outside of the scope of the present analysis, for it requires further thorough research. Before elaborating on the issues presented above, a clarification is required for methodological purposes. The present contribution stands on the basis of positive law, therefore soft law instruments, such as the United Nations Guiding Principles on Business and Human Rights[21] and operational level grievance mechanisms[22] thus fall beyond the scope of this analysis.

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[20] On the subject see e.g. Xenos, D., *The Positive Obligations of the State under the European Convention of Human Rights*, Routledge, London, New York, 2012

[21] United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (A/HRC/17/31) adopted by the Human Rights Council on 16 June 2011 as resolution 17/4. Two examination of issues related to this document and the activities of PMSCs was provided by Daria Davitti See. Davitti, *op. cit.,* note 6, pp. 42 – 53. and Davitti, D., *Beyond the Governance Gap: Accountability in Privatized Migration Control*, German Law Journal, *vol.* 21, no. 3, 2020, pp. 3 – 16

[22] Wallace, S., *Case Study on Holding Private Military and Security Companies Accountable for Human Rights Violations*, Frame. Work Package No. 7. – Deliverable No. 7.5. 2016, pp. 16 – 28

The European Union is a supranational community,[23] yet it is still an international organization, governed primarily by two international treaties, the Treaty on the European Union[24] (hereinafter: TEU) and the Treaty on the Functioning of the European Union[25] (hereinafter: TFEU). The EU has not (or at least not yet) reached a phase in its development to become a federal state such as the United States of America. The responsibility of the EU as an international organization is regulated by customary international law. A compilation of these rules can be found in the Draft Articles on the responsibility of international organizations (hereinafter: DARIO), prepared by the United Nations' International Law Commission[26] and adopted by the General Assembly in 2011.[27] Although DARIO is not as widely accepted as its counterpart, the Draft Articles on responsibility of states for internationally wrongful acts (hereinafter: DARSIWA)[28] some rules of it are without doubt considered to be of customary international law character.[29] The European Union, through one of its institutions, the European Commission on the other hand expressed its concerns regarding DARIO, since the EU believed that DARIO does not take into account the specificities of the Union.[30] The European Commission in a general comment to DARIO due to the high impact of the proposed rules to the EU, stated, that

"[f]or now, the EU remains unconvinced that the draft articles and the commentaries thereto adequately reflect the diversity of international organizations. Several draft articles appear either inadequate or even inapplicable to regional integration organizations such as the EU, even when account is taken of some of the nuances now set out in the commentaries. In addition, some commentaries show that there is very little or no relevant practice to support the suggested provisions."[31]

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23 Chalmers, D.; Davies, G.; Monti, G., *European Union Law*, Second edition, Cambridge University Press, Cambridge, New York, 2010, p. 14

24 TEU (Lisbon)

25 TFEU (Lisbon)

26 Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10)

27 Resolution adopted by the General Assembly on 9 December 2011 66/100. Responsibility of international organizations. (A/RES/66/100)

28 Resolution adopted by the General Assembly on 12 December 2001 56/83. Responsibility of States for internationally wrongful acts. (A/RES/56/83)

29 Mölder, M., *Responsibility of International Organizations – Introducing the ILC's Dario*, in: von Bogdandy, A.; Wolfrum, R. (eds.), Max Planck Yearbook of United Nations Law, *vol.* 16, 2012, p. 286

30 Responsibility of international organizations. Comments and observations received from international organizations dated 14 and 17 February 2011 (A/CN.4/637 and Add.1.). p. 138. European Commission para 1

31 *ibid.* p. 138. European Commission, para. 2

Commentators also expressed concerns regarding the customary international law status of the rules enshrined in DARIO.[32] This paper however uses specific rules of DARIO in order to examine violations of international law and attribution of conduct to the EU. Article 4 of DARIO, which sets out the elements of an internationally wrongful act of an international organization is essentially identical with that applicable to states,[33] which should be accepted as customary international law applicable to the EU since no comment has been made to that particular article. Article 5 on the characterization of an act as internationally wrongful however received sharp criticism from the Union since the internal laws of the EU should be differentiated from international law.[34] The International Law Commission on the other hand has addressed the critique in the commentaries to DARIO *expressis verbis* recognizing the special views of the Court of Justice of the European Union, declaring that "[b]reaches of obligations under the rules of the organization are not always breaches of obligations under international law."[35] Consequently, it is logical to conclude that the general rules on violating international law can be identified through DARIO even for the purposes of the EU. The only problem that can arise stems from the Charter of Fundamental Rights of the European Union, which since the Lisbon Treaty has the same legal 'value' as the fundamental treaties.[36] As for attribution, the European Commission's comment regarding the term 'agent'—namely the need to define it[37]—has been accepted by the International Law Commission resulting in Article 2(d) of DARIO, furthermore the International Court of Justice has already posited the core content of the articles referred to in this paper in several advisory opinions.[38] Due to this, the contribution accepts Sari and Wessel's position that "no special considerations justify the application of *lex specialis* rules of attribution"[39] to the Union's conduct. In

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32 See e.g. Bordin, F. L., *Reflections of customary international law: the authority of codification conventions and ILC draft articles in international law*, International Comparative Law Quarterly, *vol.* 63, no. 3, 2014, pp. 556 – 557 and 560 – 561, pointing out that even the International Law Commissions considers a significant number of provisions within DARIO as progressive development, rather than codification

33 See Article 2 DARSIWA

34 Responsibility of international organizations. *op. cit.,* note 30, pp. 146-147 paras 1 – 5

35 Draft articles on the responsibility of international organizations, with commentaries, Yearbook of the International Law Commission, *vol.* II, Part 2, 2011, p. 63. para 5. note 171. and p. 64. para 7

36 Article 6(1) TEU. This examination falls beyond the scope of the present contribution

37 Responsibility of international organizations. *op. cit.,* note 30, p. 143

38 See eg. *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports* 1949, *p.* 174. and *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177

39 Sari. A.; Wessel, R. A., *International Responsibility for EU Military Operations: Finding the EU's place in the Global Accountability Regime*, in: Van Vooren, B.; Blockmans, S.; Wouters, J. (eds), The EU's Role in Global Governance: The Legal Dimension, Oxford University Press, Oxford, 2013, p. 129.

other words, this paper argues that the general rules of attribution in accordance with DARIO is applicable to the European Union, no special rules or special treatment is granted for the EU.

According to Article 4 of DARIO, an internationally wrongful act is committed by an international organization, when conduct consisting of an action or an omission, that is attributable to the international organization constitutes a breach of an international obligation.[40] A breach of an international obligation may occur regardless of the origin or character of the obligation concerned and for member states a breach may stem from a violation of the rules of the organization.[41] In the following, the contribution addresses the issue of attribution of conduct to international organizations such as the EU.

2.1. Attribution of conduct to the European Union

This paper examines the conduct of PMSCs in the EU's migration and border activities, therefore it focuses on attribution of private conduct to international organizations, such as the EU. According to Article 6 of DARIO

"[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization."[42]

Organs are defined by DARIO as persons or entities which have that status in accordance with the rules of the organization[43] and agents as officials or other persons or entities, other than an organ, who are charged by the organization with helping to carry out or indeed carrying out one of their functions, in other words, through whom the organization acts.[44] As for determining the functions of organs and agents, the rules of the organizations apply.[45]

Note that the originial quote refers to the EU crisis management missions within the context of the Common Foreign and Security Policy

40 Article 4 DARIO

41 Article 10 DARIO. According to Article 2 subparagraph (b) DARIO „"rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization"

42 Article 6, para. 1 DARIO

43 Article 2, supbaragraph (c) DARIO

44 Article 2, supbaragraph (d) DARIO

45 Article 6, para. 2 DARIO

It can be observed that DARIO draws up the general rule of attribution to international organizations rather generously, linking the conduct of private individuals to the organizations. It should be noted that there are no separate articles for conduct of an organ of an international organization, or of persons or entities exercising element of governmental authority nor conduct which is directed or controlled by an international organization, rules which can be identified in DARSIWA, the counterpart of DARIO.[46] The question arises whether these attributional links are indeed missing or whether they are enshrined in Article 6 of DARIO.

The commentary to DARIO denotes that a simpler wording was required for DARIO in order to capture the essence of the organs of international organizations.[47] It is important to note that organs are not defined in the general attributional norm similarly to Article 4 of DARSIWA, DARIO rather gives a narrow definition to organs in Article 2(c), which can be equated with *de jure* organs of an international organization. *De facto* organs of an international organization on the other hand should be incorporated into the concept of 'agents' according to Article 2(d) of DARIO. This differentiation is crucial in light of the attribution. The conduct of a *de jure* organ of an international organization just as that of states would without doubt be attributable to the organization regardless of the level of control exercised over the *de jure* organ.[48] To date no PMSC has ever been introduced as an organ of the European Union or to the knowledge of the present author of any other international organization. The same is however not true for states, which occasionally incorporate PMSCs into a state organ.[49] The analysis therefore has to turn to *de facto* organs of an international organization, which are not designated as organs of the entity. The commentary to DARIO leaves the possibility open to exercise the functions of the international organization without the authorization of the rules of organization based on Article 6(1) of DARIO.[50] The present contribution argues that such a function of the organization can be exercised through contracts concluded between the organization and a private entity or by creating such an 'agent'.

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46 Article 4, 5 and 8 DARSIWA Other articles ar missing as well, namely Article 9 and 10. The present paper does not address the latter two questions since they are not applicable to international organizations nor to the factual issues of the contribution

47 Draft articles on the responsibility of international organizations, with commentaries, *op. cit.,* note 35, p. 56, para. 8

48 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, on p. 242. paras. 213 – 214

49 Cameron; Chetail, *op. cit.,* note 10, p. 141

50 Draft articles on the responsibility of international organizations, with commentaries, *op. cit.,* note 35, p 56. para 9 and 11

De facto organs of an international organization are therefore agents, which should have a rather liberal understanding, being able to incorporate paid or unpaid officials, individuals employed permanently or on a case-by-case basis, i.e. virtually anyone who is commissioned by the organization to carry out or help to carry out one or more of its functions.[51] Having regard to the similar phenomenon in state responsibility, it is argued that the *de facto* organ should remain under 'complete dependency' of the international organization.[52] Consequently, it can be concluded that it would be exceptionally hard to attribute the conduct of a PMSC to the EU or any other international organization on this basis. This route of attribution would only become relevant if the organization would create and own a PMSC while leaving them no room to retain any significant level of autonomy.[53] Cameron and Chetail denote in the case of state-owned PMSCs that these organizations retain a considerable level of autonomy, which makes it impossible to use *de facto* organ attribution.[54] The same should be true for international organization-owned PMSCs, if any exist at all.

According to the commentary to DARIO, another category of agents might be similar to exercising elements of governmental authority. Although the commentary stresses that it would be 'superfluous' to assign a separate article to this question such as Article 5 of DARSIWA, for on the one hand the terminology is not adequate for international organizations and on the other hand "[t]he term »agent« is given in subparagraph (*d*) of article 2 a wide meaning that adequately covers these persons or entities."[55] Exercising governmental authority along with direction and control considered by a number of scholars one of the practically possible scenarios for attribution in case of PMSCs conduct.[56]

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51 Draft articles on the responsibility of international organizations, with commentaries, *op. cit.,* note 35, p. 52. para 23

52 This test was first used by the International Court of Justice in the Nicaragua case, later reaffiremd in the Genocide case. See. Kis Kelemen, B.; van Rij, J., *Private military and security companies on E.U. borders: who will take responsibility for their human rights violations? – A theoretical analysis*, in: Kis Kelemen, B.; Mohay, Á., EU justice and home affairs research papers in the context of migration and asylum law, University of Pécs, Pécs, 2019, p. 101

53 A similar approach was taken by Cameron and Chetail, who propose a three-fold criteria for complete dependency: a) creation, b) cooperation with a significant involvment of the action of the PMSC and c) a low-level of autonomy. See Cameron; Chetail, *op. cit.,* note 10, p. 149. For a critique of the general approach taken by Cameron and Chetail see Kis Kelemen; van Rij, *op. cit.,* note 52, p. 103

54 Cameron; Chetail, *ibid.,* p. 152

55 Draft articles on the responsibility of international organizations, with commentaries, *op. cit.,* note 35, p. 56 para 10

56 See for example. Davitti, *op. cit.,* note 21, pp. 16 – 17 and 29. Tonkin, H., *State Control over Private Military and Security Companies in Armed Conflict,* Cambridge University Press, Cambridge, New York, 2011, pp. 99 –113. Kis Kelemen; van Rij, *op. cit.,* note 52, p. 104

Article 5 of DARSIWA posits that "[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."[57] The commentary to DARSIWA expressly mentions privatization of public or regulatory functions.[58] It is also denoted in the commentary that even a private corporation can be covered with the notion of 'entity', in case it is empowered by the law of the State to exercise governmental authority.[59] The commentary goes on to list examples for such practices and explains that

"in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine."[60]

Some scholars argue that the term 'empowered by law' should refer to explicit national legislations. Davitti for example asserts that

"Such powers, however, will only be provided by national prison regulations or pertain to the enforcement of a judicial sentence. PMSC's transnational activities, instead, are usually regulated by contractual agreements stipulated between the state and the company itself. Such contracts will usually not be a sufficient legal instrument to empower the PMSC with governmental authority."[61]

She bases her argument on the claim that these services are not necessarily regulated by law, e.g. immigration detention is usually administrative in nature, therefore regulations pertaining to prisons and detention centers within the criminal justice system will not apply to them.[62]

Conversely, others such as Tonkin argue that the notion 'empowered by law' refers not to a specific legislation empowering PMSCs to undertake certain functions of governmental authority, but a legal framework allowing the outsourcing of such

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57 Article 5 DARSIWA

58 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, *vol.* II, Part 2, 2001, p. 42, para 1

59 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *op. cit.,* note 58, p. 43, para 2

60 *ibid.*

61 Davitti, *op. cit.,* note 21, p. 17

62 *ibid*.

activities to the private sector would be sufficient.[63] Cameron and Chetail take a similar position, arguing that even the French version of the commentaries support this interpretation.[64] The co-authors also go one step further, claiming that "a state cannot invoke the lacunae of its domestic order to escape the reality of the fact that it has outsourced governmental functions relevant to its international obligations."[65] Consequently, the state would be liable for the conduct of a PMSCs merely by contracting with the company. This position can be supported by the *Yeager* case before the Iran-US Claims Tribunal and the International Court of Justice in the *Armed Activities on the Territory of the Congo* case.[66] This contribution therefore asserts that in lack of the customary international law nature of the criterion 'empowered by law'[67] in Article 5 of DARSIWA, a contract in itself is sufficient to attribute the conduct of a PMSC to a state, in case the outsourcing pertains to exercising governmental authority.[68] The final question that needs to be answered is what exactly are the elements of governmental authority, the exercise of which will lead to attribution? As the commentary refers to guarding prisons and detention centers and immigration control or quarantine,[69] this paper claims that the conduct of PMSCs acting in migration and/or border control, contracted for this purpose by a state should be attributable to the state.[70] The same should apply *mutatis mutandis* to international organizations such as the EU. In case the Union contracts a PMSC specifically for exercising such functions, the conduct of the private company would indeed be attributable to the European Union. It is important to note that this attributional link is automatic, for it does not require a case-by-case analysis of control over the PMSC, the existence of the contract is sufficient.[71]

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63 Tonkin, *op. cit.,* note 56, p. 111

64 Cameron; Chetail, *op. cit.,* note 10, p. 168

65 *ibid*. p 169

66 *ibid.* It needs to be noted however, that the ICJ refers to Article 5 DARSIWA rather briefly claiming that „[i]n the view of the Court, the conduct of the MLC was not [...]that of an entity exercising elements of governmental authority on its behalf (Art. 5)." Armed Activities on the Territory of the Congo, *op. cit.,* note 48, p. 226. para 160. The notion of 'empowered by law' is clearly missing however it is far from conclusive to claim that leaving out such a criterion is intentional, for the the ICJ has left out numerous criteria from another attrtibution test in the Genocide case. See Kis Kelemen; van Rij, *op. cit.,* note 52, p. 107

67 Cameron; Chetail, *op. cit.,* note 10, p. 170

68 Kis Kelemen; van Rij, *op. cit.,* note 52, p. 102

69 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *op. cit.,* note 58, p. 43 para 2

70 Kis Kelemen; van Rij, *op. cit.,* note 52, p. 104

71 *ibid*.

Having regard to Article 7 of DARSIWA, Article 6 and 8 of DARIO also capture the problem of excess of authority or contravention of instructions. DARIO stipulates in the general rule of attribution that equating occurs only when the conduct is in the performance of functions of the international organization.[72] Acts committed in private capacity therefore will not be attributable to the international organization.[73] Virtually the same is enshrined in Article 7 of DARSIWA requiring acting 'in that capacity' for attribution.[74] This is further reinforced and supplemented by Article 8 of DARIO, which states that

"[t]he conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions."[75]

The notion of 'official capacity' is equivalent to 'in that capacity' for the purposes of attribution.[76] Therefore international organizations such as the EU should bear responsibility for *ultra vires* actions as well.[77]

The last attributional tie, that demands an examination is instructions, or direction and control pursuant to the commentary to DARIO as "[s]hould persons or groups of persons act under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in subparagraph (*d*) of article 2."[78]

'Direction and control' also appears as a separate article in DARSIWA. Article 8 of DARSIWA stipulates that

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72 Article 6 DARIO

73 Draft articles on the responsibility of international organizations, with commentaries, *op. cit.,* note 35, pp. 55 – 56, para 7

74 Article 7 DARSIWA „The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

75 Article 8 DARIO

76 Draft articles on the responsibility of international organizations, with commentaries, *op. cit.,* note 35, p. 60, para 4

77 Draft articles on the responsibility of international organizations, with commentaries, *op. cit.,* note 35, p. 61,

78 Draft articles on the responsibility of international organizations, with commentaries, *op. cit.,* note 35, p. 56, para 11

"[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[79]

Sometimes 'direction and control' is mixed up with *de facto* state organs.[80] The origin of this confusion might be traced back to the *Tadić* case before the International Criminal Tribunal for the former Yugoslavia, where the Tribunal applied the 'overall control' test in order to attribute the conduct of private entities to a state.[81] However this position was criticized not only by the International Court of Justice in the Genocide case[82] but by many commentators as well.[83] The correct test to be applied for *de facto* state organs—as it was posited above—is the 'complete dependency' test, while for 'direction and control', the existence of 'effective control' should be examined on a case-by-case basis. The latter test is more permissive than the former.[84]

The commentary to DARSIWA lists three disjunctive criteria for attribution based on Article 8: instruction, direction and control. If one of these links can be proven, the conduct in question might be equated with the state.[85] Under instructions, one might understand a decision of state to commit an internationally wrongful act, the implementation of which is the responsibility of a private entity.[86] For instructions to occur, a clear manifestation of the will of the state has to be shown, which was famously denoted by the International Court of Justice in the *United*

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79 Article 8 DARSIWA

80 See Cameron; Chetail, *op. cit.,* note 10, pp. 204 – 205. Cassese, A., *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, The European Journal of International Law, *vol.* 18, no. 4, 2007, p. 650

81 Prosecutor v. Duško Tadić, Appeals Chamber Judgment of 15 July 1999, para. 120 and 131. A similar but even more permissive link was proposed by Griebel and Plücken as the 'substantial involvment' test. See Griebel, J.; Plücken, M., *New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v Serbia*, Leiden Journal of International Law, *vol.* 21, no. 3, 2008, pp. 619 – 620

82 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, on pp. 170 – 171. paras. 402 – 406.

83 Kajtár, G., *A nem állami szereplők elleni önvédelem a nemzetközi jogban*, ELTE Kiadó, Budapest 2015, pp. 217 – 219. 22. Milanović, M., *State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken*, Leiden Journal of International Law, *vol.* 22, no. 2, 2009, pp. 318 – 319. and pp. 321 – 322

84 Kis Kelemen; van Rij, *op. cit.,* note 52, p. 105. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *op. cit.,* note 82, p. 169. para. 400

85 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *op. cit.,* note 58, p. 48, para. 7

86 Cameron; Chetail, *op. cit.,* note 10, p. 205

States Diplomatic and Consular Staff in Tehran case.[87] Davitti argues that the wording of a contract or the fact that a PMSC acted upon the instruction of a state might be enough to attribute private conduct to a state, although she accepts that

"[h]uman rights abuses or other wrongful conduct generally fall outside of the substantive scope of such contractual arrangements, so it would be difficult, based on the contract alone, to prove that the PMSC acted under the instruction of the hiring state."[88]

I completely agree with this position.[89] Virtually the same conclusion can be drawn for 'direction and control', where 'effective control' is a requirement for attribution. This test was developed by the International Court of Justice in the *Nicaragua* case,[90] later reinforced in the *Genocide* case.[91] It needs to be pointed out that either specific instructions or the 'effective control' in every single operation must be proven to equate private conduct with a state.[92] Consequently, this attribution link is virtually non-provable,[93] leaving it an incidental tie to the state.[94] *Ultra vires* actions or conduct which contravenes instruction are usually also attributable to a state, in case the private entity is under the effective control of a state.[95] In the absence of effective control, no attribution should occur, since a lawful instruction would never result in attribution for internationally wrongful conduct.

Within the scope of 'direction and control', ownership of a private entity also deserves attention. According to the commentary to DARSIWA, the fact that a state has created a corporation would not in itself equate the conduct of such an organization with that of the state, but utilizing the ownership to influence decisions

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87 *United States Diplomatic and Consular Staff in Tehran, Judgment, I. C. J. Reports 1980,* p. 3, on p. 30. para. 59. "In the view of the Court, however, it would be going too far to interpret such general declarations of the Ayatollah Khomeini to the people or students of Iran as amounting to an authorization from the State to undertake the specific operation of invading and seizing the United States Embassy. To do so would, indeed, conflict with the assertions of the militants themselves who are reported to have claimed credit for having devised and carried out the plan to occupy the Embassy."

88 Davitti, *op. cit.,* note 21, p. 17

89 Kis Kelemen; van Rij, *op. cit.,* note 52, p. 106

90 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, on p. 55. para. 115

91 Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *op. cit.,* note 82, p. 169. para. 400

92 *ibid*.

93 Cameron; Chetail, *op. cit.,* note 10, p. 216

94 Kis Kelemen; van Rij, *op. cit.,* note 52, p. 107

95 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *op. cit.,* note 58, p. 48, para 8

of the corporations could lead to attribution.[96] In case a state has created a private entity and controls it without meaningful independence on the side of the company, it could be argued that attribution might occur through the *de facto* state organ rule due to 'complete dependency'. Since 'effective control' requires a lower level of dependency, it might be argued that a state using its controlling interest in a company for specific operations may be enough to equate those actions with action by the state.[97] The same should be true *mutatis mutandis* for international organizations as well. The only divergence might arise for instructions where the international organization might be responsible for lawful instructions as well, if the agent in its official capacity contravened instructions.[98] The reason behind the difference would be the lack of a separate article on instruction, direction and control in DARIO, which could have addressed this situation.

Based on the above, the following conclusion might be drawn for the European Union and PMSCs: the conduct of a PMSC might be equated with the conduct of the EU in case the former exercises elements of governmental authority via a contract concluded between the corporation and the Union. In order to be able to establish such a link, the contract should refer to elements of governmental authority such as operating detention facilities, providing services for migration control or participating in border control activities. Theoretically, attribution might also occur if the EU would instruct PMSCs to commit internationally wrongful acts such as human rights violations or if the PMSC would, under the effective control of the Union violate international law in a specific situation. In Part III, this contribution will examine the publicly available tenders and framework contracts concluded between the EU and a PMSC, then it will investigate whether such an attribution link might be established. In turn however the paper analyses positive obligations stemming from international law, the violation of which might also give way to the responsibility of international organizations such as the EU for the conduct of private entities.

3. EU CONTRACTS WITH PMSCS WITHIN MIGRATION AND BORDER CONTROL

As it was noted by Davitti, EASO has concluded two contracts with G4S for two purposes: security services in Greece and provision of security services for EASO premises in Malta.[99] Concerning the contract for security services in Greece al-

96 *ibid*. para. 6

97 Kis Kelemen; van Rij, *op. cit.,* note 52, pp. 107. and 110

98 Article 8 DARIO

99 Davitti, *op. cit.,* note 6, pp. 41 and 50

leged human rights violations has already occurred.[100] The present paper in turn investigates these contracts and the possible human rights violations in connection with it.

It has to be noted that the two abovementioned contracts are indeed listed on one of the EASO contract lists awarded in 2017 under reference number EASO/2017/453 and EASO/2017/516.[101] One open call for tender for security services in Cyprus for the first quarter of 2020 was also identifiable.[102] The present author has requested access to the contracts on hand and the details on the open call for tender. In its response, the EASO granted access to tender specifications and draft framework contracts for the two already concluded contracts, but rejected access to the specific contract and the open call for tender due to the demand of "undistorted competition" and the "protection of commercial interests of a natural or legal person including intellectual property."[103]

3.1. Provision of security services in Greece

The first contract examined is the one concerning the provision of security services in Greece, most prominently in the hotspots operated by EASO for registration and screening of irregular migrants and asylum support.[104] According to the tender specifications, the services required are:

- "Surveillance and patrolling in EASO operations in Lesvos, Chios, Samos, Kos, Leros, Athens, Thessaloniki, and Alexandroupoli;
- Access control of visitors and applicants for international protection to the EASO premises;
- The surveillance and safeguarding of assets within the premises."[105]

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100 Lethbridge, *op. cit.,* note 19

101 List of contracts awarded by the European Asylum Support Office in 2017 in accordance with Article 124 of the Commission delegated regulation (EU) No 2462/2015 of 30 October 2015 on the rules of application of Regulation (EU, Euratom) No 1929/2015 of the Financial Regulation applicable to the general budget of the Union [https://easo.europa.eu/sites/default/files/EASO-contracts-awarded-2017.pdf], Accessed 13 April 2020. Both contracts had been concluded between G4S and EASO, although two different companies were used for concluding the contracts: G4S Security Services Ltd. for Malta and G4S Secure Solutions S.A. for Greece

102 EASO Procurement plan 2020, [https://www.easo.europa.eu/sites/default/files/procurements/procurement-plan-2020.pdf], Accessed 13 April 2020, p. 15, item No. 30

103 Response of the EASO. On file with the Author

104 EASO Hotspot Operating Plan to Greece, EASO/COS/2015/677, [https://www.easo.europa.eu/sites/default/files/20150930%20EASO%20Hotspot%20OP%20Greece.pdf], Accessed 13 April 2020

105 EASO/2016/453 tender specifications, para. 1.2

The tender specifications clarify the tasks that are required from the contractor, which can be assigned to three major groups: guarding services' in working areas; screening of persons entering and exiting the hotspots including asylum seekers as well as possible guests; and monitoring supplied services.[106] Nothing in the tender specifications indicates that the contractor would exercise elements of governmental authority. The specifications require requesting the assistance and intervention of the Greek authorities in case of suspect actions.[107]

The framework contract is not particularly helpful for the purposes of this paper. It states however that

"[t]he contractor is responsible for the personnel who carry out the services and exercises its authority over its personnel without interference by the contracting authority. The contractor must inform its personnel that:

(a) they may not accept any direct instructions from the contracting authority; and

(b) their participation in providing the services does not result in any employment or contractual relationship with the contracting authority"[108]

and that

"[t]he contracting authority is not liable for any damage or loss caused by the contractor, including any damage or loss to third parties during or as a consequence of implementation of the FWC."[109]

Both provisions intend to make it more difficult to prove effective control over the PMSC contracted and to limit the liability of EASO in connection with the implementation of the contract.

3.2. Provision of security services for EASO premises in Malta

The second contract is a simpler one concerning the provision of security services for EASO premises in Malta. The tasks required by the contractor are various, but the most relevant for the purpose of the present contribution would be the surveillance and protection of EASO premises and staff, and reception and access

106 *ibid.* para. 1.3

107 *ibid*. para. 1.3.A.3, and p. 5

108 EASO/2016/453 draft framework contract, para. II.4.7

109 *ibid,* para. II.6.1. FWC means framework contract within this quote

control.[110] Similarly to the Greek contract, nothing in the tender specifications indicate that the contractor would exercise elements of governmental authority in this case and the draft framework contract also contains the above-mentioned articles with identical wording.[111]

3.3. Alleged interference with rights of asylum seekers

A number of reports published by various human rights organizations refer to a legal aid organization, which has sued EASO for preventing migrants from accessing certain areas, such as the EASO office, ultimately hampering access to the asylum application process. It has been argued that G4S is assisting EASO in the infringements.[112] Also a number of Members of the European Parliament from the Green Party have asked questions regarding this lawsuit in the European Parliament, among others regarding the contractual relationship between G4S and EASO:

„What is the role of, and what are the exact tasks being carried out on behalf of EASO by, the private company G4S, which has been awarded a direct employment contract by EASO to offer services within a public institution?"[113]

The Commission, in its answer delivered by Migration, Home Affairs and Citizenship Commissioner Dimitris Avramopoulos articulated that

"The Hellenic Police and Army have the responsibility for security in the camps. To ensure secure working conditions, the European Asylum Support Office (EASO) in agreement with the Hellenic Police, engaged a security company, G4S, which screens all who enter the interview area. Given the urgency, EASO used the framework Contract of the Commission Representation in Athens as a basis for the contract."[114]

It is very interesting however that there is no trace of such a lawsuit in the database of the Court of Justice of the European Union, which would have exclusive

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110 EASO/2017/516 tender specifications, pp. 6 – 7

111 EASO/2017/516 draft framework contract, para. II.4.7. and II.6.1

112 Arbogast, L., *Migrant Detention in the European Union: A Thriving Business, Outsourcing and Privatisation of Migrant Detention*, Migreurop, 2016, [https://www.migreurop.org/IMG/pdf/migrant-detention-eu-en.pdf], Accessed 13 April 2020, p. 40

113 Question for written answer E-005528-16 to the Commission [https://www.europarl.europa.eu/doceo/document/E-8-2016-005528_EN.html], Accessed 13 April 2020

114 Answer given by Mr Avramopoulos on behalf of the Commission E-005528/2016 [https://www.europarl.europa.eu/doceo/document/E-8-2016-005528-ASW_EN.html], Accessed 13 April 2020

jurisdiction to deal with claims against an EU agency.[115] The answer on the other hand reinforces the findings above, that G4S does not play a significant role in processing asylum applications. The security in the camps is not even provided by a PMSC but a Member State, namely Greece.

It has to be noted however that PMSCs, more specifically G4S plays an important role in providing security services for the EU within Europe and even for actions in the framework of the Common Foreign and Security Policy.[116] In spite of this, there is no evidence that would suggest that PMSCs play a major role in implementing the European Agenda on Migration, at least at the Union level. The contracts that are currently available for research are common security services which are necessary for the uninterrupted and effective operations of any public institution. In order to be thorough, the present author had surveyed Frontex as well, whether they have similar contracts to EASO, but the agency in its response clarified that they do not use PMSCs for border control activities.

"Registration and identification of the incoming migrants as well as surveillance along EU's external land borders is performed exclusively by border guards coming from various EU Member States, while border surveillance at sea and SAR is performed by coast guard officers and these tasks are not outsourced to private security companies."[117]

Frontex as a rule does not use private companies for building security either with the exception of the office in Catania.[118]

4. CONCLUSIONS

This contribution examined questions of responsibility for an alleged outsourcing of migration and border control related activities of the European Union to PMSCs. While there are a number of ways to attribute the conduct of private en-

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115 Article 268 and 340 TFEU For EU agencies. See Duić, D., *EU agencies procedure – is there a possibility for an inter-agency and cross-sectoral approach in matters of security,* in: Duić, D.; Petrašević, T., (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC I) – Procedural aspects of EU law, Osijek, 2017, pp. 322 – 324

116 Nielson, N., G4S: the EU's preferred security contractor, EU observer [https://euobserver.com/institutional/147608], Accessed 13 April 2020

117 Response of Frontex on file with the Author. For an analysis of these operations see Fink, M., *A 'Blind Spot' in the framework of international responsibility? Third Party Responsibility for Human Rights Violations: The Case of Frontex*, in: Gammeltoft-Hansen, T.; Vedsted-Hansen, J. (eds), Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement, Routledge, London, 2016, pp. 272 – 293

118 Security services for EURTF Catania, Italy, Frontex/OP/293/2017/ag, [https://etendering.ted.europa.eu/cft/cft-display.html?cftId=2769], Accessed 13 April 2020

tities to international organizations, such as exercising elements of governmental authority or effective control over specific operations of private persons, there are inherent difficulties within the procedural aspects of proving such an attributional link.

Turning to the specific issues at hand, there are two contracts concluded between EASO and a PMSC which can be linked to migration control. The subjects of both of these contracts are providing security services for EASO. While the final contracts are unavailable to the public, the tender specifications clearly indicate, that PMSCs do not play a significant role in implementing the European Agenda on Migration, at least on the EU level. Conversely, the services they provide are not unique to migration control, but necessary for the effective operation of EASO. The attribution of the examined conduct is not possible through exercising elements of governmental authority, and proving effective control for a specific operation would also encounter considerable difficulties.

The fact that, at the time this study was conducted, there is no contract in force meeting the above-mentioned criteria does not mean that this will be true for the future as well. As the European Parliament has called for a regulation of private security companies in connection with the Common Foreign and Security Policy,[119] this paper also stresses a need to regulate the conduct of such private corporations. At a bare minimum, clear guidelines are required as to what kind of companies are eligible for participating in EU tenders, but in the end, a Union level regulation could develop a true accountability regime of PMSCs, and fulfill at least the legislative positive 'obligations' of the European Union in the realm of human rights.

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UDK 339.54(71:4-67EU):341.231(4-67EU)
Review article

INVESTMENT COURT SYSTEM UNDER CETA AND THE AUTONOMY OF EU LAW*

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ABSTRACT

The paper focuses on the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, signed in Brussels on 30 October 2016 (CETA), on the investor-state dispute settlement mechanism contained therein and its compatibility with the EU legal system. It analyses the question of autonomy of the EU legal system and the difficult relationship between the Court of Justice of the European Union (CJEU) and other international jurisdictions. It identifies the compatibility conditions of different dispute settlement mechanisms developed in the CJEU's earlier case law; e.g. the allocation of powers fixed by the treaties founding the EU must not be affected, the primacy of EU law and its direct effect must be assured, the mechanism must preserve the role of national courts and tribunals to ensure the full application of EU law in all Member States, the CJEU's exclusive jurisdiction to give binding interpretations of the EU law must be assured and any action by the international tribunal must not have the effect of binding the EU and its institutions, in the exercise of their internal powers. In its opinion 1/17, the CJEU softened its approach. The paper examines how different the Investment Court System under CETA is.

Keywords*: Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA), Investor-State Dispute Settlement, Compatibility with EU law, Requirement to respect the autonomy of the EU legal order*

* The content of this paper does not reflect the official policy or position of the European Union. The views expressed in the paper are those of the author and have not been endorsed by any service of the European Commission. Responsibility for the information and views expressed therein lies entirely with the author. The author would like to thank the anonymous reviewers for their constructive and insightful comments and suggestions

1. INTRODUCTION

This paper focuses on the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, signed in Brussels on 30 October 2016 (CETA).[1] CETA is a free trade agreement that contains not only provisions on the reduction of customs duties and of non-tariff barriers to trade in goods and services, but also rules relating, among others, to investment, public procurement, competition, intellectual property protection and sustainable development. The paper delves into investor-state dispute settlement mechanism contained therein[2] and its compatibility with the EU legal system. In particular, it discusses the recent opinion of the Court of Justice of the European Union (CJEU) on the compatibility of CETA with EU law.[3]

It is difficult to write a paper on investment during the coronavirus outbreak. The containment measures linked to the COVID-19 pandemic have far-reaching social and economic repercussions. As a direct consequence of this crisis, many enterprises will be forced to close or to revise their earnings estimates. Even though there is no precise and reliable data and analysis at the time of writing, in general it is considered that the outbreak will cause a dramatic drop in foreign direct investment flows. The estimations of the fall range from 30 to 40 percent during 2020-2021.[4] Not all sectors will be hit at the same rate and the negative consequences of the crisis will depend on policy responses, which vary from country to country. Having said that, I do not think that the coronavirus crisis will make foreign investment disappear. On the contrary, my impression is that it will strengthen free trade on a global scale, forcing developing countries to provide more protection to foreign investors.[5]

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1 Comprehensive Economic and Trade Agreement (CETA) of 30 October 2016 between the European Union and its Member States, of the one part, and Canada, of the other part, [2017] OJ L 11

2 Chapter Eight (Investment), Section F (Resolution of investment disputes between investors and states) of the CETA

3 CJEU, Opinion 1/17 EU-Canada CET Agreement [2019] EU:C:2019:341, hereafter: Opinion 1/17

4 United Nations Conferences on Trade and Development, *The IPA Observer: Investment Promotion agencies striving to overcome the COVID-19 challenge*, Special issue 8, April 2020, available at: [https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d2_en.pdf?user=46], accessed 20. June 2020

5 To cope with the crises, the most common reaction of governments was to tighten the borders and bolster domestic production of strategic goods; this inevitably affected the free trade of a number of products. On the other hand, international conglomerates have their own strategies to avoid increased protectionism, especially those that heavily invested in developing economies. It is hard to expect that these conglomerates would build plants in their home countries and forgo their profit maximizing strategies of producing in growing economies that offer cheap wages and resources. On a political scale, the COVID-19 pandemic will be used as an opportunity to engage in investing in new technologies that will shape the global economy in the coming years. This investment will serve as a counterbalance to the debt governments are accruing to fight the crisis. The current economic downturn has placed

The official position of the developing countries promoting free trade is that there is a strong relationship between foreign investment and economic growth and that foreign direct investments are critical for developed and emerging market countries.[6] However, there is no real evidence supporting that conclusion.[7] The relationship between foreign investment and economic growth can be seen the other way round, i.e. that foreign investors invest in countries which already have economic growth.[8] Multinational enterprises often use sophisticated promotion techniques, as well as large grants and subsidies, to target valuable investments in both developed and developing nations.[9]

Capital flows[10], including foreign direct investments, have increased significantly in recent decades. As a cause and consequence of globalization and free trade, foreign direct investment flows reached almost USD 1 640 billion in 2015.[11] There are several international organisations that keep track of foreign direct investment

smaller economic operators situated mostly in developing countries and using outdated technology at risk of collapse. Only operators having access to adequate resources will withstand the economic slump. This access to resources can be provided by the advanced economies that will lead the global economic response to the crisis. The developing countries in financing needs will be forced to agree to participate in new free-trade agreements, establishing standards of free trade and investment practices which will strengthen even more the position of the investor. See in this regard Cimmino J. *et al.*, *A Global Strategy for Shaping the Post-COVID-19 World*, The Atlantic Council of the United States, 2020, available at: [https://www.atlanticcouncil.org/wp-content/uploads/2020/07/AC-A-Global-Strategy-for-Shaping-the-Post-COVID-19-World.pdf], accessed 20. June 2020

6 European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy*, COM/2010/0343 final, p. 3, available at: [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF], accessed 20. June 2020

7 Foreign ownership of companies in strategically important industries could lower the comparative advantage of the nation. Loungani, P., Razin, A., *How Beneficial Is Foreign Direct Investment for Developing Countries?*, Finance & Development, *vol.* 38, no. 2, 2001, available at: [https://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm], accessed 20. June 2020

8 For an interesting and provocative view on free trade, see Chang, H.J., *Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism*, Bloomsbury Press, New York, 2008

9 United Nations Conference on Trade and Development, *World Investment Report 2003, FDI Policies for Development: National and International Perspectives, United Nations*, New York and Geneva, 2003, p. 86, available at: [https://unctad.org/en/docs/wir2003light_en.pdf], accessed 20. June 2020

10 Capital flows can take the form of grants, debt and equity investment. The latter can contain control by the investor over the activity, which is a foreign direct investment, or can be without control, which is portfolio equity investment. Williamson, J., *Curbing the Boom-Bust Cycle: Stabilizing Capital Flows to Emerging Markets: Policy Analyses in International Economics*, Institute of International Economics, Washington, 2005, p. 38

11 Organisation for Economic Co-operation and Development, *FDI flows*, available at: [https://data.oecd.org/fdi/fdi-flows.htm], accessed 20. June 2020

statistics, e.g the United Nations Conference on Trade and Development[12], the Organization for Economic Cooperation and Development[13] and the International Monetary Fund[14].

The main ways to attract foreign direct investment are: 1) reducing obstacles by removing restrictions on admission and establishment, as well as on the operations of foreign affiliates; 2) improving standards of treatment of foreign investors by granting them non-discriminatory treatment, vis-à-vis domestic or other foreign investors; 3) protecting foreign investors through provisions on compensation in the event of nationalization or expropriation, on dispute settlement, and on guarantees on the transfer of funds; and 4) promoting foreign direct investment inflows through measures that enhance a country's image, provide information on investment opportunities, offer location incentives, facilitate foreign direct investments by institutional and administrative improvements and render post-investment services.[15] International investment agreements, concluded at bilateral, regional and multilateral levels, are a powerful tool for countries promoting free trade to encourage developing countries to open up their markets in order to obtain more of that investment. They tend to make the regulatory framework more transparent, stable, predictable and secure, and thus provide more security for foreign investments.[16]

There are two types of international investment agreements: the stand-alone investment treaties, which are referred to as bilateral investment treaties, and investment chapters in broader trade and investment agreement, such as the Energy Charter Treaty[17]. Both of them are subject to increasing scrutiny, debate and

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12 United Nations Conference on Trade and Development, Global Investment Trends Monitor (Series), available at: [https://unctad.org/en/Pages/Publications/Global-Investment-Trends-Monitor-%28Series%29.aspx], accessed 20. June 2020

13 Organization for Economic Cooperation and Development, *Foreign Direct Investment Statistics: Data, Analysis and Forecasts*, available at: [http://www.oecd.org/investment/statistics.htm], accessed 20. June 2020

14 International Monetary Fund, available at: [http://data.imf.org/]. See also International Monetary Fund, *Press Release No. 10/510, IMF Publishes First Worldwide Survey of Foreign Direct Investment Positions*, 22.12.2010, available at: [https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr10510], accessed 20. June 2020

15 United Nations Conference on Trade and Development, *World Investment Report 2003*, *op. cit.*, 89

16 *Ibidem*, p. 91

17 Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (98/181/EC, ECSC, Euratom) [1998] OJ L 69. The European Union and Euroatom are members of the Energy Charter Treaty as well as all Member States, except Italy. Italy withdrew from the Energy Charter Treaty and Protocol on Energy Efficiency and Related Environmental Aspects in 2016. See Energy Charter Secretariat, Italy, available at: [https://energycharter.org/who-we-are/members-observers/countries/italy/], accessed 20. June 2020

reform.[18] The most problematic part is the establishment of the investor-State dispute settlement mechanism. It presents a unique system for dispute settlement under international law involving individuals, and it plays a central role when it comes to the fulfilment of obligations arising from these investment treaties.

The Commission has already concluded the negotiation with Canada and of two other free trade agreements with almost identical provisions with Singapore and Vietnam. Similar agreements are being negotiated with Japan, Malaysia, Mexico, Chile, the Philippines, Australia and Indonesia; as well as autonomous investment protection agreements with China and Myanmar (previously known as Burma). The Commission has been authorized by the Council under Article 218 (5) TFEU to negotiate agreements with similar provisions with India, the USA, Morocco, Jordan, Egypt, Tunisia and Russia.[19]

The first part of the paper explores the state of play concerning the investment protection in intra-EU relations, including the new developments on the application of *Achmea* judgement[20] in disputes emerging from the Energy Charter Treaty. It also explores the main characteristics of the dispute settlement mechanism proposed by the Commission.

The second part explores the question of autonomy of the EU legal system and the difficult relationship between the CJEU and other international jurisdictions. This section analyses the opinion of the CJEU. It should be, however, noted that there are two main grounds to examine the CETA's compatibility with EU law, i.e. the question of autonomy and that of non-discrimination. The latter is not included in the analysis, and it is left for later considerations.

These two sections provide adequate material for the final analysis and conclusion.

2. STATE OF PLAY

2.1. Intra-EU relations

At the European Union level, intra-EU treaties which envisage investor-state dispute mechanisms are considered not compatible with the EU law. In fact, in its

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18 Organization for Economic Cooperation and Development, *Business and Finance Outlook 2016, Chapter 8: The impact of investment treaties on companies, shareholders and creditors*, p. 229, available at: [https://www.oecd.org/daf/inv/investment-policy/BFO-2016-Ch8-Investment-Treaties.pdf], accessed 20. June 2020

19 European Commission, *Negotiations and agreements*, available at: [https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements], accessed 20. June 2020

20 CJEU, C-284/16 *Slowakische Republik v Achmea BV* [2018] EU:C:2018:158, hereafter: *Achmea*

Achmea judgement in March 2018 the CJEU established that articles 267 and 344 of the Treaty on the Functioning of the European Union[21] preclude the arbitration clause contained in bilateral investment treaties concluded between Member States.[22] The reason is that such arbitration mechanisms are not compatible with the autonomy of the EU legal order.

The judgement does not affect bilateral investment treaties concluded between Member States and third countries. However, these treaties impinge on the competence of the European Union in investment matters. In this regard and for practical reasons, Regulation No 1219/2012[23] provisionally empowers Member States to maintain their treaties in force.

The European Commission tries to extend the CJEU's reasoning developed in *Achmea* to multilateral investment treaties which contain comparable provisions on the protection of investments. In its views, even though it has been approved by the Council and the Commission, the multilateral Energy Charter Treaty cannot be used as a basis for dispute settlement between EU investors and EU Member States.[24]

However, arbitral tribunals constituted under the rules of the International Centre for Settlement of Investment Disputes (ICSID) and established for intra-EU disputes on the basis of Energy Charter Treaty did not follow Commissions' arguments. On the contrary, they rejected the application of *Achmea* judgement, underlying that the judgement applied only to bilateral investment treaties, and not to multilateral ones like the Energy Charter Treaty.[25]

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21 Treaty on the Functioning of the European Union, Consolidated version [2012] OJ C 326/47

22 For a detailed analysis see Materljan, I., *Investment Protection and the EU Law*, International Commercial Arbitration Review (Вестник международного коммерческого арбитража), Vol. 17, No. 2/2018, pp. 114-143, available at: [http://arbitrationreview.ru/wp-content/uploads/2019/04/!vestnik_MKA_cover_2_2018.pdf], accessed 20. June 2020

23 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, [2012] OJ L 351

24 European Commission, *Fact Sheet: Commission provides guidance on protection of cross-border EU investments – Questions and Answers*, 19 July 2018, available at: [http://europa.eu/rapid/press-release_MEMO-18-4529_en.htm], accessed 20. June 2020

25 ICSID, Case No. ARB/13/31, *Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV v Kingdom of Spain*; ICSID, Case No. ARB/12/12, *Vattenfall AB and others v Federal Republic of Germany*; ICSID, Case No. ARB/14/1, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*; ICSID Case No.ARB/13/36, *Eiser Infrastructure Limited and Energia Solar Luxembourg Sarl v. Kingdom of Spain*; ICSID, Case No. ARB/14/3, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*

The same approach on arbitral tribunals was employed under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).[26] In this regard, the case *Novenergia v. Kingdom of Spain*[27] deserves special attention. The award ordering Spain to pay a compensation of € 53,3 million for the breach of the Energy Charter Treaty is challenged before the Svea Court of Appeal. Spain argues that the arbitral tribunal exceeded its jurisdiction in hearing the case, basing its argument on *Achmea* judgement. The Swedish Court decided to stay any enforcement of the award, making it impossible for the investors to enforce it, while the challenge is pending. It is to be seen whether the Svea Court of Appeal will refer the case to the CJEU by way of a preliminary reference under Article 267 TFEU.[28]

In January 2019, Member States issued three declarations concerning the legal consequences of *Achmea* in relation to further intra-EU investor-state arbitrations. The first declaration is signed by the majority of Member States (22 of them). They undertook to: 1) inform arbitral tribunals in all pending arbitrations about the legal consequences of *Achmea*; 2) inform "the investor community" that no new intra-EU investment arbitration proceedings should be initiated; 3) request their national courts and any third country courts to set aside and/or not to enforce any intra-EU investor-state awards, due to a lack of valid consent to arbitration; 4) procure that any state entities which have brought investment arbitration claims against another Member State will withdraw those claims; and 5) terminate all intra-EU BITs by way of a plurilateral treaty or (if more expedient) bilaterally, ideally by 6 December 2019.[29]

Member states Finland, Luxembourg, Malta, Slovenia and Sweden signed a second declaration. These Member States recognised that the question of *Achmea*'s applicability to the Energy Charter Treaty is being considered in the *Novenergia v. Kingdom of Spain* appeal. Thus, they will not take the actions specified in the first declaration with regard to intra-EU claims unless and until the CJEU has deter-

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26 SCC, Case No. V 062/2012, *Charanne B.V. and Construction Investments S.á.r.l v. Kingdom of Spain*; SCC, Case No. V 2013/153, *Isolux Netherlands, BV v. Kingdom of Spain*

27 SCC, Case No. 063/2015, *Novenergia v. Kingdom of Spain*

28 Dahlquist, J., Spain challenges Novenergia arbitral award in Swedish court, relying on the Achmea judgment, 23 May 2018, available at: [https://aquiescencia.net/2018/05/23/spain-challenges-novenergia-arbitral-award-in-swedish-court-relying-on-the-achmea-judgment/], accessed 20. June 2020

29 Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the legal consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, available at: [https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf], accessed 20. June 2020

mined whether the *Achmea* principles apply equally to claims under the Energy Charter Treaty.[30]

Hungary issued a third declaration, expressly stating that *Achmea* does not apply to claims under the Energy Charter Treaty.[31]

It follows that, at least concerning the energy sector, an investor can bring an intra-EU claim under the Energy Charter Treaty before an arbitral tribunal, which will most likely accept its jurisdiction. The problem that can arise is how to enforce a reward delivered by an arbitration tribunal under the rules of that multilateral treaty. It is clear from the first and the second declarations that the majority of Member States will not enforce such an award. It seems that only Hungary is unlikely to contest jurisdiction in, and enforcement of, an intra-EU arbitral claim on *Achmea* grounds.

In these conditions, an investor can always try to enforce an award outside the European Union or to obtain protection before national courts of the sued Member State.[32]

On 5 May 2020, most of the Member States (apart from Austria, Finland, Sweden and Ireland) signed the Agreement for the termination of bilateral investment treaties between the Member States of the European Union.[33] According to this agreement, all bilateral investment treaties listed in the annexes are thereupon terminated (including their sunset clauses that are deprived of legal effects). Consequently, arbitration clauses included in those agreements cannot serve as a basis for future litigation. It must be however noted that the discussion on the applicability of the *Achmea* judgement to intra-EU disputes is far from over. In this respect, two cases should be briefly examined.

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30 Declaration of the Representatives of the Governments of the Member States of 16 January 2019 on enforcement of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, available at: [https://www.regeringen.se/48ee19/contentassets/d759689c-0c804a9ea7af6b2de7320128/achmea-declaration.pdf], accessed 20. June 2020

31 Declaration of the Representative of the Governments of Hungary of 16 January 2019 on the legal consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, available at: [http://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf], accessed 20. June 2020

32 European Commission, Press release, *Capital Markets Union: Commission provides guidance on protection of cross-border EU investments*, 19 July 2018, available at: [http://europa.eu/rapid/press-release_IP-18-4528_en.htm?locale=en], accessed 20. June 2020

33 Agreement for the termination of bilateral investment treaties between the Member States of the European Union, available at: [https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200505-bilateral-investment-treaties-agreement_en.pdf], accessed 20. June 2020

In the *Micula* case, the ICSID ruled that Romania breached the bilateral investment treaty concluded with Sweden and awarded the investors ca. 178 millions of euros of damages.[34] Considering the payment of arbitral award as illegal state aid[35] the European Commission imposed on Romania not to implement the said award.[36] Romania requested the annulment of the award, but the ICSID rejected the claim.[37] In the meantime, the investors requested before the General Court the annulment of the Commission's decision and obtained it. The General Court upheld their application considering that EU State aid law was inapplicable in the present situation.[38] The decision was appealed by the Commission before the CJEU and the case is still pending.[39]

The investors lodged applications for recognition and execution of the arbitral award before a number of national courts, among others in Belgium and the United Kingdom. The Brussels Court of Appeal suspended the enforcement of an arbitral award and requested a preliminary ruling from the CJEU regarding the impact of the Commission's decision on the Member States' obligation to enforce arbitral awards.[40] Unlike the Belgian court, the UK Supreme Court lifted the stay on the enforcement of the award.[41] When balancing the duties under EU law, especially the sincere cooperation duty, on the one hand, and the UK's international obliga-

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34 ICSID Case No ARB/05/20, *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL* v *Romania*, Final Award of 11 December 2013

35 European Commission, Press release, State aid: *Commission refers Romania to Court for failure to recover illegal aid worth up to €92 million*, 7 December 2018, available at: [http://europa.eu/rapid/press-release_IP-18-6723_en.htm], accessed 20. June 2020

36 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — *Arbitral award Micula v Romania of 11 December 2013* (notified under document C(2015) 2112), [2015] OJ L 232

37 ICSID, Case No. ARB/05/20 Annulment Proceedings, *Ioan Micula, Viorel Micula and others* (Respondents on Annulment) (Claimants) v. Romania (Applicant on Annulment) (Respondent), Decision on Annulment of 26 February 2016

38 General Court of the European Union, Cases T-624/15, T-694/15 and T-704/15, European Food SA and Others v European Commission [2019] ECLI:EU:T:2019:423

39 CJEU, InfoCuria, *Case C-638/19 P, appeal brought on 27 August 2019 by European Commission against the judgment of the General Court (Second Chamber, Extended Composition) delivered on 18 June 2019 in Case T-624/15: European Food e.a. v Commission*, available at: [http://curia.europa.eu/juris/document/document.jsf?text=&docid=219134&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=6657449], accessed 20. June 2020

40 Cour d'appel Bruxelles, Arrêt du 12 mars 2019, 2016/AR/393 joint avec 2016/AR/394, available at: [https://jusmundi.com/en/document/decision/fr-ioan-micula-viorel-micula-and-others-v-romania-i-arret-de-la-cour-dappel-de-bruxelles-tuesday-12th-march-2019], accessed 20. June 2020

41 Supreme Court of the United Kingdom, Judgement of 19 February 2020, *Micula and others (Respondents/Cross-Appellants) v Romania (Appellant/Cross-Respondent)*, UKSC 2018/0177, [2020] UKSC 5, available at: [https://www.supremecourt.uk/cases/docs/uksc-2018-0177-judgment.pdf], accessed 20. June 2020_

tions under ICSID Convention, on the other, the UK Supreme Court decided in favour of the latter. Some commentators suggested that with this decision, it made the UK a fertile ground for the enforcement of intra-EU awards.[42]

The second case concerns *PL Holdings S.à.r.l. v Republic of Poland.* The foreign investor, PL Holdings, had acquired shares in two Polish banks, which merged making the investor the owner of 99% of the shares in the new bank. The Polish Financial Supervision Authority decided to cancel PL Holding's voting rights for its shares in the bank and forced it to sell them. The arbitral tribunal awarded the investor damages (ca. 150 million of euros) stating that Poland violated the bilateral investment treaty signed with the Belgium-Luxembourg Economic Union.[43] Referring to the *Achmea* case, Poland challenged the award before the Swedish court stating that the arbitration clause contained in the bilateral investment treaty is contrary to EU law. However, the Swedish Court of Appeal rejected Poland's claim.[44] Poland appealed and the Supreme Court[45] decided to stay the proceedings and to request a preliminary ruling from the CJEU.[46]

It is clear that the dispute settlement clause contained in the bilateral investment treaty was invalid under EU law. CJEU considers submission of such disputes to an arbitral tribunal contrary to EU law. The Swedish Supreme Court tries to find a way to circumvent the outcome resulting from the strict application of *Achmea*. With its referral, it asked the CJEU whether the investor's request for arbitration could be considered as an offer to the host state to accept jurisdiction in accordance with the principles set out in *Achmea* in respect to the party autonomy commercial arbitration. Some commentators noted that it is not likely that the CJEU will relax the strict rule contained in *Achmea*.[47] In any case, the story

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42 Croisant, G., *Micula Case: The UK Supreme Court Rules That The EU Duty Of Sincere Co-operation Does Not Affect The UK's International Obligations Under The ICSID Convention*, Kluwer Arbitration Blog, 20 February 2020, available at: [http://arbitrationblog.kluwerarbitration.com/2020/02/20/micula-case-the-uk-supreme-court-rules-that-the-eu-duty-of-sincere-co-operation-does-not-affect-the-uks-international-obligations-under-the-icsid-convention/], accessed 20. June 2020

43 SCC, Case No. V 2014/163, *PL Holdings S.à.r.l./. Republic of Poland*, Partial award of 28 June 2017

44 Svea Court of Appeal, Judgement of 22 February 2019, T 8538-17, T 12033-17, unofficial translation, available at: [https://www.italaw.com/sites/default/files/case-documents/italaw10447.pdf], accessed 20. June 2020

45 Högsta Domstolen, *Republiken Polen v. PL Holdings S.Á.R.L.*, Begäran om förhandsavgörande den 12 december 2020, T 1569- 19, available at: [https://www.italaw.com/sites/default/files/case-documents/italaw11099.pdf], accessed 20. June 2020

46 The case is registered under C-109/20. The translation is available here: [http://curia.europa.eu/juris/showPdf.jsf?text=&docid=225602&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=11270533], accessed 20. June 2020

47 Lowther, J., *Keeping Intra-EU ISDS Alive: The Supreme Court of Sweden Requests Preliminary Ruling from the CJEU on Validity of Arbitration Agreement in Light of Achmea Decision*, Kluwer Arbitration

started with *Achmea* is far from over, and pending cases at the CJEU will clarify the issue further.

2.2. Extra-EU relations

When it comes to agreements concluded between the European Union and third countries, the Commission seems to have a different position. Its approach is that these treaties do not undermine the autonomy of the legal system established by the Treaties. Under that background, it started to negotiate, on behalf of the EU, a convention establishing a multilateral court for the settlement of investment disputes.[48]

The Lisbon Treaty conferred an exclusive competence on the European Union in matters of foreign direct investment by making it part of the common commercial policy.[49] Concerning other types of investments, the European Union has shared competence with the Member States.[50] In fact, in its Opinion 2/15, which concerned the European Union's competence regarding the free trade agreement with Singapore, the CJEU explained that, there are two areas covered in the agreement in which the European Union does not have exclusive competence: the field of non-direct foreign investment and the investor-State dispute settlement regime. Those areas, therefore, fall within the shared competence of the European Union and the Member States.[51]

It should be noted that Opinion 2/15 relates only to the question whether the European Union has exclusive competence, and not to whether the content of the agreement is compatible with the EU law. It does not cover the issue of the jurisdiction of the CJEU in the settlement of disputes within the European Union relating to the interpretation of the EU law.

The European Commission is heading towards a multilateral investment court. Its idea is to create a permanent body that would settle investment disputes under

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Blog, 5 March 2020, available at: [http://arbitrationblog.kluwerarbitration.com/2020/03/05/keeping-intra-eu-isds-alive-the-supreme-court-of-sweden-requests-preliminary-ruling-from-the-cjeu-on-validity-of-arbitration-agreement-in-light-of-achmea-decision/?doing_wp_cron=1587814334.0948209762573242187500], accessed 20. June 2020

48 Council of the European Union, Press release, *Multilateral investment court: Council gives mandate to the Commission to open negotiations*, 20 March 2018, available at: [https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/], accessed 20. June 2020

49 Article 3(1)(e), articles 206 and 207 of TFEU

50 CJEU, Opinion 2/15 *Free Trade Agreement with Singapore* [2017] EU:C:2017:376, paragraph 243

51 *Ibidem*, disposition

future and existing investment treaties. This multilateral court system would eventually replace the traditional arbitration framework.[52]

It can be argued that the traditional arbitration framework could be perceived as "private justice" and, therefore, inappropriate for resolving issues involving the regulatory autonomy of states. Against this background, arbitrators are seen as lacking neutrality, lacking experience in public international and national law, and having vested interests. Concerning the structure of the arbitration framework, there is no form of appeal that could remedy errors of law or mistakes in fact finding, and the whole system is too expensive.[53]

It is evident that a multilateral reform is preferable to a bilateral approach. Meanwhile, the permanent court system concerns only trade and investment agreements concluded by the European Union, on the one hand, and the third country, on the other. It does not concern intra-EU bilateral investment treaties, and its aim is not replacing the *ad hoc* arbitral mechanism established by these treaties.[54] The immediate consequence of such approach is different treatment of investors established in the European Union and investors established in third countries.[55]

Investors established in the European Union can only rely on the system of investment protection provided by the EU law, i.e. protection that must be provided before national courts. From the practical standpoint, the investor will not be able to rely on a one-size-fits-all protection. Even though the EU law is applicable to all Member States, there are hurdles as the national court systems operate differently due to their distinctive procedural autonomy.

2.3. The importance of CETA

In 2015, Cecilia Malmström, Commissioner for Trade, announced: "*CETA is an agreement with a major economic player. In economic terms, Canada is as big as Rus-*

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52 European Commission, President Jean-Claude Juncker, *State of the Union Address: A Multilateral Investment Court, A new system for resolving disputes between foreign investors and states in a fair and efficient way*, 13 September 2017, available at: [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf], accessed 20. June 2020

53 Brown, C.M., *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches*, ICSID Review, *vol.* 32, Issue 3, 2017, pp. 673–690

54 Council of the European Union, *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17*, 1 March 2018, footnote 1, available at: [http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf], accessed 20. June 2020

55 Advocate General Bot did not share that point of view. See Opinion of Advocate General Bot, Opinion 1/17, *CETA EU-Canada* [2019], EU:C:2019:72 (hereafter: Opinion of Advocate General), paragraph 185 and the following

sia. It's bigger than Spain. It's bigger than Sweden, Belgium, Austria and the Czech Republic combined. It's therefore a vital part of the platform of agreements we are building to make sure the EU is properly connected to the global economy."[56]

CETA was agreed in October 2016 after a long public debate. Its main goal is the trade liberalization between the EU and Canada by removing a vast majority of custom duties as well as other barriers to trade. Before its conclusion, the Commission consulted the relevant public, especially concerning the investor-state dispute settlement mechanism.[57]

CETA is not yet ratified by all Member States. Not only is the ratification process legally and politically difficult and time-consuming[58], some Member States have not yet initiated it[59] and some of them even announced that they would not ratify the agreement.[60]

Legally, however, as an international agreement concluded by the European Union, CETA is considered to be a legal act of EU institutions.[61] CETA covers the exclusive and shared competence of the European Union. Even though it is not completely in force yet[62], regarding the exclusive competence, CETA is binding for the institutions of the Union and its Member States and, therefore, its dispositions should prevail over provisions of secondary EU legislation.[63] In this respect,

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56 European Commission, Cecilia Malmström, Commissioner for Trade, *Speech, CETA: Europe's Next Trade Step, Workshop on the EU-Canada Comprehensive Economic and Trade Agreement (CETA)*, 9 Decembar 2015, available at: [http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154022.pdf], accessed 20. June 2020

57 European Commission, *Staff Working Document, Report, Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP),* available at: [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf], accessed 20. June 2020

58 Gantz D. A. *The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreements?*, Loyola University Chicago Law Journal, *vol.* 49, 2017, pp. 361 to 385

59 Laman L., *Libre-échange: l'exécutif reporte la ratification du CETA*, Mediapart, 21 Septembre 2018, available at: [https://www.mediapart.fr/journal/international/210918/libre-echange-l-executif-reporte-la-ratification-du-ceta], accessed 20. June 2020

60 Sisto A.; Jones G., *Italy says it won't ratify EU-Canada trade deal; Canada plays down threat*, Reuters, 13 July 2018, available at: [https://www.reuters.com/article/us-italy-canada-trade/italy-says-it-wont-ratify-eu-canada-trade-deal-canada-plays-down-threat-idUSKBN1K318Q], accessed 20. June 2020_

61 Popescu R.-M., *The jurisdiction of the Court Of Justice of the European Union to deliver a cancellation judgment regarding the international agreements to which the EU is party*, LESIJ - Lex ET Scientia International Journal, Issue 1, 2016, pp. 92-100

62 The trade related part of the agreement has provisionally entered into force on 21 September 2017. See Article 30.7 of the CETA

63 CJEU, C-344/04, *IATA and ELFAA* [2006] EU:C:2006:10, paragraph 35

the Commission and the Council formulated a statement[64] concerning the provisional application of certain CETA's dispositions.

Once in force, CETA will replace all extra-EU bilateral investment treaties concluded between the Member States and Canada.[65]

According to its case law, it is the CJEU who has the monopoly over the interpretation of acts adopted by the EU institutions as well as of the decisions adopted by the authority established by the international agreement.[66] Therefore, with its entry into force, CETA will be completely integrated into the EU legal order, including the area of shared competence, and it will form part in the same way as other sources of the EU legislation.[67] It is for this reason that the opinion of the CJEU concerning CETA's compatibility with the EU law is important.

CETA has two separate components, i.e. substantive and procedural rules. The latter pertains to investor-state dispute settlement mechanism. The investor-state dispute settlement mechanism enables disagreements to be settled where an investor considers that a Member State has infringed its obligations under the CETA. The investor has the opportunity to choose to bring a dispute against the Member State in which the investment was made before its courts or before the CETA Tribunal. In other words, the investor has the privilege of forum-shopping, i.e. to choose the jurisdiction which suits him better.[68]

CETA's principal goal is to promote cross-border investment between the European Union and Canada by affording a high level of protection to investors. This is done through substantive provisions. In order to achieve that goal, the Investment Court System plays the central part. In fact, the establishment of CETA's tribunals is the first step to implement the reform of the investor-state dispute settlement system developed by the Commission.[69] Eventually, the CETA Investor-State Dispute Settlement mechanism would result in the establishment of the Investment Court System. At the occasion of the signing of CETA, the contracting parties

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64 Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, [2017] OJ L 11

65 Annex 30-A to the CETA

66 CJEU, C-192/89, *Sevince* [1990] EU:C:1990:322, paragraph 10

67 Opinion of Advocate General, paragraph 60

68 It seems that the CETA allows an investor to file a claim to before the CETA Tribunal after having unsuccessfully litigated before national courts. Article 8.10 of the CETA

69 European Commission, *Concept paper, Investment in TTIP and beyond – the path for reform, Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*, available at: [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF], accessed 20. June 2020

established a joint interpretative instrument.[70] It states that CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals.[71]

The CETA investor-state dispute settlement mechanism is regulated by Chapter 8, Section F of the CETA, entitled "Resolution of investment disputes between investors and states".[72] Section F provides for the establishment of two jurisdictions, the Tribunal and the Appellate Tribunal. It also contains the procedural framework for the settlement of disputes between an investor of one Party and the other Party, concerning the interpretation and application of the CETA. Notwithstanding its title, the mechanism also covers cases in which a Canadian investor submits a claim against the European Union.

It should be noted that the European Union supports the Commission's initiative of a global reform of the model for settling disputes between investors and States. The overall idea is to establish a permanent multilateral court.[73] For now, the CETA is focused on two main aspects, i.e. the limitation of arbitration tribunals' broad interpretation of the agreement by explicitly referring to the right of the parties to regulate in the general interest, and the will to move towards a judicial system characterised, inter alia, by the independence and the impartiality of its members and the transparency of its procedures.[74]

Until now, the CJEU showed little compassion for extra-EU dispute settlement mechanisms.[75] However, its opinion 1/17 concerning the CETA shows that the CJEU is willing to accept such a mechanism. No doubt, this opinion will have a strong impact on the Commission's plans to establish a permanent multilateral court. The next chapters will explore how different the Investment Court System under CETA is in relation to intra- and extra-EU dispute settlement mechanisms scrutinized by the CJEU.

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70 Joint Interpretative Instrument on the Comprehens ive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States [2017] OJ L 11

71 Ibidem, paragraph 6(f)

72 The relevant articles are Articles 8.18 to 8.45 of the CETA

73 Council of the European Union, *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes*, 12981/17 ADD 1 DLC 1, 1 March 2017, available at: [http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf], accessed 20. June 2020

74 Opinion of Advocate General, paragraph 21

75 This will be explained later in the paper

3. AUTONOMY OF THE EU LAW

3.1. Autonomy of the EU legal order

The autonomy of the EU law is the key element of the EU legal structure. It was first alluded to in *Costa v Enel*[76], where the CJEU referred to "an independent source of law". From the very beginning, especially in its famous case *Van Gend en Loos*[77], the CJEU established the autonomy of the EU law as a new legal order independent from any form of national or international recognition.[78] This new legal order differs from any other treaty-based system within international law. The principal elements of that legal order are direct effect and primacy. According to the CJEU, it is by virtue of those elements that the EU law is distinguished from international law. The CJEU developed further the concept for both internal (case *MOX-Plant*[79]) and external relations (cases *GATS*[80], *Patent Court*[81] and *Kadi*[82]). These cases are chosen because they show the negative stance of the CJEU towards any possibility of limiting its monopoly to provide a definitive interpretation of EU law.

Internally, those elements ensure that the EU law is applied uniformly and effectively across the European Union and enforced in Member States in different legal contexts. At a national level, national courts are responsible for the implementation of the EU law. A system of cooperation between the CJEU and national courts is established, according to which national courts are advised and sometimes obliged to ask the CJEU for the interpretation of the EU law.[83] Through this system of autonomous interpretation of EU law, the CJEU protects its independence and monopoly to interpret EU law. Developed in that way, the concept of autonomy covers both procedural and substantive issues.

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76 CJEU, C-6/64 *Flaminio Costa v E.N.E.L.* [1964] EU:C:1964:66

77 CJEU, C-26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] EU:C:1963:1

78 There are two forms of recognition of the EU law; formal recognition, when the EU law is incorporated in national law, and practical recognition, when judges apply the EU law. Eckes C., International Rulings and the EU Legal Order: Autonomy as Legitimacy?, in Cremona M.; Thies A.; Wessel R. A. (editors), The European Union and International Dispute Settlement, Hart Publishing, Oxford and Portland, Oregon, 2017, p. 167

79 CJEU, C-459/03 *Commission v Ireland* [2006] EU:C:2006:345

80 CJEU, Opinion 1/94 *Agreements annexed to the WTO Agreement* [1994] EU:C:1994:384

81 CJEU, Opinion 1/09 *Agreement creating a unified patent litigation system* [2011] EU:C:2011:123

82 CJEU, Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] EU:C:2008:461

83 CJEU, Opinion 2/13 *Accession of the EU to the ECHR* [2014] EU:C:2014:2454, paragraph 176

Externally, there is autonomy of the EU legislation from international and national laws. The CJEU has defined autonomy in such a way that the European Union may be a construction of international law; however, its internal legal order contains its own rules that replace the principles and mechanisms of international law.[84] This autonomy is most relevant in the relationship and commitments of the European Union and its Member States. In case of conflicts between the EU internal rules and obligations resulting from international law, the EU law is given priority over conflicting international agreements and other international obligations.[85]

The dualist approach applied by the CJEU was severely criticized[86] as there was no agreed directive as to how the autonomy of the EU law is supposed to operate at international level. Many international law scholars contest the absolute autonomy of the EU law as its ties with the international law is one of its highly specialized sub-systems[87], while others do not consider it as international law at all.[88]

In the CJEU case law, external jurisdictions are often perceived as a possible menace to the EU legal order. When it comes to committing the EU to an international dispute settlement mechanism, the CJEU makes it clear that international agreements that would allow such a possibility are incompatible with the EU law.[89] The reason for this is that these mechanisms could question its role as a final judge over matters that arise not only within the EU legal order (the relationship between EU institutions, between Member States and the European Union, between individuals and the European Union, and between individuals and Member States) but also between international law and the EU law.

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84 Molnár T., *The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States*, Hungarian Yearbook of International Law and European Law, 2015 pp. 438-439

85 In *Kadi* the CJEU stated that "an international agreement cannot affect the allocation of responsibilities defined in the Treaties, and consequently, the autonomy of the [EU] legal system". CJEU, Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] EU:C:2008:461, paragraph 282

86 de Burca G., *The European Court of Justice and the International Legal Order After Kadi*, Harvard International Law Journal, Volume 51, Number 1/2010, pp. 1-49

87 Cremona M., de Witte B. (editors), *EU Foreign Relations Law – Constitutional Fundamentals*, Oxford, Hart Publishing, 2008

88 Weiler J. H. H., Haltern U. R., *Autonomy of the Community Legal Order – Through the Looking Glass*, Harvard International Law Journal, Volume 37, Number 2/1996, pp. 421-422

89 CJEU, Opinion 1/91 *EEA Agreement — I* [1991] EU:C:1991:490; Opinion 2/94 *Accession by the Community to the ECHR* [1996] EU:C:1996:140; Opinion 1/00 *Agreement on the establishment of a European Common Aviation Area* [2002] EU:C:2002:231, Opinion 2/13 Accession of the EU to the ECHR [2014] EU:C:2014:2454

When it comes to mechanisms where the EU is not a contracting party, they are not a problem as long as the primacy of the EU law is respected. In that regard, questions concerning the EU law could be considered by external jurisdictions. It follows from the earlier case law, where the CJEU examined the possibility of enforcing an award issued by a commercial arbitration[90], that the EU law could be discussed before and applied by external jurisdictions, as long as the CJEU has the last word over its interpretation and application. The possibility to use the EU law was conditioned by the need to ensure effective control of the application of the EU law by these external forums. This control depends on two things: could the external forum be considered a tribunal of a Member State in order to request a preliminary ruling on the interpretation of EU law; and if not, could the question of application of the EU law be raised at a later stage, e.g. when executing the arbitral award?[91]

As regards to investment arbitration tribunals, in *Achmea* the CJEU stated that they are not courts or tribunals of Members States and are thus not allowed to initiate preliminary ruling procedures. In that respect, Advocate General Wathelet expressed his position that an arbitral tribunal should be allowed to refer preliminary questions to the CJEU.[92]

Not only did the CJEU not follow that line of arguments, but it also went a step further in the *Achmea* case. The CJEU was not willing to allow political actors to submit the domestic legal order to the binding force of rulings awarded by external judicial bodies, even when the application of the EU law was not at stake.[93]

3.2. Compatibility conditions established in the CJEU's case law

The CJEU was called on several occasions to examine the compatibility of different international dispute settlement mechanisms with the EU law.

As a general rule, it maintains the view that these mechanisms are not incompatible with the EU legal system. It has stated that an international agreement providing

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90 CJEU, C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] EU:C:1999:269

91 Von Mehren R. B., *The Eco-Swiss Case and International Arbitration*, Arbitration International, *vol.* 19, Issue 4, 2003, pp. 465-470

92 Opinion of Advocate General Wathelet, C-567/14 *Genentech Inc. v Hoechst GmbH, formerly Hoechst AG, Sanofi-Aventis Deutschland GmbH* [2016] EU:C:2016:177; opinion of Advocate General Wathelet, C-284/16 *Slowakische Republik v Achmea BV*, [2017] EU:C:2017:699

93 This conclusion is reached as a result of reasoning by analogy. *Achmea* did not deal with issues of EU law. Since EU law forms part of the Member States' domestic legal order, any investment disputes outside the EU judicial system would conflict with EU law, because potentially all cases might involve the interpretation or application of EU law. See also de Sadeleer N., The End of the Game: The Autonomy of the EU Legal Order Opposes Arbitral tribunals under Bilateral Investment Treaties Concluded between two Member States, European Journal of Risk Regulation, Vol. 10, no.1/2019, pp. 355-370

for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the CJEU, is not in principle incompatible with the EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court, which is created or designated by such agreements with regards to the interpretation and application of their provisions.[94] However, in the end, each of them concluded that the particular mechanism in question could adversely affect the EU law autonomy.

In order for an international dispute settlement mechanism to be compatible with the EU law, the CJEU has established a number of conditions which should be met.[95]

Firstly, the protection of autonomy of the EU law must be provided, observance of which is ensured by the CJEU. It is important that the international agreement in question does not affect the allocation of powers fixed by the Treaties. According to Article 344 TFEU, the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.[96]

Secondly, the primacy of the EU law and its direct effect must be assured. Those characteristics of the EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and its Member States to each other.[97]

Thirdly, the international agreement in question must not adversely affect the judicial system established by the Treaties, intended to ensure consistency and uniformity in the interpretation of the EU law. It cannot get around a system that is strongly marked by the quintessential role of the preliminary reference procedure.[98]

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94 CJEU, Opinion 1/91 EEA Agreement — I [1991] EU:C:1991:490, paragraphs 40 and 70; opinion 1/09 *Agreement creating a unified patent litigation system* [2011] EU:C:2011:123, paragraphs 74 and 76; opinion 2/13 *Accession of the EU to the ECHR* [2014], EU:C:2014:2454, paragraphs 182 and 183; C-284/16, *Slowakische Republik v Achmea* BV [2018] EU:C:2018:158, paragraph 57

95 An international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order. CJEU, Opinion 2/13 *Accession of the EU to the ECHR* [2014] EU:C:2014:2454, paragraph 183

96 CJEU, Opinion 2/13 *Accession of the EU to the ECHR* [2014] EU:C:2014:2454, paragraph 201; C-284/16 *Slowakische Republik v Achmea BV* [2018] EU:C:2018:158, paragraph 32

97 CJEU, Opinion 2/13 *Accession of the EU to the ECHR* [2014] EU:C:2014:2454, paragraphs 165 to 167 C-284/16 *Slowakische Republik v Achmea BV* [2018] EU:C:2018:158, paragraph 33

98 CJEU, Opinion 2/13 *Accession of the EU to the ECHR* [2014] EU:C:2014:2454, paragraph 174; C-284/16 *Slowakische Republik v Achmea BV* [2018] EU:C:2018:158, paragraph 35

Fourthly, it must preserve the role of national courts and tribunals to ensure the full application of the EU law in all Member States and to ensure judicial protection of the rights of individuals under that law.[99]

Fifthly, to be compatible with the EU law, the international agreement must be compatible with the principles of mutual trust and sincere cooperation.[100] The EU law is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation, to ensure in their respective territories the application of and respect for the EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU.[101]

Sixthly, the CJEU's exclusive jurisdiction to give binding interpretations of the EU law must be assured. This is done by assuring the preliminary ruling procedure, which is the keystone of the judicial system established by the Treaties. It sets up a dialogue between the CJEU and the courts and tribunals of the Member States, which secures uniform interpretation of the EU law, its consistency, its full effect, its autonomy, and the particular nature of the law established by the Treaties.[102]

Lastly, any action by the bodies that have been given decision-making powers by the international agreement must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation

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99 CJEU, Opinion 1/09 *Agreement creating a unified patent litigation system* [2011], EU:C:2011:123, paragraph 68; Opinion 2/13 *Accession of the EU to the ECHR* [2014], EU:C:2014:2454, paragraph 175; C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117, paragraph 33; C-284/16 *Slowakische Republik v Achmea BV* [2018] EU:C:2018:158, paragraph 36

100 Prechal A., *Mutual Trust before the Court of Justice of the European Union*, European Papers, Volume 2, Issue 1/2017, pp. 75 - 92; Van Elsuwege P., *The duty of sincere cooperation (Art. 4(3) TEU) and its implications for the national interests of EU Member States in the field of external relations*, UACES conference paper, Bilbao, 2015, p. 5, available at: [https://www.uaces.org/documents/papers/1501/Van%20Elsuwege.pdf], accessed 20. June 2020; Neframi E., *The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations*, Common Market Law Review, *vol.* 47, no. 2, 2010, pp. 323-359

101 CJEU, Opinion 2/13 *Accession of the EU to the ECHR* [2014] EU:C:2014:2454, paragraphs 168 and 173; C-284/16 *Slowakische Republik v Achmea BV* [2018] EU:C:2018:158, paragraph 34

102 CJEU, Opinion 2/13 *Accession of the EU to the ECHR* [2014] EU:C:2014:2454, paragraph 176; C-284/16 *Slowakische Republik v Achmea BV* [2018] EU:C:2018:158, paragraph 37

of the rules of the EU law.[103] On the contrary, the bodies in question cannot disregard the binding nature of decisions of the CJEU within the EU legal order or its binding case-law.[104]

Assessing the international dispute settlement mechanisms under scrutiny, the CJEU did not find the accession to the European Court of Human Rights, the Court of Justice of the European Free Trade Association States, the European Patent Court, and the investor-state under intra-EU bilateral investment treaties compatible with the autonomy of the EU legal system.

In the opinion of the Advocate General it was announced that the assessment of the investment court system under CETA will differ from other types of dispute settlement mechanisms. In fact, the Advocate General considered that *Achmea*, the main obstacle to recognition of external jurisdictions, is not applicable in the current case. He pointed out that the preservation of the autonomy of the EU legal order is not a synonym for autarchy and it requires merely that the integrity of that legal order is not undermined.[105] The next chapter examines how the dispute settlement mechanism under CETA differs from other mechanisms that did not resist the CJEU's scrutiny.

3.3. How different is the mechanism established by the CETA?

3.3.1. *No interference with EU law*

The system of rules established by the CETA runs in parallel with the system of investment protection (substantive and procedural) established by EU law.[106] Focusing on the judicial systems put in place in the Member States and in Canada, the CJEU observed that the dispute settlement mechanism under CETA stands outside those systems and that it cannot be considered to form part of the judicial system of either of the parties.[107]

If we compare the reasoning of the Advocate General and the CJEU in *Achmea*, the fact that the investment arbitration tribunal established by a bilateral investment treaty could not be considered a court or tribunal of a Member State was

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103 CJEU, Opinion 2/13 *Accession of the EU to the ECHR* [2014] EU:C:2014:2454, paragraph 184; Opinion 1/00 *Agreement on the establishment of a European Common Aviation Area* [2002] EU:C:2002:231, paragraphs 12 and 13

104 CJEU, Opinion 1/92 *EEA Agreement — II* [1992] EU:C:1992:189, paragraphs 22 to 24

105 Opinion of the Advocate General, paragraph 59

106 Opinion of the Advocate General, paragraph 63

107 CJEU, Opinion 1/17, pp. 113 and 114

negatively perceived. The argumentation there was focused on the fact that bodies that are not courts or tribunals of a Member State are not allowed to initiate preliminary ruling procedures.[108] By creating a parallel judicial system the CJEU would lose its monopoly on the resolution of disputes in matters concerning the EU law and this is something that the CJEU was not willing to accept.

In Opinion 1/17, the fact that the dispute settlement mechanism is not part of the judicial system of a Member State does not present a problem, since it will never be called to interpret EU law. This aspect will be addressed further in the following chapters. However, it should be noted that in *Achmea*, the application of EU law was not at stake. It was only the possibility that such an arbitration tribunal could be called to apply EU law.[109]

The CJEU justified its position taken in Opinion 1/17 by stressing the double aspect of international agreements. On the one hand, international agreements are an integral part of EU law and may therefore be the subject of references for a preliminary ruling. On the other hand, the jurisdiction of the CJEU and national courts to interpret and apply those agreements does not take precedence over either the jurisdiction of the courts and tribunals of the non-Member States with which those agreements were concluded or that of the international courts or tribunals that are established by such agreements.

The reciprocal nature of international agreements and the need to maintain the powers of the Union in international relations allow for the creation of an international forum with jurisdiction to interpret that agreement.[110]

3.3.2. *No direct effect*

The CETA has no direct effect.[111] That means that it cannot be applied directly before domestic courts and authorities of the parties.

The direct effect is excluded deliberately and, according to the Advocate General, the main reason for that is to guarantee effective reciprocity between the parties.[112] In this regard, he called on the CJEU's case law concerning the application

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108 See Advocate General Wathelet, C284/16 *Slowakische Republik v Achmea BV*, [2017] EU:C:2017:699, paragraphs 90-131; CJEU, C-284/16 *Slowakische Republik v Achmea BV* [2018] EU:C:2018:158, paragraphs 44-49

109 See Advocate General Wathelet, C284/16 *Slowakische Republik v Achmea BV*, [2017] EU:C:2017:699, paragraph 228. In the *Achmea* judgement, the CJEU did not address this question

110 CJEU, Opinion 1/17, paragraphs 116-118

111 Article 30.6 of the CETA

112 Opinion of the Advocate General, paragraph 91

of WTO agreements[113], according to which the different positions regarding the direct/indirect application of these agreements would amount to a "lack of reciprocity", which would be capable of introducing an imbalance in the application of those agreements, since it would deprive European Union's legislative or executive bodies of the discretion which the equivalent bodies of the European Union's trading partners enjoy. [114]

Some commentators have addressed the question of reciprocity, stating that is not relevant in the context of the autonomy of the EU law, since it is a feature of an international dispute settlement mechanism and not an internal EU requirement.[115] Also, the case law referred to by the Advocate General does not concern the compatibility of an extra-EU dispute settlement mechanism with EU law, but the direct effect of international agreements under the World Trade Organisation.

3.3.3. *Limited jurisdiction of the CETA Tribunal*

The CETA Tribunal has limited jurisdiction. In fact, its jurisdiction concerns the breach of an obligation under Section C (Non-discriminatory treatment) and Section D (Investment protection) of Chapter Eight of the CETA. The CETA Tribunal cannot decide cases that fall outside this scope.[116]

The Tribunal applies the relevant law, i.e. the CETA as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.[117] It cannot apply the EU law or national law of the parties.

The investor can claim only damages resulting from a measure adopted by the Member State or the European Union.[118] He cannot ask for the determination of illegality of the measure in relation to the EU law or the national law of the Member States. He cannot contest it in the abstract or ask its annulation or to be

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113 CJEU, joined cases C-659/13 and C-34/14 C & J Clark International and Puma [2016] EU:C:2016:74, paragraph 94 to 98

114 Opinion of the Advocate General, paragraph 92

115 Gáspár-Szilágyi S., *AG Bot in Opinion 1/17: The autonomy of the EU legal order v. the reasons why the CETA ICS might be needed*, European Law Blog, 6 February 2018, available at: [http://europeanlaw-blog.eu/2019/02/06/ag-bot-in-opinion-1-17-the-autonomy-of-the-eu-legal-order-v-the-reasons-why-the-ceta-ics-might-be-needed/], accessed 20. June 2020. More on the issue see Semertzi A., *The preclusion of direct effect in the recently concluded EU free trade agreements*, Common Market Law Review, *vol.* 54, Issue 4, 2014, pp. 1125–1158

116 Article 8.18 of the CETA

117 Article 8.31.1 of the CETA

118 Articles 8.18.1 and 8.39 of the CETA

brought in line with the CETA.[119] There are only two possible types of awards, i.e. monetary damages and, under certain conditions, the restitution of property.[120] The awards are only binding between the disputing parties and in respect of that particular case.[121]

The Advocate General found the question concerning the review of legality of acts crucial for the compatibility of the mechanism with the EU law. Though it recognised that the EU judicial system represents a complete set of legal remedies and procedures designed to ensure review of the legality of acts of the institutions[122], he stated that the role of the CJEU in that respect is not called into question, since the CETA mechanism is intended solely to review the compatibility of the acts with the relevant provisions of the CETA, and not to review its legality in the light of EU law or the national law of Member States.[123] He compared the CETA Tribunal's awards with the rulings and recommendations of the Dispute Settlement Body established under the World Trade Organisation.[124]

The CJEU took a similar approach, concluding that the power of interpretation and application conferred on the CETA Tribunal is confined to the provisions of the CETA. It compared the CETA mechanism with the unified patent litigation system, which did not pass the examination. The reason why the patent court did not pass was that it would be called upon to interpret and apply not only the provisions of the agreement establishing it, but also instruments of EU law, as well as to determine disputes pending before it in the light of the fundamental rights and general principles of EU law and to examine the validity of an act of the European Union.[125]

The CJEU also compared the CETA mechanism with the mechanism established by a bilateral investment agreement, as examined in *Achmea*. Apart from the fact that the arbitration tribunal established in the context of the latter mechanism could be called upon to give rulings on disputes that might concern the interpretation or application of EU law, the CJEU invoked the principle of mutual trust. That principle obliges each Member State to consider, other than in exceptional circumstances, that all the other Member States comply with EU law, including

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119 Article 8.31.2 of the CETA

120 Article 8.39.1 of the CETA

121 Article 8.41.1 of the CETA

122 CJEU, Opinion 1/09 *Agreement creating a unified patent litigation system* [2011] EU:C:2011:123, paragraph 70

123 Opinion of the Advocate General, paragraph 124

124 Opinion of the Advocate General, paragraph 126

125 CJEU, Opinion 1/17, paragraphs 124-125

fundamental rights, such as the right to an effective remedy before an independent tribunal. However, this principle is not applicable between the European Union and a non-Member State.[126]

3.3.4. *EU law "as a matter of fact"*

The CETA Tribunal may consider the EU law and the national law of Member States "as a matter of fact".[127]

In this context, there are several elements that have to be analysed. When deciding on an investor's claim against the host Member State or the Union, the CETA Tribunal will be called to determine the consistency of the State or Union's measure with the CETA. In this regard, it will consider domestic law of a Member State and EU law.

In order to consider domestic law of the parties, the CETA Tribunal will have to undertake an examination of the effect of the contested measure. That examination may require that domestic law of Member States, which includes EU law, be taken into account. Even though the CJEU puts it in different words, the CETA Tribunal may be called to apply EU law. However, it sees a way to bypass the obstacle; the examination of the effect of a measure consists of that party's domestic law being taken into account as a "matter of fact".[128] In the CJEU's view, this is not equivalent to an interpretation. I will discuss this issue later in the paper.

Concerning the application of law of the parties, the CETA Tribunal has to follow the prevailing interpretation given to that law by courts or authorities of that party.[129] Accordingly, when applying the EU law, it must follow the interpretation given by the CJEU.

The Advocate General put forward an interesting issue. He stated that it is essential that the CETA Tribunal be authorized to consider the domestic law of each party. By allowing the parties the possibility to rely on their national law that provides for the protection of public interest, the CETA strikes a balance between public and private interests of investors. In other words, when deciding the case the CETA Tribunal has to take into consideration the legitimate objectives in the public interest.[130]

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126 CJEU, Opinion 1/17, paragraphs 127-129

127 Article 8.31.2 of the CETA

128 CJEU, Opinion 1/17, paragraph 131

129 Article 8.31.2 of the CETA

130 Opinion of the Advocate General, paragraph 130

There is, however, one problem, and it concerns cases where the CJEU did not and does not have the opportunity to give its advice or provide guidance. In that case, the CETA Tribunal will be called to interpret the EU law in a way that is hardly conceivable with the requirement to apply it "as a matter of fact".

In fact, the CJEU decided that when a provision of the EU law, including secondary law, is open to more than one plausible interpretation, it requires, in principle, its own interpretation.[131] The Advocate General proposed a way to overturn that problem. He outlined that the possible interpretation of the EU law given by the CETA Tribunal is made solely for the purposes of ruling on the dispute brought before it, and it is not binding on the authorities or the courts of the European Union.[132] He backed his argument stating that the Appellate Tribunal may modify or reverse the first-instance award on the basis of manifest errors in the appreciation of the facts, including that of the domestic law.[133] This line of argument was accepted by the CJEU.[134]

These elements show that the margin of interpretation enjoyed by the CETA Tribunal and the Appellate Tribunal is very limited, which makes the mechanism compatible with the EU legal order. It should be noted that the provision to apply domestic law "as a matter of fact" is frequent in practice of international courts and tribunals that determine whether a state has complied with its international treaty obligations.[135] Before delivering the Opinion 1/17, the real question was whether the CJEU would be willing to accept the blurred distinction between the interpretation of the EU law "as a matter of fact" and "as a matter of law", particularly, when it is provided by the CETA Tribunal. That issue has not been dealt with in its previous jurisprudence.[136] Now, it is clear that the CJEU is willing to accept that possibility.

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131 CJEU, Opinion 2/13 *Accession of the EU to the ECHR* [2014], EU:C:2014:2454, paragraph 245

132 Opinion of the Advocate General, paragraph 139

133 Opinion of the Advocate General, paragraph 148

134 CJEU; Opinion 1/17, paragraphs 131-133

135 Declève Q.; Isabelle Van Damme, *Achmea: Potential Consequences for CETA, the Multilateral Investment Court, Brexit and other EU trade and investment agreements*, International Litigation Blog, 13 March 2018, available at: [http://international-litigation-blog.com/achmea-consequences-ceta-mic-brexit/], accessed 20. June 2020

136 Ankersmit L., *Judging International Dispute Settlement: From the Investment Court System to the Aarhus Convention's Compliance Committee*, Amsterdam Law School Research Paper No. 2017-46, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080988], accessed 20. June 2020

3.3.5. *No effect on the division of powers between the EU and its Member States*

To justify its opinion, the CJEU put forward a second reason: the CETA Tribunal has no jurisdiction to rule on disputes internal to the European Union.[137] The European Union alone has the power to determine, when a Canadian investor seeks to challenge measures adopted by a Member State and/or by the Union, whether the dispute is to be brought against that Member State or against the Union. The exclusive jurisdiction of the CJEU to give rulings on the division of powers between the Union and its Member States is thereby preserved.[138]

The CETA does not affect the division of powers between the European Union and its Member States. It establishes an automatic procedure for determining the respondent party if the proceedings are initiated by a Canadian investor.[139] Under that procedure, the European Union has the right to determine which Member State(s) will be the respondent(s). The rules for determining the respondent are contained in the Regulation No 912/214.[140] It seems that the CJEU considers that its jurisdiction to apply the rules on the said division of powers in combination with the limited interpretation of the CETA Tribunal jurisdiction examination of the effect of that measure is enough to preserve its monopoly over the interpretation and the application of EU law.

3.3.6. *No preliminary ruling procedure*

There is no procedure for prior consultation of the CJEU, and the awards delivered by the CETA Tribunal would not systematically be subject to full review by the courts of the parties. The CJEU sees no problem with that solution.[141]

The Advocate General pointed out that the CETA contains sufficient guarantees to prevent that its mechanism of dispute resolution will not undermine the monopoly of the CJEU over the interpretation of the EU law.[142] One of his ar-

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137 In its opinions 1/09 and 2/13, the CJEU maintained that the European Court of Human Rights and the European and Community Patents Court could be called to rule on the reciprocal relations between the European Union and its Member States, between the Member States themselves or between the investors of one Member State and the other Member States. For that reason, those courts were not compatible with the EU legal system

138 CJEU, Opinion 1/17, paragraph 132

139 Article 8.21 of the CETA

140 Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L 257

141 CJEU, Opinion 1/17, paragraphs 134-135

142 Opinion of the Advocate General, paragraph 180

guments in this regard is that the possibility to review the award before national courts is not ruled out, especially in the event of conflict with public policy.[143] There are, however, situations in which the review would not be possible.[144] The second one refers to the argument of reciprocity. If the CJEU had the possibility to intervene, the same possibility would be given to the highest court of the other party of the agreement. This would run counter to the purpose of the CETA's dispute settlement mechanism, i.e. to be neutral and independent from the domestic courts of the parties.[145]

It is not clear, however, why the prior consultation with the CJEU (or a national court) would not be possible, and why would affect the neutral position of the CETA Tribunal. The idea of that mechanism is to make sure that the CETA Tribunal gets clarification when it is not sure about the meaning of EU law (or other domestic law). Besides, such a mechanism is not a complete novelty.[146]

Some authors even suggested that the CJEU's open approach in opinions 1/91 and 1/00 demonstrates that external-EU tribunals could also refer preliminary questions, provided that the answers given by the CJEU were binding on the referring courts.[147] However, there is a risk that allowing for such possibility of interpretation of one (or both) of the parties' courts would destroy the purpose of the proposed Investment Court System itself.[148]

3.3.7. *No effect on the operation of EU institutions*

The nature of the dispute settlement mechanism established by the CETA is different from the one already under scrutiny by the CJEU. The objective of the

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143 Opinion of the Advocate General, paragraph 181

144 This is when the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of the International Centre for Settlement of Investment Disputes (ICSID), signed in Washington on 18 March 1965, is applicable. See Opinion 1/17, footnote 145

145 Opinion of the Advocate General, paragraph 182

146 See Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L 29; Pirker B., *Dispute settlement and interpretation in the draft framework agreement between Switzerland and the EU*, European Law Blog, 12 December 2018, available at: [http://europeanlawblog.eu/2018/12/12/dispute-settlement-and-interpretation-in-the-draft-framework-agreement-between-switzerland-and-the-eu/], accessed 20. June 2020

147 Gáspár-Szilágyi S., *A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union*, The Journal of World Investment & Trade, *vol.* 17, Issue 5, 2016

148 Pukan P., *Implications of the CJEU Achmea decision for CETA's Investment Court System*, International and European Law: International Trade and Investment Law 2017/2018, Master thesis, University of Amsterdam, 2018, p. 37, available at: [http://www.scriptiesonline.uba.uva.nl/document/667350], accessed 20. June 2020_

CETA is not to extend the rules of the EU law outside its borders, particularly to Canada.[149] Although there is a substantive overlap with the investment protection provided by the EU law, the rules contained in the CETA are not identical. They form an independent body of law.[150]

The substantial rules on which a Canadian investor may rely on in disputes with a Member State or the Union are contained in Sections C and D of the Chapter Eight of the CETA. The most important of these are the principle of legality of investment, fair and equitable treatment, full security and protection, the most-favoured-nation clause, free transfer of payments, prohibition of direct and indirect expropriations etc.

In practice, the CETA Tribunal would be called to examine whether a measure adopted by a Member State or the EU on the basis of EU law breaches the CETA and the principles contained therein. To take an example, the concept of fair and equitable treatment does not have its direct equivalent in EU law, but its subject-matter falls within areas regulated by EU law. It includes principles of fair trial, non-discrimination, proportionality, transparency, absence of ambiguity and of unfair treatment, protection of legitimate expectations, protection against coercion and harassment, absence of denial of justice, etc.[151] Since the CETA Tribunal will not decide on the basis of EU law, but will apply the CETA and the case law developed in the context of arbitration disputes, it is likely that the outcome of the weighing of interests will be different from what we could expect if only EU law would be applied. In case that the respondent Member State or the Union invokes public interests to justify a measure resulting in investment restriction, the CETA Tribunal will be called to examine the effects of primary and secondary EU law. It will provide findings of the same type as the CJEU is empowered to make that will result in definitive decisions that will bind the respondent Member State and the Union.

The concept of investment defined by the CETA is very broad permitting the CETA Tribunal to hear a wide range of disputes. The respondent Member State and the Union cannot circumvent jurisdiction of the CETA Tribunal to examine whether the disputed measure is in accordance with the CETA.[152] That jurisdic-

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149 That was one of the arguments stated by the CJEU in its opinions 1/91 and 1/00

150 Opinion of the Advocate General, paragraph 157

151 See Yannaca-Small K., *16. Fair and Equitable Treatment Standard*, in Yannaca-Small K. (editor), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, Oxford, 2010; Paulsson J., *Denial of Justice in International Law*, Cambridge University Press, Cambridge, 2005

152 Article 8.21.1 of the CETA

tion covers all measures adopted by the Member State and/or the Union, which may relate to any form of act or practice, including measure of general application. If it finds that the contested measure breaches the CETA, the CETA Tribunal can order damages to be paid to the investor who logged the claim. The respondent Member State and/or the Union must recognise the award and comply with it by making the payment.[153]

The CJEU considers that the interpretation of EU law by the CETA Tribunal and the imposition of damages will not have any effect on the operation of the EU institutions. It compared the dispute settlement mechanism established by the CETA with the system in force within the World Trade Organisation and concluded that the possibility to award damages to private investors distinguishes the mechanism established by the CETA.[154]

I consider this aspect rather problematic. Although the CETA Tribunal cannot annul the contested measure, or oblige the Member States and/or the Union to harmonise its law to be compatible with the CETA, or impose a penalty on the respondent Member State and/or the Union, it can *de facto* call into question the level of protection of a public interest defined by national and EU law. In fact, the protection of public interest is the most likely line of argument that the respondent will put forward to justify the measure in question. The consequence of an award of damages could be the abandonment of interpretation of public interest defined by the CJEU in favour of the interpretation made by the CETA Tribunal. This is especially true if we consider the high amounts of damages awarded by arbitration tribunals in disputes between multinational companies and states.

The CJEU does not see this as a real threat. On the one hand, it considers the CETA as limiting the CETA Tribunal to determine whether the treatment of an investor or a covered investment is vitiated by a defect mentioned in Section C or D of Chapter Eight.[155] On the other, the EU legislation is deemed to be both appropriate and necessary to achieve a legitimate objective of the Union and the CJEU is the sole responsible to ensure review of the compatibility of the level of protection of public interests established by EU law.[156]

The CJEU referred to the CETA and the Joint Interpretative Instrument according to which the provisions of Sections C and D of Chapter Eight cannot be interpreted in such a way as to prevent a Member State and/or the Union from

153 CJEU, Opinion 1/17, paragraphs 139-145

154 CJEU, Opinion 1/17, paragraph 146

155 CJEU, Opinion 1/17, paragraph 148

156 CJEU, Opinion 1/17, paragraph 151

adopting and applying measures necessary to protect public interests and concluded that the CETA Tribunal has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures and, on that basis, to award damages.[157] It cannot call into question the choices democratically made within a party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights.[158]

I see a possible contradiction in the CJEU's reasoning. First, it pointed out the broad definitions of the notions of investments and measures given by the CETA, which allow to bring a claim against almost any measure, including laws of general application. Later, it relied on the limited jurisdiction of the CETA Tribunal and the fact that this jurisdiction cannot call into question choices made by the legislator on a number of legal bases. It remains to be seen how the CETA Tribunal will interpret the system of law established by the CETA and whether it will have the same approach in interpreting it as the CJEU.

4. CONCLUSION

The CJEU accepted the same line of argument as the Advocate General did. Criticism addressed to the Advocate General's opinion can be applied to the CJEU's opinion. For some commentators, it provides not much more than a summary of the talking points offered by the Council, the Commission and the vast majority of the 12 intervening Member States who were remarkably united in a bid to save the EU's new external trade and investment policy.[159]

In *Achmea*, the CJEU stressed the difference between bilateral investment agreements concluded by Member States and those concluded by the European Union.[160] It could be argued that this difference was emphasised in order to leave open the possibility to declare an investor to state dispute settlement mechanism based on extra-EU/mixed agreements compatible with the EU legal order.

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157 CJEU, Opinion 1/17, paragraph 152-154

158 CJEU, Opinion 1/17, paragraph 160

159 Schepel H., *A* parallel universe: *Advocate General Bot in Opinion 1/17*, European law Blog, 7 February 2019, available at: [http://europeanlawblog.eu/2019/02/07/a-parallel-universe-advocate-general-bot-in-opinion-1-17/], accessed 20. June 2020

160 CJEU, Case C-284/16 *Slowakische Republik v Achmea BV* [2018] EU:C:2018:158, paragraph 58

It is evident that the compatibility of the CETA with EU law depends on the weight given to the concept of autonomy of the EU legal order. The CJEU's argumentation reduces it to its interpretative monopoly over EU law.[161] It seems that the CETA Tribunal considers the EU law "as a matter of fact", that its decisions are not binding on national courts and the CJEU, and the guarantee to assure the application of the EU law as interpreted by the CJEU is enough to preserve the autonomy of the EU legal order.

However, it should be stated that there is a possibility for the CETA Tribunal to be called to interpret the EU law not only "as a matter of fact", i.e. when the content of the applicable law is disputed by the parties and there is no clear guidance by the CJEU. Although this may not be frequently as the "erroneous" application of the EU law could be remedied at the appellate phase, it still exists.

The problem is amplified in cases of enforcement of an award in which the CETA Tribunal *de facto* interprets the EU law. As it was mentioned before, there are situations when the award can avoid being reviewed on the ground of public policy. This situation can affect the uniform application of the EU law and, therefore, its autonomy.

Furthermore, since the investment protection is provided by the EU law, some dispositions of the CETA overlap with it and some contradict it. In fact, the CETA establishes a parallel system of investment protection that should not interfere with the investment protection established by the EU law. The question that arises in this regard is: does the autonomy of the EU law allow such a parallel system?

In *Achmea*, the CJEU found that the Member States could not remove from the jurisdiction of their own courts, and hence from the system of judicial remedies established by Article 19 of the Treaty on the European Union, disputes in fields covered by the EU law.[162] Therefore, the CJEU did not limit the autonomy of the EU law to its interpretative monopoly.

In its Opinion 1/17, the CJEU has shown a different approach, i.e. the concept of autonomy allows the European Union to remove disputes in areas which are covered by the EU law from the judicial system established by the Treaties to an extra-EU jurisdiction, provided that these disputes do not concern the interpretation and application of the EU Law. Still, the important difference that remains

[161] Schepel, *op. cit.*, note 159

[162] CJEU, Case C-284/16 *Slowakische Republik v Achmea BV* [2018] EU:C:2018:158, paragraph 55

is that *Achmea* covers intra-EU disputes[163], whereas CETA tribunal would be deciding disputes between a Member State and/or the EU and the third country. Submitting intra EU-disputes to arbitration shows distrust to national courts, and this cannot be allowed for the sake of mutual recognition.

By restricting the concept of autonomy of the EU legal order to procedural aspects, the CJEU allows the existence of two parallel investment protection systems, i.e. one regulated by EU law and the other by the CETA. Thus, it clearly shows that it does not want to take the challenge and become the competent legal institution for resolving conflicts between foreign investors and Member States and/or the European Union.

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[163] Some commentators believe that the issue of application of *Achmea* to extra-EU dispute remains unclear. See e.g. Gáspár-Szilágyi S., It Is not Just About Investor-State Arbitration: A Look at Case C-284/16, Achmea BV, European Papers, Vol. 3, No 1/2018, pp. 357-373, available at: [http://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2018_I_020_Szilard_Gaspar_Szilagyi_0.pdf], accessed 20. June 2020

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UDK 502.131.1(4-67EU): 339.92
Review article

SUSTAINABLE DEVELOPMENT IN EUROPEAN LAW – WITH THE SPECIAL REFERENCE TO THE CONTRIBUTION OF THE COLLABORATIVE ECONOMY

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ABSTRACT

Today, with the current state of our planet, we face the challenges to which old solutions will no longer be applicable. At the initiative of the United Nations with cooperation of the European Union, the Agenda 2030 for Sustainable Development was created. Although the idea of resource efficiency is known from previous periods, Agenda 2030 is characterized by its versatility. Regardless of differences in capacities and other circumstances, respecting the other singularities, the Agenda 2030 is suitable for the development of all countries at all levels of development. Achieving economic prosperity in the private sector with the support of the public sector, creating social innovation, on condition to adhere environmental rules, is the ideal solution for the future. Can we call such a model the business of the future ?

Keywords*: sustainable development, Agenda 2030, priorities of European Commission, economic dimension, collaborative platforms*

1. INTRODUCTION

The author deals in the submitted paper with the area of sustrainable development in a broad sense. Agenda 2030 for the sustainable development is a set of global commitments by which the international community responds to today's most serious challenges. The main subject of this contribution is to analyze Resolution adopted by the General Assembly received on 25 September 2015 and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Commitee and the Commitee of the Regions-Next steps for a sustainable European future - European action for sustainability

COM(2016) 739 final, which contains a list of initiatives at the global level in relation to priorities of the European Commission created for the term of office 2019-2024. Mentioned initiatives to some extent quite understandably coincide with the priorities set by the European Commission. In the next part of this contribution we will try for deeper insight into the economic sphere and individual aspects in the context of Agenda 2030. Whereas the economic sphere of the Agenda 2030 itself is a relatively broad area, we will focus only on selected aspects, especially for the use of interconnection of individual key spheres of Agenda 2030 also in the field of business. At the same time we will try to point out on currently functioning models in the field of business which at first glance may not indicate completely clearly that by their presence on the market they meet the requirements established for business sustainability models. In this regard, we will point to a functioning model of a collaborative platform as part of a collaborative economy and we will briefly characterize the way in which the operation of the platform can adapt to the idea of three mutually balancing spheres of a sustainable development, which is a prerequisite for a sustainable economy.

2. SUSTAINABLE DEVELOPMENT IN EUROPEAN LAW AND OTHER DOCUMENTS OF THE EUROPEAN UNION

We meet with the notiton "sustainable development" in a primary law of the European union, exactly in Treaty on European union, Article 3 (5), where stands that: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."[1]

In accordance with this wording, the role of European union is to contribut to the sustainable development of the Earth. With the respect to this task, 2015 was significant year. On September 25th, 2015 at the session of 70th General Assembly of United Nations, a new global framework for sustainable development has been adopted.[2] Taking into account the objectives of this program, representatives as Head of State and Government and High Representatives took a huge step

[1] Treaty on European union

[2] Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1 available at: [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf], accessed 09. March, 2020

forward. Moreover, previsious legal framework was criticize and denoted as *insufficient, cautious, incremental and incomplete*.[3] Agenda 2030, as progressive conception of United Nation, contains 17 goals and 169 related targets.

Accordingly to European law, it is necessary to emphasize that there is also Article 21 (3) of Treaty on European union. It´s wording is as follows: "The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies."

In this context, as it is stated in Article 21(1) subparagraph 2 "The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations."

Undoubtedly, substance of the notion *sustainable development* is an important element on our way to meeting our commitments. It is essential to define why sustainability is so relevant and necessary. Unless we take the necessary initiatives at global level to sustain development, ultimately, such an approach would catch up with us. We face the challanges as youth unemployment, aging population, significant climate change, environmental pollution, exhaustible resource issues and migration. European union has a high level of economic development and commitment achieve "permanent" sustainable development firmly anchored in European Treaties.[4]

Following the context of European law, we also have the Regulation (EU) 2017/1601 of the European parliament and of the Council of 26 September 2017 establishing the European Fund for Sustainable Development (EFSD), the EFSD Guarantee and the EFSD Guarantee Fund (hereinafter referred to as: "Regulation 2017/1601"). Regulation 2017/1601 governs European fund for sustainable development, purpose of this Fund, structure, strategic board of the Fund and other meaningful questions connected with this Fund.

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3 Walliser G.B.; Shrivastava P., Beyond Compliance: *Sustainable Development, Business, and Proactive Law,* Georgetown Journal of International Law, 2014-2015, *vol.* 46, p. 417, available at: [https://heinonline.org/HOL/LandingPage?handle=hein.journals/geojintl46&div=19&id=&page=], accessed 09. March, 2020

4 Next steps for a sustainable European future, European action for sustainability, {SWD(2016) 390 final}, European Commission COM (2016) 739 final

Agenda 2030 will for European union include "two work streams. The first work stream, presented in this Communication, is to fully integrate the SDGs[5] in the European policy framework and current Commission priorities, assessing where we stand and identifying the most relevant sustainability concerns. A second track will launch reflection work on further developing our longer term vision and the focus of sectoral policies after 2020, preparing for the long term implementation of the SDGs. The new Multiannual Financial Framework beyond 2020 will also reorient the EU budget's contributions towards the achievement of the EU's long-term objectives."[6]

3. EUROPEAN COMMISSION PRIORITIES FROM A SUSTAINABLE DEVELOPMENT PERSPECTIVE

Composition of the European Commission for the period 2019-2024 has set six essential priorities. Mentioned priorities are clearly linked to several 17 goals of the Agenda 2030. For the purposes of comparing and analyzing each goal, we shall use in particular, Resolution adopted by the General Assembly on 25 September 2015 (United Nations) (hereinafter referred to as "Resolution") and Communication from the Commission – European action for sustainability[7] (hereinafter referred to as "Communication"). In that connection, it is necessary to add that the main 17 goals which are contained in the Resolution, are listed in wording of the Communication with the special atention to conditions of European union.

First priority is the European Green Deal. European union strives to be the first climate-neutral continent. Placing the environment in the first place speaks for itself. "Climate change and environmental degradation are an existential threat to Europe and the world. To overcome these challenges, Europe needs a new growth strategy that transforms the Union into a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases by 2050, economic growth is decoupled from resource use, no person and no place is left behind"[8] Area of the enviromental protection, is more important than it seems. As it was mentioned, without properly working enviroment, hard work in other areas makes no sense. Undoubtedly, all industries have great importance for the economic side of our countries. Factories and industrial lines employ the citizens of our countries and create values that make our lives much more comfortable.

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5 Sustainable Development Goals

6 *Ibid*.

7 Next steps for a sustainable European future, *op. cit.,* note 4

8 European Commission, Strategy, A European Green Deal, available at: [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en], accessed 09. March, 2020

Through greater availability of vehicles and greater use of trucking for transport (instead of the previously preferred trains) are goods more accessible to us. However, we "pay a tax" in the form of polluted air. Measures which should be applied are summarized in document of European union called The European Green Deal.[9] Implementation timetable of key actions is included in the Anex to the mention document.[10] The creation of new measures in this case will not be sufficient, whereas at the same time the original ones need to be effectively adapted.[11] Having regard to the foregoing we should state, the European Green Deal is a highly anticipated document.

The area of the enviroment goes across most goals outlined in the Resolution and (naturally) in the Communication. However, it is most related to the goal 2 - "End hunger, achieve food security and improved nutrition and promote sustainable agriculture"[12], goal 3 "Ensure healthy lives and promote well-being for all at all ages", goal 6 - "Ensure availability and sustainable management of water and sanitation for all", goal 7- "Ensure access to affordable, reliable, sustainable and modern energy for all" and goal 13 - "Take urgent action to combat climate change and its impacts".

The second from the six priorities is *An Economy that works for people.* As it is stated "individuals and businesses in the EU can only thrive if the economy works for them."[13] In this context small and medium-sized enterprises are in the focus of attention. Areas of equal importance are connected with the completing the Capital Markets Union and deepening the Economic and Monetary Union.[14] In this context, second priority (european economy) is the most connected with the goal 4 "Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all".[15] A natural precondition for a well-functioning economy is a sufficient amount of skilled manpower. It is natural, that countries with quality and progressive education system have more advanced economies. In this area, more than any other, it is necessary to incorporate the process of education and the creation of a suitable work base.

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9 Communication from the Commission, the European Green Deal, Brussels, 11.12.2019,COM(2019) 640 final

10 Anex to the European Green Deal, Brussels, 11.12.2019 COM(2019) 640 final ANNEX

11 Communication from the Commission, the European Green Deal, op.cit., note 9 ,COM(2019) 640 final, p. 4

12 Next steps for a sustainable European future, *op. cit.,* note 4

13 An economy that works for people, Working for social fairness and prosperity, available at: [https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people_en], accessed 09. March, 2020

14 An economy that works for people, *ibid.*

15 Next steps for a sustainable European future, *op.cit*., note. 4, p. 5

A Europe fit for the digital age is the third from the list of European prorities. In the previous season there was Digital single market, as a one of ten priorities of European Commission. Member States of European union with the support of European Commission tried to provide better possible access to the online world for individuals and also for businesses. Digital single market, whose predecessor was the internal market, is connected with the free movement of persons, services and capital. In the digital area it will mainly be about free movement of services and capital. Understandably, it is hard to imagine the free online movement of persons in cyberspace. The third priority is related in particular with goal 9 - "Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation*".* Much discussed become new initiative in the area of collaborative platforms – Digital Services Act. This planned document will upgrade our liability and safety rules for digital platforms, services and products.[16] Liability of digital platforms as part od collaborative economy has been the subject of many professional discussions and professional publications. Previous access to questions associated with liability of collaborative platforms consisted on a case-by-case approach.

Promoting out European way of life - is the title of the European Commission's fourth priority. Main idea of this priority is to protect european citizens and our core values.[17] Despite of the modernization of our society and digitalisation, many Member States of the European union still struggle with high levels of corruption and their citizens' suffer from lack of confidence in the judiciary, the police, the public prosecutor's office or other public authorities. Transparency requirements are increasing, affordable justice for everyone based on the principle of equality before the law must be a matter of course for every developed country. This iniciative is most connected with the goal 16 - "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".

The fifth priroity is *A stronger Europe in the world* – with emphasis on reinforcing our responsible global leadership.[18] As it is stated in the offficial webside of the European Commission : "A strong, open and fair trade agenda, making Europe an attractive place for business, is key to strengthening the EU's role as a global

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16 A Union that strives for more, My agenda for Europe, By candidate for President of the European Commission Ursula von der Leyen, Political Guidlines for the next European Commission 2019-2024, p. 13

17 Promoting our European way of life, avalaible at: [https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life_en], accessed 26. March 2020

18 A stronger Europe in the world, available at: [https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world_en], accessed at: 26. March 2020

leader while ensuring the highest standards of climate, environmental and labour protection. European leadership also means working shoulder-to-shoulder with neighbouring countries and partners, introducing a comprehensive strategy on Africa and reaffirming the European perspective of the countries of the Western Balkans". From this wording is clear that European union is fully aware that for maintaining of its position, it is necessary to constantly deepen the current successes and addapt priorities to current need of the population with the regard development. In that context, we dare to insist thath all of the goals of the Agenda 2030 are connected with strengthening the position of the European union in the world.

A new push for European democracy – is the last priority od European Commission. Last European election took place in 2019. High turnout legitimized the interest of European Union citizens to participate on issues related to the work of the European Union. Conference on the Future of Europe, which should be launched on Europe day, 9th May 2020 will run for two years. [19] This conference will provide space to give Europeans a greater say on what the European Union does and how it works for them. [20] From the perspective of the Agenda 2030, is European democracy associated with the goal 16 - "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".[21] For sustaining european democracy and its development is equally important goal 10 "Reduce inequality within and among countries"[22] It is not in vain that the community is only as strong as its weakest link. This partial goal is hidding more than just the need for equality. The whole idea of Agenda 2030 is built on cooperation of involved individual entities regardless of the state of development. From reducing the disparities between Member States thus will not benefit only the citizens of the European Union for achieving their own goals but also for those, which are contained in the Agenda 2030.

4. SUSTAINABILITY AS CRUCIAL FACTOR

It is natural, that modern states urge for rapid development. With increasing digitalization we reach the results faster, than we once imagined. Dynamic shift in the field of technologies forces us to adapt to this fast time. Of course that it brings

[19] Shaping the Conference of the future of Europe, Press release, available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip_20_89], accessed 26. March 2020

[20] *Ibid.*

[21] Next steps for a sustainable European future, *op.cit.*, note 4, p. 7

[22] Next steps for a sustainable European future, *op.cit.*, note 4, p. 5

many benefits, especially when it comes to healthcare and treatment, but also other conveniences that make our life more comfortable. But we can not forget, that there is one area that suffers from rapid development. The environment is rightly getting into the deeper awareness of both, the professional and lay public. Sustainability is now a feature, that must be part of the development and it is an integral part of all three dimensions: economic, social and enviromental.

If we should characterize sustainability as a property, we would need to break down this notion in the context of long-term. The key aspect, from the long-term perspective, is the *responsibility* (or *liability*). Responsibility as a regular element, is mainly encountered in the law of obligations, but for example also in a corporate law or in many other branches of law. However in the context of sustainability, responsibility has a much broader scope than in standard legal notion. In the standard application of the law (for example in claiming damages), we have clearly established who is obliged and who is entitled, having regard to the circumstances. Now we are responsible for the coming generations and to some extent, we also shape the way of life for future generations. Having regard to the foregoing, when we are speaking about sustainability, when should keep on mind particularly responsibility.

5. ECONOMIC DIMENSION AS A PART OF AGENDA 2030

Main idea of the Agenda 2030, as follows from the title of this post, is balance of the three key dimensions: economic, social and enviromental dimension. It would be difficult to determine which sphere of three mentioned, is the most imporant for proper functioning of our society in terms of sustainability. All spheres are interconnected and more or less depend on each other. In relation to the economic sphere, it is appropriate to state what specifically this term includes. From the point of view of the activities of the European Union, this will be in particular: "responsible trade and investment policy as an instrument of SDG implementation contributing to boosting jobs, sustainable growth and investment in Europe and outside."[23] this is discussed in a other document of European union, Strategy "Trade for all"[24], which was adopted following the adoption of the United Nations Agenda 2030. Naturally, several entities, not only the European Union, are involved in the functioning of economic dimension. It will be primarily the Member States, entrepreneurs offering their goods or services on the market and consumers. States can make a significant contribution to the business sector with a regard to economic dimension implementing appropriate measures and adopt-

[23] Next steps for a sustainable European future, *op.cit.*, note 4, p. 7

[24] Trade for All, COM (2015) 497 final

ing appropriate legislation. Under favorable conditions and in a business-friendly environment entrepreneurs will be more motivated by their part to contribute to creating a sustainable economy. Consumer participation is equally important. Although it does not seem, they form an equally important part of the imaginary triangle of the economic sector.

In context of economic dimensions is often mentioned The Triple Layered Business Model Canvas. Apposite definition is the one by *Joyce and Paquin,* who characterize it as "a tool for exploring sustainability-oriented business model innovation. It extends the original business model canvas by adding two layers: an environmental layer based on a lifecycle perspective and a social layer based on a stakeholder perspective."[25] There is no coincidence that this tool connects three layers exactly like the Agenda 2030, although the fact that it primarily concerns business models. Economic layer (based on the original BMC), Environmental life cycle layer and Social stakeholder layer.[26] As an suitable example, we can mention the company dealing with distribution of coffee and other related equipments, Nespresso.

In our opinion, important element playing the role in process concerning sustainability in business is also motivation of entrepreneurs to contribute willingly in order to achieve a higher public interest. It is a logical fact that business entities are mainly motivated by their own economic interests than they should prefer demands resulting from sustainability. Another question arising from this issues is, which entity should represent motivating element.

6. COLLABORATIVE ECONOMY AND ITS CONTRIBUTION TO THE SUSTAINABLE DEVELOPMENT

Following the aspects of economic dimension of Agenda 2030, as we mentioned above, there are a lot of possibilities how to use resources efficiently. As most effective way to get to status of sustainable development in our economy, is to use systematic balancing of profit efforts on the one hand, and on the other hand aspiration to get higher interest at the same time to support the environmental sector. When we speak about increase of efficiency we should definitely not forget that we already have functional models that are capable of saving our resources in a broader sense. Of course, we do not mean anything other than the collabora-

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[25] Joyce A.; Paquin, R. L., *The triple layered business model canvas: A tool to design more sustainable business models*, Journal of Cleaner Production, *vol.* 135, 1 November 2016, pp. 1474-1486

[26] Joyce, A.; Paquin, R.; Pigneur, Y., *The triple layered business model canvas: a tool to design more sustainable business models*, ARTEM Org*anizational Creativity International Conference,* 26-27 March 2015, Nancy, France

tive economy in particular, its probably the most important part, collaborative platforms. In the area of collaborative economy, is within the discussions of the professional public, addressed many issues in terms of various aspects of collaborative platforms. The market position of collaborative platforms has been addressed relatively intensively, as well as the liability regime of collaborative platforms. In this context, we would like to draw your attention to the publications by Laura Rózenfeldová and Regina Hučková in article Collaborative Economy in Transport (certain issues)[27] and also in article Collaborative Economy – open problems and discussion (with regard to commercial and tax issues) by Regina Hučková, František Bonk and Laura Rózenfeldová.[28] Equally crucial are issues related to platform taxation whether the position of collaborative platforms from the point of view of competition law. It is also necessary not to forget the aspects of personal data, which are collectivized and processed by collaborative platforms or a new category of non-personal data also referred to as other than personal data.

The issue of the collaborative economy has so far only been comprehensively summarized at European Union level uniformly in a other document of European union - An European agenda for the collaborative economy. This document have brought framework definition of collaborative economy, which we can characterize as "business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: 1. service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis ('peers') or service providers acting in their professional capacity ("professional services providers"); 2. users of these; and 3. intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them ('collaborative platforms'). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit."[29] One of the last legislative act following the online intermediaries is Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. Significant expected legal act which the European

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27 Rózenfeldová. L.; Hučková. R., *Collaborative Economy in Transport (certain issues),* STUDIA IURIDICA Cassoviensia, year 7, no. 1, 2019, available on: [https://sic.pravo.upjs.sk/index.php/sk/21-casopis-72019-1], accessed 29. April 2020

28 Hučková, R.; Bonk, F.; Rózenfeldová, L., *Collaborative Economy – open problems and discussion (with regard to commercial and tax issues)*, STUDIA IURIDICA Cassoviensia, year 6, no. 2, 2018, available on: [https://sic.pravo.upjs.sk/index.php/sk/20-casopis-62018-2], accessed 29. April 2020

29 A European agenda for the collaborative economy, {SWD(2016) 184 final}, Brussels 2.6.2016, COM(2016) 356 final, p. 3

Union plans to create is the Digital Services Act. Taking into account that 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 as know as Directive on electronic commerce is in effect already twenty years, and whereas the technological means have shifted dramatically, technological innovation did not bypass area of business, creation of new business models and business resources have also changed significantly, and an overall change in the online business environment suggest, that the announced legislation in this area is desirable.

If we should give a concrete example of a collaborative platform that effectively contributes to saving depletable resources we would like to emphasize the BlablaCar platform. Apart from other issues related to the functioning of platforms in the light of sustainable development, this platform shall make an appropriate contribution. This platform was based on a really interesting story and idea with a social subtext. As stated on the official website[30] of the platform, its founder Frédéric Mazzela wanted to get home on Christmas in 2003 and saw a lot of vehicles on the road, just with one person – driver. And so the idea came into being - to offer a financial reward, resp. replacement for gasoline for one free place in the car. In terms of the three aspects that are key to sustainable development – economic, enviroment and social dimension, we can state with exaggeration that the conduct of the said platform affects each of these three areas. From an economic point of view the platform saves the financial resources of its users, at the same time as an income of business entity contributes to the economy. From the perspective of the social dimension, of course in a broad sense, this platform connects people in a positive sense, for a positive purpose. Even with such small steps we can implement pro-social activities that are beneficial for both parties. From the enviromental point of view carpooling saves exhaustible resources that are necessary when traveling, ie fuel for cars, as well as the emissions generated by motor vehicles while driving.

By referring to this platform operating in the field of transport we wanted to draw attention to the fact that we already have many interesting ways on the market which fulfill the idea of sustainability. The concept of collaborative economy is in itself based on the idea of sharing, more precisely resource sharing. Therefore, given the importance of the collaborative economy in the context of the overall economy, the European Union does not underestimate the potential of a collaborative economy and pays due attention to it.

[30] BlaBlaCar, available at: [https://www.blablacar.co.uk/], accessed 29. April 2020

7. CONCLUSION

Through the analysis of the documents we announced in the introduction of our paper we were able to prove that the goals appearing in the Agenda 2030 have also been significantly reflected in the priorities of the new Commission, which will operate in the 2019-2024 term of office. European union is attentive to the needs of its citizens, reflecting the global situation and development. In this context, it is desirable to use a formula that appropriately describes the efforts of the European Union thath "many hands make light work". Having regard to the provisions of the founding Treaties, many of the objectives contained in the 2030 Agenda can already be achieved more effectively at European Union level, jointly and with the participation of all Member States, for whom this effort will be beneficial. In addition from the perspective of the economic sphere of a sustainable economy, we currently have business models at our disposal, which can, through their functioning, contribute to the pursuit of a sustainable economy. In the last chapter of our paper, we tried to point out the advantages offered by collaborative platforms which not only seem to contribute to sustainability as such. In our opinion, in the context of submitted contribution, it is important not to forget to mention the area of collaborative economy. One of the reasons is the very idea of a collaborative economy –resource sharing. Reffering the concrete working model of the digital platform we have highlighted some of the benefits which collaborative platforms bring to all key spheres of sustainable development. These business models are capable of saving our resources at the economic level, developing the social sphere in an appropriate way, and helping the environmental area through their activities. The European Union certainly does not underestimate the potential of collaborative economy. Through its initiatives, the European union seeks to create suitable, fair and safe conditions for the operation of modern technologies also in the business environment. In relation to the planned activities in the near future, we can mention preliminary discussions on creating a comprehensive legal framework for the regulation of online services, so- called Digital services act.

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UDK 340.131:341.241.2(4-67EU)
Original scientific paper

RULE OF LAW – EU'S COMMON CONSTITUTIONAL "DENOMINATOR" AND A CRUCIAL MEMBERSHIP CONDITION ON THE CHANGED AND EVOLUTIONARY ROLE OF THE RULE OF LAW VALUE IN THE EU CONTEXT

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ABSTRACT

For decades the Rule of Law has been emphasized as a core constitutional value common to all Member States of the European Union, although its substantial content was not precisely determined enough in the European context. Moreover it was defined as a multilayered value that encompasses other values such as democracy and fundamental rights, and it was underlined as one of the most important conditionality criteria for the EU enlargement policy. The ongoing crises of EU values, and more precisely the Rule of Law crisis, appeared long before, but reemerged fiercely with the creation of the "illiberal state" concept in Hungary and then in Poland. The EU has implicitly and more successfully, through the work of its institutions tried to compensate for the inadequate and a "a little too late" reaction, as well as for the lack of monitoring in the previous enlargement circles.

The aim of this article is to show how, the rule of Law was stressed as a leading value shaping democratic constitutions and national, as well as supranational, legal systems. It is important to demonstrate that the Rule of Law is not only "coined" for the EU or Council of Europe purposes, but that it is firstly a value that is in the core of each constitutional tradition of a sovereign state. Therefore, in order to be promoted as common and set as a strong and rigid condition for future members, it should be, pro futuro, analyzed, understood and endorsed by EU institutions on each level. Finally, we take Western Balkan countries as an example where the Rule of Law is defined as a value but also as a core basis of the Negotiation Chapters 23 and 24, determined in a more thorough and precise way than in the EU and among its Member States, where, we could agree, it should have been in the first place. We point out to the need of getting closer to its uniform understanding in and outside of the EU and therefore to the need to create a continuous and stable Rule of Law concept both substantially and formally.

Keywords: *Rule of Law, Values, Treaty on the European Union, Court of Justice of the EU, European Commission, Rule of Law Framework, Conditionality, Western Balkans*

1. INTRODUCTION

We are decades away from the image of the European Unionas a Community with the sole purpose of establishing and effectively running the Single market. The "Community to Union evolution" had a political impact so strong, it was obvious that principles, or later on, values, such as democracy, human rights and the rule of law will become more than mere "side-effects of the EU free-movement mission".[1]And so they did.

With the Treaty of Maastricht,[2] the newly established European Union faced challenges that went well beyond the economic development and cooperation: preparing for the future enlargements that would more than double its size and capacities, the European Council established Copenhagen Criteria[3] that envisaged not only economic but also political criteria. Not long after, the EUprovided an EU primary law basis for the common principles in the Treaty of Amsterdam.[4] This was the first time that the principles, which the EU proclaimed to be founded on, were formally confirmed, so any other state that aspires to become a Member should also adhere to. In addition, at the same time the EU, in preparing for the future enlargements, introduced a sanction mechanism in the case that Member States did not respect the aforementioned principles. Further on, in the Article 2 of the Lisbon Treaty, the principles became"valuescommon to all Member States",[5] even though it was never explained, why the Union accepted the expression "common values" instead principles, and whether (and to what extent) the difference was only lexical.

"United in Diversity" motto, coined two decades ago, proved to bring more than just a symbolically enlarged political Union of 28 (now 27) states. One of the values, that underpins all other values, the rule of law, faced backsliding in not one, but several Member States that, at the time of their entrance,fulfilled the Copenhagen Criteria and respected Article 49 of the Treaty. Even though the rule of law was at first symbolically introduced, the importance of this principle grew to bein the centre of legal and political disputes on the national as well on supranational level. The lack of its respect in Austria, then in France, Romania and afterwards

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1 Herlin-Karnell, E., *The EU as a Promoter of Values and the European Global Project*, German Law Journal. no. 13, 2012, p. 1227

2 TEU (Maastricht)

3 Copenhagen European Council, Presidency Conclusions [1993] SN 180/1/93 REV 1

4 Article F (1) TEU (Amsterdam)

5 Article 2 (1), TEU (Lisbon): "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

in Hungarydid not suffice to activate the so-called "nuclear option"[6], but it was against Poland in December 2017that the EU finally triggered the infamous Article 7.

The recent events caused a stir and the rule of law backsliding[7] resulted not only overtly in Article 7 activation but also in numerous cases that ended before Court of Justice of the European Union against again Hungary and Poland. The rule of law, which now features prominently in the EU primary law,[8] is not only proclaimed as a common value of its Member States but also as anobjective that Union must pursue,[9] as well as the condition for the future EU candidates. Therefore, the rule of law, as a value, underlines the whole idea of European integration and is confirmed to be a political and legal *conditio sine qua non* criterion to enter the European Union.

In this article we will try to understand the lack of uniform definition of the EU rule of law as a meta-value of the European Unionthrough initial judicial activism and through the EU Institutions' documents. We believe that the emergence of the rule of law crisis and the Copenhagen dilemma[10] stem precisely from the lack of understanding of the this value as well as widely and loosely perceivedconditionality criteria from both sides at the negotiation table. This is very visible now in the presence of the so-called illiberal states.[11]In relation to this "painfully present" issue, wewill also put a special emphasis on the rule of law enforcement instruments prepared by the EU institutions as a response. Finally, in order to shed a light on the seriousness of this issue in the EU, but also in relation to the candidate countries, Western Balkans' negotiation process will be analysed through the rule of law prism and the prospective proposed New Methodology.

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6 José Manuel Durão Barroso President of the European Commission State of the Union 2012 Address Plenary session of the European Parliament/Strasbourg 12 September 2012, [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_596], accessed 20. March 2020

7 Kochenov D.; Pech, L., *Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation*, Journal of Common Market Studies, str.Nonih pitanja koje je proiziof Law, marijastr.Nonih pitanja koje je proiziof Law, marijano. 5, 2016, p. 1063

8 Sadurski, W., *Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jorg Haider*, Colum. J. Eur. Law, no. 16, 2010, p. 386

9 Article 3 (1) TEU (Lisbon)

10 Speech: Safeguarding the rule of law and solving the "Copenhagen dilemma": Towards a new EU-mechanism, [https://ec.europa.eu/commission/presscorner/detail/da/SPEECH_13_348], accessed 18. March 2020

11 Or as the Hungarian Prime Minister Viktor Orban tends to call it "illiberal democracy": [http://abouthungary.hu/blog/pm-orban-at-tusvanyos-the-essence-of-illiberal-democracy-is-the-protection-of-christian-liberty/], accessed 13. January 2020

2. IN SEARCH OF THE DEFINITION – "MULTI-LAYERDNESS"[12] OF THE EU RULE OF LAW AND THECOURT OF JUSTICE TO THE RESCUE?

It is very common to "dissect" the concept (or the lack of it) of the EU rule of law by stating that the Treaties' articles introduced common values in order to symbolically present the legal and political union with the aim of buildingthe European identity. This is not far from the truth, if we look at the 1973 Declaration on the European identity[13] and the Treaty establishing the Constitution on Europe,[14] of which majority of provisions were left unaltered in the Treaty of Lisbon. A homogeneity clause,[15] as the Article 2 TEU is perceived, was so vaguely determined, in order to regulate EU values understanding on both horizontal and vertical level. It was meant to bring together two main ideas- constitutional homogeneity or the minimum of it, as well as constitutional diversity and pluralism in a very specific political and legal system.[16]This was especially visible after the2004 "Big-Bang enlargement" where two parallel processes occurred: introduction of common values and the establishment of Copenhagen Criteria, which were, evidently, determined by 12 then existing Member States.[17] Not more than a decade after, 15 more states became members, and despite their shared experiences, geopolitical position and declared shared common values, they had, and still have, profound social, political differences and substantial discrepancies that it was almost impossible to claim that there ever was a common, or even uniform understanding of values.

The rule of law, as Brian Tamanaha claims was, and is, the one point on which there was a widespread agreement since the beginning: that it is "good for everyone".[18] It became a leading value, either encompassing other values such as democracy and

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12 Vlajkovic, M.; Tasev, J., *The Lack of Uniform Understanding of the Rule of Law in the EU and its Implications on Prospective Member States*, Transition of Legal Systems 30 Years after the Fall of the Berlin Wall, Law Review Iustinianus Primus Special Issue – Conference Proceedings, Skopje, North Macedonia, 8-9 November 2019

13 Declaration on European Identity", Bulletin of the European Communities, Luxembourg: Office for official publications of the European Communities, No. 12, December 1973

14 Treaty establishing a Constitution for Europe, [https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_establishing_a_constitution_for_europe_en.pdf], accessed 20. February 2020

15 Delledone, G., *Homogeneity and Constitutional Diversity in the EU : Protecting Fundamental Rights and the Rule of Law*, [https://dial.uclouvain.be/pr/boreal/object/boreal:178155], accessed 22. February 2020

16 Lukić, M., *Pluralizam ustava ili ustavnih* činilaca? Konstitucionalizacija *prava Evropske unije*, Teme, no. 4, 2013, pp. 1705-1718

17 Copenhagen European Council, Presidency Conclusions [1993] SN 180/1/93 REV 1

18 Tamanaha, B., *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2014, p.1

fundamental rights or making a "holy trinity of values"[19]together with them. In the European discourse it was the "it" value, the value that was referred the most, from Walter Hallstein's speeches in the 1960s and his endorsement of the "community of law founded on the rule of law principle",[20] to first judiciary acclamation in the opinion of the Advocate General Mancini in one of the most famous judgements Les Verts v Council.[21] However, as an argument, and maybe a basis for the noticeable lack of uniform understanding of the rule of law notion, we should quote Professor Joseph Weiler: "the rule of law is not in the EU's DNA"[22]. It is a principle that was coined for the purposes of finding the constitutional common ground for all Member States that are part of *sui generis* entity and it was suppose to be a "theoretical principle rather difficult to construe".[23] This means that the rule of law is not only lexically diverse, having in mind 27 Member States,but also substantially as *Rechstaat* and *L'*état de droit are not, in their own constitutional systems, understood and perceived in the identical sense.Even when we talk about the most used notion- the (English) rule of law, we should mention that in 2006 and 2007 the House of Lords Select Committee on the Constitution engaged Professor Paul Craig to, among other things, try to give a precise understanding of the rule of law meaning which resulted with a conclusion that, despite the hard work on the analysis, the "rule of law is and remains a complex and in some respects uncertain concept".[24] Moreover, the dual role of the rule of law in the EU integration made the concept even more complex: on the one side, its role was to strengthen the legal and political foundation of the Union and its Member States within, and on the other side its role was moreof a "missionary"-in the function of the Common Foreign Policy with special emphasis on the enlargement.[25] Uncertain in its nature and content, the EU rule of law was not even defined in its theoretical

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19 Kochenov, D., *The Acquis and Its Principles*, in: A. Jakab, D.; Kochenov, D. (eds.), The Enforcement of EU Law and Values: Ensuring Member States' Compliance, Oxford University Press, 2017

20 *The EU as a community of law: Overview of the role of law in the Union,* [https://www.europarl.europa.eu/thinktank/fr/document.html?reference=EPRS_BRI%282017%29599364], accessed 10. March 2020

21 Case C/294/83, Partiécologiste "Les Verts" v. European Parliament [1986] ECR 1986 -01339, par. 23

22 Kochenov D., *The EU and the Rule of Law – Naïveté or a Grand Design?*, in: Adams, M. *et al.* (eds.) Constitutionalism and the Rule of Law: Bridging Idealism and Realism, Cambridge, 2017, p. 427

23 Baratta, R., *Ruleof Law 'Dialogues' Within the EU: A Legal Assessment*, Hague Journal on the Rule of Law, no. 2, 2016, p. 358

24 House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and the Parliament*, HL Paper 152, 2006-2007, p. 12

25 Articles 8 and 49 TEU (Lisbon)

sense: was it thick or thin,[26] or somewhere in between coined for specific purposes, whether internal or external?

Throughout the years, more specifically until 2014 Commission's Framework[27], the only EU institution that seemed to be either referring to the rule of law in the context of the EU, while at the same time giving *telle-quelle* reference relevant for the rule of law substance, was the Court of Justice of the EU (CJEU). It is important to remind that the rule of law, in the sense of Article 2 TEU is not part of the EU *aquis stricto sensu,*[28] and therefore the Court cannot rule solely on the basis of the non-respect of the values that are stated in the Article 2. An enforcement of values was expected to be resolved throughout a more political procedure envisaged in the Article 7, and the Courtdoes not have jurisdiction over theArticle 7 activation, except for the procedural reasons. However, the Court has brought to (legal) life the values especially the rule of law, starting from the interpretation given in 1986 in the aforementioned Case *Les Verts*v Parliament[29] where it referred for the first time very explicitly to the rule of law role in the Community. Further on, in the CaseCommission v. EIB[30] the rule of law was also mentioned by the Court, but understood purely inprocedural/judicial terms,[31] whereas in the Case UPA v

[26] One of the formal, thin definitions is given and explained by Tamanaha: "The rule of law, at its core, requires that government officials and citizens are bound by and act consistent with the law. This basic requirement entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms.", Tamanaha Brian, *A concise guide to the Rule of Law*, The Social Science Research Network Electronic Paper Collection, Paper 07-0082, 2007. *Par rapport* "in a thick, or 'democratic rule of law', conception laws enshrine and protect political and civil liberties as well as procedural guarantees", Magen A*., Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU*, JCMS 2016 *vol*. 54. no. 5, p. 1053

[27] Communication from the Commission (COM) 2014/0158 to the European Parliament and the Council a new EU Framework to strengthen the Rule of Law, 2014

[28] Sadurski, *op.cit.*, note 8, p. 1063

[29] See note 21, par. 23: "It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty"

[30] Case C-15/00 Commission v. BEI [2003], ECR I-7281 par. 75: "Such an interpretation would also ignore the fact that the European Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions"

[31] Pech, L.*, A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, EU. Const, no. 6, 2010, p.372

Council[32] and later on in Case Kadi v Council and the European Commission,[33] the Court showed progressive tendency towards the more substantive understanding of the rule of law leaning towards the thick concept. This was also in the Case PKK v. Council case where the Court reiterated that the Community is based on rule of law "in which its institutions are subject to judicial review of the compatibility of their acts with the EC Treaty and with the general principles of law which include fundamental rights".[34] Moving towards the deeper understanding of the EU rule of law could also be regarded as a judicial perspective of a political Union with stronger constitutional basis in the material sense.[35] The rule of law seemed to represent, at least for the Court, an umbrella-principle[36] that will encompass other values and should underpin the constitutional character of the EU. Judicial activism in the rule of law sphere reached its peak in 2014, right about the same time as the values crises started to "boil". In the Case *Associagao Sindical dos Juizes Portugueses* (ASJP) (request for preliminary reference), the Court, while defining Article 19, paragraph 1, second subparagraph TEU[37]purposely widened the scope of its application. It made clear that judicial independence, which is without a doubt a crucial element of the rule of law, stretches to all national jurisdictions which might in general be confronted with questions relating to the application of Union law.[38] It enhanced the enforceability of the rule of law standards *vis-à-vis* the EU Member States[39] and even though it leanedagain towards the thin concept of the EU rule of law, the Court pointed out that the enforcement of the rule of

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32 Case C-50/00, Unión de Pequeños Agricultores v Council of the European Union [2002], ECR I-667, par. 38-39

33 Joined Cases C-402/05 P and C-415/05, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008] ECR I-6351

34 Case C-229/05 P, Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK) and Serif Vanly, on behalf of the Kurdistan National Congress (KNK) v Council of the European Union, ECR [2007] i-349, par. 109

35 Note that in almost every judgment mentioned above, the constitutional importance of the Treaties is underlined. See for example *Les Verts* par. 75 or Kadi par. 81 and par 281. For an earlier reference see Opinion 1/91, European Court Reports 1991 I-06079, par. 21: "In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law"

36 Pech, *op.cit.*, note 31, p. 369

37 Article 19 (1 (1)) TEU (Lisbon): "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

38 Case C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas, Request for a preliminary ruling from the Supremo Tribunal Administrativo, ECLI:EU:C:2018:117, par. 39

39 Krajewski, M., *Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma*, [http://www.europeanpapers.eu/en/europeanforum/associacao-sindical-dos-juizes-portugueses-court-of-justice-and-athena-dilemma], accessed 15. March 2020

standards (read: effective judicial protection) should be more straightforward.[40] Moreover, this judgment elaborated all CJEU case-law relevant for the development of the rule of law understanding in the EU context. In addition it combined the Article 2 TEU, Article 4 (3) TEU that proclaims principle of sincere cooperation and finally Article 19(1) TEU, which the Court read and interpreted in the sense of the first two articles. This was the Court's answer to the acceleration of the rule of law backsliding without a proper EU response in sight. However, even though the development of the rule of law reasoning and the filling the *lacunae* in the EU rule of law substance by the CJEU was more than welcome, it was far from a satisfactory answer for the deeply rooted rule of law crisis where no enforcement was provided on the EU level *grosso modo*.

3. THE AFTERMATH OF THE CONDITIONALITY CRITERIA – WHAT NOW?

3.1. "Mistakes" from the past: from conditionality to crisis

The pre-accession conditionality that marked the EU enlargementscould be seen as divided into *acquis* conditionality and *quasi-acquis* or democratic conditionality. Having in mind the specificity of the latter –the fact that the Union does not have the right to legislate in those fields[41], made it very hard to form an uniform EU conditionality policy, introduced by the Commission, with a view on democracy, rule of law and other values. Moreover, since the eastern enlargement was considered to be one of the most successful EU foreign policy moves, this type of political conditionality was copy/pasted into the subsequent enlargements. Thereforethe lack of clear and strict standards on how to evaluate and determine the existence of the rule of law and other values respect was replicated in new and repacked enlargement policies. It is also common opinion that the Commission, as a "technical" leader of the negotiations, had the opportunity to add the substance to the non-transparent and vagueconditionality criteria. However, it failed to do so, leaving the negotiations requirements on the good old bureaucratic measures and sometimes subjective estimations. These drawbacks went on for a decade and resulted in the ongoing crisis.

To prove and connect the "pre-accession conditionality with post-accession conundrums"[42], especially when it comes to the implementation, protection and

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40 *ibid.*

41 Article 4 (1) TEU (Lisbon)

42 Hillion, C., *EU Enlargement*, in: Craig, P.; Graine de, B. (eds.), The Evolution of EU law, Oxford University Press, 2011

respect of the rule of law, we should firstly point out to the transformative power of the EU conditionality policy tool- the promise of membership. Conditionality, that is the most effective enlargement instrument, suggests that after fulfilling conditions, there should be a strong assumption of the functioning democracy and shared values among all Member States, the old and the new ones. Taking into consideration that, starting from the 2004 enlargements, all candidate countries were at the same time going through a transformative process and politico-judicial transition, in parallel with the EU negotiation process, their choice to have their own understanding of the rule of law was replaced by the technique of "mirroring". According to some authors,[43] in order to successfully cross-out all the requirements on their way to the EU, Central and Eastern European countries accepted the principles that were common to the states that were already in the EU, and that they perceived as ideal values of the West. This understanding was also facilitated by the lack of clarity as the values such as democracy, rule of law and protection of fundamental rights were intertwined in their conceptual understanding, sometimes encompassed by the rule of law *in toto*. The Copenhagen dilemma was actually depicted in the following problematic: firstly, the EU begins and ends membership negotiations without taking into account conceptual and constitutional variations of the rule of law and values in general;[44] secondly in order to fulfil the imposed criteria of the rule of law respect, the candidate countries formally adhere to the EU common values standard without precise assessment; and finally, as the result of the previous two, with every new circle of enlargement a discrepancy between the respect of the rule of law as a pre-membership condition and post-accession respect and promotion by the new Member States is more and more visible. The issue of double standards should be mentioned as it concerns legal obligations set out in Article 3 TEU *par rapport*Article 49 TEU. Respect, as well as the promotion of the rule of law value, is an eligibility criterion for the application for membership, and later ona requirement throughout the whole negotiation process for the membership itself. When it comes to Member States in their post-accession status, Article 3 TEU sets an aim for the EU to promote, among other things, the values of the EU. So, on the one hand we have a stronger legal obligation- requirement to respect and promote values whilst a candidate, but on the other, once a Member State, the legal obligation "loosens up". One may say that in connection with the principle of sincere cooperation and mutual trust, and together with Article 7 mechanism, the assumption that Member States shall remain functioning democracies with inherent protection of the rule of law

[43] For more see: Claes, M., *How Common are the Values of the European Union?*, Croatian Yearbook of European Law and Policy, no. 1, 2019 as well as Torcol,S., *Partager des valeurs communes, préalable à l'émergence d'un droit constitutionneleuropéen*, Revue de l'Union européenne, 2017

[44] Mineshima, D., *The Rule of Law and EU Expansion*, Liverpool Law Review, no. 1-2, pp. 73-74

and fundamental rights is totally justifiable. Nevertheless, if the values were only formally respected[45] upon entering, without shared understanding or profound respect, can we expect that declarative sentencesset out in the Treaty's Common provisions, should secure the above mentioned goal in continuum?

A copy/paste method used in conditionality policy proved to be very efficient when it comes to the formal fulfilment of conditions and respect of membership requirements on the superficial level in order to fit in, but not to adapt the existing. This resulted in a general acclamation of the rule of law respect, but the way this concept was utilised and made a part of the newly transformed governing system and structures, greatly differed.[46]

3.2. Is there a Common answer to the Common values crises?

The CJEU, continued to make significant, yet indirect steps, towards Article 2 protection, with focus on the coreelements of the rule of law protection. Interpretation of the Article 19 TEU in conjunction with Article 2 TEU in the ASJP judgement[47] shed a new light to the rule of law protection and had far-reaching judicial consequences, as seen in the cases that were brought before the Court against Hungary and moreover against Poland.[48]In November 2019, in joined Polish cases, the Court applied "the fine tuning of Article 2 with Article 19",[49]and made a greater impact than mechanisms provided by the EU institutions or even Article 7 TEU. The Court did not miss the chance to underline what rights constitute the legalunderstanding of the Article 2 and in particular the rule of law.[50] In that respect, it was clear that the Court's judicial reaction, although restricted in accordance with the action for failure to fulfil obligations under Article 258 TFEU, was perceived as a double response: on the one side it provided a counterbalance to the

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45 Formally, in this context, refers to the fact that the respect of the values and the rule of law per se is fulfilled only to a certain extent, to satisfy the conditionality criteria, and in that sense, it could be similar to the abovementioned thin concept of the rule of law

46 Pishev, O., *Dilemmas of the Transition Period*, Problems of Communism, no.1–2, 1992, p. 83

47 Case C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas

48 Joined Cases C-585/18, C-624/18 and C-625/18 A.K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy [2020] OJ C 27/6. Also see CJEU judgment: Case C-619/18 Commission v Poland (Independence of Supreme Court), ECLI:EU:C:2018:910

49 Kochenov, D., *Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law*, Hague Journal on the Rule of Law, no. 11, 2019, p. 427

50 "The Court points out that the fact that the independence of the SądNajwyższy may not be guaranteed is likely to cause serious damage to the EU legal order and thus to the rights which individuals derive from EU law and to the values, set out in Article 2 TEU,8 on which the EU is founded, in particular the rule of law", Court of Justice of the European Union, Press Release No 47/20, [https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200047en.pdf], accessed 10. April 2020

EU institutional inactivity and on the other to the Member States' national courts' disregard of the rule of law protection. However, the question remained where to draw the (very) fine line between supranational competence and national jurisdiction, especially when it comes to values which are outside of the EU competences but part of the EU foundation? In providing the reasoning for this Court's activism in the recent judgments, Koen Lenaerts, the President of the CJEU, explained that the European integration is possible only through the rule of law depicted in judicial independence and effective judicial protection principles that are indeed supranational and circumscribe national principles. He goes on to explain that the "Court of Justice does not seek to redesign national judiciaries"[51] but it limits itself in examining if national courts and national rules are in accordance with the aforementioned principle. The Europeanisation through the Court's work is not without its own shortcomings. It could and should provide red lines, although indirectly, for the rule of law infringements, as Armin von Bogdandy *et al.* stated when commenting the Case Minister for Justice and Equality v LM.[52] However, the role of the Court is not to be a substitute for the European institutions and their lack of efficient response in deepening the European integration through the rule of law respect and protection.

On the institutional side, Commission's Rule of Law Framework[53] had considerably contributed, however not as efficient instrument, even though it was its principal purpose. Namely,it added even more steps prior the Article 7 activation and questionably broadened the Commission's competences and discretionary power, questioned by the EU Council.[54] However, it brought, for the first time, a solid definition of the rule of law components in the EU legal system and its importance as an EU value.[55] As it was said, the Council was not in accordance with

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51 Lenaerts, K., *New Horizons for the Rule of Law within the EU*, German Law Journal, *vol.* 21, 2020, pp. 29–34

52 Von Bogdandy, A. *et al.*, *A potential constitutional moment for the European rule of Law – The importance of red lines*, Guest Editorial, Common Market Law Review, *vol.* 55, pp. 983-996; Case C-216/18 PPU Minister for Justice and Equality v LM, Judgment of the Court (Grand Chamber) of 25 July 2018 ECLI:EU:C:2018:586

53 Communication from the Commission (COM) 2014/0158 to the European Parliament and the Council a new EU Framework to strengthen the Rule of Law, 2014

54 As it was said in the Press Release, following the Council of the European Union, General Affairs Opinion, the Council proposed another mechanism in order to ensure an effective respect the rule of law: "The Council held an exchange of views on an idea to establish a regular political dialogue among member states within the Council on ensuring respect for the rule of law", [https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/145844.pdf], accessed 27. February 2020

55 An overview of the relevant case law on the rule of law and the principles which the rule of law entails was set in the Annex I to the Framework. In addition, in a subsequent Commission's document from 2019 a definition is given on page 2 in order to answer the question: "What is the rule of law?", Communication from the Commission to the European Parliament, the European Council and the

Commission's Framework proposed mechanisms. It proposed a different solution that envisaged more of a "dialogue among peers" instead of EU-driven process.[56] Moreover, the activation of the Article 7 (1) TEU against Poland, seemed long overdue, since it was actually the first time it was activated since its introduction in the Amsterdam treaty. The above initiatives share common traits: they are deeply political and very slow in activation. A mix of legal and political approaches from different sides, as well as very fragmented response weakens the protection of the rule of law and it causes even more confusion, to the protection concept not only on the EU level, but among Member States as well.[57] The enforcement of the values, where judicial activation is only possible in indirect manner and where institutional response is defined as "better late than never",[58] new solutions should definitely be not only considered but rapidly adopted.

The timid reaction by the EU waspublicly criticised, and under the pressure, the Commission proposed a Regulation that would protect the EU's budget in case of the rule of law deficiencies in Member States. The Proposal introduces sort of a rule of law conditionality policy in order to protectthe Union's budget by introducing measures that would be directed towards one or several Member States as regards to the non-respect of the rule of law.[59] It also provides with two definitions among which the first one determines the rule of law as a Union value and its legal components.[60] While awaiting the legal outcome of this Proposal, we should stress the characteristics and possible impact of this document. This Document underlines, as the 2014 Commission Framework already did, that the rule of law backsliding is definitely not a purely internal issue. By connecting financial resources with the issue of the rule of law protection, the EU Commission used a tested tool used in the EU external policy, especially in enlargement and neighbourhood con-

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Council Further strengthening the Rule of Law within the Union State of play and possible next steps, [https://ec.europa.eu/info/sites/info/files/rule_of_law_communication_en.pdf], accessed 29. May 2020

56 Kochenov; Pech,*op. cit*., note 7, p. 624

57 Argyropoulou, V., *Enforcing the Rule of Law in the European Union, Quo Vadis EU?*, [https://harvardhrj.com/2019/11/enforcing-the-rule-of-law-in-the-european-union-quo-vadis-eu/#_ftn1], accessed 28. February 2020

58 Kochenov; Pech, *op. cit*., note 7

59 Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final

60 Article 1 (a) Commission Proposal: "'the rule of law' refers to the Union value enshrined in Article 2 of the Treaty on European Union which includes the principles of legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection by independent courts, including of fundamental rights; separation of powers and equality before the law."

ditionality policy. Even though this "spending conditionality"[61] mechanism seem as a more powerful instrument *vis-a-vis* Member States,it would be useful to point out that conditionality per se is not characteristic for the (EU) internal matters, having in mind that upon the entry, the pre-accession conditionality is replaced with mutual solidarity.[62] The only exception to this case is asthe Cooperation and Verification Mechanism(CVM)[63] introduced in Bulgaria and Romania, which, regardless of the membership of the aforementioned states, has the conditionality scheme in its core.[64] In addition, we arrive again to the issue between the supranational mechanism and reserved national legal affairs, with an additional question of theEU Commission's discretionary powers that should be examined. When potentially applying this mechanism, the EU Commission itself may come to a situation to be close to disregarding the principle of conferral and legal certainty, and therefore potentially risking the EU rule of law principle with its own actions.[65]

Another EU Commission's document, a 2019 Communication: Strengthening the rule of law within the Union[66] was welcomed as a positive effort of the EU *par rapport* the rule of law enforcement issue. With the aim of upholding the rule of law which is, according to the Communication, a "bedrock of the common identity"[67], and aside of stressing its own pro-activity, the Commission introduces the regular rule of law reporting cycle and a stronger involvement of Member States in the coordinated and reinforced approach. In addition, as in the Proposal, it paid more attention to the financial conditionality. Moreover it aimed to be far from the EU Commission driven process, by involving not only Member States but engaging civil societies as well as Venice Commission and GRECO of the Council of Europe. This response, besides all others, previously mentioned, seems to be more focused on the promotion than on the reaction or more importantly, efficient and strong response on the EU level. As Dimitry Kochenov rightly

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61 Fisicaro, M., *Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values*, European Papers, no. 3, 2019, pp. 701-706

62 *ibid.*, 718

63 Commission, Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, notified under document number C(2006) 6570 final

64 The Commission monitors the fulfillment of benchmarks, which exist in the pre-accession conditionality such as judicial reform including independence of the judiciary, fight against corruption etc. Using this mechanism, the Commission can take appropriate measures that include the suspension of the Member States' obligation to recognise and execute Bulgarian and Romanian judgments

65 Fisicaro, *op. cit.*, note 56

66 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening the rule of law within the Union, a blueprint for Action, COM/2019/343 final

67 *ibid.*

notices, the EU Commission does not explain neither the nature of the rule of law backsliding nor it provides an instrument that will equally match the deeply rooted crisis.[68]

3.3. "Practice makes perfect" – Western Balkans negotiation process

When it comes to the Western Balkans' countries, especially Serbia and Montenegro, as they are considered to be the front runners in the negotiation process[69], the EU Commission's documents seem to determine the rule of law criteria in a more precise and detailed manner than in the previous enlargement rounds. Yearly Progress reports and Chapter specific Screening reports as well as Common positions emphasised the role of the rule of law in the negotiation process.[70] The significance of the rule of law as a political criterion is especially emphasised in Chapter 23 devoted to Fundamental rights and Judiciary and in a more technical form in Chapter 24 devoted to Justice, Freedom and Security. It is also important to emphasise that those two chapters are, as part of the Commission's altered approach, covered by the separate Non paper and therefore not included anymore in the yearly Progress report with other Chapters covering the *acquis*. This demonstrates the importance of tackling the two chapters underpinned by the rule of law, separately in a specific document that ultimately dictates the pace of the overall negotiations.

After the sixth circle of enlargement, with the Croatian accession process, the revisedmethodology included opening and closing benchmarks, as well as interim benchmarksand paved the way for further detailed conditionality approach. The shortcomings and lesson learnt from the previous enlargements rounds, were underlined even in the Council Conclusions in 2011,[71] and the introduced "equal balance clause" or the "imbalance" clause firstly for Montenegro and then Serbia, meant that the success in providing the respect of the rule of law functioning and

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68 *ibid.*

69 Drenovak-Ivanovic, M.; Bogojevic, S., *Environmental Protection Through the Prism of Enlargement: Time for Reflection*, Common Market Law Review, no 56, 2019, p. 950

70 See for example: Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions 2016 Communication on EU Enlargement Policy, p. 9 [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20161109_strategy_paper_en.pdf], and Commission Staff Working Document Serbia 2019 Report Accompanying the document, Chapter 2, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-serbia-report.pdf], accessed 29. May 2020

71 Council conclusions on Enlargement and Stabilisation and Association Process 3132nd General Affairs Council meeting Brussels, 5 December 2011, [http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/], accessed 15. March 2020

promotion will definitely balance the overall development in all other chapters.[72] It seemed that this new approach gave, paradoxically, the rule of law value more impact and importance than in the previous enlargement process. It was also motivated by the Croatian experience, as the EU had introduced Chapters underpinned by the respect of the rule law (namely Chapter 23 and 24), however the focus on their substance and respectwas shifted at the end of negotiation process leaving no time to estimate Croatian real fulfilment of the rule of law criteria.[73]

With new challenges arising inside the EU, it was noteworthy to take into account recent documents such as the Commission's Communications in 2016 and subsequently in 2018[74] that again altered the so-far approach and promoted the principle "fundamentals first" that included the rule of law. In a separate chapter in the 2018 Communication, the EU Commission stressed the rule of law principle that should be given the utmost priority, having in mind the *momentum* in the EU as well. Interestingly enough, driven by the internal EU rule of law issue, the Communication did not miss to stress the need for a more effective mechanisms that will continue to follow the candidate's progress from its beginning throughout the whole process. It seemed that, at least in the recent years, the EU institutions realised that fulfilling the rule of law purely as a formal condition, without the proper understandingwould not suffice as it will come back as a boomerang not only for the country in question but for the EU legal and political system as well. Moreover, the country-by-country experience so far, steered the EU Commission in the right direction towardsstrengthening the prevention instruments in the candidate countries rather than reaction in the EU later on. If we follow the structure of the recent Non paper for Serbia for the Chapter 23,[75] we can see that the rule of law value per se is not mentioned. Nor its definition or understanding in a proper enlargement context is ever specified in an EU institution document. However, is strongly considered, stemming from the whole negotiation narrative and the chapters that fill in the content of the aforementioned benchmarks of the Chapter 23/24 that if the enforcement and development of the functioning judiciary in all its aspects, the anti-corruption measures as well as the protection of fundamental rights show progress, the rule of law is therefore considered respected and equally

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72 Pejović, A. A., *Vladavin aprava u politici prijema u Evropsku uniju*, Matica Crnogorska, no. 66, 2016

73 *ibid*.

74 Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee Of The Regions 2016 Communication on EU Enlargement Policy, 9.6.2016. COM(2016) 715 finalCommunication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans, 6.2.2018. COM(2018) 65 final

75 Non-paper on the state of play regarding chapters 23 and 24 for Serbia, November 2019

protected. In the case of the progress documents related to the Western Balkans, aside of the declaratory statements that accentuate the importance of the respect of the said value, it is assumed that it is to underpin every area of Chapter 23 (and in most parts also Ch. 24) as the Commission once again refers to the external sources such as the Rule of Law Checklist by the Venice Commission.[76]

Regardless of the more specified and focused approach that was updatedin order to prioritise and engage the EU's supervision and involvement, we point out to the following: firstly, as already said, the EU rule of law value and its content are not defined in a single accession document so far; and secondly, aside of claiming that the respect of the rule of law is of utmost priority,[77] the understanding of what it represents as a common value of the EU, according to article 49 TEU is not given. If we take a look in the Commission's document:A Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans, under the aforementioned rule of law imperative, organised crime, corruption, extensive political interference, lack of independent media as well as independent judiciary and accountable government are listed as issues to be solved.[78] This is far from the vast Chapter 23 substance, and far from the full or thick rule of law conception. Yet again, we may come to the conclusion that the Commission lacks the substance in demonstrating what exactly is common between the constitutional values such as the rule of law in the candidate countries with the already set values in the EU, even though it repeatedly insists on it.[79] The common understanding beyond the concept of the rule of law, which varies from thin to thick, on the one side, and its fulfilment by the candidate countries, on the other, is still "in the making". On the one hand, this could be understood, having in mind that the negotiation policy aiming at "fundamentals, such as rule of law, first" is rather new, driven by the prior experiences, still lacking its own proper instruments, as we can see in some areas it heavily relies on the Council of Europe's Venice Commission when it comes to Chapter 23, which is the "heart" of the rule of law application in the accession countries.[80] On the other hand, however, the only thing that is left for the candidate states is to understand and more importantly fulfil benchmarks

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76 Venice Commission, Rule of Law Check-list [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e], accessed 17. March 2020

77 Communication, *op.cit.*, note 74, A Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans, pp. 3-4

78 *ibid.*

79 "The region must embrace these fundamental EU values much more strongly and credibly", Communication, *op.cit.*, note 77, p. 4

80 "Serbia is encouraged to consult the Venice Commission in this legislative reform proces.", Serbia 2019 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the

of the aforementioned chapters as part of the rule of law negotiation criteria. This also seems rather difficult having in mind that even the EU approach towards accession and its content varies with years.

The New Methodology for the Western Balkans, introduced in February 2020,[81] obviously responds tothe EU spill-over of the rule of law backsliding. This confirms once again that vague and flawed pre-accession conditionality policy in the previous enlargements was to be altered significantly so the same mistakes are to be avoided *pro futuro*. The New Methodology re-enforces the Commission's involvement and the monitoring process as well as the Member States systematic involvement. This was also an answer to the EU accession fatigue that re-emerged in the candidate countries, especially when it comes to the prospective EU- membership process. This new approach is not without concerns. Surely, the strong rule of law conditionality will determine the pace of negotiations, and more importantly the opening and closing of the accession negotiations. However, it still does not give a solid definition of what are the EU rule of law components that a candidate country should share, leaving it open to the arbitrariness of both sides. Additionally Serbia and Montenegro, the two states that went the furthest in the negotiations process are to alter the previous for the new methodology, marking the whole process with legal uncertainty. To depict, if for example, the EU rule of law is to be endangered even more in the EU, the EU can again change the accession methodology that is already applied on the candidate countries.Nevertheless, the enforcement and monitoring of the rule of law is indeed an important goal, having in mind the importance of the enlargement process for the internal state of affairs of the EU. Moreover, "fundamentals first" is also the right approach having in mind the experiences of Hungary, Poland, Romania etc. Nevertheless, besides finding the balance between positive and negative incentives while monitoring the negotiation process, the EU Commission should focus also on the substance of the each political and legal reform that has a rule of law *rationale* behind it. The proper guidance in the New Methodology goals application and understanding its core is of utmost importance for the candidate states and should be on the EU's agenda. Should this be omitted by the EU institutions, namely EU Commission, the Western Balkans' countries could end up with a new set of rules and benchmarks, even more complex to understand and demanding to fulfil without

Regions 2019 Communication on EU Enlargement Policy, p. 16, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-serbia-report.pdf], accessed 30. May 2020

81 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, Enhancing the accession process - A credible EU perspective for the Western Balkans COM(2020) 57, [https://ec.europa.eu/neighbourhood enlargement/sites/near/files/enlargement-methodology_en.pdf], accessed 22. March 2020

their clarity. Finally, as a result, the rule of law condition could be perceived by the candidate states as a burden and not a goal and ultimate value in one country.

4. CONCLUSION

The EU's handling of the rule of law crisis and the lack of a strong coherent response actually paintsthe real picture of the European identity that aims to be (re)built. This means that even though the idea of the "United in diversity" functioned well as a political motto, it had a little relevance on the practical level. The complexity of finding the proper balance between the unity envisaged through common constitutional values, on the one side andthe expected plurality of constitutions, on the other, is somehow not understood well. The political success of the European enlargement policy seemed to underestimate the importance of the commonunderstanding of the legal and political meaning of each value instead of just proclaiming that a value or a set of values is common. Without taking into account the legal and constitutional specificities of the countries in transition, whether Member States or candidate countries, the European Union chose the "form over substance" approach. The result was nevertheless seen less than a decade after.

With the rule of law backsliding, spilling-over from one EU country to another, it became clear that the rule of law issue is not just formality and purely internal issue. The Court of Justice of the European Union seemed to be the only institution willing to proactively provide the legal basis for the EU rule of law protection. In addition, until 2014 Rule Framework, it was the sole body to touch upon the substance of the EU rule of law, although varying from the thin to thick concept of this value. The EU institutions have failed in two ways: firstly, in achieving a common understanding as to what the rule of law represents in and outside the EU and secondly in enforcing this open-ended value against national authorities. Even when it was past the due time to react the EU Commission, as a response, included procedures that envisaged ex-post involvement and depended on the political will. This could have been avoided if the EU Commission had not been silent about the core problem – the lack of uniform understanding of what the EU rule of law represents. This is without a doubt a highly sensitive business. The reason is not rooted solelyin the somewhat blind acceptance of the Western ideals and values, it was also the strong reliance of both sides that "on paper" all the conditions where fulfilled including the rule of law. This made the understanding the Article 49 TEU as proclaiming "*finalité* oriented values"[82] where the only goal was

[82] Mader, O., *Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law*, Hague Journal on the Rule of Law, 2019, p. 140

to use the values as an instrument to the Unity, without the substance. The vulnerability of the EU's constitutional structure is rooted exactly between the ideal of the proclaimed values and goals that all States, especially the "new ones" should achieve and the reality that has fragmented integration and lack of coherent EU response. The concern over the application of the rule of law principle instead of trying to define it or find whatrepresents a common constitutional denominator between all the states, is now taking its toll. In near and medium-term future, the EU will need to find, not only a stronger enforcement instruments, whether in spending conditionality or in CVM-like mechanisms, but it would also need to focus on the *ex-ante* dealing with values. This means dealing with the specificities of the constitutional systems, in accordance with constitutional pluralism and in order to achieve constitutional values homogeneity not only on paper, but in practice.

In order to avoid the same approach, the New Methodology for the Western Balkans should contribute to the stability of the states' adherence to the values that are proclaimed by the EU to be common. Albeit, still without an uniform understanding of the said value, the Union is to tackle general deficiencies in every aspect that the rule of law underpins, and (un)fortunately, as an umbrella principle,it underpins a lot: so much that it is difficult to understand whether all aspects of negotiating chapter such as anti-corruption and fundamental rights *in toto* are to be considered as covered by the rule of law principle. If they are, it should be explicitly explained, as not to hinder the accession process with too wide or too narrow interpretation of the rule of law components, overstepping in the national competences. The political will of the countries involved on the one side, and the EU institutions on the other,as well as a substantially deeper involvement should be the two focus points. In addition, having in mind that the New Methodology is yet to be accepted by the two front runners in negotiations, Serbia and Montenegro, the EU has the chance to re-orient its focus, not only to the strong monitoring but also to the conceptualising what is the rule of law value that one country with differences in history, constitutional tradition, legal system which is going through the political, economic and legal transition, should adhere to or accept. And finally, the EU should pay attention to the creation of "perfect Member States" that will eventually throughout the "carrot and the stick" game, have a greater compliance with all the conditions, including values, than the existing Member States.

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Topic 2

EU law in context of enlarged Union

UDK 340.137(4-67EU:470)
Review article

CONTEMPORARY ASPECTS OF LEGAL APPROXIMATION BETWEEN THE EUROPEAN UNION AND THE RUSSIAN FEDERATION

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ABSTRACT

Legal harmonization has been playing a central part in international relations from the second half of the XX century. This was caused by the intensification of cooperation in the economic sphere between both public and private actors from different countries. This can be seen in an example of the European Union and the Russian Federation. The goal of legal approximation of the EU law with the Russian legal system was inscribed in the Partnership and Cooperation Agreement between the European Communities and the Russian Federation.

Russia, like many countries that are not member states of the European Union, has been making efforts to approximate their national legislation to norms of the EU legal system. Legislative approximation of the EU law means transposition, implementation, and enforcement of the norms of the EU legal system in their partner countries' national legal practices; a legislative process that aims gradually to bring closer and eventually to bring into compliance partner countries' legislative framework with EU law.

The research is focused on the study of modern issues of approximation between legal orders of the European Union and the Russian Federation with stress on particular branches of law, which was influenced by the process. The author starts from the evolution of the approximation process, its general issues, development of a relevant international legal basis. Features of influence of the EU on developments of the Russian legal system were identified and analyzed. As the EU-Russia legal approximation process now faces both internal and external-global threats, relevant law, developments of its different spheres and branches of the legal system of the Russian Federation, will be explored. In the focus of research, there will be developments in the following branches: civil law, labor law, technical regulation, legal regulation of higher education. The author finally gives his view on prospects of the EU-Russia legal approximation process, its development in the light of existing and future global and regional challenges and relations.

Keywords: *approximation, legal harmonization, implementation, the legal system, European Union, Russian Federation*

1. INTRODUCTION

The normative sphere occupies a crucial place in relations of the European Union with Russia, however, as with other states. Obviously, in the context of Russian-European relations, Russia is seen as a recipient — an actor called upon to adopt European standards. Bilateral international treaties act as the legal basis for the EU's influence on legal orders of third countries. Moreover, when concluding international agreements with third countries, the EU widely uses the practice of including in these agreements provisions similar to those contained in EU legislation addressed to member states, as well as provisions that require third countries to adapt their legislation to relevant legal acts of the European Union, thereby harmonizing it with the provisions of *aquis*. This creates the legal basis for the assimilation of the provisions established by EU law, the internal legal orders of third countries.[1] This is a model of "hierarchical inclusion",[2] which considers the European Union as a "normative hegemon"[3] and involves the gradual entry of the recipient into the European normative space.[4]

Relations between the European Union and the Russian Federation are a serious test for the "normative power of Europe." This concept, formulated by J. Manners, indicates that the European Union is, first and foremost, values and norms, first of all, such as peace, freedom, democracy, the rule of law and respect for human rights, as well as several secondary ones — social solidarity, non-discrimination, sustainable development, and good governance.[5] Considering the scale and ambitions of both sides, regulatory cooperation is hardly effective, smooth, and cloudless.

In these conditions the main objective of the contribution is to provide analysis of the normative component of the process of adaptation of Russian national legislation to the legislation of the European Union in particular areas of legal regulation. Taking into consideration this objective the paper will start from consideration of major issues of the EU-Russia law approximation process. Since the approximation process covers various fields of Russian law, attention will be given

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1 See further: Hillion, Ch., *The evolving system of the EU external relations as evidenced in the EU partnerships with Russia and Ukraine,* Leiden, 2005

2 Haukkala, H.. *Debating Recent Theories of EU-Russia Interaction,* Cooperation, and Conflict, *vol.* 43, no. 1, 2008, p. 116

3 Haukkala, H., *The European Union as a Regional Normative Hegemon: The Case of European Neighbourhood Policy,* Europe-Asia Studies, *vol.* 60, no. 9, 2008, pp. 1601–1622

4 Yun, S.M. (ed.), *Russia and the European Union: Textbook*, Tomsk, Publishing house of Tomsk University, 2014, p. 53

5 Manners, I., *Normative Power Europe: A Contradiction in Terms?* Journal of Common Market Studies, *vol*. 40, no. 2, 2002, pp. 235-258

to relevant developments in civil law, legal regulation of the transport sector, labor law and the sphere of technical regulation. Further, the paper elaborates in detail the normative arrangements of Eu-Russia law approximation and some features of the current Russian legislation in the field of higher education through the analysis of the relevant Russian legal sources.

2. EU-RUSSIA LAW APPROXIMATION: SOME MAJOR REMARKS

Approximation of the Russian legal system with the legal order of the European Union is primarily based on the Partnership and Cooperation Agreement (PCA) of 1994,[6] by which the concept of creating EU-Russia four common spaces should be implemented: a Common Economic Space; a Common Space of Freedom, Security and Justice; a Common Space of External Security and a Common Space of Research and Education, including Cultural Aspects.[7] These four spaces should appear based on the PCA and the basis of the tools and mechanisms provided by the PCA. As noted in the Russian doctrine, a tool for approximation of legislation, provided for by Art. 55 of the PCA should also become a reference point for their formation.[8] The implementation of the relevant provisions of documents on cooperation between the Russian Federation and the EU allows forming the basis for reforming the domestic legal system and its development in the context of the most advanced regulatory trends. This, among other things, can contribute to greater predictability of work in Russia not only for foreign, but also for domestic business, and stimulate investment attraction.[9]

Some PCA provisions have not been sufficiently implemented so far. Among the main ones, the question of approximation of the legislation should be noted. The Agreement stipulated the gradual ensuring of compatibility of the economic legislation of Russia with the legislation of the European Union as a direction of Russian reforms. Later, in the roadmap on the common economic space and the mechanism of the dialogues created within its framework, this general reference was indirectly interpreted primarily as a task of gradual harmonizing the laws of

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6 Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, OJ L 327, 28.11.1997, p. 3-69

7 Kashkin, S.Yu., *Strategy and mechanisms for harmonizing the legislation of Russia and the European Union as key components of their effective mutual development in the 21st century,* Moscow, Russian-European Center for Economic Policy, 2006, p. 10

8 Kashkin S.Yu.; Kalinichenko, P.A., *Harmonization of the legislation of Russia and the European Union, as a key component of their effective mutual development in the XXI century*, Law and state: theory and practice, 2005, no. 4, p. 103

9 Kulik, S.A., *Russia - European Union: On the Forks of "Strategic Partnership",* INSOR, 2010, June, [http://www.insor-russia.ru/files/Russia_EU_Kulik_.pdf#3], Accessed 10 April 2020

Russia and the European Union based on the legislation of the latter — *acquis communautaire*. In other words, based on the principle that the EU usually provides for in preferential agreements with third countries or with the prospect of switching to a preferential regime.[10] However, there is no legal basis for such an interpretation. In fact, Russian legislation has been improved in line with international best practices, including the EU's one.

It should be noted that any references to EU law, the mention of acts of the Union in the texts of Russian legal acts or explanatory notes to them are extremely rare. Nevertheless, their content in some cases in every possible way indicates the use of European regulatory experience, the perception of the norms and institutions of EU law in the legal system of the Russian Federation, the convergence of Russian legislation with EU law. Besides, the membership of Russia in the Council of Europe also makes a significant contribution to the convergence of Russian legislation with European legal norms, because the European Convention on Human Rights and other conventions of this organization establish common legal standards, including for EU member states.

In general, the process of approximating Russian legislation with EU law is too diverse and complicated. Nevertheless, some researchers point to the trend of "Europeanization" of Russian law,[11] which in the modern era consists of both Europeanizing the Russian legal culture as a whole and modernizing legislation based on European standards and Europeanizing Russian judicial practice.[12]

3. EFFECTS OF THE EU-RUSSIA APPROXIMATION PROCESS IN VARIOUS FIELDS OF LEGAL REGULATION

Among the branches in which obvious success in approximating Russian legislation with EU law has been achieved, various institutes of civil law, intellectual property law, competition law, public procurement, state regulation of foreign trade, technical regulation and others can be distinguished.

So, on 18 July 2008, Decree No. 1108 "On improving the Civil Code of the Russian Federation"[13] was signed. This document approved the proposal of the

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10 *Ibid.*

11 See: Kalinichenko, P.A., *Europeanization of Russian law,* [https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/5663/file/belling_online_S65_86.pdf], Accessed 10 April 2020

12 Kazimirova, N.G., *Russia in the of continental law: reception and perspectives of reforming of the legislation,* Economic, Legal, Social-Political and Psychological Problems of Development of the Modern Society, 2015, pp. 171-175

13 Decree of the President of the Russian Federation "On improving the Civil Code of the Russian Federation" dated July 18, 2008 No. 1108, Rossiyskaya Gazeta, 2008, No. 155

Presidential Council on the codification and improvement of civil legislation on the development of a concept for the development of civil legislation.[14] At the same time, among other things, the following goals were proclaimed:

- further development of the basic principles of civil legislation of the Russian Federation;
- reflection in the Civil Code of the experience of its application and interpretation;
- approximation of the provisions of the Civil Code of the Russian Federation with the rules for regulating relevant relations in EU law;
- use in the civil legislation of the Russian Federation the latest positive experience in the modernization of EU civil codes.

Subsequently, on 27 April 2012, the State Duma of the Federal Assembly of the Russian Federation in first reading adopted the draft Federal Law No. 47538-6 "On Amendments to Parts One, Two, Three and Four of the Civil Code of the Russian Federation, as well as to Separate Legislative Acts of the Russian Federation",[15] which incorporated many provisions and entire institutions of law of the European Union, for example, concerning the introduction of new categories of legal entities, some internal issues of their functioning and activities. This project was developed as part of the implementation of the Civil Law Development Concept, and it was assumed that back in 2012 it would be adopted as a whole and at the same time. However, the project did not receive further promotion.[16] Later on, it was divided into smaller blocks, which were gradually finalized and adopted in the form of federal laws on amendments to different chapters of the Civil Code.[17]

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14 Baltutite, I.V., *The contingence of corporate regulation in the being reformed Civil Code of the Russian Federation with the provisions of the Corporate law of the European Union*, Science Journal of VolSU, Series 5: Jurisprudence, no. 4, 2013, p. 2

15 Draft Federal Law No. 47538-6 "On Amending the Civil Code of the Russian Federation, Certain Legislative Acts of the Russian Federation and on the Recognition of Certain Legislative Acts (Provisions of Legislative Acts) of the Russian Federation" (On Amending Parts One, Two, Three and the fourth Civil Code of the Russian Federation, as well as in certain legislative acts of the Russian Federation), [https://sozd.duma.gov.ru/bill/47538-6], Accessed 10 April 2020

16 Regulation of the State Duma of the Federal Assembly of the Russian Federation of November 16, 2012, No. 1150-6-ГД "On the procedure for considering the draft federal law N 47538-6 "On amendments to parts one, two, three and four of the Civil Code of the Russian Federation, as well as separate legislative acts of the Russian Federation", Collection of the legislation of the Russian Federation of November 26, 2012, No. 48, Art. 6596

17 Sergeeva, A.P., (ed.), *Commentary on the Civil Code of the Russian Federation. Part one,* Moscow, Prospect Publishing House, 2018, p. 74

One of the main mechanisms of cooperation between the European Union and the Russian Federation is the Transport Sector Dialogue. It functions as part of the Roadmap to create a common economic space between Russia and the EU. Since 2010, priority in its work has been put on the implementation of the Partnership for Modernization initiative. In particular, within the framework of this sector dialogue, a special Working Group on modernization was created.

The transport dialogue between Russia and the EU is a mechanism of cooperation between the Ministry of Transport and other state bodies of the Russian Federation, on the one hand, and the European Commission, primarily the General Directorate for Transport, on the other. Its goals are to exchange views and establish strategic relations between partners in the transport and logistics sphere.[18] It is called upon to ensure harmonization of technical requirements and conditions for transporting goods, synchronizing transport development strategies, exchanging experience and know-how, collaborating in the implementation of major initiatives, such as the "Northern Dimension», and discussing issues that arise at the level of Russia and the European Union in whole[19].

In the field of labor law, there is also a convergence of Russian legislation with EU legal norms. It is noted that, in principle, the Labor Code of the Russian Federation reproduces almost all institutions of EU labor law. Another thing is how it does this, where there are gaps and shortcomings, how to improve Russian labor legislation to make it more effective by harmonizing it with the European one. Russian legislation in the field of labor protection as a whole meets high standards for ensuring industrial safety and occupational health and is not inferior in this regard to EU labor law standards. However, it is still significantly inferior to Europe in putting these standards into practice.[20]

It is rightly pointed out that the modern similarity of legal regulation of the labor sphere in Russia and the EU is since both sides largely accept international labor standards developed by the International Labour Organisation at the universal level. At the same time, nothing prevents the approximation of these legal orders in the field of labor regulation, which in many ways will make this process even more effective.[21]

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18 See further: Entin, M.L.; Istomin, I.A., *EU-Russia cooperation in the transport and logistics sector. Analytical reports,* Issue 2, September 2012., Moscow, MGIMO-University, European Training Institute at MGIMO (University) of the Ministry of Foreign Affairs of Russia, 2012

19 Emirova, A.E., *Transborder problems of formation transport and transit systems,* Research of innovative potential of the company and forming directions of its strategic development, 2013, p. 352

20 Kashkin, S.Yu., *European Union Labor Law*, Moscow, 2009, p. 138

21 *Ibid.*

Regarding the sphere of technical regulation, within the EU it is characterized by a developed corresponding institutional system, an effective system of control and punishment, universality, spreading its influence almost on a par with global standardization systems (International Organization for Standardization (ISO),[22] International Electrotechnical Commission (IEC),[23] WTO Agreement on Technical Barriers to Trade (TBT WTO),[24] etc.).

The EU technical regulation system dates back to 1957 when member states initiated negotiations with the European Free Trade Association (EFTA) regarding the harmonization of technical standards. In the future, within the framework of the European Economic Community, the necessary institutional base began to develop, so in 1961 the European Committee for Standardization[25] was created, in 1972 — the European Committee for Standardization of Electrical Engineering.[26] In total, 330 technical committees currently operate within the European Union. In their competence, they partly duplicate relevant ISO bodies.

In the Russian Federation, under Article 7 paragraph 8 of the Federal Law «On Technical Regulation», 2002,[27] international standards should be used in whole or in part as a basis for the development of draft technical regulations, unless the international standards or their sections would be ineffective or unsuitable to achieve those goals established by Article 6 of this federal law, including due to climatic and geographical features of the Russian Federation, technical and (or) technological features.

Therefore, the consideration of a foreign standard as a source of information, the application of the best foreign experience, the borrowing of certain provisions of international standards is one of the ways of developing Russian legislation in this area. When considering the scope of technical regulation in the Russian Federation, it is necessary to take into account the membership of the state in the Eurasian Economic Union (hereinafter — the EAEU).[28] The EAEU technical

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22 International Organization for Standardization (ISO), [https://www.iso.org/ru/home.html], Accessed 10 April 2020

23 International Electrotechnical Commission, [http://www.iec.ch/], Accessed 10 April 2020

24 WTO Technical Barriers to Trade (TBT) Agreement, [https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm], Accessed 10 April 2020

25 European Committee for Standardization, [https://www.cen.eu/Pages/default.aspx], Accessed 10 April 2020

26 European Committee for Electrotechnical Standardization, [https://www.cenelec.eu/#top], Accessed 10 April 2020

27 Federal Law of December 27, 2002 No. 184-ФЗ «On Technical Regulation», Rossiyskaya Gazeta, N 245, December 31, 2002

28 Eurasian Economic Union, [http://www.eurasiancommission.org/], Accessed 10 April 2020

regulation system is still at the stage of formation, in this regard, law enforcement practice cannot yet be characterized by a high degree of efficiency, like the whole EAEU technical regulation system, which is not comparable with the level of development of the EU technical regulation system.

Since the system of technical regulation of the Russian Federation has the highest level of development in terms of quality and legal support, it largely determines the development of the Eurasian regional system of technical regulation and determines the level of requirements, standards and procedural restrictions in this area, extending to the markets of the EAEU countries.

Interestingly, most of the technical regulations and standards adopted by the Eurasian Economic Commission are "identical" in terms of text and content to EU technical regulations and European standards, as well as "international" standards, which, as mentioned above, are in line with European ones. The practice of developing and adopting technical regulations and standards in the Eurasian Economic Union based on international / European standards creates the main prerequisite for the convergence of technical regulation systems of the EU and the EAEU. In 2017, Eurasian Economic Commission, CEN and CENELEC signed a Memorandum of Understanding.[29]

31 EAEU technical regulations, which entered into force from 2012 to 2015, were developed based on EU framework directives and regulations. From 60% to 80% of the EAEU technical standards are identical to European / international standards (depending on the regulations). The total number of Eurasian standards developed based on international and European standards is 5821. For example, the EAEU technical regulation "On the safety of low-voltage equipment" (household appliances and hand tools) practically coincides with the relevant EU directive, and out of 978 standards listed in the list of standards to this technical regulation, 841 are identical to IEC / CENELEC standards. The remaining 137 standards are "modified" based on international / European standards, i.e. according to the text deviate from them no more than 20%.[30] This is since initially when forming the national legislation of the Russian Federation, guidelines were taken for harmonizing the national system of technical regulation with international

[29] Memorandum of understanding in the field of standardization between the European Committee for Standardization (CEN), the European Committee for Standardization in the Field of Electrical Engineering (CENELEC), the European Institute for Standardization in Telecommunications (ETSI) and the Eurasian Council for Standardization, Metrology and Certification (EASC), Technical Regulation Bulletin, No. 6 (103), 2012

[30] Kofner, Yu.K., *The system of technical regulation in the EAEU,* EAEU Partner, Bulletin of the Eurasian Economic Union, *vol.* 18, 2018, p. 77

standards. However, procedurally, the institutions and mechanisms for their implementation are significantly different.

3. LEGAL ANALYSIS OF THE PROCESS OF LEGAL APPROXIMATION BETWEEN EU AND RUSSIA IN THE HIGHER EDUCATION SPHERE

In the context of the present research, a special focus should be placed on the study of the field of science and higher education.

Knowledge and innovation are becoming the main factors in the competitiveness of national economies in the growing global processes of globalization. Awareness of the evolutionary nature of the civilizational development of these processes in the European Union gave impetus to the deployment of two interconnected strategic initiatives — the Bologna Declaration (1999)[31] and the Lisbon Strategy (2000).[32] The Russian Federation acceded to the Bologna Declaration, and therefore to the Bologna Process in 2003. Its goal is to bring together and harmonize the educational systems of European countries, to create the single European space for higher education. The participation of Russia in the Bologna process makes it possible to carry out structural transformations of higher education according to an agreed system of criteria, standards, and characteristics, which allows Russia to be part of the European educational and scientific space.[33]

The achievement of the Bologna Process is the creation of conditions for each participating country to compare their educational systems and understand their uniqueness and identity, but not completely identical education systems in different countries. The Bologna process is integration for the sake of self-identification and self-awareness in the European context, aiming to create the European scientific and educational space to increase the competitiveness of European higher education, while the main priority of the Lisbon Strategy is to turn Europe into a dynamic knowledge economy. Measures to implement both mechanisms of cooperation are aimed at developing the intellectual potential of the European region, namely, its formation and use for the stability of economic growth, increasing the

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31 Joint Declaration of the European Ministers of Education convened in Bologna on 19 June 1999, [http://www.ehea.info/media.ehea.info/file/Ministerial_conferences/02/8/1999_Bologna_Declaration_English_553028.pdf], Accessed 10 April 2020

32 Lisbon Strategy, 2000, [http://www.europarl.europa.eu/summits/lis1_en.htm], Accessed 10 April 2020

33 See: *Russia in the European Higher Education Area,* Artamonova, Yu.D. *et al.* (eds.), Moscow, 2015, [https://istina.msu.ru/media/publications/book/bbc/575/10628419/Russia_in_european.pdf], Accessed 10 April 2020

number of new jobs for highly skilled workers, as well as ensuring social consent of the European society. However, one should not idealize the Bologna process as it is characterized by inconsistency and complexity.

By joining the Bologna process, Russia has initiated some normative measures to ensure compliance of domestic legislation with the provisions of the Bologna Declaration. Initially, the Government of the Russian Federation approved the "Priority Directions for the Development of the Education System of the Russian Federation", among which were the following:

- meeting the demands of the modern labor market for professional education programs (introduction of professional standards by 2008, new educational standards by 2010);
- changing the concept and structure of the state educational standard (expanding the freedoms of educational organizations, switching to "framework" educational standards);
- introduction of a two-tier higher professional education;
- creation of conditions for academic mobility of students (internal and external);
- providing conditions for lifelong education;
- credit-modular construction of professional educational programs.[34]

On 15 February 2005, the Ministry of Education and Science of Russia issued an Order "On the implementation of the provisions of the Bologna Declaration in the higher education system of the Russian Federation", which approved the Action Plan[35] for the implementation of the Bologna Declaration in the higher education system of the Russian Federation for 2005-2010.[36]

The Plan identified several priority activities, here are some of them:

- amendments to the Laws "On Education" and "On Higher and Postgraduate Professional Education";

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[34] *Ibid*.

[35] Order of the Ministry of Education and Science of the Russian Federation of February 15, 2005 No. 40 "On the implementation of the provisions of the Bologna Declaration in the system of higher professional education of the Russian Federation", Bulletin of the Ministry of Education and Science of the Russian Federation, No. 4, 2005

[36] Gorylev, A.I., *Legal regulation of the participation of Russian universities in the Bologna process,* Bulletin of the Nizhny Novgorod University. N.I. Lobachevsky, no. 6-1, 2009, p. 41

- development, approval, and implementation of state educational standards of higher professional education of the third generation, formed based on the competency-based approach and credit system;
- mandatory use of the credit system (ECTS);
- creation of a system of comparable criteria, methodologies, and technologies for assessing the quality of education to ensure harmonization of the Russian system for assessing the quality of education with European systems;
- promoting the development of academic mobility of students and university lecturers.[37]

Currently, the desire to ensure compliance with the Bologna process in every possible way permeates the measures of legal regulation of higher education in the Russian Federation. In particular, in the Concept of the Federal Target Program for the Development of Education for 2016-2020, approved by Decree of the Government of the Russian Federation of 29 December 2014 N 2765-r,[38], as one of the main results of the implementation of the Program, that as part of measures on development and dissemination of new technologies and forms of organization of the educational process by creating a regulatory and methodological base in the system of vocational education, advanced training of managers and scientific and pedagogical workers, analytical support of these processes, it is indicated the implementation of basic requirements of the Bologna process in all institutions of higher education and secondary vocational education.

The Bologna process includes many different mechanisms for its implementation, for example, the national qualifications framework, a three-tier system of higher education, the European system of accumulation and transfer of credit units (ECTS), mechanisms for recognition of periods of study at other universities and others. Hence, it seems necessary to analyze the implementation of some of these mechanisms in the Russian Federation in more detail.

In 2008, Recommendation on the establishment of the European Qualifications Framework for Lifelong Learning (EQF)[39] formally entered into force. Since then it allows us to compare qualifications and educational degrees, and to create the

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37 *Ibid.*

38 Regulation of the Government of the Russian Federation of December 29, 2014, N 2765-r «On the Concept of the Federal Target Program for the Development of Education for 2016 - 2020», Collection of the legislation of the Russian Federation, No. 2, 01/12/2015, Art. 541

39 Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning (Text with EEA relevance), OJ C 111, 6.5.2008, p. 1–7

basis for mutual recognition of higher education programs of different countries.[40] The National Qualifications Frameworks (NQF) have already been established in most European countries. In the Russian Federation, the National Qualifications System (NQF) is being introduced, that is, a set of interrelated documents, state-public institutions and events, in particular, consisting of the National Qualifications Framework,[41] industry qualifications frameworks, professional standards[42] and other components. However, these measures have not yet been fully developed and implemented.

It should be noted the success in introducing a three-tier structure of Russian higher education. In particular, the Federal Law of 29 December 2012 No. 273 "On Education in the Russian Federation"[43] enshrined provisions on regulatory deadlines for the development of educational programs. Previously, the legislation fixed exact terms of study in higher education programs: undergraduate — 4 years, master's programs — 2 years. According to Article 12 paragraph 7 of the specified Federal Law, organizations carrying out educational activities under state-accredited educational programs (except for educational programs of higher education, implemented based on educational standards approved by educational institutions of higher education independently), develop educational programs under federal state educational standards and taking into account relevant basic educational programs.

Hence, according to paragraph 3.3 of the Federal State Educational Standard for Higher Education in the direction of preparation 40.03.01 «Jurisprudence» (undergraduate level),[44] the term for receiving education in a full-time undergraduate program, including vacations provided after passing the state final certification, regardless of the educational technology, is 4 years; in full-time or part-time education, regardless of the educational technologies used, it is increased by at least 6 months and no more than 1 year, compared with the term for full-time education.

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40 See: Artamonova, *op. cit.,* note 33

41 Russian NQF was developed based on the PCA and interaction of the Ministry of Education and Science of the Russian Federation and the Russian Union of Industrialists and Entrepreneurs, taking into account the experience of building the European Qualifications Framework

42 Regulation of the Government of the Russian Federation of January 22, 2013 No. 23 "On the Rules for the Development and Approval of Professional Standards", Collection of Legislation of the Russian Federation, January 28, 2013, No. 4, Art. 293

43 Federal Law of December 29, 2012, No. 273-ФЗ "On Education in the Russian Federation", Collection of Legislation of the Russian Federation, December 31, 2012, No. 53 (part 1), Art. 7598

44 Order of the Ministry of Education and Science of Russia No. 1511 of 12/01/2016 "On the approval of the federal state educational standard of higher education in the field of preparation 40.03.01 Jurisprudence (undergraduate level)", [https://xn--80abucjiibhv9a.xn--p1ai/%D0%B4%D0%BE%D0%BA%D1%83%D0%BC%D0%B5%D0%BD%D1%82%D1%8B/9604], Accessed 10 April 2020

The specific term of education and the scope of the specialty program, implemented in one academic year, in the part-time form of study under an individual student's plan, are determined by the organization independently within the time limits established by this paragraph.

In the field of legal higher education, national admissibility and expediency acceptable within the framework of the Bologna process also find its manifestation. For example, along with the Federal State Educational Standards for bachelor and master programs, federal state educational standards of higher education were also adopted in the specialty 40.05.02 «Law enforcement activities» (specialist program)[45] and in the specialty 40.05.01 «Legal support of national security» (specialist program).[46] These documents determined a full-time study period of five years.

The 2012 Federal Law, having established the three-tier structure of higher education, also equated postgraduate period with one of the study cycles. Under Article 108 paragraph 1 point 6, postgraduate professional education in the postgraduate study was equated to higher education, i.e. preparation of highly qualified staff in study programs for scientific and pedagogical personnel.

Based on this, postgraduate programs began to be developed and implemented by educational and scientific organizations:

- by the List of areas of study in postgraduate study, approved by the Order of the Ministry of Education and Science of Russia (harmonized with the international Fields of Science and Technology classifier of the Organization for Economic Cooperation and Development (OECD) — FOS-2007[47])[48];
- based on the Federal State Educational Standards in the areas of postgraduate studies approved by the orders of the Ministry of Education and Science of

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45 Order of the Ministry of Education and Science of Russia No. 1424 of November 16, 2016 "On the approval of the federal state educational standard of higher education in the specialty 40.05.02 Law enforcement activities (specialist program)", [https://xn--80abucjiibhv9a.xn--p1ai/%D0%B4%D0%BE%D0%BA%D1%83%D0%BC%D0%B5%D0%BD%D1%82%D1%8B/9609], Accessed 10 April 2020

46 Order of the Ministry of Education and Science of the Russian Federation of December 19, 2016 No. 1614 "On approval of the federal state educational standard of higher education in the specialty 40.05.01 Legal support of national security (specialist program)", [http://fgosvo.ru/uploadfiles/fgosvospec/400501.pdf], Accessed 10 April 2020

47 Fields of Science and Technology classifier of the Organization for Economic Cooperation and Development (OECD) — FOS-2007, [https://www.oecd.org/science/inno/38235147.pdf], Accessed 10 April 2020

48 Order of the Ministry of Education and Science of the Russian Federation of September 12, 2013 No. 1061 "On approval of the lists of specialties and areas of higher education training", [https://rg.ru/2013/11/01/obr-napravlenia-dok.html], Accessed 10 April 2020

> Russia, or based on educational standards independently set by educational institutions of higher education that have been given this right by federal legislation, and besides the federal state educational standards determine the modern universal competencies necessary for a postgraduate student, as well as research and teaching competencies.[49]

For example, according to the Federal state educational standard of higher education in the direction of preparation 40.06.01 «Jurisprudence» (the level of preparation of highly qualified staff),[50] as a result of the acquisition of postgraduate educational programs based on the results of the state final certification, graduates will be awarded the qualification "Researcher. Lecturer-researcher" with the issuance of the appropriate diploma.

One of the key aspects of the development of the education system in the European Union is lifelong learning. In Russia, the formation of a lifelong learning system is still in its infancy. However, this type of education is reflected in domestic law. By Article 10 paragraph 7 of the Federal Law "On Education in the Russian Federation" of 2012, the education system creates the conditions for lifelong learning through the implementation of basic educational programs and various additional educational programs, providing the opportunity to simultaneously acquisition of several educational programs, as well as taking into account existing education, qualifications, and practical experience during the study. However, necessary organizational, regulatory and methodological mechanisms for the implementation of this legislative norm have not yet been created.

Within the framework of the Bologna process, great attention is paid to ensuring the quality of education. In particular, the national quality assurance system is implemented through licensing and accreditation systems.

Under Article 91 paragraph 1 of the 2012 Federal Law "On Education in the Russian Federation", educational activities are subject to licensing in accordance with the legislation of the Russian Federation on licensing certain types of activities, taking into account the features established by this article. Licensing of educational activities is carried out by type of education, by the level of education, by profession, specialty, areas of study (for vocational education), by subspecies of further education. The purpose of state accreditation of educational activities

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49 See: Artamonova, *op. cit.,* note 33

50 Order of the Ministry of Education and Science of the Russian Federation of December 5, 2014 No. 1538 «On approval of the federal state educational standard of higher education in the field of training 40.06.01 Jurisprudence (the level of preparation of highly qualified staff)», [http://fgosvo.ru/uploadfiles/fgosvoaspism/400601.pdf], Accessed 10 April 2020

is to confirm compliance with federal state educational standards of educational activities in the main educational programs and the preparation of students in educational organizations.

For concretization of these legislative provisions and regulate the relevant procedures, there were adopted several acts of delegated legislation: Regulations of the Government of the Russian Federation of 18 November 2013 No. 1039 "On State Accreditation of Educational Activities"[51] and of 28 October 2013 No. 966 "On Licensing of Educational Activities",[52] which approved relevant Regulations.

The Federal Law in Article 95 also provides for the possibility of an independent assessment of the quality of education. Besides, Article 96 paragraph establishes that organizations engaged in educational activities may receive public accreditation in various Russian, foreign and international organizations. Article 96 paragraph 4 ensures the possibility of undergoing professional and public accreditation of basic professional educational programs, basic professional training programs and (or) additional professional programs as recognition of the quality and level of preparation of graduates who have acquired such educational programs in a specific organization engaged in educational activities that meet the requirements of professional standards, labor market requirements for specialists, workers and employees of a relevant profile.

Thus, the current Russian legislation provides an integrated system of various procedures for ensuring the quality of education under the provisions of European standards:

- licensing of educational activities;
- state control (supervision) in the field of education;
- state accreditation of educational activities, mandatory for all educational institutions;
- public accreditation of educational organizations by independent organizations;
- voluntary professional accreditation of educational programs by employers;

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[51] Regulation of the Government of the Russian Federation of November 18, 2013 No. 1039 "On state accreditation of educational activities", Collection of legislation of the Russian Federation, November 25, 2013, N 47, Art. 6118

[52] Regulation of the Government of the Russian Federation of October 28, 2013 No. 966 "On the licensing of educational activities", Collection of the legislation of the Russian Federation, 04.11.2013, N 44, Art. 5764

- an independent assessment of the quality of education carried out to determine the conformity of the education provided to the needs of an individual or a legal entity whose interests educational activities are carried out.

In general, the ongoing modernization of the legislation regulating the sphere of higher education complies with the requirements of the Bologna process, and its basic principles themselves have become an integral part of Russian educational law. This is due to the fact that the initial paradigms of such modernization were focused on integrating the national education system into the single European space for higher education, including on the basis of bilateral EU-Russian cooperation mechanisms. However, there remains a need for further improvement of the legislation of the Russian Federation on education for its optimization and conformity with recent European norms and best practices.

4. CONCLUSION

Despite the existing problems in mutual relations, the European Union remains the main economic and political partner for Russia on the European continent. The EU-Russia partnership is supposed to be built based on contractual relations, which in the long run facilitated the development of joint efforts in various fields of cooperation, including the sphere of legal approximation.

Approximation of national legislation with the EU *acquis* is a consistent process of convergence of the legal system of the state, including legislation, lawmaking, legal technics, law enforcement practice under the criteria set by the Union. Therefore, the process of legal approximation should be approached more broadly, since it includes a specific variety of processes of changing the legal system, the key component of which is an active and systematic impact on the national legal system and its segments to ensure an appropriate degree of functional and (or) structural similarity of the national legal order with chosen political means of a model analog and thus providing controllability of the process of development of society in the projected directions.

As international experience testifies, the mechanism of legal approximation depends on the characteristics of the legal, political, economic system of each of the states. For the Russian Federation, approximation of national legislation with law of the European Union is of particular importance and relevance, since this process involves not only the creation of a legal framework for relations with the EU but also the achievement of other goals important for the state, namely: the creation of mechanisms for implementing economic reforms, increasing the competitiveness of the economy and promoting foreign investment in the country,

the development of foreign trade between the Russian Federation and the Union and the entire spectrum of mutual trade and economic mutual relations, further democratization of social processes, development of the basic principles of the functioning of civil society per European standards, the development of the higher education system.

Work on the approximation of the Russian legislation with the EU normative prescriptions should be continued, and the existing successes and achievements to be preserved and developed. However, Russia should accept new challenges not only transferring European experience to her legal system but also offering her works, achievements, proposals, the vision of problems to the European community. Hence it appears necessary to achieve a harmonious combination of European innovations and the best domestic traditions.

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UDK 332.144:061.1(4-67EU)
Preliminary communication

TOWARDS A NEW STRATEGY FOR EU ENLARGEMENT – BETWEEN THE WISH FOR AN ENCOURAGEMENT, THE REALITY OF THE FATIGUE AND THE THREAT OF A DEAD END

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ABSTRACT

European Union's (EU) enlargement policy is, for at least half a decade, facing a reality that, with quite some benevolence, could be defined as an orientation crisis, accompanied with a substantial lack of clarity and precision. The fact that, during the second half of 2019, both North Macedonia (NM) and Albania (AL) have not achieved the status of candidate countries was only a symptom – unfortunately not devoid of still unforeseeable internal political and economic consequences – of undeniable and profound discord between the EU member states over the future of the Union's enlargement policy. When it comes to the two countries of the Western Balkans – Serbia (SR) and Montenegro (MN) – that are already in the process of membership negotiation, their relatively poor progress in 2019 – with either no further chapters provisionally closed (MN) or with only one chapter opened (SR) – only confirms the initial assessment about the fundamental crisis of this important EU policy. On the basis of scarce and mostly underdeveloped elements of the new enlargement methodology presented by the Commission in February 2020, this paper – using content analysis and scrutiny of negotiation-related polices of candidate countries – seeks to go beyond questions of conditionality and benchmarks, in order to examine some major consequences that this potentially new enlargement strategy could have. In spite of the fact that the focus of the analysis is put on some major changes the reorientation of this policy would entail, the author also examines (and, to some extent, predicts) what are the potential benefits and/or threats the new methodology could bring to both candidates and the EU itself. Without any pretention to provide final answers and apodictic conclusions, this paper proposes some elements of fine-tuning, in order to better define a potential change that encompasses the following three controversial elements: the wish for an encouragement, the reality of the fatigue and the threat of a dead end.

Keywords: *EU enlargement, new enlargement methodology, policy reform, membership negotiation*

1. INTRODUCTION

For at least two decades that followed the fall of the Berlin wall and numerous major political and economic changes it entailed, the EU enlargement has been an undisputed success story. After the 1995 enlargement (Austria, Finland and Sweden) – whose specificity was that it concerned politically well prepared and economically solid countries, having, according to the numerous parameters, better results than the EU12 average at that time[1] – the following three enlargements (2004, 2007 and 2013) have brought profound changes in the way the EU functions and prepares itself for the new member states. In this regard, the 2004 enlargement – quite often referred to as 'a big bang'[2] – was particularly important, given that, out of ten new member states, eight were the countries with predominately illiberal political heritage and still not stabilised market economy. As the institutions of both the EU and member states were slowly adapting to the bigger Union[3] with richer variety of political views and backgrounds of its numerous representatives, the block's enlargement policy has also undergone various substantial changes, so much so that, for example, Bulgaria, Romania (both joined in 2007) and Croatia (joined in 2013) have been expected to fulfil procedural and substantial conditions which considerably differed compared to those applicable in previous waves of enlargement, introducing more detailed benchmarks and signalling 'a new chapter in the development of EU enlargement policy'.[4] In the same vein, the regulatory framework that is (or that will be) applied to all actual candidate and potential candidate countries for the EU membership is now undergoing yet another substantial change. As of April the 1st 2020, there are five current candidate countries: Albania (AL), Montenegro (MN), North Macedonia (NM), Serbia (SR) and Turkey (TR), out of which two (AL and NM) have recently (March 25, 2020) achieved this status,[5] while one (TR) is, for quite a long time, in a standstill regarding its EU accession.[6] In the same time, starting from the second half of

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1 See Kaiser, W:; Elvert, J. (eds), *European Union Enlargement: A Comparative History*, Routledge, 2004, 139-200

2 See, for example, Berger, H.; Moutos, T., (eds), *Managing European Union Enlargement,* The MIT Press, Cambridge 2004; Zimmermann, H.; Dür, A., (eds), *Key Controversies in European Integration* (2nd edition), Palgrave, London 2016; Haakon Ikonomou, Aurélie Andry and Rebekka Byberg (eds), *European Enlargement accross Rounds and Beyond Borders,* Routledge, London, 2017

3 For some major global and country-specific institutional adaptations, see Börzel, T., *States and Regions in the European Union – Institutional Adaptation in Germany and Spain*, Cambridge University Press, Cambridge, 2002

4 Gateva, E., *European Union Enlargement Conditionality*, Palgrave Macmillan, 2016

5 General Affairs Council – Coucil Conclusion 7002/20 of 25 March 2020, accessible at [https://data.consilium.europa.eu/doc/document/ST-7002-2020-INIT/en/pdf], accessed 20. June 2020

6 For a recent and comprehensive study on the relations between the EU and Turkey, see Zucconi, M., *EU Influence Beyond Conditionality: Turkey Plus/Minus the EU*, Palgrave Macmillan, 2019

2019, the EU is striving to define a new set of rules dedicated to the enlargement process; some of those rules are already known, while a number of important elements is still in a *chiaroscuro*, tore between the wish of encouragement, the reality of enlargement fatigue and the ever-present threat of a dead-end. In the following two chapters, this paper analyses those of the enlargement-related legal and regulatory principles that are already known (Chapter 2 – Section 1), and examines some of the major potential benefits and/or disadvantages of the changes those new principles would entail (Chapter 2 – Section 2). Chapter 3 brings a per-country overview of the actual status of four (out of five) actual candidate countries, especially in regard of the new enlargement strategy. The main methods used are content analysis and comparative legal method, while the national administrative and regulatory frameworks of the candidate countries will be analysed in the context of EU conditionality.

2. THE NEW ENLARGEMENT METHODOLOGY – AN ADMINISTRATIVE TOUCHING UP OR A CREDIBLE ALTERNATIVE

As it was the case with numerous other important political events, the global public health crisis caused by the SARS-CoV-2 virus (and COVID-19 outbreak it provoked) was the reason why the Zagreb Summit of the EU Member States and the states of Southeast Europe (Western Balkans),[7] initially planned for May 6-7, 2020, was first postponed,[8] and then planned to be held via video conference.[9] As it was already announced at several occasions, one of the main goals of this summit would be to enhance the process of the accession of new member states, by adopting the new enlargement methodology. Consequently, this chapter will be dedicated to the most recent official document treating exclusively this issue – the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'Enhancing the accession process – A credible EU perspective for the

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7 In its official documents and press releases, the Croatian presidency tends to use the notion of *Southeast Europe*, while the European Commission, as the subtitle of its Communication(2020) 57 of February 5, 2020 clearly indicates, privileges the term *Western Balkans.* Without entering in complex and predominantly meta-legal reasons for this terminological distinction, in this paper will be used the term *Western Balkans*

8 Website of the Croatian presidency of the EU, *Croatian Presidency postpones informal meetings in Croatia until 15 May*, [https://eu2020.hr/Home/OneNews?id=236], accessed 20. June

9 Website of the Croatian presidency of the EU, *On the initiative of Prime Minister Andrej Plenkovic, Zagreb Summit will be held May 6th via video conference,* [https://eu2020.hr/Home/OneNews?id=257], accessed 20. June 2020

Western Balkans' of February 5, 2020[10] (hereinafter referred to as Communication(2020) 57). This relatively short document (eight pages) comprises only one substantial chapter (preceded by mostly historical introduction and followed by a technical annex dedicated to the clusters of negotiation chapters), divided in four subchapters characterised by emphatic, mainly meta-legal style, and unequal level of development. For the purposes of our analysis of the Communication(2020) 57, we will first examine the proclamatory general principles upon which the new enlargement methodology is based (Section 2.1), before focusing on major changes the new enlargement strategy would entail (Section 2.2). Finally, once adopted, all the changes in enlargement methodology proposed by the Commission will be fully applicable to AL and NM, while negotiating frameworks for MN and SR will not be amended, 'but the proposed changes could be accommodated within the existing frameworks,' of course, with their agreement.[11]

2.1. List of proclamatory general principles

As it is often the case with the documents initiating important reform processes and – generally lengthy and hefty – law-making procedures, the Communication(2020) 57 has three important features: 1) emphatic and proclamatory style; 2) excessive use of prescriptive formulations; 3) globally low level of precision. However, even the consensus-based decision making procedure and, as it was the case for this document, long-lasting political bargaining before its final adoption, allows us to distil some *grandes lignes* defining general principles upon which the new enlargement methodology is based. Before focusing on each of these general principles, we will first substantiate the above-mentioned three important features of the entire document.

Primo, the overall editorial style of the Communication(2020) 57, besides the use of the usual EU's bureaucratic jargon, is excessively emphatic, attitude-oriented and too frequently purely proclamatory.[12] The world 'credible' or 'credibility' is mentioned 12 times, the accession process as such has to be 'reinvigorated,' the support for the European perspective of the Western Balkans is 'unequivocal,'[13]

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10 COM(2020) 57, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology_en.pdf], accessed 20. June 2020

11 This is particularly applicable to the organisation of negotiating chapters in thematic clusters; see sub-section 2.1.2. of this paper

12 For an extensive and highly valuable overview of the various aspects of the use of language in EU law, see Šarčević, S. (ed), *Language and Culture in EU Law – Multidisciplinary Perspectives,* Surrey, 2015

13 At this stage, it would be appropriate to mention that the support of the member states in the accession process of candidate and potential candidate countries in neither 'unequivocal' nor unanimous. Public opinion in numerous European countries is more and more hostile to the further enlargement, and the

while an 'accession perspective' is 'the key incentive and driver' of transformation in the region.

Secundo, the closer analysis of the Communication(2020) 57 also reveals the excessive use of prescriptive formulations. The Western Balkans leaders '*must deliver* more credibly', while 'both sides *should show* more leadership'. The noun 'commitment' is mentioned seven times, and Inter-Governmental Conferences (IGCs) '*should provide* for stronger political steering.'

Tertio, the level of precision of numerous formulations used in the document is globally low. This is particularly evident in the sub-chapter b), entitled 'A stronger political steer'. While imprecise wording is most often the consequence of the two features mentioned above, sometimes the whole phrases consist of entire blocks of mainly empty and often meaningless phraseology.[14] For example, both sides 'should (…) live up to their respective commitments in public, while coming in more directly on matters of concern,' while 'further dynamism' should be injected in the process and 'cross-fertilisation' of efforts fostered.[15]

When it comes to the general principles upon which the Communication(2020) 57 is based, the chapter *Reinvigorating the accession process* comprises four subchapters (a to d), each of them being dedicated to set out 'Commission's concrete proposals for strengthening the whole accession process'[16] and 'to enhance credibility and trust on both sides and yield better results on the ground.'[17] We will now focus on each of the proposed principles, in the order of their importance,[18]

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actual crisis caused by COVID-19 outbreak would only accentuate this tendency; this attitude of the electorate will, sooner or later, result in the new ruling political elites, whose intention to continue and further develop the enlargement would be significantly compromised

14 Some authors have rightly noticed that 'the relatively closed environment of the EU and the patterns of communicative adjustment to the *lingua franca* often cause native speakers to lose their touch with their mother tongue to the point that government jargon sounds absolutely natural', Felici A., '*Translating EU Legislation from a Lingua Franca: Advantages and Disadvantages*', in: Šarčević, S. (ed), *Language and Culture in EU Law – Multidisciplinary Perspectives,* Surrey, 2015, 123-140

15 The only practical and concrete consequence of the mentioned 'cross-fertilisation' of efforts is the organisation of negotiating chapters in thematic clusters; for more details, see sub-sections 2.1.2. and 2.2.2.

16 Communication (2020) 57, 1

17 *Ibid*.

18 The structure of the Chapter II (Reinvigorating the accession process) of the Communication (2020) 57 follows the internal logic that, for example, puts the issue of credibility (Subchapter a) before the questions of a stronger political steer (Subchapter b), dynamism of the process (Subchapter c) and predictability, positive and negative conditionality (Subchapter d). Notwithstanding the fact that this structure and positioning of the innovative elements of enlargement methodology can be seen as quite consistent and meaningful, this author considers that the issues of political leadership of the process and its temporal dimension have to be put in forward in analysis

while the scope of possible changes they would entail in the existing enlargement strategy will be examined, following the same structure, in Section 2.2. of this paper.

2.1.1. *Focus on the political nature of the process and stronger steering.*

It is not unusual to hear from various political decision-makers at the national and European level – both in member states and in candidate and potential candidate countries – that the EU should not be seen as a 'money box' or 'piggy bank,'[19] whose main purpose is to poor financial resources from various pre-accession funds and through numerous other mechanisms of economic support. Even if it may sound self-evident and merely proclamatory, this element upon which the new enlargement strategy should be based is very important and could have significant, long lasting and down-to-earth consequences. Notwithstanding the fact that the EU has an undisputedly significant economic facet, it is, fundamentally, a value-based community, and this fact should also weigh more in the accession of new member states. Following the wording of the Communication(2020) 57, accession to the EU 'is not moving on autopilot but must reflect an active societal choice'[20] both by political decision-makers and by citizens of candidate countries. When it comes to the stronger steering of the enlargement process, the further analysis shows that the Commission insists on three important elements: 1) intensified 'high level political and policy dialogue' (including regular EU-Western Balkans summits and intensified ministerial contacts); 2) stronger involvement of

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[19] Of course, the vision of the EU as a 'piggy bank' is not only the exclusive characteristics of the population and politicians in the countries in process of accession. See, for example, the article *'L'Europe n'est pas qu'une tirelire'* published in 'Courrier Picard' shortly before the European elections and focused on the perception of the purpose of the EU by French citizens, as well as local and regional decision-makers, [https://premium.courrier-picard.fr/id12781/article/2019-05-24/leurope-nest-pas-quune-tirelire], accessed 09. April 2020

[20] Communication(2020) 57, 4. Good example of a candidate country in which the accession to the EU is quite far from being 'an active societal choice' is Serbia. In spite of the results of the regular surveys of public opinion published by the country's Ministry of European Integration – which, in general, show that more than 50% of respondents support membership in the EU – the overwhelming majority of national media, as well as the declarations of the numerous political decision-makers actively promote Euro-sceptic, often anti-European agenda; it was particularly evident during the crisis caused by COVID-19 outbreak, during which relatively modest Chinese support and aid was labelled as 'brotherly aid showing steel-solid friendship', while the substantial aid of the EU was either totally ignored or designated as 'minimal and belated'; for December 2019 results of opinion poll published by the Serbian Ministry of European Integration, see [https://www.mei.gov.rs/upload/documents/nacionalna_dokumenta/istrazivanja_javnog_mnjenja/opinion_pool_dec_19.pdf]; for an overview regarding EU's and Chinese assistance to Serbia during the crisis caused by COVID-19 outbreak, see [https://europeanwesternbalkans.com/2020/03/30/steel-friendship-between-serbia-and-china-criticised-by-european-commentators/], accessed 11. April 2020

all bodies under the Stabilisation and Association Agreement (SAA) and 3) more focus on monitoring on the ground (participation of experts, direct contributions to the annual reports and sectoral expertise).

2.1.2. *Dynamisation of the enlargement process, mainly through the organisation of negotiating chapters in thematic clusters.*

As it was often remarked by numerous researchers,[21] the political conditionality of the accession negotiations and, consequently, the entire enlargement procedure, is becoming lengthier over the years.[22] However, this element could be applicable only to AL and NM, countries that have recently become candidates for EU membership, while, for the negotiations with MN and SR and Montenegro, 'work on chapters can also be organised around clusters, while respecting the existing negotiating frameworks'.[23] Given that this new element of enlargement methodology is less focused on general principles than on their practical implementation, it will be more closely examined in sub-section 2.2.2. of this paper.

2.1.3. *Enhanced credibility of the process.*

This principle basically represents the reiteration and accentuation of a rule that should be the crucial element of every bilateral and multilateral international relation – mutual trust, confidence and clear commitments; this is especially applicable when one party (an accession country) strives to fulfil numerous conditions related to the membership in an organisation gathering a number of states sharing common legal heritage, values and complex institutional structure (the EU). However, the wording and the tone of the entire sub-chapter a) of the Communication(2020) 57 indirectly, but very clearly, implies that the legal framework currently applicable to the accession process is far from being satisfactory. Among others, the formulation '*regain* credibility' confirms this assessment.[24] One of the big advantages of this new – or, more precisely, the enhancement and clarification

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21 See Masuy-Stroobant, G., (ed), *L'*élargissement de l›Union européenne: Enjeux et implications, Presses Universitaires de Louvain, Louvain, 2012; Góra, M.; Styczynska, N.; Zubek, M. (eds), *Contestation of EU Enlargement and European Neighbourhood Policy – Actors, Areanas and Arguments,* Djøf Publishing, Copenhagen, 2019; Staab, A., *The End of Europe,* independently published, 2020

22 For a global overview of previous waves of enlargement and some major reasons of more and more demanding criteria for new member states, see also Nello, S.S.; Smith, K. E., *The European Union and Central and Eastern Europe: The Implications of Enlargement in Stages*, Taylor & Francis Group (Routledge Revivals), London, 2020

23 Communication(2020) 57, 4

24 For the specific case of Turkey and some important generally applicable conclusions, see Zucconi, *op. cit.*, note 6

of the existing – guiding principle of the new enlargement methodology is that it demands more credibility from both sides involved in the process. On the one hand, 'the Western Balkans leaders must deliver more credibly on their commitment to implement the fundamental reforms required, whether on rule of law, fighting corruption, the economy or ensuring the proper functioning of democratic institutions and public administration, and foreign policy alignment'.[25] On the other hand, the counterpart of this requirement addressed to the acceding countries is the obligation of the EU to deliver on its 'unwavering commitment to a merit-based process,'[26] meaning that 'when partner countries meet the objective criteria and the established objective conditions, the Member States shall agree to move forward to the next stage.'[27] Moreover, this is the point where the principle of the enhanced credibility closely imbricates with the one related to the dynamisation of the enlargement process, analysed in the previous sub-section. It is very important to underline that – as the example of unnecessary long and quite often not evidence-based prolongation of the process of the acquirement of the status of candidate country by NM very clearly demonstrates – what really undermines the credibility of the entire EU's enlargement policy is the opposition of certain member states to allow to a (potential) candidate country to move forward in its accession. This is why the mention of the 'objective criteria' and 'established objective conditions,' if not followed by their common interpretation by all member states, would remain empty words devoid of any concrete implications.

2.1.4. *Process characterised by predictability, with positive and negative conditionality as a core element.*

Once again, a 'new' principle of the proposed reform of the enlargement methodology substantially overlaps with one, or even two,[28] guiding rules already introduced by the Communication(2020) 57. It is not necessary to invest particularly high analytical effort in order to conclude that – both in international relations and accession negotiation, but also in numerous other meta-legal and meta-political circumstances – credibility largely relies on predictability. In other words, 'greater clarity on what the Union expects of enlargement countries at different stages of the process'[29] is just a less legal-sounding way to say that the 'objective criteria' and 'established

[25] Communication(2020) 57, 2

[26] *Ibid*.

[27] Communication(2020) 57, 2

[28] The reference to 'a stronger political steer,' and the mention that 'the political actors in the countries [...] have a clearer indication of what must be done to move ahead' indicates that the sub-chapter d) of the Communication(2020) 57 also significantly overlaps with subchapter b)

[29] Communication(2020) 57, 5

objective conditions' should be known well in advance. At this point, it becomes much clearer why, in the introduction to this chapter, we pointed out that the Communication(2020) 57 is characterised by emphatic and proclamatory style and has globally low level of precision. However, one of the rare indisputably unequivocal and not auto-referential provisions of subchapter d) is the one indicating that 'the Commission will better define the conditions set for candidates to progress, in particular through its annual reports,'[30] adding that 'these conditions must be objective, precise, detailed, strict and verifiable'.[31] Consequently, it is evident that a well-defined, uniformly interpreted and strictly applied conditionality is the core element for a successful reform of the EU's enlargement methodology. This is the reason why the another positive element of the proposed new principle is the introduction of negative conditionality, allowing 'more decisive measures proportionally sanctioning any serious or prolonged stagnation or even backsliding in reform implementation and meeting the requirements of the accession process'.[32] If every candidate country rightfully expects more clarity from the EU and the strict application of the principle that sufficient progress should lead to the next stage of the accession process, it is also appropriate to introduce the possibility for candidate countries to retrograde in case of serious and proven lack of necessary reforms and harmonisation of national legislation with the Union's acquis. As it was the case for positive conditionality, the criteria for negative conditionality should be defined on clear, objective and verifiable way, while the member states should show a real political will to apply it. Therefore, the new Commission's proposition, in spite of its numerous weaknesses, could represent – once clarified and accompanied with clearer criteria – a solid starting point for a substantially new era in the enlargement of the EU.

2.2. Major changes the new enlargement strategy would entail

All general proclamatory principles of the new EU enlargement strategy analysed in the previous section have an intrinsic capacity to bring significant changes in the relations between the EU and the candidate countries, and, consequently, to influence their political and economic future. However, as the previous considerations have demonstrated, the way those principles are formulated, as well as their level of precision and elaboration, leave a significant number of doubts regarding their concrete application and the changes this would entail.[33] Moreover, CO-

30 *Ibid.*

31 Communication(2020) 57, 5

32 *Ibid.*

33 As it was already mentioned in the introduction of Chapter 2, enlargement methodology proposed by the Commission will be fully applicable only to AL and NM, while the negotiating frameworks for MN and SR will not be amended, unless those two countries accept certain accommodations

VID-19 outbreak and global public health crisis it provoked will also leave – for now quite unforeseeable – consequences on all EU policies and on its relations with numerous third parties, including the candidate countries. In this section, all general principles examined in subsections 2.1.1. to 2.1.4. will be analysed from the angle of their major potential consequences. The equal attention will be paid to both potentially negative and potentially positive changes.

2.2.1. *An increasingly politicised negotiation process.*

Until now – and especially at the occasion of the last two waves of enlargement – the entire procedure of the accession to the EU was a very technical matter,[34] left to the highly sub-specialised and initiated experts and, consequently, very distant from the citizens. This is why the Communication(2020) 57 rightly points out that, from the standpoint of candidate countries, the accession 'is not moving on autopilot but must reflect an active societal choice,'[35] while, on the side of the member states, it should be seen as a 'significant political and not simply technical undertaking.'[36] This observation would have been a good starting point for a substantial reform of enlargement methodology if the Commission had accompanied it with more substantial propositions on how to better involve the citizens (of both member states and candidate countries), in order to present them why the EU should be an active societal choice and a matter of interest for both parties. Especially after COVID-19 outbreak, it would be increasingly difficult to explain to the citizens why the continuation of the enlargement process and integration of the new member states would be a better political choice than the refurbished national sovereignty, more border control and less supra-national solidarity and cooperation. Instead, the Commission proposes more planning, stronger leadership and solider institutional structure. All these elements are undoubtedly important, but it is inappropriate to insist on societal choice and not exclusively technical nature of the enlargement, while proposing reinvigorated politicisation and more top-down approach to the enlargement.

2.2.2. *Clustering of negotiation chapters.*

This is indisputably the most concrete, applicable and potentially beneficial element of the Communication(2020) 57. Even if the principle of a separate opening (and closing) of each negotiation chapter has some important advantages – out

[34] On technicality and hyper-normativity of the EU's legal system, see Nugent, N., *The Government and Politics of the European Union,* 8th edition, Palgrave, London, 2017, 97

[35] Communication(2020) 57, 3

[36] *Ibid*.

of which some of the most significant are the focus on national legislation and involvement of experts, monitoring of progress and media presence of the EU-related matters in the candidate countries – their clustering according to the thematic criteria has a great potential to make the entire enlargement process more effective. The screening process would be carried out per cluster, while the 'priorities for accelerated integration and key reforms will be agreed between the EU and the candidate country'.[37] Once these priorities successfully satisfied, the cluster would be 'opened without further conditions and closing benchmarks are set for each chapter'.[38] Commission's proposition also includes the alignment of clusters with the Stabilisation and Association Agreement sub-committees, limited timeframe between the opening of a cluster and the closing of its individual chapters, and accelerated sectoral alignment and integration. If applied efficiently, responsibly and in good faith, the clustering of negotiation chapters has a great potential to bring more dynamism and transparency to the entire enlargement methodology. Moreover, it could also contribute to reduce some of the negative aspects of top-down approach to politicisation analysed in the previous sub-section, by making the process (at least in some aspects) less technical and by giving to the citizens a clearer picture of what exactly is at stake during the negotiations (broader themes of, for example, good governance, internal market or economic competitiveness).

2.2.3. *Focus on a merit-based process and fundamental reforms.*

As it is the case of numerous other key elements of the new enlargement methodology introduced by the Communication(2020) 57, enhanced credibility of the entire accession process should be based on the commitments of both parties – the EU and the candidate countries. In comparison with the existing negotiation framework, the major changes that would help 'the accession process to regain credibility […] and deliver to its full potential' are the focus on a merit-based progress of candidate countries, on the one side, and clearer commitment to implement the fundamental reforms, on the other. Once again, the Commission, starting from very pertinent observations on the weaknesses of the existing negotiation framework, fails to give clearer indications on what concretely the new obligations of both parties should consist of. More concretely, how and to which extent the enunciation that, 'when partner countries meet the objective criteria and the established objective conditions, the Member States shall agree to move forward to the next stage of the process'[39] would change the existing practices and already well-known reluctances and (more or less justified) scepticism

[37] Communication(2020) 57, 4

[38] *Ibid.*

[39] Communication(2020) 57, 2

of certain member states?[40] On the other hand, while it is beyond any doubt that 'EU Member States and citizens have legitimate concerns and need to be reassured of the unequivocal political will of the countries, proven by structural, tangible reforms,'[41] how exactly the obligation of 'Western Balkans leaders' to 'deliver more credibly on their commitment to implement the fundamental reforms required'[42] shall be assessed? If we stay in the scope of the reforms proposed by the Communication(2020) 57, and within the framework of the measures it introduces, the most plausible answer would be the reference to the clustering of negotiation chapters and negative conditionality, practically the only two concrete and applicable elements of the new enlargement methodology.

2.2.4. *More clarity through positive and negative conditionality.*

As it was already mentioned in subsections 2.1.4, 2.2.1. and 2.2.3. of this paper, better application of the principle of conditionality – as well as the introduction of negative conditionality in the case of stagnation or backsliding of reforms – is one of the rare aspects where the Communication(2020) 57 proposes substantially innovative and applicable elements of the enlargement strategy. Moreover, the document gives some valuable additional precisions regarding the negative conditionality. On the one hand, the decisions 'to halt or even reverse the process should be informed by the annual assessment by the Commission in its enlargement package on the overall balance in accession negotiations and the extent to which fundamental reforms, in particular on the rule of law are being implemented,'[43] while, 'in serious cases, the Commission can make proposals at any time on its own or at the duly motivated request of a Member State in order to ensure a quick response to the situation through, whenever relevant, simplified procedures, including reverse qualified majority voting'.[44] However, both positive and negative conditionality could only bring more clarity and predictability to the accession process if the two additional criteria are cumulatively fulfilled. On the one hand, they should be accompanied by a set of well-defined, uniformly interpreted and strictly applied[45] criteria; on the other, those criteria should be neither the subject

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40 In this regard, the most glaring example was the reticence of France (and some other member states) to grant candidate status to Albania and North Macedonia; for a detailed and well-documented study of this issue, see Eisl, A., *Les arguments contestables de la France contre l'élargissement de l'UE*, Institut Jacques Delors – Europe dans le monde, [https://institutdelors.eu/publications/frances-questionnable-arguments-against-eu-enlargement/], accessed 13. April 2020

41 Communication(2020) 57, 2

42 *Ibid.*

43 Communication(2020) 57, 5

44 Communication(2020) 57, 6

45 See subchapter 2.1.4.

of contradictory and 'creative' interpretation by different member states, nor the way to satisfy their purely internal political (most often, election-related) needs, mainly deriving from the pressure from both extreme right and extreme left wing of their national party spectrum.

3. BETWEEN POLITICAL ENCOURAGEMENT AND ENLARGEMENT FATIGUE - PER COUNTRY REVIEW

As the previous chapter of this paper strived to demonstrate, the new EU's enlargement strategy could only be a credible alternative to the existing one if it effectively remedies its deficiencies and improves its positive aspects. The main principles introduced by the Communication(2020) 57 are mainly too general, vague and characterised by a low level of precision,[46] while the major changes it could entail – apart from a few concrete and applicable elements – are still globally unknown.[47] Given that the new strategy would be fully applicable only to AL and NM, countries that have recently become candidates for EU membership – while, for the accession of MN and SR it could only be effective when it comes to the clustering of negotiation chapters[48] – the countries of the Western Balkans could find themselves in quite a different positions regarding the rules applicable to the process of their accession to the EU. Without the pretention to bring in-depth analysis of the specificities of each candidate country's national legislation and its position vis-à-vis the accession process, this chapter would strive to give some major indications about the actual state and the possible future developments in this respect. In spite of numerous important differences, the four analysed candidate countries will be grouped (AL-NM and MN-SR) according to the extent to which the new enlargement criteria would be applicable to them.

3.1. Albania and North Macedonia

After several unsuccessful attempts to give a decisive incentive to the accession of AL and NM, the EU's General Affairs (GA) Council, on March 25, 2020, has finally adopted the Conclusions on Enlargement and Stabilisation and Association Process,[49] which were, on the next day, endorsed by the members of the Eu-

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46 See introduction to chapter 2 and section 2.1.

47 See section 2.2.

48 And this, as pointed out in the introduction to Chapter 2, only with the express consent of each of the two candidate countries

49 Council Conclusions 7002/20, [https://data.consilium.europa.eu/doc/document/ST-7002-2020-INIT/en/pdf], accessed 28. March 2020

ropean Council.[50] However, the Council also added that it 'looks forward to the Commission's proposals integrating the enhanced approach in future negotiating frameworks and building on applicable established practice under the renewed consensus on enlargement.'[51] As it has recurrently been underlined in sections 2.1 and 2.2. of this paper, mainly general, often imprecise and proclamatory principles upon which the Communication(2020) 57 is based need to be followed by substantive clarifications, not only in order to be efficiently integrated in the future negotiating frameworks, but also to be more understandable both to the member states and candidate countries. This assessment seems to be implicitly integrated in GA's Council's Conclusions, given that, in this stage of its development, the new enlargement methodology – as the formulation 'applicable established practice' circuitously indicates – represents more a mere political (self)encouragement, than a credible, detailed and applicable new agenda for an improved accession process. This is especially important if one take into consideration the fact that the newly proposed enlargement methodology – unlike it is the case for MN and SR[52] – would be fully applicable to AL and NM. Moreover, the internal complexities of political situation in both countries, as well as the difficulties of the law harmonisation process they encounter,[53] have a potential to further impede the enthusiasm for EU membership related reforms. On the other hand, the lengthy and laborious process of consensus-building among the member states regarding the opening of accession negotiation with AL and NM – to which the COVID-19 outbreak cannot influence but negatively – clearly indicates that the political encouragement desired by the Commission would, most probably, face the wall of internal economic and political difficulties, with a high risk of facing a dead end. As for the country-specific considerations, Council has underlined that, 'prior to the first intergovernmental conference,'[54] AL should resolve numerous important issues, some of which are: 1) adoption of the electoral reform 'ensuring transparent financing of political parties and electoral campaigns'[55]; 2) continued implementation of the judicial reform, 'including ensuring the functioning of the Constitutional Court and the High Court, taking into account relevant international expertise including applicable opinions of the Venice Commission'[56]; 3)

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50 Joint statement of the Members of the European Council, [https://www.consilium.europa.eu/media/43076/26-vc-euco-statement-en.pdf], accessed 28. March 2020

51 Council Conclusions 7002/20, 3

52 See the introduction of Chapter 2 and section 3.2. of this paper

53 See, for example, Hoxhaj, A., *The EU Anti-Corruption Report: A Reflexive Governance Approach*, Taylor & Francis, 2019

54 Council Conclusions 7002/20, 5

55 *Ibid.*

56 Council Conclusions 7002/20, 5

finalisation of 'the establishment of the anti-corruption and organised crime specialised structures'[57]; 4) further strengthening of the fight against corruption and organised crime and 5) tackling the phenomenon of unfounded asylum applications. As for NM, the GA Council Conclusions do not mention any specific issue to be resolved before the first intergovernmental conference, but simply 'invites the Commission to continue to monitor the progress and continued compliance in all areas of the conditions identified by the Council in June 2018 related to the opening of negotiations,'[58] as well as 'to carry out and complete the process of analytical examination of the EU acquis.'[59] Consequently, once the issues of the further clarification of the new enlargement strategy and of the laborious consensus-building resolved, it seems that NM is closer to a potentially successful first intergovernmental conference.

3.2. Montenegro and Serbia

The elements of the new enlargement methodology brought about by the Communication(2020) 57 can be accommodated within the existing negotiating frameworks with MN and SR only with their agreement. As it was already underlined in sections 2.1 and 2.2 of this paper, given that the clustering of negotiation chapters is one of the rare undoubtedly clear and applicable elements of the proposed new enlargement methodology, it is probable that these two candidate countries – in the limits defined by the existing negotiating frameworks – would accept the organisation of chapters in thematic clusters. However, the membership negotiations with both MN and, especially, SR, have shown a poor progress in 2019, with either no further chapters provisionally closed (MN) or with only one chapter opened (SR). Both by the number of opened negotiation chapters and by the overall political and media context related to EU integration, MN is more advanced than SR. On the other hand, the absence of a clear political will and functional consensus about the enlargement among the member states is prejudicial for a larger national consensus on the EU accession in both countries, creating the atmosphere where the enlargement fatigue, on the one side, feeds the 'accession fatigue' on the other. In such a context, the Communication(2020) 57 has brought much more of empty political phraseology than of concrete and applicable solutions to reinvigorate the process.

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57 *Ibid.*

58 Council Conclusions 7002/20, 4

59 *Ibid.*

4. CONCLUSION

Recently, there has been practically no disagreement among researchers regarding the assessment that the enlargement process of the EU is at a standstill. While Albania and North Macedonia, in addition to their internal difficulties, have been faced to lengthy and laborious process of consensus-building among the member states regarding the opening of accession negotiation, Montenegro and Serbia have shown a poor progress in 2019, with either no further chapters provisionally closed (MN) or with only one chapter opened (SR). In such a context, the Commission Communication(2020) 57 on 'Enhancing the accession process – A credible EU perspective for the Western Balkans,' had hardly brought any significant and applicable solutions. Characterised by emphatic and proclamatory style, excessive use of prescriptive formulations and globally low level of precision, the newly proposed enlargement methodology needs to be followed by substantive clarifications, not only in order to be efficiently integrated in the future negotiating frameworks, but also to be more understandable both to the member states and candidate countries. The Commission, starting from very pertinent observations on the weaknesses of the existing negotiation framework, fails to give clearer indications on what concretely the new obligations of both parties should consist of. Moreover, the global public health crisis caused by the SARS-CoV-2 virus (and COVID-19 outbreak it provoked) puts the entire issue of enlargement further down on the agenda of the Union's policy priorities. Therefore, the absence of a clear political will and functional consensus about the enlargement among the member states, on the one hand, and numerous internal political, institutional and value-related difficulties and uncertainties in the candidate countries, on the other, create the atmosphere where the enlargement fatigue, on the one side, feeds the 'accession fatigue' on the other. Even if the wish of an encouragement is undoubtedly present, the future of the EU enlargement still remains decidedly unclear.

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UDK 341.9(497.7):061.1(4-67EU)
Preliminary communication

EUROPEANISATION OF THE MACEDONIAN PRIVATE INTERNATIONAL LAW – LEGAL EVOLUTION OF A NATIONAL PRIVATE INTERNATIONAL LAW ACT

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ABSTRACT

The new Private International Law Act of the Republic of North Macedonia (hereinafter the PIL Act 2020) has been adopted in 2020. It represents one of the most comprehensive codification of European Union private international law (hereinafter the EU PIL) provisions in national private international law act. The PIL act 2020 implements most of the EU conflict of law rules and EU jurisdictional criteria especially those that have universal application. The most significant characteristics of PILA 2020 are: firstly, the act has limited the exclusive jurisdictional criteria; secondly, it introduced habitual residence as one of the main jurisdictional and conflict of law criteria; and thirdly, the act 'mirrors' the provisions that are present in the EU regulations. Moreover the PILA 2020 has positioned direct link between the decisions of the Court of Justice of the European Union regarding the EU PIL Regulations and the national courts, although N. Macedonia is still a candidate country to the EU. This Europeanisation of the Macedonian PIL has been done for two reasons: first, to modernize the rules in line with the new PIL trends, and secondly to prepare the Macedonian judges for the forthcoming radical change in the PIL when N. Macedonia becomes a full member in the EU. The intention of this article is not to give full detailed analyses of every provision in the new PILA 2020 but rather to provide for general overview of the solutions present in this act, as well to determine the main principles and new tendencies that would define the Macedonian private international law in future.

***Keywords*:** *Private International Law; Private International Law Act of the Republic of North Macedonia; Conflict of Laws; International Jurisdiction; Recognition and Enforcement of Foreign Judicial Decisions*

1. THE DEVELOPMENT OF PRIVATE INTERNATIONAL LAW IN N. MACEDONIA IN THE PERIOD 1982-2020

The new Private International Law Act (hereinafter the PILA 2020)[1] of N. Macedonia has been adopted in January 2020 and represents second systematization of private international law rules since its independence from Socialist Federative Republic of Yugoslavia (hereinafter the SFRY) in 1991. However, to properly understand the "DNA" of the new PILA 2020 notion has to be given to its predecessors: the Private International Law Act of 2007 (hereinafter the PILA 2007)[2] and Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters (hereinafter the PILA 1982).[3] Also, the duty imposed by Article 68 of the Stabilization and Association Agreement with the European Communities and their Member States (SAA)[4] for adaptation of the internal laws and compatibility of the legal sources of N. Macedonia with the EU legal sources has significant influence on the structure and the substance of the new PILA 2020.

The PILA 2007 in its structure, had many similarities with the PILA 1982 which was the first systemized PIL act a law enacted on a federal level in the SFRY.[5] In essence, the PILA 1982 represented the first codification of private international law rules in SFRY. Before that law came into force, private international law legal issues in SFRY were either scattered among different acts or they were not regulated.[6] For example, recognition of foreign judicial decisions before the enactment of the PILA 1982 was provided according to the Law on Civil Procedure[7] while

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1 Private International Law Act (Закон за меѓународно приватно право), Official Gazette, no. 32/2020

2 Private International Law Act (Закон за меѓународно приватно право), Official Gazette, no. 87/2007 and 156/2010

3 Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters (Закон за решавање на судирот на законите со прописите на другите држави во одредени односи), Official Gazette of the SFRY, no.43/1982

4 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, Official Gazette of Republic of Macedonia, no. 28/2001

5 For more comprehensive understanding of the historical development of the act see Dika M.; Knežević G.; Stojanović S., *Komentar zakona o međunarodnom privatnom i procesnom pravu*, Nomos, (1991); Џунов Т. *Меѓународно приватно право*, Скопје, (1995), 227-235

6 Varadi T. *et al.*, *Međunaodno privatno pravo*, deseto izdanje, JP "Službeni Glasnik', Beograd, 2008, p. 61

7 Articles 16 to 22 of the Law on civil procedure, Official Gazette of the FPRY, no.4/57

the enforcement of foreign judicial decisions was left to the Law on Enforcement procedure.[8] All of these legal issues and the legal vacuum that existed over some issues in SFRY were settled with the codification and coming into force of the PILA 1982.[9]

The similarity between the PILA 2007 and the PILA 1982 was evident. Both laws were systematically divided into six chapters containing rules for international jurisdiction (and procedure), conflict of law rules, recognition and enforcement rules and other rules were also contained within them. These two acts were not only similar in their structure, but also the similarity could be seen in the substance of the rules present in these acts.[10] This provided for consistent understanding of the rules and the use of practical and doctrinal materials in the interpretation of the solutions in both PIL acts.

2. THE STRUCTURE AND THE SOLUTIONS IMPLEMENTED IN THE NEW PILA 2020

2.1. Structure of the new PILA 2020

The first impression of the structure of the new PILA 2020 is that it has been modestly altered from its predecessor the PILA 2007. The PILA 2020 has been constructed to be more "user friendly" identifying and providing for more sections and subsections making it easier for the judiciary and the legal practitioners to implement this act. Similarly to its predecessor, the PILA 2020 is composed of six components[11] covering the following issues: basic provisions (part one); applicable law (part two); international jurisdiction and procedure (part three); recognition and enforcement of foreign judicial decisions (part four); special provisions (part five) and final and transitory provisions (part six). Inside these parts in the PILA 2020, the influence of the PILA 2007 and PILA 1982 is easily traceable, providing for the same systematization of the main PIL issues.

The first change in the new PILA 2020 can be seen in part two (applicable law) providing for two chapters instead of only one, as it was provided in the PILA 2007. In the PILA 2020 the first chapter of part two is called "General part" (articles 7-14) and refers to different PIL issues which apply to all of the conflict

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8 Law on Enforcement procedure, Official Gazette of the SFRY, no.20/78

9 Živković M.; Stanivuković M, *Međunarodno privatno pravo (opšti deo),* Beograd, Službeni glasnik, 2006, p. 41-42

10 For more on the novelties introduced with the PILA 2007 see, Deskoski T., *The new Macedonian Private International Law Act of 2007*, Yearbook of Private International Law, *vol.* X, 2008, p. 441-459

11 In the PILA 2020 these components are called parts while in the PILA 2007 they are given as chapters

of law rules (renvoi, states with non-unified legal system, determination of the content of the foreign law, overriding mandatory provisions, general exemption clause, interpretation and application of foreign law, public policy and characterization). Moreover, the second chapter of part two is systematically different from the systematization of the special part in PILA 2007. In the PILA 2007 all of the rules regarding the determination of the applicable law were given altogether (articles 15-51), containing only titles in front of every article. The principle of the PILA 2020 to make the act more "user friendly", provides for systematization of the legal issues in sections and subsections divided according to the subject matter and with titles in front of every component and then containing titles which identify the subject matter for every article.

This systematization is followed in part three of the PILA 2020, which contains two chapters: chapter one that refers to international jurisdiction containing general section regarding international jurisdiction, special section for choice of court agreements, and special jurisdictional rules in different subject matters given in subsections (personal status, family relations, succession, rights in rem, contractual and non-contractual relations). Chapter two of part three refers to other rules relating to the procedure (applicable law regarding the procedure; capacity to be a party in a lawsuit and capacity to conduct legal proceedings; and cautio iudicatum solvi).

Part four of the PILA 2020 contains three chapters: chapter one (definitions), chapter two (conditions) containing two sections (section one - conditions determined ex officio and section two - conditions determined upon objection by the parties) and chapter three procedure for recognition of foreign judicial decisions. The fifth part is generally the same as the counterpart in PILA 2007.

2.2. The new solutions implemented in the PILA 2020

The main differences between the new PILA 2020 and its predecessor the PILA 2007 are the solutions provided in the act. These new solutions are constructed around the ideas to enhance transparency of the provisions, to adopt an open and to international approach in dealing the PIL issues and in that process to make the rules more easily accessible to legal practitioners.[12] To achieve these ideas, the PILA 2020 has set three main goals.

The first goal of the new PILA 2020 is to make the act more "user friendly", containing sections and subsections divided according to the subject matter and with titles in front of every component and then containing titles which identify the

[12] Kramer X. *et al.*, *Study by the European Parliament's Committee on Legal Affairs "A European framework for private international law: current gaps and future perspectives"*, PE 462.487, 8

subject matter for every article. Such structure of the PILA 2020 should make the act more easily accessible to legal practitioners and in that process it should enhance the transparency of the provisions.

Secondly, the PILA 2020 tends to implement most of the new tendencies of the EU PIL rules and those of the Hague Conference of Private International Law regarding the determination of the applicable law, jurisdictional criteria and the rules regarding recognition and enforcement of foreign decisions. To achieve this goal "Europeanisation of the PIL"[13] the PILA 2020 is transposing the private international law rules of the EU, especially those which have 'universal application'.[14]

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[13] European Private International Law is consisted of approximately twenty instruments. For more on the development and future prospects of EU PIL see, Kramer, X., *A Common Discourse in European Private International Law? A View from the Court System*, in: von Hein J.; Kieninger E.M.; Rühl G., (eds.), How European Is European Private International Law, Intersentia, 2018/19, [https://ssrn.com/abstract=3207771], accessed 04. July 2020, p. 4-5; Kramer X., *et al.*, *A European framework for private international law: current gaps and future perspectives. Study*, European Parliament, 2012; Kramer X., *Current gaps and future perspectives in European private international law: towards a code on private international law?* Briefing note, European Parliament 2012; Kramer X., *'European Private International Law: The Way Forward. Indepth analysis'* in Workshop on Upcoming Issues of EU Law, European Parliament, Brussels 2014, pp. 77-105; Von Hein; Rühl G., '*Towards a European code on private international law? Study*', in Cross-border activities in the EU: Making life easier for citizens, Workshop for the JURI Committee, European Parliament, 2015, pp. 8-53. The process of the "Europeanisation of the PIL" refers to the adoption of the PIL rules that are being formed at European level instead of traditionally at national level. For more on this process and the relationship with globalization see, Van Den Eeckhout V., *The Instrumentalisation of Private International Law: Quo Vadis? Rethinking the 'Neutrality' of Private International Law in an Era of Globalisation and Europeanisation of Private International Law*, August 22, 2013, [https://ssrn.com/abstract=2338375], accessed 04. July 2020, pp. 3-4

[14] There are several provisions in the EU Regulations that tend to harmonize the conflict of law rules within the EU providing for 'universal application' of these provisions such as Article 2 of the 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) OJ L 177, 4.7.2008, 6–16; Article 3 of the 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), OJ L 199, 31.7.2007, 40–49.; Article 4 of the 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 OJ L 343, 29.12.2010, 10–16; Article 20 of the 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 OJ L 201, 27.7.2012, 107–134; and Article 20 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes OJ L 183, 8.7.2016, 1–29. For more on the 'universal application' of these rules see, Deskoski T.; Dokovski V., *Lex Contractus for Specific Contracts under Rome I Regulation*, Iustinianus Primus Law Review, *vol*. 10, 2019, p. 3; Behr V., *Rome I Regulation a—Mostly—Unified Private International Law of Contractual Relationships within—Most—of the European Union*, Journal of Law and Commerce, *vol*. 29, no. 2, 2019, p. 238; Kramer X., *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: The European private international law tradition continued,* Nederlands Internationaal Privaatrecht (NIPR)

These rules are constructed according to the firmly rooted principle in the private international law instruments of the EU and the Hague Conference on Private International Law, by which the law designated by the Regulation shall apply whether or not it is the law of a participating Member State and that intra-Union and extra- Union situations are dealt with on an equal basis.[15] Moreover, the legislator bears in mind that EU PIL is still in construction,[16] consisted not only of the legal instruments of the European Council and the European Parliament, but also of international conventions (especially significant are those of the Hague Conference of Private International Law).[17] Furthermore, in the EU there are certain tendencies and debates whether as a long term option a more coherent approach for the EU PIL is necessary trough adoption European Code on Private International Law which will cover the general rules of PIL (Regulation Rome '0'). [18] On the other hand, there are certain discrepancies in the implementation of the EU PIL rules that can be traced in many of the Member States of the EU.[19] Therefore, to properly implement the EU PIL rules and in the same time to provide for more coherent approach regarding the EU PIL, the national legislator opted to incorporate many of these PIL tendencies (increased use of party autonomy as a connecting factor, reduction of nationality as a connecting factor, introduction of habitual residence as an alternative to the domicile as a connecting factor/jurisdictional criteria, limitation of the exclusive jurisdictional grounds etc.) in the PILA 2020 so the judges and the practitioners would get acquainted with the EU PIL rules even before N. Macedonia becomes Member State to the EU.

Lastly, the intention of the legislator was to conduct Europeanisation of the national PIL but with specific notion that national private international law act does not only apply among Member States of the EU, but also it applies in regard third countries. So this notion of universality of the provisions in the PILA 2020 played important role in the drafting of the rules, based on the experiences from the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement

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2008, no. 4, p. 415; Ahern B.; Binchy W. (ed.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligation – A New International Litigation Regime*, Martinus Nijhoff Publishers, Leiden Boston, 2009, p. 265; Boele Woelki K., *For better or for worse: The Europeanisation of International Divorce Law*, Yearbook of Private International Law, *vol.* 12, 2010, p. 29

15 Boele Woelki, *ibid.,* p. 29

16 *Ibid.,* p. 20

17 *Ibid*.

18 Von Hein; Rühl, *op. cit.,* note 13, p. 26-46; Kramer, X., *op. cit.,* note 13, p. 20; Kramer *et al., op. cit.,* note 13, pp. 89-92

19 Hess, B.; Law, S.; Ortolani P. (eds.), *An 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, 2017, p. 45

and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter the 1996 Hague Convention); Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter the 2007 Hague Convention); Hague Protocol on the Law Applicable to Maintenance Obligations (hereinafter the 2007 Hague Protocol) and the Hague Convention on Choice of Court Agreements (hereinafter the 2005 Hague Convention).

2.2.1. *New solutions regarding the basic provisions*

The basic provisions of the PILA 2020 have been structurally changed in comparison with the PILA 2007. This part now only contains six articles (PILA 2007 contained 14 articles). The first major difference of PILA 2020 from its predecessor is that it introduces the formation of the new Chapter I in the second part, where the general rules which refer to the determination of the applicable law are now transferred from the basic provisions of Part I.

The scope of the PILA 2020 has been slightly changed and in comparison with the PILA 2007 now only contains one paragraph covering all of the PIL issues (applicable law, international jurisdiction and procedure and recognition and enforcement). Also, this rule does not go in specific subject matter of the relations covered by the PILA 2020,[20] but contains general definition that the PILA 2020 applies to "… private legal relations having an international element…".[21]

There is slight difference in Article 2 of the PILA 2020 which now provides for title "Supremacy of international agreements". In respect of the provisions contained in this article it provides for certain clarification that the provisions are not applicable if they are regulated with ratified international treaties.

Article 3 of the PILA 2020 refers to rules regarding filling of legal gaps and contains simplification of the bases upon which the relevant authority can fill the legal gaps. The PILA 2007 contained several bases upon which the relevant authority can fill the legal gaps: the provisions and principles of the private international law act, the principles of the system of law of the Republic of N. Macedonia and lastly the principles of private international law.[22] The new rule provided in Article 3 of

[20] This was case with the PILA 2007 which in Article 1 provided "…personal (status), family, labour, property and other civil relationship having an international element." Identical solution was contained in Article 1 of PILA 1982

[21] Article 1 of the PILA 2020

[22] Article 4 of the PILA 2007

PILA 2020 provides only for two bases: the provisions of the private international law act and the principles of private international law.

The rules in the PILA 2007 regarding multiple citizenship,[23] stateless persons[24] and habitual residence[25] are significantly changed in the PILA 2020. The new rule in PILA 2020 regarding multiple citizenship has introduced the habitual residence as an alternative of the domicile, so if a person possesses two or more foreign citizenships and none of them is Macedonian, then that person will be regarded as having citizenship of the State where "…he/she has its habitual residence".[26] The other solutions in the PILA 2020 regarding multiple citizenship (closest connection and one of the citizenships is a Macedonian) have remained the same as the solutions in PILA 2007. Moreover, in the PILA 2020 the rules regarding stateless persons are broadened, adding another category- *refugees.*[27] So if the person is a stateless persons *or a refugee* then the applicable law instead of citizenship as a connecting factor, will be determined according to their habitual residence or ordinary residence.[28]

Lastly, the mere definition of habitual residence for natural person is changed from the definition given in PILA 2007, in aspect that it has left out the limitation of six months for creation on habitual residence and giving more flexibility in determination of the habitual residence.[29] Such solution is welcomed, since the understanding of whether a person has acquired a habitual residence or not is left to the relevant authority to determine based on the factual situation.[30] For natural persons acting in the course of business and for companies and other legal persons there are specific rules provided in Article 75 and 87 of the PILA 2020, modeled according to definitions of habitual residence provided in Article 19 of the Rome I Regulation and Article 23 of the Rome II Regulation.

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23 Article 11 of the PILA 2007

24 Article 12 of the PILA 2007

25 Article 12a of the PILA 2007

26 Article 4 of the PILA 2020.

27 Article 5 of the PILA 2020.

28 Article 5 of the PILA 2020.

29 Article 6 of the PILA 2020.

30 For more on the determination of habitual residence according to the Brussels IIbis Reguation and the 1980 Child Abduction Convention see, Rumenov I., *Determination of the Child's Habitual Residence According to the Brussels II bis Regulation*, Pravni Letopis, Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani, Ljubljana Slovenia, 2013 pp. 57-81; Rumenov I., *The legal paradox of child's habitual residence: How to uniformly understand a factual concept?,* Iustinianus Primus Law Review, *vol.* V, no. 8, 2014, pp. 1-15

2.2.2. New solutions regarding the applicable law

2.2.2.1. *General provisions*

The rules regarding the determination of the applicable law are structured in Part II of the PILA 2020. Significant novelty in the PILA 2020 from its predecessor is that it introduces the formation of the new Chapter I in the second part. Such structural change was done to provide for more focused application of the general rules regarding the determination of the applicable law. The rules provided in this chapter refer to *renvoi*,[31] non-unified legal system,[32] determination of the contents of the foreign law,[33] interpretation and application of foreign law,[34] general exemption clause,[35] public policy,[36] overriding mandatory provisions[37] and a special rule regarding characterization.[38]

The main principles contained in the provision regarding *renvoi* in PILA 2007, are also present in Article 7 of the PILA 2020 providing for single *renvoi* system and containing exclusions in cases when the parties have the right to choose the applicable law. The legislator opted to enumerate the legal relationships where the PILA allows the parties to choose the applicable law, making it much more "user friendly".[39] Another aspect introduced in the PILA 2020 regarding *renvoi* is that it applies the single *renvoi* system not only when the applicable law refers back to the Macedonian law, but also to third states, thus resolving one ambiguity that was present in PILA 2007 and its predecessors.[40]

The rules regarding the determination of the contents of the foreign law have in general remained the same as the ones in the PILA 2007 (ex officio determination, with significant role of the ministry of justice and possibility of procurement of public documents of the contents of the foreign law). The new aspect introduced in Article 9 of the PILA 2020 is that the parties now can provide an expert opinion for the content of the foreign law, however the court is not bound by its findings.

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31 Article 7 of the PILA 2020

32 Article 8 of the PILA 2020

33 Article 9 of the PILA 2020

34 Article 10 of the PILA 2020

35 Article 11 of the PILA 2020

36 Article 12 of the PILA 2020

37 Article 13 of the PILA 2020

38 Article 14 of the PILA 2020

39 For more on renvoi in Macedonian law, see Гавроска П., Дескоски Т., Меѓународно приватно право, Скопје,, 2011, pp. 248-256

40 Regarding the problems which arise out of the implementation of *renvoi* in relation to third states see Dika; Knežević; Stojanović *op. cit.,* note 5, pp. 26-30

Article 10 of the PILA 2020 refers to interpretation and application of foreign law. This rule must be seen together with Article 14 which refers to the characterization. The PILA 2007 and its predecessors regarding characterization covered only the scenario for the application of foreign law, meaning that the law of the foreign State is applied in accordance with its meaning and the notions that it contains (*lex causea* characterization).[41] This was done intentionally, because according to the understanding of the previous legal doctrine, implicitly it was understood that the Court in first step, applied the *lex fori* characterization when it applied the domestic conflict of law rules and reached the foreign law as applicable.[42] The PILA 2020 provides for two step characterization, providing explicitly in Article 14 of the PILA 2020 for first step *lex fori* characterization. Then the second step of characterization provides for *lex causae* characterization, meaning that if the foreign law is applicable, then the law of the foreign State is interpreted and applied in accordance with its meaning and the notions that it contains.[43] Seen together with Article 9 of the PILA 2020 the consequence of non-application of foreign law or incorrect application of foreign law is base for legal remedy.[44]

The new PILA 2020 contains a rule regarding legal institutes unknown in the domestic legal system, providing that this legal institutes should be interpreted according to the Macedonian legal system, but when with such acts the proper position of this legal system cannot be determined then then the legal system from which this legal institute originates, will be taken into consideration for the characterization.[45]

The rules regarding the general exemption clause in comparison to the PILA 2007 have been more precisely drafted. Namely, the rules given in Article 3 of PILA 2007 contained only partial solution that in the situations when if it was evident that the legal relationship didn't have significant connection with the applicable law, then the Courts would not apply that law. Article 11 of the PILA 2020 goes further and provides that the Courts would apply the law which has closer connection with the legal relationship.[46]

Regarding the overriding mandatory provisions in the PILA 2020, they have been substantially changed from the provisions in the PILA 2007[47] and modeled ac-

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41 For more on this rule see, *ibid.,* pp. 35-42; Varadi *et al.*, *op. cit.*, note 5, pp. 128-129

42 Dika; Knežević; Stojanović *op. cit.*, note 5, pp. 35-42

43 Article 10 of the PILA 2020

44 Article 10 (2) of the PILA 2020

45 Article 14(2) of the PILA 2020

46 Article 11(2) of the PILA 2020

47 For more on the solutions regarding the mandatory rules provided in the PILA 2007 see Deskoski T., *The new Macedonian Private International Law Act of 2007*, pp. 445-446

cording to Article 9 of the Rome I Regulation[48] providing for application of rules in the law of Republic of North Macedonia which are regarded as crucial for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable.[49] As an exemption, the Court would consider the overriding mandatory provisions of another country, which has close connection with the legal relationship and in considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.[50]

The public policy rule in the PILA 2020 got slight modification, in context of the 'Europeanisation of the PIL'[51] providing for higher threshold for its application, given that the consequences of the application of the applicable law would be 'manifestly' contrary to the public policy in Republic of North Macedonia.[52]

2.2.2.2. *Specific provisions*

1. *Legal status of natural and legal persons*

The first specific provisions in the PILA 2020 refers to legal capacity and capacity to contract of natural person and legal person. In comparison with the rules in the PILA 2007 the new rules are structurally different. They are much more "user friendly" divided in two subsections: one referring to natural persons[53] and one

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48 For more on the importance of Article 9 of the Rome I Regulation see, Crawford E.B.; Carruthers J.M, *Connection and Coherence Between and Amoung European Instruments in the Private International Law of Obligations*, International and Comparative Law Quarterly, *vol.* 63, 2014, pp. 1-29; Pauknerová, M. *Mandatory rules and public policy in international contract law.* ERA Forum 11, 2010, pp. 29–43; Hellner M., *Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?,* Journal of Private International Law, 2009, pp. 447-470

49 Article 13 (1) of the PILA 2020

50 Article 13(2) of the PILA 2020

51 De Lange R., *The European Public Order, Constitutional Principles and Fundamental Rights*, Erasmus Law review, 2007, pp. 3-24; Hess B.; Pfeiffer T., *'Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law*', European Parliament 2011, [www.europarl.europa.eu/studies], accessed 20. June 2020; Hoško T., *Public Policy as an Exception to Free Movement within the Internal Market and the European Judicial Area: A Comparison*, Croatian Yearbook of European Law and Policy, *vol.* 10, 2014, pp. 201-202; Kessedijan C., *Public Order in European Law*, Erasmus Law Review, *vol.* 1, issue 1, 2007, pp. 25-36.

52 Article 12 of the PILA 2020. For more on the interplay between national public policy, international public policy and European public policy see, Kramberger Škerl J., *European Public Policy (With an Emphasis on Exequatur Proceedings*), Journal of Private International Law *vol.* 7, 2011, pp. 466-477; Kramberger Škerl J., *Evropeizacija javnega reda v mednarodnem zasebnem pravu*, Pravni letopis, Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani, Ljubljani, 2009, pp. 354-358

53 Articles 15 to 20 of the PILA 2020

regarding legal persons.[54] The connecting factors regarding legal capacity and capacity to contract for natural persons have remained the same (*lex nationalis*). The exemptions from the main connecting factors are different. The exemption present in Article 15(2) of the PILA 2007 is changed with new rule modeled according to Article 13 of the Rome I Regulation providing for solution in cases when the contract has been concluded between persons who are in the same country. Another difference is present in Article 16(3) of the PILA 2020 from its predecessor, providing for another exemption for rights in rem on immovable property found in another country. New rule was introduced regarding natural person acting in the course of his business.[55]

The rules regarding guardianship and provisional protective measures[56] and the rules relating declaration of death of a missing person[57] have remained the same as the ones in the PILA 2007.[58] General novelty in the PILA 2020 is the introduction of a new rule regarding the determination of the applicable law for personal name.[59]

Regarding legal persons, the solutions adopted in the PILA 2020 are positioned around the place of registry of the legal person as a connecting factor,[60] or the seat of legal person determined by its acts.[61] For the organizations that are lacking legal personality, the connecting factors are the place of registry or the place of establishment of these entities.[62]

2. *Family law relations*

The private international family law relations cover large part of the provisions regarding the determination of the applicable law. These rules are given in Articles 24 to 50 of the PILA 2020 and cover different family law aspects: matrimonial relations and divorce, matrimonial property, relations between parents and children, maintenance and adoption.

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54 Articles 21 to 23 of the PILA 2020

55 Article 17 of the PILA 2020

56 Article 18 of the PILA 2020

57 Article 19 of the PILA 2020

58 Articles 17 and 18 of the PILA 2007

59 For more on this subject see, Župan M. *Nominiranje mjerodavnog prava za osobno ime – Novina Hrvatskog zakona za međunarodnom privatnom pravu*, , Collection of papers from the IX Private International Law Conference, Skopje 2011, pp. 179-193

60 Article 21(1) of the PILA 2020

61 Article 21(2) of the PILA 2020

62 Article 22 of the PILA 2020

The provisions regarding the determination of the applicable law for matrimonial relations have remained almost the same as the ones in PILA 2007. Article 24 of the PILA 2020 contains the same connecting factor as the one in Article 38 of the PILA 2007 regarding conditions for conclusion of marriage that is *lex nationalis* for each of the spouses. What is different is the abandoning of the *in concreto* determination of public policy regarding these relations which was present in PILA 2007 and its predecessor. In the new PILA 2020 these aspects are covered by the general rule regarding public policy (Article 12 of the PILA 2020). The other matrimonial relations provisions have remained the same as the ones in the PILA 2007.[63]

One of the most fundamental novelties in the PILA 2020 are the new set of rules regarding divorce, modeled according to the Rome III Regulation.[64] Article 27 of the PILA 2020 is modeled according to Article 8 of the Rome III Regulation[65] and transposes its connecting factors (habitual residence of the spouses, last habitual residence of the spouses, nationality of the spouses and the law of the court sized).[66] This is significantly different from the provisions provided in the PILA 2007 which relied on the nationality and the domicile of the spouses as a connecting factors.[67] Moreover, one of the most significant novelty in the PILA 2020 is the introduction of the possibility to choose the applicable law regarding divorce. Articles 28 to 30 mimic the rules of Rome III Regulation regarding choice of law[68] and provide for the first time in the Macedonian PIL possibility of the parties to choose the applicable law regarding divorce.

The matrimonial property regime in the PILA 2020 has been drafted according to the Regulation 2016/1103 referring to matrimonial property regimes.[69] With that the PILA 2020 allows the spouses or future spouses to choose the applicable law.[70] In absence of such choice the following connecting factors are applied: the spouses' first common habitual residence after the conclusion of the marriage; the

63 Article 25 and 26 of the PILA 2020 (form of marriage and invalidity of marriage)

64 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, OJEU L 343/10

65 Applicable law in the absence of choice of the parties

66 On the importance of Article 8 see, Boele Woelki K., *For better or for worse: The Europeanisation of International Divorce Law*, pp. 32-34

67 Article 41 of the PILA 2007

68 Boele Woelki K., *For better or for worse: The Europeanisation of International Divorce Law*, pp. 29-32; Kruger T., *'Rome III and Parties'* Choice', Familie & Recht, 2014, pp. 2-4

69 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJEU L183/1

70 Articles 32 and 33 of the PILA 2020

spouses' common nationality at the time of the conclusion of the marriage; or if they don't have common nationality then the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances especially the place where the marriage was concluded.[71] These rules also apply to extra-marital cohabitation.[72]

Article 38 of the PILA 2020 refers to the recognition, establishment and contesting of paternity or maternity. This rule is slightly changed from its predecessor Article 47 of the PILA 2007, still providing for the nationality of the child as a main connecting factor, but allowing for application of other law if it is more favorable towards the child (habitual residence of the child or the law which in the time of birth of the child was applicable for the relations between the spouses). The parent-child relations have been evidently changed introducing the common habitual residence or alternatively the habitual residence of the child as connecting factors.[73]

The maintenance relations have been also one of the main aspects which have underwent drastic change, shaping the solutions according to the EU legal sources and in this case according to the 2007 Hague Protocol.[74] The situations of the applicable law regarding maintenance relations is specific in this filed, because the 2007 Hague Protocol is applicable among the Member States of the EU.[75] To provide for 'Europeanisation'[76] of this legal aspect which is one of the main principles of the PILA 2020, Articles 40 to 49 of the PILA 2020 provide for compatible solutions as those present in the 2007 Hague Protocol.[77]

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71 Article 34 of the PILA 2020

72 Article 37 of PILA 2020

73 Article 39 of the PILA 2020

74 Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. More on the position of the maintenance obligations regime established by the Hague Conference see, Walker, S., *Maintenance and Child Support in Private International Law*, Oxford and Portland, Oregon, 2015, pp. 18-24

75 Župan, M., *Innovations of the 2007 Hague Maintenance Protocol*, in: Beaumont, P., *et al.* (ed.), The Recovery of Maintenance in the EU and Worldwide, Oxford and Portland, Oregon, 2014, p. 314

76 For more on the new tendencies in private international law in family matters see, Boele-Woelki, K., *The principles of European family law: its aims and prospects,* Utrecht Law Review, *vol.* 1, issue 2, 2005, pp. 160-168; Župan, M., *Europska pravosudna suradnja u prekograničnim obiteljskim predmetima (European judicial cooperation in cross border family matters),* Pravni aspekti prekogranične suradnje i EU integracija: Mađarska – Hrvatska, Pravni fakultet Sveučilišta Pečuh i Pravni fakultet u Osijeku, 2011, pp. 591-618

77 Rumenov I., *Contemporary challenges of the cross border maintenance obligations system in the Republic of Macedonia*, in: Duić, D.; Petrašević, T. (eds.), EU and Comparative Law Issues and Challenges Series – Issue 2, Osijek, 2018, pp. 275-288.

What is very important in the PILA 2020 is the introduction of the rule regarding interpretation of fully transposed EU Regulations in the national law. To avoid discrepancies between the understanding of the 'national' legal provisions and the provisions present in the Maintenance Regulation, the legislator provided that the interpretation of the 'national' PILA 2020 provisions must be interpreted and applied in accordance with the Maintenance Regulation, meaning that national Courts should bear in mind the application of the Maintenance Regulation in the EU and especially the interpretation of its provisions by the Court of Justice of the European Union, although Republic of North Macedonia is still a candidate country to the European Union. This provides for full compliance of the application of the EU Regulations and the national private international law.

Lastly, the rules for the determination of the applicable law regarding adoption, have been structurally and substantially changed. First change in Article 50 of the PILA 2020 is the structure of the rule, now containing all of the aspects regarding the determination of the applicable law for adoption: conditions, termination and legal effect. Secondly, the main connecting factor for all of the aspects regarding the determination of the applicable law in the PILA 2020 is the nationality of the adoptive parent.[78] If the spouses are together adopting a child the connecting factor is their common nationality or if they don't have common nationality then is their common habitual residence.[79] The form of the adoption is governed by the law of the place where the adoption is created.[80]

3. *Succession relations*

Another significant change in the new PILA 2020 is the transposition of the rules provided in the Succession Regulation in the PILA 2020 regarding the determination of the applicable law. Chapter III of the Succession Regulation is transposed in Articles 51 to 59 of the PILA 2020 containing provisions for general rule, choice of the applicable law, scope of the applicable law, substantive validity and formal validity, validity as to form of a declaration concerning acceptance or waiver and commorientes.[81]

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78 Article 50 of the PILA 2007 provided for the common nationality of the adoptive parent and the adopted child, or if they lacked common nationality, then it was cumulatively the laws of the states which they are nationals

79 Article 50(2) and (3) of the PILA 2020

80 Article 50(4) of the PILA 2020

81 For more on the solutions provided in the Succession Regulation see, Pfeiffer M., *Legal certainty and predictability in international succession law*, Journal of Private International Law, 2016, pp. 569-585

Also for full compliance between the PILA 2020 and the Succession Regulation a rule for interpretation in accordance with the Succession Regulation is provided in the PILA 2020.[82]

4. *Rights in rem*

The determination of the applicable law regarding rights in rem underwent great structural change in the PILA 2020 from its predecessor. In the PILA 2007 the determination of the applicable law regarding rights *in rem* was contained only in one article (Article 20 of the PILA 2007) which was referring to different aspects regarding rights in rem such as: immovable property, movable property, *res in transitu* and means of transport. The PILA 2020 now contains 9 articles which are drafted in more details from its predecessor.[83] The generally accepted connecting factors regarding rights in rem (lex rei sitae) is also the main connecting factor regarding immovable and movable property.[84] One specific novelty in this section is that the legislator provided for a new rule which determines the scope of the applicable law regarding rights in rem.[85]

Very important novelty in the PILA 2020 is the specific provision regarding characterization of immovable and movable property, which is also conducted under the law where the property is located.[86] Moreover in the PILA 2020 there are separate articles regarding *conflit mobile,*[87] *res in transitu,*[88] means of transport[89] and validity of entry into registry.[90] Also, new article was provided for determination of the applicable law regarding cultural goods.[91]

5. *Intellectual property rights*

In the PILA 2020, new section 5 was added in Chapter II for the determination of the applicable law regarding intellectual property rights (IP rights). This represents genuine novelty in the PILA 2020 covering different cross border issues regarding

82 Article 59 of the PILA 2020
83 Articles 60 to 68 of the PILA 2020
84 Articles 61 and 62 of the PILA 2020
85 Article 68 of the PILA 2020
86 Article 60 of the PILA 2020
87 Article 63 of the PILA 2020
88 Article 64 of the PILA 2020
89 Article 65 of the PILA 2020
90 Article 66 of the PILA 2020
91 Article 67 of the PILA 2020

IP rights such as: basic rule,[92] IP rights arising out of labor relations,[93] contracts relating to IP rights[94] and infringement of IP rights.[95] Regarding IP rights the main connecting factor is the country for which protection is sought,[96] while for industrial property rights the country of registration.[97] For the IP rights arising out of labor relations the law applicable towards the labor contract determines the titled person for the IP right if the subject of IP right arose out of labor relation.[98] For the determination of the applicable law regarding IP contracts, sections 6 and 8 of the PILA 2020 applies (determination of applicable law regarding contracts and common provisions for contractual and non-contractual relations).[99] The applicable law regarding infringement of IP rights is determined according to the country of protection.[100]

6. *Contractual obligation*

The provisions for the determination of the applicable law regarding contractual obligations continuously are modeled according to the Rome I Regulation.[101] Articles 73 to 85 of the PILA 2020 are fully transposed from the Rome I Regulation.[102]

For full compliance between the PILA 2020 and the Rome I Regulation a rule for interpretation in accordance with the Rome I Regulation is provided in the PILA 2020.[103]

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92 Article 69 of the PILA 2020

93 Article 70 of the PILA 2020

94 Article 71 the PILA 2020

95 Article 72 of the PILA 2020

96 Article 69 (1) of the PILA 2020

97 Article 69 (2) of the PILA 2020

98 Article 70 of the PILA 2020

99 Article 71 of the PILA 2020

100 Article 72 of the PILA 2020

101 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), OJEU L177/6

102 For more on the Rome I Regulation see, Deskoski T.; Dokovski V., *Lex Contractus for Specific Contracts under Rome I Regulation*, pp. 2-12; Lando O.; Nielsen P.A., *The Rome I Proposal*, Journal of Private International Law, 2007, pp. 29-51; Maultzsch F., *Party autonomy in European private international law: uniform principle or context-dependent instrument?*, Journal of Private International Law, 2016, pp. 466-491; Le Verhagen H.; van Dongen S., *Cross-Border Assignments under Rome I*, Journal of Private International Law, 2010, pp. 1-21

103 Article 85 of the PILA 2020

7. *Non-contractual obligations*

The provisions for the determination of the applicable law regarding contractual obligations continuously are modeled according to the Rome II Regulation.[104] Articles 86 to 98 of the PILA 2020 are fully transposed from the Rome II Regulation.

For full compliance between the PILA 2020 and the Rome II Regulation a rule for interpretation in accordance with the Rome II Regulation is provided in the PILA 2020.[105]

Another novelty regarding contractual and non-contractual obligations is the new section 8 of the PILA 2020 which contains common provisions for these relations.

8. *Formal validity of legal transactions and legal acts, contractual agency and statute of limitations*

The last section of Chapter II of the PILA 2020 refers to several specific relations such as formal validity of legal transactions and legal acts[106], contractual agency[107] and statute of limitations.[108] In comparison with the PILA 2007, out of the rules provided in the PILA 2020 only the rule regarding contractual agency is a novelty, while the other two rules have remained unchanged.

2.2.3. *New solutions regarding the international jurisdiction and procedure*

The three basic principles upon which the PILA 2020 is based, are also present in Part III of this act that refers to international jurisdiction and procedure. Part III is divided in two chapters, Chapter I refereeing to international jurisdiction and Chapter II referring to international procedure.

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[104] For more on the application of the Rome II Regulation in the EU see, Kramer, *op cit.* note 14, pp. 414-424; Ahern B.; Binchy W. (eds.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligation – A New International Litigation Regime,* pp. 1-473; Pineau E.R., *Conflict of Laws Comes to the Rescue of Competition Law: the New Rome Ii Regulation*, Journal of Private International Law, 2009, pp. 311-336; Papettas, J. *Direct Actions against Insurers of Intra-Community Cross-Border Traffic Accidents: Rome II and the Motor Insurance* Directives, Journal of Private International Law, 2012, pp. 297–321; Nagy, C. I. *The Rome II Regulation and Traffic Accidents: Uniform Conflict Rules with some Room for Forum Shopping – How so?* Journal of Private International Law, 2010, pp. 93–108

[105] Article 103 of the PILA 2020 provides for interpretation of the rules regarding the determination of the applicable law for non-contractual relations but with exemption to Articles 93, 94 and 95 of the PILA 2020

[106] Article 107 of the PILA 2020

[107] Article 108 of the PILA 2020

[108] Article 109 of the PILA 2020

2.2.3.1. *International Jurisdiction*

1. *General provisions*

The simplicity and consistency of the PILA 2020 is evident in the first section of Chapter I, giving the general provisions for international jurisdiction. This section, among other, contains provisions for general jurisdiction in contentious procedure,[109] general jurisdiction for non-contentious procedure,[110] international jurisdiction for counterclaims,[111] international jurisdiction for provisional measures,[112] *perpetuation fori*,[113] *forum necessitates*,[114] general rule for exclusive jurisdiction,[115] *lis pendens* rule[116] and other rules.[117]

The main novelty regarding the provisions for general jurisdiction both in contentious and in non-contentious procedure is the introduction of habitual residence of the defendant as a jurisdictional criterion.[118] The domicile of the defendant is still present as a jurisdictional criterion but now it is given alternatively with the habitual residence of the defendant. So the general jurisdiction of Courts of N. Macedonia are determined if the defendant (which is natural person) has domicile *or* habitual residence in N. Macedonia. Regarding the general jurisdictional criterion for legal persons in both procedures there is separate provision which is determining the jurisdiction of Courts of N. Macedonia according to the seat of the legal person.[119] Another novelty is the provision in the PILA 2020 that excludes the succession from general jurisdiction.[120]

Important novelty in this section in the PILA 2020 is the introduction of specific rules for determining jurisdiction regarding provisional measures, rule for *forum necessitates* and general rule for exclusive jurisdiction. Such rules were not present in the PILA 2007.

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109 Article 110 of the PILA 2020

110 Article 114 of the PILA 2020

111 Article 113 of the PILA 2020

112 Article 115 of the PILA 2020

113 Article 116 of the PILA 2020

114 Article 117 of the PILA 2020

115 Article 118 of the PILA 2020

116 Article 119 of the PILA 2020

117 Unity of interest (Article 111 of the PILA 2020); jurisdiction for related claims (Article 112 of the PILA 2020); exclusive jurisdiction for approving and conducting enforcement (Article 120 of the PILA 2020) and International jurisdiction for claims against citizens of Republic of North Macedonia which are in service abroad (Article 121 of the PILA 2020).

118 Article 110 (1) of the PILA 2020 and Article 114 (1) of the PILA 2020

119 Article 110 (1) of the PILA 2020 and Article 114 (1) of the PILA 2020

120 Article 110 (2) of the PILA 2020 and Article 114 (3) of the PILA 2020

There is certain amendment to the rules regarding *lis pendens*. In the PILA 2020 it is required an additional condition for application of this rule: reasonably to expect that the foreign Court would render a decision that could be recognized in Republic of North Macedonia.[121] The other criteria are as same as those in the PILA 2007(same subject matter, same parties, the procedure was initiated firstly before the foreign court and the dispute does not fall under exclusive jurisdiction of Courts of Republic of N. Macedonia).[122]

The provisions regarding assessment of the jurisdiction of the Court of Republic of N. Macedonia underwent certain change. Firstly the new provisions in Article 116 of the PILA 2020 specifically state that the international jurisdiction is determined *ex officio*. Secondly, the jurisdiction is determined according to the facts and the circumstances that exist when the procedure is initiated.[123] This is different from the provision in the PILA 2007 where the time when the facts were determined was the time when the procedure was individualized (made *in concreto*) that is the time when the suit was served to the defendant.[124] Article 116 (2) of the PILA goes even further from Article 94 of the PILA 2007 and unambiguously provides that even where the circumstances and the fact change, this would not influence the determined jurisdiction of the Courts of N. Macedonia.

2. *Choice of Court Agreement*

Section 2 of the PILA 2020 now is dedicated to the prorogation of the jurisdiction. This section has been modified and constructed according to the Brussels Ibis Regulation.[125] Articles 122 to 125 mirror the provisions in Section 7 of Brussels Ibis Regulation and the wording of these provisions tries to follow the wording of the provisions in the Brussels Ibis Regulation. In comparison with the PILA 2007, one of the most significant novelties is provided in Article 122 of the PILA

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121 Article 119 of the PILA 2020

122 Article 93 of the PILA 2007

123 Article 116 of the PILA 2020

124 Article 94 of the PILA 2007

125 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, OJEU L351/1. For more on the jurisdictional agreements in the Brussels Ibis Regulation see, Forner-Delaygua, Q., *Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast*, Journal of Private International Law, 2015, pp. 379–405; Ratković, T.; Zgrabljić Rotar, D., *Choice-of-Court Agreements under the Brussels I Regulation (Recast),* Journal of Private International Law, 2013, pp. 245–268; Kistler, A. R. E. *Effect of exclusive choice-of-court agreements in favour of third states within the Brussels I Regulation Recast,* Journal of Private International Law, 2018, pp. 66–95; Ballesteros, M. H., *The Regime of Party Autonomy in the Brussels I Recast: the Solutions Adopted for Agreements on Jurisdiction,* Journal of Private International Law, 2014, pp. 291–308; Weller, M., *Choice of court agreements under Brussels Ia and under the Hague convention: coherences and clashes,* Journal of Private International Law, 2017, pp. 91–129

2020 which refers to prorogation of jurisdiction of the Courts of Republic of N. Macedonia. According to this provision exclusive jurisdiction status is attributed to the prorogation of the jurisdiction of Courts of N. Macedonia.[126] With such position, the prorogation of jurisdiction of Courts of N. Macedonia are afforded all of the modalities for protection of the exclusive jurisdiction in the PILA 2020 such as the *lis pendes* rule[127] and non-recognition of foreign decisions that are in breach of prorogation of Courts of Republic of N. Macedonia.[128] The effect of the exclusive jurisdictional aspect of choice of Court agreements is not absolute, since it is left to the parties to opt for such effect.[129]

Another important difference from the PILA 2007 is that to choose the Courts of Republic of N. Macedonia, it is not required in the PILA 2020 for one of the parties to be Macedonian citizen or if it is legal person to have its *situs* in N. Macedonia.[130] Also to choose foreign Court, in the PILA 2020 it is not required for one of the parties to be a foreign citizen or if it is a legal person to have its *situs* in N. Macedonia.[131]

For the formal validity of the choice of Court agreements, the conditions mimic the provisions of Article 25 (a) to (c) of the Brussels Ibis Regulation. Also there is possibility of *tacit* choice of Court in the situations where the defendant entered in appearance either by submitting response of the lawsuit, entered in appearance for the main issue without contesting the jurisdiction or filed a counterclaim.[132]

3. *Specific provisions*

The specific provisions regarding jurisdiction follow the systematization of the provisions regarding the determination of the applicable law. Section 3 of Chapter I in Part III is divided in subsections containing specific jurisdiction provisions for status of persons,[133] family relations,[134] succession,[135] rights in rem,[136] intellectual property rights,[137] contractual and non-contractual relations.[138]

126 Article 122 (2) of the PILA 2020
127 Article 119 of the PILA 2020
128 Article 160 of the PILA 2020
129 Article 122(2) of the PILA 2020
130 Article 56 (3) of the PILA 2020
131 Article 56(1) of the PILA 2020
132 Article 125 (1) of the PILA 2020
133 Articles 126 to 130 of the PILA 2020
134 Articles 131 to 136 of the PILA 2020
135 Articles 137 to 140 of the PILA 2020
136 Articles 141 to 143 of the PILA 2020
137 Article 144 of the PILA 2020
138 Articles 145 to 150 of the PILA 2020

The legislator in the PILA 2020 has done important changes with the specific jurisdiction. Firstly, the situations where the exclusive jurisdiction was attributed to the Courts of N. Macedonia has been reduced. In the PILA 2007 there were 13 situations of exclusive jurisdiction of Courts of N. Macedonia.[139] In the PILA 2020 only 7 situations are attributed with exclusive jurisdiction of Courts of N. Macedonia.[140] Secondly, in family matters,[141] maintenance[142] and succession,[143] habitual residence was introduced as jurisdictional criterion. Lastly, limited prorogation of jurisdiction was introduced regarding succession.[144]

2.2.3.2. *International procedure*

The provisions regarding international procedure have been structurally altered and in the recomposition of Part III of the PILA 2020 many of the rules which were present in PILA 2007, have been transferred to the new Section 1 in the PILA 2020 regarding general provisions for international jurisdiction.[145] There are four aspects in this section, first, the provision regarding applicable law for the procedure with cross border aspect;[146] second, capacity to be a party in a lawsuit and capacity to conduct legal proceedings;[147] third, *cautio iudicatum solvi,*[148] and lastly exemption from payment of costs of litigation.[149]

Regarding the applicable law for the procedure conducted in front of Courts in N. Macedonia provided in Article 151 of the PILA 2020, the applicable law is the law of Republic of N. Macedonia. The provisions in the PILA 2020 regarding the capacities to be a party in a lawsuit and capacity to conduct legal proceedings have remained the same as the ones provided in the PILA 2007.[150] The provisions regarding *cautio iudicatum solvi* in the PILA 2020 are generally unchanged from the PILA 2007 with some amendments: foreign legal persons that are not enlisted in the registry have to provide security for the payment of the costs of

139 Articles 65, 66, 67, 68, 63, 84, 85, 86, 73 (2), 76 (2), 78 (2), 83 (2), 87, 88 and 91 of the PILA 2007

140 Articles 122(2), 129, 130, 136 (2), 141, 144 and 147

141 Article 131 of the PILA 2020

142 Article 135 of the PILA 2020

143 Article 137 of the PILA 2020

144 Article 140 of the PILA 2020

145 The provisions regarding foreign *lis pendens* (Article 93 of the PILA 2007) and perpetuation fori (Article 94 of the PILA 2007) are in the PILA 2020 transferred to the general part of the international jurisdiction

146 Article 151 of the PILA 2020

147 Article 152 of the PILA 2020

148 Articles 153 to 155 of the PILA 2020

149 Article 156 of the PILA 2020

150 In comparison see Article 92 of the PILA 2007 and Article 152 of the PILA 2020

litigation.[151] The rules regarding exemptions for payment of costs of litigation have been changed, providing that these exemptions are not conditioned anymore with reciprocity but these rules are available for foreign citizens under conditions applicable towards the citizens of Republic of N. Macedonia.[152]

2.2.4. *New solutions regarding recognition and enforcement of foreign decisions*

The three basic principles upon which the PILA 2020 is based, also prevail in Part IV of this act that refers to recognition and enforcement of foreign decisions. Part IV is divided in three chapters, Chapter I definitions; Chapter II conditions for recognition and enforcement and Chapter III procedure for recognition and enforcement. In comparison to the PILA 2007 this part follows the systematic division of its predecessor however with some novelties.

2.2.4.1. *Definitions*

The provisions in this section remain the same as the provisions in the PILA 2007. The definitions regarding what should be considered as 'foreign judicial decision' in the PILA 2020 remains the same as the ones provided in the PILA 2007.[153] Also the provision regarding the definition of 'recognition' remains the same without any change.[154]

2.2.4.2. *Conditions for recognition and enforcement*

The provisions of the PILA 2020 regarding the conditions for recognition and enforcement of foreign judicial decision in comparison to the provisions in PILA 2007 underwent structural and substantial modification. Firstly, this Chapter II of Part IV is divided in two sections: Section 1 which provides for the conditions for recognition and enforcement of foreign decisions that are considered ex officio by the Court; and Section 2 that provides for the conditions that are considered upon objection by the parties. Secondly, in line with the tendency of the PILA 2020 the conditions have been amended and reduced.

1. *Conditions that are considered ex officio*

One of the greatest novelties regarding the recognition and enforcement of foreign judicial decisions in N. Macedonia is that the Court of recognition inspects most

[151] Article 153(1) of the PILA 2020

[152] Article 156 of the PILA

[153] Article 99 of the PILA 2007 and Article 157 of the PILA 2020

[154] Articles 100 of the PILA 2007 and Article 158 of the PILA 2020

of the conditions ex officio and thus provides for swift recognition based on objective circumstances. Most of the conditions for recognition in the PILA 2020 were present in its predecessor. The certificate of finality and enforceability provided in Article 159 of the PILA 2020 is combination of Article 101 and 102 of the PILA 2007. The wording of these provisions has remained unchanged. Regarding the exclusive jurisdiction of courts of N. Macedonia, the provision from its counterpart in the PILA 2007[155] is simplified, providing that foreign judicial decision would not be recognized in N. Macedonia if exclusive jurisdiction over the matter lies with the court or some other authority in Republic of N. Macedonia, unless the provisions of the PILA 2020 allow the parties to choose otherwise.[156]

One of the novelties regarding the condition for recognition and enforcement is that as a prevention from exorbitant jurisdiction, the legislator opted to incorporate 'mirror principle' meaning that foreign judicial decision would not be recognized in Republic of N. Macedonia, if the jurisdiction was determined according to circumstances which are not provided for determination of the jurisdictions for complementary cross border issues in Republic of N. Macedonia.[157]

The provisions in the PILA 2020 regarding parallel proceedings, solve this problem with the rules regarding *lis pendens*[158] and the provisions provided in Article 162 which determine that foreign judicial decision shall not be recognized if the court or another authority in N. Macedonia rendered a final decision on the same subject matter or if another foreign judicial decision on the same subject matter and between the same parties was recognized in Republic of N. Macedonia.[159] This provision sustained a slight but very important change regarding the identity of the parties, because Article 106 of the PILA 2007, provided for the foreign judicial decision which was previously recognized, that only the subject matter of both decisions should correspond, while the provision in Article 164 of the PILA 2020 ask for both of the judicial decisions to be *"…on the same subject matter and between the same parties…".* Paragraph 2 of Article 164 of the PILA 2020 remains the same as Article 106 (2) of the PILA 2007.

Another significant novelty in the PILA 2020 that goes in line with the new tendencies in private international law,[160] is the higher threshold that is required in

155 Article 104 of the PILA 2007

156 Article 160 of the PILA 2020

157 Article 161 of the PILA 2020

158 Article 119 of the PILA 2020

159 Article 162 of the PILA 2020

160 Kramberger Škerl J., *European Public Policy (With an Emphasis on Exequatur Proceedings)*, pp. 466-477; Kramberger Škerl J., *Evropeizacija javnega reda v mednarodnem zasebnem pravu,* pp. 349-370; Hess B.;

order to apply the '*public policy*' exemption. Article 107 of the PILA 2007 provided that foreign judicial decision would not be recognized in Republic of N. Macedonia on the grounds of public policy. For this clause to take effect the provision of 'public policy' only required that if the effects of recognition thereof were contrary to public policy of N. Macedonia then this exemption could be applied. Article 163 of the PILA 2020 elevates the threshold higher to the standard "*evidently contrary to public policy".* Such wording is not only semantically significant, but provides for much more restrictive approach to the use of 'public policy' exemption.[161]

2. *Conditions that are considered upon objection by the parties*

The possibility to refuse to recognize a foreign decision upon objection by the parties has been limited to the minimum in the PILA 2020 only in the cases against severe violations by the judicial authorities of the Country of origin.[162] The evolutionary path of the provision regarding 'violation of the right of defense' as a condition for recognition and enforcement of foreign judicial decision in the Macedonian private international law can be seen in this rule. Article 104 of the PILA 2007 went further from the provision on 'right of defense' given in Article 88 of the PILA 1982. Namely, Article 88 (1) contained general condition that: "The court of the Republic of Macedonia shall refuse the recognition of a foreign judicial decision if upon objection the person against whom the decision was rendered it has been established that due to irregularities in the proceedings he had no opportunity to participate therein". From this position Article 88(2) of PILA 1982 provided for *in concreto* scenarios regarding infringement of the right of service of documents in the procedure.[163] The PILA 2007 modified this rule in two aspects: firstly, the provisions didn't went from general to specific, rather as two aspects of the infringement of the right of defense; and secondly, regarding the service of documents specific reference to the law according to which the service needs to be conducted was provided (the law of the country of origin). The PILA 2020 modifies this rule in two aspects: firstly, it left out the specific reference to

Pfeifer T., *Study on the Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law,* pp. 1-181; Siehr K, *General problems of private international law in modern codifications—de lege lata and—de lege europea ferenda*, Yearbook of Private International Law, 2005, p. 54

161 Hess B.; Pfeifer T., *Study on the Interpretation of the Public Policy Exception*, p. 13

162 Article 164 of the PILA 2020

163 In particular, a person against whom a foreign judicial decision was rendered shall be considered as having no opportunity to participate in the proceedings if the summons, the document or the ruling instituting the proceedings were not served upon him in person or if service in person was not even tried, except when the person pleaded to the merits of the plaintiff's claim in the first instance procedure. Article 88(2) of the PILA 1982

the law according to which the service needs to be conducted was provided; and secondly it provides for third *in concreto* scenario, that the party was not given sufficient time to arrange its defense from the moment of service of the document instituting the proceeding until moment when the hearing was scheduled.[164]

3. *Procedure for recognition of foreign judicial decisions*

The core of the procedure for recognition and enforcement of foreign judgments has generally remained the same as the procedure in the PILA 200. The novelties in the procedure for recognition and enforcement are relating to two aspects: firstly, the time limits have been prolonged;[165] and secondly the adversarial hearing in the second stage of the procedure for recognition is obligatory.[166]

3. CONCLUSION

It can be said that the PILA 2020 represents a significant step forward for the Macedonian private international law, bridging the new tendencies in private international law and Europeanizing the core understanding of its institutes. The systematization that has be introduced in this new PIL code, provides for much easier implementation from practitioners soliciting in N. Macedonia. It will represent a challenge for the judiciary to consume such large structural change of private international law, however to achieve the main goal of the law, that is to bring closer the EU private international law rules, this mustn't represent an obstacle. When the judiciary adopts to these provisions in the PILA 2020, then the immanent move to the EU private international law regulations would not represent tremendous problem. With that, the PILA 2020 solves two problems with one act, it evolutionary modernizes the national private international law and provides for easier adaptation to the EU regulations.

Very important provisions in the PILA 2020 are the rules for interpretation regarding the provisions which represent fully transposed EU regulations. These rules would allow the judiciary to comply its national law to the standards and interpretations of the EU institutes and with that to go in line with the interpretation provided in EU, although N. Macedonia is still just a candidate country to the EU. Without these provisions, there would still be a possibility of distortion of the understanding of EU legal institutes and with that the goal of harmonization of the internal law with the EU law would not be achieved. The PILA 2020

164 Article 164 of the PILA 2020

165 Article 168 and 170 of the PILA 2020

166 Article 169 of the PILA 2020

will also represent a model for a modern national private international law act that other countries can follow.

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UDK 341.645(4):347.962
340.131:341.64
Review article

ROLE OF COURT OF JUSTICE OF THE EUROPEAN UNION IN ESTABLISHMENT OF EU STANDARDS ON INDEPENDENCE OF JUDICIARY

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ABSTRACT

Although the rule of law is globally and regionally increasingly in focus, there are various attempts to blur the separation of powers and weaken judiciary, its integrity and independence through institutional reforms and in individual cases. Judicial independence and integrity are under threat in several EU member states, including Hungary, Romania, and Poland. Judicial crises in the EU jeopardize essential principle of mutual recognition in judicial matters and free movement of goods, services, people and capital. The recent decision of the Irish high judge to refuse to extradite a suspected drugs trafficker to Poland due to concerns about the integrity of the Polish justice system, re-confirms the relevance of the rule of law for the EU and judgement of Court of Justice of EU (CJEU) in case LM, C216/18 PPU. Following Court of Justice decisions related to the Polish judiciary are relevant for shaping Court of Justice position on independence and impartiality of judiciary (i.e. judgment of 24 June 2019, Commission v Poland, C619/18; judgement of 19 November 2019, joined cases A.K. and Others v Krajowa Rada Sadownictwa, C585/18, C624/18 and C625/18).

Backsliding on rule of law in the EU is a possibility that the Court of Justice of the European Union is seeking to prevent and mitigate. In doing so, the Court of Justice is establishing EU standards on independence and accountability of judiciary. There have also been signs that citizens care about the rule of law, highlighting he importance of demand-side initiatives that foster citizen voice. In all, in the current European environment, the rule of law is highly visible and increasingly relevant for citizens, businesses, governments, and EU institutions, especially EU Court of Justice.

In the article author is reviewing Court of Justice decisions relevant for the independence of judiciary, its influence on national legislators, European Commission policy towards access countries and strengthening requests for genuine reform of justice in candidate countries. Consequently, author emphasized the advantages of active role of Court of Justice in establishment

of EU standards on independence and impartiality of judiciary in order to prevent further erosion of rule of law, separation of powers and position of judiciary in the member states.

***Keywords**: Court of Justice, EU standards on independence of judiciary, rule of law, separation of powers*

1. INTRODUCTION

The rule of law is at the core of the EU system and specifically mentioned in the Article 2 of the Treaty of European Union as the value on which the EU is founded. The rule of law requires the respect of legality, the equality of citizens, the legal certainty, the independence of the judiciary, the accountability of the decision-makers and the protection of human rights.[1] The rule of law is incorporated in the EU founding treaties and case law of the Court of Justice of the EU (CJEU).

Although the EU is supranational organization founded on common values, it includes Member States with different traditions, some of them with an established rule of law tradition as well as states where the rule of law is relatively new. The EU has to remain cautious with regard to abuses of the rule of law.[2] The European Commission, together with all other EU institutions is responsible under the Treaties for guaranteeing the respect of the rule of law as a fundamental value of Union and making sure that EU law, values and principles are respected.

The rule of law is not only a common value, but also the foundation of the European integration process. Since 1993 the rule of law has been part of the Copenhagen accession criteria used for assessing the eligibility of the candidate country to join the European Union. The rule of law negotiation chapters, chapter 23 and 24 of the acquis, are at the heart of the European accession process. European Commission expects of candidate countries to fully comply with EU principles relating to the Rule of Law, Judiciary, Fundamental Rights and the Anti-Corruption. Areas of focus of Chapter 23 of accession negotiations are improving judicial independence, both conceptually and functionally, and strengthening impartiality, accountability, professionalism and efficiency of judiciary. Judicial independ-

[1] According to the European Commission the Rule of Law can be defined as "legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law". European Commission, Communication: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 Final, pp. 4

[2] Sledzinska-Simon, A.; Bard, P., *The Teleos and the Anatomy of the Rule of Law in EU Infringement Procedures*, Hague Journal on the Rule of Law, 2019, *vol*. 11, no. 2-3, pp. 440

ence is crucial since national courts need to apply EU acquis and uphold rule of law within the EU.[3]

The phenomenon of rule of law backsliding[4] raised attention after judicial reforms in Hungary[5] and Poland[6] where Governments have sought to reduce judicial independence and jeopardize checks and balances by limiting the power of their respective constitutional courts. The EU has political and legal mechanisms to address challenges with rule of law in the Member States. The political mechanism is incorporated in the Article 7 of the TEU, while legal action may take form of infringement proceeding in line with Article 258 TFEU.

Since 2015, the Polish authorities have enacted a series of judicial reforms including the creation of new disciplinary procedures and oversight body for judges that have dramatically increased political oversight of the judiciary. Already in 2016 the European Commission triggered mechanism under the EU Framework to strengthen the Rule of Law to prevent further negative influence on rule of law in Poland and adopted 1st Rule of law recommendation 2016/1374.[7] In addition, judgement of the Court of Justice of the EU in Case *LM*[8] regarding the decision of the Irish high judge to refuse to extradite a suspected drugs trafficker to Poland due to concerns about the integrity of the Polish justice system, re-confirms the relevance of the rule of law for the EU. Same mechanism was triggered against Hungary in 2017 for concerns about the functioning of the country's institutions, including problems with the electoral systems, independence of the judiciary and

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3 Lenaerts, K., *New Horizons for the Rule of Law Within the EU,* German Law Journal, 2020, *vol.* 21, no. 1, pp. 30

4 Pech, L.; Scheppele, K.L., *Illiberalism Within: Rule of Law Backsliding in the EU*, Cambridge Yearbook of European Legal Studies, 2017, *vol.* 19, pp. 8

5 The independence of the judiciary has been jeopardized since right wing government gain power in 2010. By introducing new age limits for retirement with immediate effect, 27 percent of Supreme Court judges and more majority of appeal court presidents were removed, and the positions were filled by lawyers loyal to the government. Bard, P., *EU responses to rule of law backsliding in the Member States – the Hungarian case*, 2017, Hungarian Europe Society, Budapest, available at: [https://europatarsasag.hu/sites/default/files/open-space/documents/magyarorszagi-europa-tarsasag-rolmet.pdf], Accessed 31. March 2020

6 Since gaining power in 2015, the Polish right-wing government has used the populist blueprint to radically reform the justice system. Bugarič, B., *Central Europe's descent into autocracy: A constitutional analysis of authoritarian populism*, International Journal of Constitutional Law, *vol.* 17, no 2, 2019, pp. 597-616

7 Commission Recommendation (EU) 2018/103 of 20 December 2017 Regarding the Rule of Law in Poland Complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, [2017] OJ L17/50, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0103&from=EN]

8 Case C-216/18 PPU *LM,* [2018] ECLI:EU:C:2018:586

the respect for citizens' rights and freedoms.[9] One of the problems in Hungary was the fact that the competences of the Hungarian Constitutional Court were limited as a result of the constitutional reform, including with regard to a budgetary matters, the abolition of the *action popularis* and other important issues.

These recent experience with EU member states and challenges in the negotiation process with candidate countries influenced on the content of a New methodology for the accession negotiations that was adopted on February 5, 2020. The application of the methodology depends on rule of law progress in the member states and genuine delivery of reforms in candidate countries to ensure irreversibility of the process. The CJEU decisions shaped EU judicial standards and will provide stronger arguments to the European Commission in the process of European integrations and assessment of progress in judicial reforms. The CJEU jurisprudence is especially relevant in the discussion with candidate countries that are emphasizing the fact that Member States have different judicial systems with no hard standards on organization of judiciary.

2. EU STANDARDS ON INDEPENDENCE OF JUDICIARY

The Fall of Berlin Wall in 1990 led to opening of the accession process for former Warsaw Pact member states that had different legal traditions. This accession process that included 12 countries raised issues of European judicial standards. Although the EU member states judiciaries are different from country to country, as well as constitutional regulation of independence and impartiality of judiciary,[10] the rule of law is accepted as a common value.

For many years judiciary and internal affairs incentivize discussion on their role within the EU acquis, lack of democratic responsibility and human rights protection.[11] Only for the last decade, after adoption of Lisbon Treaty, the EU got a legal ground to act in the area of criminal law and influence on the judiciary and legislation in the member states in this specific area.[12]

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9 European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2017/2131(INL)

10 More about differences among Member States judicial systems: Gutmann, J.; Voigt, S., *Judicial Independence in the EU – A Puzzle*, ILE Working Paper Series, No. 4, 2017, [https://www.econstor.eu/bitstream/10419/156756/1/ile-wp-2017-4.pdf], Accessed 08. April 2020

11 Peers, S., *Justice and Home Affairs Law since the Treaty of Lisbon: A Fairy-Tale Ending?*, in: Arcarazo, D. A.; Murphy, C. C. (eds.), EU Security and Justice Law after Lisbon and Stockholm, Hart Publishing, 2014, pp. 17

12 Craig, P., *The Lisbon Treaty – Law, Politics, and Treaty Reform*, Oxford University Press 2013, pp. 336

In the area of the criminal law and judiciary the EU relied on Council of Europe standards. According to the article 6 of the TEU the EU is obliged to respect fundamental rights guaranteed in the human rights conventions. In addition, the integral part of the Lisbon Treaty is Protocol 8 relating to the accession of the Union to the European Convention of Human Rights and Fundamental Freedoms.[13] European Convention of Human Rights and Fundamental Freedoms and European Court of Human Rights (ECtHR) developed human rights standards (right to a fair trial and access to justice) and within them standards on judiciary, before the EU started to intervene in this area.[14] Although the EU, especially CJEU is developing own judicial standards through the interpretations, the basis represent the Council of Europe rule of law standards and ECtHR jurisprudence.[15]

Although the organization of justice in the Member States falls within the national competences, the Member States are required to comply with their obligations under the EU law. In addition, in accordance with the Article 19(1) TEU the Member States are obliged to ensures that courts and tribunals within the meaning of EU law meet the requirement of the effective legal protection within the denotation of the Charter of Fundamental Rights of the European Union. Courts and tribunals can provide such protection only if sustaining their independence. According to article 47 paragraph 2 the Chapter of fundamental rights of the EU everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

EU standards are defined based on the goals that should be achieved, namely independence, impartiality, integrity, efficiency and trial within the reasonable time, while instruments for their realization are different among the member states. Challenges that Romania and Bulgaria had in the area of judiciary and fight against corruption provided additional incentives for the Council of Europe and European Union to standardize criteria for the measuring the progress of the judicial reforms and achievement of European standards.

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13 Defeis, E. F., *Human Rights and the European Court of Justice: An Appraisal*, Fordham International Law Journal, *vol.* 31, no. 5, 2007, pp. 1104–1117

14 Škulić, M., Osnovni evropski standardi u krivičnom postupku Srbije, in: Kron, L.; Jugović, A., (eds.), Kriminal, državna reakcija i harmonizacija sa evropskim standardima, Institut za kriminološka i sociološka istraživanja, Beograd, 2013, pp. 29–55; Vervaele, J. A. E., *Evropsko kazneno pravo i opća načela prava Unije*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 12, no. 2, Zagreb 2005, pp. 855–882

15 Memorandum of Understanding between the Council of Europe and the European Union of May 2007

International law recognizes link between human rights, specifically right to a fair trial and independence and accountability of judiciary.[16] Independence of judiciary is based on the right of the individual to a fair trial, so independent judiciary as well as prosecution are crucial elements of the fair trial. Although the accused person has right to a fair trial, it cannot be concluded that judge or a prosecutor have right to be independent.[17] Right to an independent judiciary is issue of the accountability of judiciary that is incorporated in the legislation[18] to be independent and impartial in exercising right to a fair trial. Discussion on independence of the judiciary and its elements should be focused on its purpose of guarantying right of each individual to a fair trial.

Council of Europe developed some of the main European judicial standards, which are further evolved within the EU institutions.[19] European standards that relates to the independence of judiciary include recommendations on procedure for selection of judge's candidates, appointment of judges, irremovability, career path and promotion, accountability, financial independence and tenure.[20] Furthermore, there is a distinction between external and internal independence.[21] Judicial councils are recommended as guarantee of independence of judiciary.[22]

Standards of independence of judiciary refer more on courts and judges than prosecution service and public prosecutors. However, over last few years in Europe prevails opinion that independence of prosecution is also important for establishment of independent judicial system, since public prosecutors are a key part of the criminal justice chain.[23] Public prosecutors decide on criminal prosecution, withdrawal of criminal prosecution, diversion of prosecution, provide legal qualification of the offence, propose criminal sanction, etc. The public prosecutors are

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16 See: Bangalore principles of judicial conduct adopted in 2002. Value 1 is independence and it is defined as "a pre-requisite to the rule of law and a fundamental guarantee of a fair trial"

17 Report of the Special Rapporteur on the independence of judges and lawyers – Judicial accountability, 2014, A/HRC/26/32

18 See: OSCE Document of the Copenhagen meeting of the conference on the human dimension of the OSCE from 1990 and Document of the Moscow meeting of the conference on the human dimension of the OSCE from 1991

19 Matić Bošković, M.; Nenadić, S., *Evropski standardi u oblasti pravosu*đa, Strani pravni život, 2018, *vol.* 62, no 1, pp. 39-56

20 European Charter on the statute for judges and Explanatory Memorandum, Council of Europe, 1998

21 Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities

22 Garoupa, N.; Ginsburg, T., *Guarding the Guardians: Judicial Councils and Judicial Independence,* American Journal of Comparative Law, *vol.* 57, Oxford University Press 2008, pp. 103–134

23 Matić Bošković, M.; Ilić, G., *Javno tužilaštvo u Srbiji: Istorijski razvoj, međunarodni standardi, uporedni modeli i izazovi modernog društva*, Institut za kriminološka i sociološka istraživanja, Beograd, 2019, pp. 74

perceived as gatekeepers of the courtroom, since withdrawal of criminal prosecution by the public prosecutor present finalization of the procedure and the judge cannot process case further.[24]

It is of utmost importance that public prosecutors are objective in proceedings and decision making, and to impartially apply criminal law. Independence of the public prosecution is necessary element of the right to a fair trial, however, specific level of the control over the prosecution is needed to ensure that there is no abuse of the competences. Assessment of the independence and impartiality of public prosecutors should include structural independence of public prosecutors and functional independence. Lack of autonomy and functional independence can jeopardize credibility of prosecution and public trust in the justice system.[25]

One of the elements usually discussed within the standards of the independence of the judiciary are judicial councils as body that should guarantee independence. The Resolution of the General Assembly of the European Network of Judicial Councils, adopted in Budapest on 23 March 2008, emphasized that majority of the European countries have judicial councils or similar independent or autonomous institutions, separate from executive and legislative powers, with the competence to protect and guarantee independence of the judiciary.[26]

Independence of the judicial councils should be understood that councils should be protected from undue influence of executive and legislative powers.[27] Comparative examples show that structural and operational autonomy is necessary as well as clear legal background and competences. Transparent procedure of election of judicial council members, adequate human resource policy and internal controls are needed elements for prevention of influence over the councils' work.

European Network of Judicial Councils in its Report from 2010-2011 stressed that "mechanism of appointment of council's members from the judiciary must exclude any interference of executive and legislative powers and that judiciary members should be elected by their peers". Many authors emphasized relevance of election of the majority of members from the judiciary by their peers, while

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24 Tonry, M., *Prosecutors and Politics in Comparative Perspective,* Crime and Justice, *vol.* 41, 2012, pp. 1–33

25 Report of the Special Rapporteur on the independence of judges and lawyers, 18 April 2011, A/HRC/17/30/Add.3, paras. 16 and 87

26 Resolution of the General Assembly of the European Network of Judicial Councils on Self Governance for the Judiciary: Balancing Independence and Accountability, [http://www.encj.eu/images/stories/pdf/resolutionbudapestfinal.pdf]. Accessed 06. April 2020

27 Autheman, V., Sandra Elena, S., *Global best practices: Judicial Council – Lessons learned from Europe and Latin America*, USAID, 2004

political control over the process of election can influence on the perception of the independence of councils' work.[28]

Members of the judicial council should be elected based on objective criteria in transparent and fair procedure, to avoid politicization and protect independence of judiciary. However, election by the peers or appointment by the Parliament cannot fully prevent external or undue influences on the council. European standards relevant for the judicial councils are listed in the Council of Europe Recommendation and Opinion,[29] like clear legal framework that regulates competences, position, members election, accountability, human and financial resources, procedure and work processes, etc. Legal framework should be established by the highest legal act in the country (constitution) or by the law. Countries that decided to apply South European model of the council that among other competences elects judges and prosecutors, usually regulate council by the constitution.[30]

The biggest challenge for sustainability of the European judicial standards represent difference between member states legal systems. Formal acceptance of European values in the form of recognition and incorporation of standards in national legislative framework does not guarantee their practical acceptance. Having in mind that listed European judicial standards include values, their application and irreversibility of the reforms depends on acceptance of these values and social principles and standards. This is confirmed in the survey results which show that *de jure* guarantees of the independence are not in the direct relation with *de facto* independence.[31]

3. COURT OF JUSTICE JURISPRUDENCE ON STANDARDS OF INDEPENDENCE OF JUDICIARY

Member States and their organization of judiciary differ due to historical reasons. These differences are treated as diversity that have not prevented the EU from establishing the European area of freedom, security and justice. Introduction of mutual trust and mutual recognition of judgements, as well as reorganization and reform of judiciary in some countries raised question of violation of rule of law.

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28 Guarneri, C., *Judicial independence in Europe: threat or resource for democracy?,* Representation, Journal of Representative Democracy, 2013, *vol.* 49, no. 3, pp. 347–359

29 Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities; Consultative Council of European Judges Opinion No 10 on Council for the Judiciary in the Service for Society, 2007

30 Matić Bošković, M., *Tužilački saveti i garancija tužilačke autonomije u državama zapadnog Balkana*, Anali Pravnog fakulteta u Beogradu, 2017, *vol.* 65, no. 1, pp. 169-186

31 Gutmann; Voigt, *op. cit*., note 10

The judiciaries of the Member States called the CJEU to make decision in the specific cases and to provide interpretation whether there is a violation of the rule of law and judiciary independence.

The CJEU jurisprudence represents significant source of EU law. The CJEU decisions are important for the interpretation of the European Union law as well as for application of general EU law principles. Some of the CJEU decisions shaped development of EU legal system and influence on national legislation. Role of the CJEU in development of EU law is formed in the article 19(1) TEU, which envisages that Court "shall ensure that in the interpretation and application of the Treaties the law is observed". Although the national courts are deciding cases that relates to the application of the EU law, provisions of the Treaty establishing the European Community introduced competence of the CJEU to decide on questions referred by national courts of the members states that are related to the application of the EU acquis in specific case.[32]

Request for preliminary ruling, according to the article 267 of the TFEU, is referred by the national court of the member state to the CJEU, which has exclusive jurisdiction to interpret founding treaties,[33] and interpret and decide on validity of EU acts. National court of the member state is entitled to requesting preliminary ruling when it has dilemma in interpretation or validity of an EU law. In this procedure the CJEU is not acting as appeal court that decide on facts at main hearing or interpretation and application of national law.[34] Preliminary ruling procedure is treated as special phase of the procedure in front of the national courts of the members state.[35] CJEU decision is final. Decision of the CJEU includes interpretation of the harmonization of national law with EU acquis and national court has obligation to apply CJEU interpretation in the national legal system.[36]

Preliminary ruling procedure is often described as the most important mechanism that enables constitutionalizing of EU legal system and development of EU law principles.[37] Recent CJEU judgement in Case *LM* underlines relevance of the Court interpretation in the rule of law area. This judgement is allowing national courts to assess the rule of law compliance of the Member States issuing the

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32 Stanivuković, M., *Pojedinac pred Sudom evropskih zajednica*, Službeni glasnik, Beograd 2009, pp. 43.

33 Vukadinović, R., *Pravo Evropske unije,* Megatrend, Beograd 2001

34 Harlow, C., *Three phases in the evolution of EU administrative law*, in: Craig, P.; De Burca, G., (eds.), The Evolution of EU Law, Oxford University Press, 2011, pp. 442

35 M. Stanivuković, *op. cit*., note 32, pp. 44.

36 Harlow, C., *op. cit.*, note 34, pp. 455.

37 de la Mare, T.; Donnelly, C., *Preliminary Rulings and EU Legal Integration: Evolution and Stasis*, in: P. Craig, G de Burca (eds.), The Evolution of EU Law, Oxford University Press, 2011, pp. 363–393

European Arrest Warrant (EAW) within the concrete case and to postpone their cooperation with those countries that are compromising the rule of law.[38]

The rule of law backsliding allowed the national judiciaries to raise issues of Member States judicial standards to the CJEU. One of the main issues that was interpreted by the CJEU is independence of the judiciary as an EU law principle and element of the rule of law.[39] As national courts are obliged to apply EU law they are considered as "arm of EU law" that allows functioning of the EU law system only if they are independent.[40] These interpretations allowed the national courts under the treat to use the preliminary ruling procedure to safeguard own independence.[41] Lately, many Polish courts submitted references concerning the Polish reforms restraining the judiciary and jeopardizing separation of powers.

One of the CJEU answers on the rule of law backsliding is the Court's decision in case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*.[42] The judgement establishes a general obligation for Member States to guarantee and respect the independence of their national courts and tribunals (par. 42). This obligation is established by interpretation of the Article 19(1) TEU and Article 2 and Article 4(3) TEU. The Court elaborated concept of independence of judiciary as autonomous exercise of judicial functions without hierarchical limitation or subordination to other body or obligation to follow instructions or orders from other institution, or external pressure that can jeopardize independence in decision making (par. 44).

In the same judgement the CJEU defined elements of the independence that need to be assessed in the process of deciding if some court or tribunal is independent. Legal foundation of the court or tribunal is one of the key factors, namely whether the body is established by law and if it is established permanently or *ad hoc*. Furthermore, it has to be analyzed if jurisdiction of the court or tribunal is compulsory and whether procedure is *inter partes* and if court applies the rule of law (par. 38).

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38 Spieker, L. D., *Breathing Life into the Union's Common Values: On the Judicial Application of the Article 2 TEU in the EU Value Crisis*, German Law Journal, 2019, *vol.* 20, no. 8, pp. 1197

39 Krajewski, M., *Associação Sindical dos Juízes Portugueses*: *The Court of Justice and Athena's Dilemma*, European Papers, 2018, *vol.* 3, no, 1, pp. 395-407

40 Lenaerts, K., *Upholding the Rule of Law through Judicial Dialogue*, Yearbook of European Law, 2019, *vol.* 38, pp. 3-17

41 Biernat, S.; Kawczyńska, M., *Why the Polish Supreme Court's Reference on Judicial Independence to the ECJ is Admissible after all*, 2018, [www.verfassungsblog.de/why-the-polish-supreme-courts-reference-on-judicial-independence-to-the-ECJ-is-admissible- after-all/], accessed 31. March 2020

42 Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117

Conditions under which the CJEU can provide interpretation of the national justice system organization are set in the Case *Commission v Poland*.[43] The CJEU explained that although the organization of the national justice systems is an exclusive competence of the Member States, the Member States committed themselves to respecting and promoting common values referred to in Article 2 TEU (par. 42). The Court specifically mentioned rule of law as one of the common values that national courts would recognize (par. 43).

The CJEU confirmed its previous interpretation[44] that national authorities must respect the principle of judicial independence even in situations where national judicial reforms do not implement EU law, since Article 19(1) TEU relates to any national court which may rule on questions concerning application or interpretation of EU and any national measure influencing on the independence of these courts falls within the jurisdiction of the EU law (par. 52).

The *Commission v Poland* case is relevant for incorporating principle of the irremovability of judges as one of the fundamental guarantees of the independence. The CJEU concluded that the forced early retirement is not in compliance with the principle of irremovability (par. 72) and standard that judges may remain in post until expiration of the mandate or reaching of the retirement age (par. 76). However, the Court did not provide any guideline how to achieve principle of irremovability nor indicated institutional measure, only included possibility that exception of the irremovability could be "warranted by legitimate and compelling grounds, subject to the principle of proportionality" (par. 76). Instead of providing general guideline applicable to any future situation, the Court decided in the specific case based on the assessment whether the national measures that lowered the retirement age for active judges could be justified and found that chosen measure was not suitable to improve age balance among senior members of the Supreme Court and standardize the general retirement age (par. 90).[45]

The CJEU in the same case assessed issues of external influences over the judiciary, specifically resistance of the court or tribunal to external factors and pressure that could damage independent judgement (par. 108). In the specific case the Court underlined that it is within the competences of the Member States to decide on the possibility of an extension of the mandate of judicial office holders beyond normal retirement age, however the conditions and procedures for extension should not undermine the principle of judicial independence (par. 110). Solution that was introduced in Poland that President of the Republic is entrusted with the

[43] Case C-619/18 *Commission v Poland* [2019] ECLI:EU:C:2019:531

[44] Position from the case C-64/16 Associação Sindical dos Juízes Portugueses

[45] Sledzinska-Simon; Bard, *op.cit.,* note 2, pp. 444

power to decide whether to grant any extension of the judge's mandate beyond retirement age, while there were no substantive conditions and detailed procedural rules governing the adoption of such decisions cause a doubts on impartiality of the judges (par. 111).

The regulation of the disciplinary procedure against judiciary members is one of the crucial elements of the judicial independence and the CJEU confirmed that the Court's case law requires that the rules governing the disciplinary system and dismissal of judges "must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions" (par. 77). The Court concluded that to ensure independence of judiciary, rules on disciplinary procedure must include the right of the defence and possibility of bringing legal proceedings challenging the disciplinary bodies' decision (par. 77).

The CJEU in joined cases *A.K. and Others v Krajowa Rada Sadownictwa*[46] have continued to assess rules governing judicial independence, including disciplinary system in Poland and the Polish National Council of Judiciary based on the request for preliminary ruling. More precisely the Court decided on independence of the Disciplinary Chamber of the Supreme Court of Poland. The Court avoided to clearly state whether the Disciplinary Chamber and National Council of Judiciary are bodies independent from the executive and legislative powers and left final decision to the referring court. However, the Court provided to referring court elements for assessment, including external and internal aspects of independence (par. 121,122). The Court highlighted that guarantees of independence and impartiality must include rules on the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members to ensure its neutrality (par. 123). Independence and impartiality rules should prevent both direct and indirect influence that can have effects on the decision of the judges (par. 125). The CJEU stated that it is very unlikely that the National Council of Judiciary and Disciplinary Chamber can past test of independence.

Shaping of the EU judicial standards will be continued in the request for the preliminary ruling in the Case *Repubblika v Il Prim Ministry*.[47] The CJEU will need to address issues of judicial appointment, specifically system that exists in Malta and whether the role of the Prime Minister in the process jeopardizes independence.

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[46] Joined cases C-585/18, C-624/18 and C-625/18 *A.K. and Others v Krajowa Rada Sadownictwa* [2019] ECLI:EU:C:2019:982

[47] Case C-896/19 *Repubblika v Il Prim Ministry* [2020] OJ C 77

The further development of the jurisprudence will operationalize the rule of law standards in the EU.

The CJEU jurisprudence and standards on public prosecution mostly were developed through the preliminary rulings that were adopted in the context of the application of the European arrest warrant.[48] These CJEU decisions are also relevant since they are contributing to interpretation of the term of judicial authority within the EU framework and broaden understanding to cover both judges and public prosecutors. According to the CJEU interpretation the judicial authority includes public prosecution as an "authority responsible for administering criminal justice in the national legal system" (par. 53, *Openbaar Ministerie v Halil Ibrahim* Özçelik).[49]

In deciding on the EAW application the Court examined whether the Member States public prosecution as authority that is issuing EAW has a sufficient level of judicial protection in issuing a warrant. The CJEU in its judgment form 27 May 2019 in the *Case Minister for Justice and Equality v OG and PI* decided that public prosecution in Germany lacks guarantees of independence from executive and thus political interference and cannot issue European arrest warrant.[50] The Court assessed independence of the German public prosecution based on statutory framework and an institutional framework and its capability to prevent external influences. Specifically, the Court examined whether the prosecution service in deciding on issuing of the arrest warrant is exposed to an instruction from the executive (par. 74). The Minister of Justice is part of the German prosecution hierarchical structure and has power to issue instruction to the prosecution authorities, which was considered by the CJEU as lack of independence.

However, the CJEU in the joined cases *JR and YC* C-566/19 found that hierarchical subordination of the public prosecution to the Minister of Justice in France does not jeopardize independence, since the Minister cannot issue individual instructions to public prosecutors, except general instructions on criminal justice policy to ensure unified application throughout country.[51] The CJEU in its jurisprudence is assessing only guarantees of prosecutors' independence from external influence, especially from executive branch, while internal hierarchy and internal

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48 Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190

49 Case C-453/16 PPU *Openbaar Ministerie v Halil Ibrahim* Özçelik [2016] ECLI:EU:C:2016:860

50 Joined Cases C-508/18 and C-82/19 PPU *Case Minister for Justice and Equality v OG and PI* [2019] ECLI:EU:C:2019:456

51 Joined cases C-566/19 PPU and C-626/19 PPU *JR and YC* [2019] ECLI:EU:C:2019:1077, par. 54

instructions coming from superior prosecutors is not perceived as prevention of independence (par. 56).

In the Case *Minister for Justice and Equality v PF* the CJEU found that Constitutional guarantees of independence of public prosecution in Lithuania and provisions on independence in the Law on the Public Prosecutor's Office of the Republic of Lithuania provides enough guaranties of independence from executive.[52] The CJEU concluded that the prosecution service in Lithuania has sufficient guarantees of independence from executive to issue EAW.

The CJEU took formalistic approach in assessing prosecutorial independence and analysed only statutory and organizational rules. As it is already mentioned, the scope of the CJEU's assessment of the prosecutors' independence is limited to issuing of the EAW and not to the exercise of prosecutorial powers. This limited approach influence on narrow scope of the CJEU jurisprudence on public prosecution and standards. However, increased legislative activities in the area of judicial cooperation in criminal matters will lead to increase of requests for preliminary rulings that relates on public prosecution and thus development of the CJEU jurisprudence in this area.

Implications of the CJEU decisions could be twofold and could affect national normative framework, either through amendments of substantive or procedural legislation or through changing organization of judiciary. For example, as a response to the CJEU decision Germany did not change organization of prosecution service to remove role of minister of justice as potential external influence on prosecution but changed procedural rules and include courts in the process of issuing of the EAW.[53]

4. HOW CJEU COULD INFLUENCE EU ACCESSION PROCESS AND REFORM OF JUDICIARY IN CANDIDATE COUNTRIES

Over last three decades we could notice that candidate countries are facing challenges to introduce European standards in judiciary and once when they become members to ensure irreversibility of the process. Mechanisms of influence on organization of judiciary were more efficient in candidate countries through the negotiation procedure and monitoring of reform implementation.

EU enlargement is more than territorial increase. Enlargement incentivise creation of new politics, institutional organization of EU and influence on legal acts,

[52] Case C-509/18 *Minister for Justice and Equality v PF* [2019] ECLI:EU:C:2019:457, par. 55

[53] Working paper, Council of European Union, WK 6666/2019 INIT, 28 May 2019

both in EU member states and candidate countries.[54] Implementation of the EU acquis in rule of law area is requirement of accession negotiation and got central role during 2004, 2007 and 2013 enlargement, while judicial cooperation in civil and criminal matters is one of the requirements. Characteristic of EU accession process is strong role of the EU that transposes EU acquis to third countries.[55] States that aspire to become EU members states are in obligation to adopt and implement EU acquis. Conditionality is methodology that is applied during accession process to ensure that new member states can absorb requirements incorporated in the EU acquis and implement obligations from the membership.[56]

During the EU enlargement to the East, the EU faced with the situation that countries in the transition, with different economic, political and social environment, are aspiring to become members. To address this challenge, the EU develop approach that was wider that simple requirement to harmonize national legislation with EU acquis.[57] European Council adopted in 1993 the Copenhagen criteria that included, among other requirement, stability of institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minority rights, and functioning market economy and the ability to cope with competitive pressure and market forces within the EU. Copenhagen criteria were gradually developed and extended. As a result, European Council organized 1995 in Madrid adopted conclusions where is stated that it is not sufficient condition to have political commitment of the candidate countries to adopted EU acquis, but they have to adjust administrative structures to guarantee efficient application of the EU acquis. When it comes to the rule of law, the EU policy developed over time. Countries that intends to join to the EU during negotiation process have to make sure that their judiciary is independent and impartial, which includes guaranteed access to justice, fair trial procedures, adequate funding for courts and training for magistrates and legal practitioners, while laws are clear, publicised, stabile, fair and protect human rights. In addition, candidate country government and its officials need to be accountable under the law and take a clear attitude against corruption.

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54 Hillion, C., *EU Enlargement*, in: Craig, P., De Burca, G., (eds.), *The Evolution of EU Law,* Oxford, 2011, pp. 187–217

55 Cremona, M., *The Union as a Global Actor: Roles, Models and Identity*, Common Market Law Review, 2004, *vol.* 41, no. 2, pp. 555–573

56 Smith, K. E., *Evolution and Application of the EU Membership Conditionality*, in: Cremona, M. (ed.), The Enlargement of the European Union, Oxford University Press, Oxford 2003, pp.105–140

57 Matic Boskovic, M., *Obaveza usklađivanja sa pravnim tekovinama Evropske unije*, in: Škulic, M; Ilic, G.; Matic Boskovic, M., (eds.), Unapređenje Zakonika o krivičnom postupku: *de lege ferenda* predlozi, Beograd, Udruženje javnih tužilaca i zamenika javnih tužilaca, 2015, pp. 149-158

During '90s of the XX century the EU adopted significant number of EU acquis in the area of criminal law and judiciary. After terrorist attack from 11 September 2001 EU put criminal matters and judicial cooperation in this area as a priority, including application of mutual recognition and mutual trust among member states.[58] However, shortcomings that existed in states that joined EU in 2004, influenced on the decision that new member states cannot automatically join to Schengen system. Intergovernmental mechanism was used for decision on full membership status to the Schengen system, which requires unanimously decision of all member states that new members fulfil membership conditions.[59] The article 39 of the Act on accession contained protection clause to include potential shortcomings in the application of the EU instruments in the area of mutual recognition in criminal matters in the new member states. The protection clause envisaged possibility for the Commission to temporary suspend provisions on judicial cooperation in criminal matters in case of shortcomings or risk. Period of validity of protection clause was three years and it has never been used.

When Bulgaria and Romania became member states, progress in the area of judiciary and internal affairs were closely followed and monitored.[60] European Commission Progress reports emphasized shortcomings of the progress in the area of judiciary and internal affairs, including lack of institutional capacities. The European Commission even questioned if countries would become members in 2007 as it was planned.[61] To enable that these states become members in the planned timeframe, European Commission introduced Cooperation and verification mechanism (CVM) as additional security mechanism in both countries.[62] Benchmarks of the CVM requires changes in the organization of judiciary. Romania were obliged to ensure transparent and efficient court procedure, while Bulgaria needed to ensure guarantees of independence of judiciary through constitutional

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58 Mitsilegas, V., *EU Criminal Law*, Hart Publishing, 1st Edition, 2009. pp. 284

59 Monar, J., *Enlargement-Related Diversity in EU Justice and Home Affairs: Challenges, Dimension and Management Instruments*, Dutch Scientific Council for Government Policy, Working Document W 112, The Hague 2000, [https://english.wrr.nl/publications/publications/2000/12/18/enlargement-related-diversity-in-eu-justice-and-home-affairs-challenges-dimensions-and-management-instruments], accessed 30. March 2020

60 Bozhilova, D., *Measuring Success and Failure of EU: Europeanization in the Eastern Enlargement: Judicial Reform in Bulgaria,* European Journal of Law Reform, *vol.* 9, 2007, pp. 285–319

61 European Commission, Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, COM (2006) 549 final, Brussels, 26 September 2006

62 Commission Decision 2006/929/EC establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime [2006] OJ L 354; Commission Decision 2006/928/EC establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption [2006] OJ L 354

amendments and removal of ambiguity in relation to independence and accountability of judiciary system.[63]

Experience with Bulgaria and Romania in which significant shortcomings remain after accession to the EU, influenced on the Commission to revise approach and introduce practice that negotiation on Chapters 23 and 24[64] are open the first and close at the end of the negotiation process. This approach was used for the first time with Croatia that became EU member state in 2013. The same practice was applied with Montenegro that opened accession negotiation in 2012 and Serbia that opened in 2014.

The EU influence on organization of judiciary in candidate countries, could be identified through the recommendations included in the Screening reports for Chapters 23 and 24[65] and the Action plans for these chapters.[66] In the Screening report EU experts assessed the area of judiciary through three dimensions: independence of judiciary; impartiality and accountability; and professionalism, competence and efficiency. For each of dimensions the Screening report provides overview of legislative and institutional framework and compare it with the European standards. The Screening report contains recommendations to take additional activities to ensure complete independence of judiciary, impartiality and better efficiency. European Commission biannually assess progress of implemented reforms:

Although Serbian authorities accepted recommendations from the Screening report for Chapter 23 and incorporated measures in the Action plan for Chapter 23 only moderate progress was achieved for four years since its adoption.[67] Draft amendments of the Constitution instead of introduction of stronger guarantees of

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63 Trauner, F., *Post-accession compliance with EU law in Bulgaria and Romania – a comparative perspective*, European Integration online Papers (EIoP), *vol.* 13, no. 2, article 21, 2009, [http://eiop.or.at/eiop/texte/2009-021a.htm], accessed 07. April 2020

64 Chapter 23 relates to judiciary and fundamental rights. European standards in the Chapter 23 include strengthening independence, impartiality and professionalism in judiciary, enforcement of measures of prevention and fight against corruption and maintenance of high standards of protection of human and minority rights. Chapter 24 relates to justice, freedom and security. European standards include 11 areas thematic areas: external borders and Schengen system of migration, asylum, visa, police cooperation, fight against organize crime, fight against human trafficking, fight against terrorism, fight against drug, judicial cooperation in civil and criminal matters and custom cooperation

65 *Vodič kroz Izveštaj o skriningu za poglavlje 23 – pravosuđe i osnovna prava,* Beogradski centar za bezbednosnu politiku i Beogradski centar za ljudska prava, Beograd, 2015

66 Action plan for Chapter 23 is available at: [https://www.mpravde.gov.rs/tekst/9849/finalna-verzija-akcionog-plana-za-pregovaranje-poglavlja-23-koja-je-usaglasena-sa-poslednjim-preporukama-i-potvrdjena-od-strane-evropske-komisije-u-briselu-.php], accessed 07. April 2020

67 Serbia 2019 Report, 2019 Communication on EU Enlargement Policy, COM(2019) 260 final, 29.05.2019, "It made some progress during the reporting period: while last year's recommendations have only been partially addressed…", pp. 13

independence of judiciary open possibilities for greater external control over judiciary.[68] Proposed draft amendments on composition of Councils raised debate if there are common European standards on this issue, as well as on the appointment of judges and prosecutors and role of ministry of justice in administration and management of judiciary. These discussions and adopted opinions of the Consultative Council of European Judges, Consultative Council of European Prosecutors and Venice Commission confirmed need for existence on the EU level clear guidelines on reform of judiciary and standards for ensuring independence, impartiality and accountability of judiciary.

The CJEU decisions provided arguments for the Consultative Council of European Prosecutors and Consultative Council of European Judges to request in their opinions higher standards in protection of independence of judiciary and prosecution service in Serbia. Elaboration of standards on judiciary by the CJEU also enables their better understanding in specific national context. Thus, European Commission as a leading institution in the negotiation process could use reasoning from the CJEU judgments in assessing progress in the justice reforms of candidate countries.

Reversibility of justice reforms in some Member States and slow reforms in candidate countries led to adoption of the EU revised enlargement methodology from February 2020 that is putting an even stronger focus on the core role of fundamental reforms essential for the EU path. Within this methodology the rule of law will become even more central in the accession negotiations, while progress on the fundamental reforms will determine the overall pace of negotiations.[69] It has to be seen how this revised enlargement methodology will be applied in the practice. Although the negotiation procedure has become stricter over the time, existing mechanisms were not sufficient to track real progress in the justice reforms. Most of the activities were focus on amending legislation, while independence and ac-

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[68] Consultative Council of European Prosecutors, Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the High Prosecutorial Council and the way prosecutors work, 27 March 2019 and 25 June 2018; Consultative Council of European Judges, Opinion of the CCJE Bureau following request by the Judges' Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect organization of judicial power, 4 May 2018 and 21 December 2018

[69] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Enhancing the accession process - A credible EU perspective for the Western Balkans, Brussels, 5.2.2020, COM(2020) 57 final, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology_en.pdf], accessed 07. April 2020

countability of judiciary remain the problems in all candidate countries. Additional challenge for the EU and its institutions are countries that are members for more than decade, which are over the last few years facing with reversible processes and violation of rule of law. The backsliding of rule of law in the member states is jeopardizing mechanisms of mutual trust and mutual recognition and put in the risk judicial cooperation and functioning of are of freedom, security and justice.

5. CONCLUSION

Backsliding of the rule of law in EU member states, as well as challenges with the enlargement process in Western Balkan countries confirm needs for setting hard European standards on independence of judiciary and mechanism for monitoring its application in the practice. The EU Commission has significant role, but during recent years the CJEU is shaping judicial standards that should ensure mutual trust and mutual recognition in the judicial cooperation among EU Member States.

Although there are many concerns if CJEU jurisprudence is unified,[70] its judgements are of utmost importance for national judiciaries and for protection of individual rights. Either in the process of preventing backsliding of rule of law or as a guide in justice reforms for candidate countries the CJEU jurisprudence enables better understanding of the content of rule of law as a common value. The CJEU jurisprudence already included process for appointing judges and irremovability of judges as one of the elements of judicial independence. The Court also stated that rules must ensure the exclusion of any doubt that independence and impartiality are jeopardize by external factors or interests.

Having in mind differences in organization of judiciaries it is not realistic to expect that the CJEU could provide specific recommendations and tailor-made standards that are directly applicable in member states or candidate countries. However, the CJEU and the EU institutions need to remain attentive with regards to modifications of judicial organizations and amendments of rules that put at risks protection of individual rights and application of EU law.

[70] Jacobs, M.; Muender, M.; Richter, B., *Subject Matter Specialization of European Union Jurisdiction in the Preliminary Rulings Procedure*, German Law Journal, *vol.* 20, no. 8, 2019, pp. 1214-1231

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UDK 347.132.142:347.98](4-67EU:497.5)
Original scientific paper

CONTEMPORARY ISSUES REGARDING MEMBER STATE LIABILITY FOR INFRINGEMENTS OF EU LAW BY NATIONAL COURTS

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ABSTRACT

The objective of the paper is the analysis of the development of the concept of liability of Member States of the European union for infringements of EU law committed by national courts of last instance. Focus is placed on the improvements in the Court of Justice of the European union's (CJEU) case-law which have been made on the subject in the almost 25 years since its landmark judgment in the joined cases of Brasserie du Pêcheur and Factortame, where it was firstly explicitly stated that a Member State may be held liable for damage arising even from decisions of the judiciary. Balancing on the thin line between the doctrine of judicial independence and the need for compensation of damages suffered by a judicial breach has always been an uncomfortable and arduous legal task, which is why the CJEU occasionally undertook to clarify and improve its position on the topic during the twenty first century.

Even though serious advancement towards satisfying both of the aforementioned notions have been carried out by the CJEU in almost a quarter of a century since the Brasserie judgment, many legal predicaments and insufficiently answered questions which may arise in modern cases still remain present. The paper in its introductory part addresses the impact of the Francovich and Brasserie judgments which are considered landmark rulings in the area of Member State liability. In the central part, it demonstrates the more in-depth standpoint of the CJEU in the area of Member State liability for infringements committed within judicial decisions that firstly appeared in the CJEU's Köbler judgment. Furthermore, it depicts how the CJEU further interpreted the criteria required for Member State liability for infringements of EU law by national courts to arise. The focal point of the paper deals with the most recent case-law of the CJEU that demonstrates how it attempts to tackle the issues around Member State liability in contemporary times. Since not everyone seems to be in full agreement with the current Member State liability arrangements in that regard, certain disagreements of legal scholarship with the CJEU's latest solutions are also discussed. Finally, as a conclusion, a step-by-step demonstration of the obstacles which injured persons face in an action for damages suffered by a breach

of EU law caused by a judicial decision of a national court of last instance is provided, and suggestions for future improvements and developments in this legal area are also pointed out.

Keywords: *Member State liability, CJEU, manifest infringement, sufficiently serious breach*

1. INTRODUCTION – SETTING THE SCENE FOR A MEMBER STATE LIABILITY FRAMEWORK FOR DECISIONS OF NATIONAL COURTS CONTRARY TO EU LAW

The necessity of the existence of a legal framework for non-contractual liability of Member States for infringements of EU law has never truly been a matter of extreme dispute. It should be noted that it is true that the Treaty on the Functioning of the European Union deals exclusively with infringements committed by the EU itself, as well as its institutions and servants,[1] but that there are no written rules about the liability of Member States in that regard, let alone their national courts. Even in the earliest days of paving the way for the introduction of a Member States' liability framework, it could be seen that an emphasis would be placed on constructing a systematic case-law regime with regard to this matter, i.e. that the Court of Justice of the European Union (hereinafter: CJEU) would play the main role in making sure that the Member States are abiding by EU law.[2] Indeed, from the very beginning the judicial thinking of the CJEU was in favour of establishing solid legal grounds for such liability.[3] For instance, it was already in the *Humblet* case that the Court pointed out the obligation of a Member State to make reparation for unlawful consequences stemming from a measure that the CJEU determined contrary to EU law,[4] namely, to Article 86 of the Coal and Steel Community Treaty.[5]

Although the CJEU was enhancing its viewpoint on Member State liability throughout the following period,[6] there were also instances within it when it took a different opinion, such as the one in *Rewe v Hauptzollamt Kiel*, where it decided that the EC Treaty[7] was not intended to create new remedies.[8] It required thirty

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1 Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26 October 2012, (consolidated version), Article 340 para. 2 and 3

2 Rodríguez, P. M., *State Liability for Judicial Acts in European Community Law: The Conceptual Weaknesses of the Functional Approach*, The Columbia Journal of European Law, *vol.* 11, no. 3, 2005, pp. 605-621, p. 606

3 Biondi, A.; Farley, M., *The Right to Damages in European Law*, Wolters Kluwer, 2009, p. 11

4 Case C-6/60 *Humblet v Belgium* [1960] ECR English special edition 559, at 569

5 Treaty Establishing The European Coal and Steel Community of 18 April 1951

6 See *e.g.* Case C-60/75 *Russo v AIMA* [1976] ECR 45, par. 9

7 Treaty establishing the European Community, OJ C 325, 24.12.2002, p. 33–184 (consolidated version)

8 Case C-158/80 *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* [1981] ECR 1805, par. 44

years, until the *Francovich* case appeared before the CJEU, for it to adamantly ascertain that *"...it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible."*[9] The final settlement of the aforementioned debate may be attributed not only to the *ubi ius, ibi remedium* principle, according to which it is the available remedies that determine the value of a right, but also to the change in the legal and political climate of that time.[10]

In any event, the Court in *Francovich* laid down the then applicable three main conditions which needed to be fulfilled for Member State liability to arise: (i) the directive should grant rights to individuals, (ii) the content of those rights must be identifiable on the basis of the directive's provisions and (iii) there must be a causal link between the State's obligation and the loss and damage that the injured persons suffered.[11] However, *Francovich* specifically pertained to cases in which the damage suffered was due to non-implementation of a directive and it remained unclear whether the same conditions would apply in other cases, for example, when a directive's implementation has been deficient,[12] or there has been an infringement of EU law with regard to a provision with direct effect.[13] Even the dominant scholarly opinion of that time still deemed it unthinkable that in accordance with *Francovich*, Member States' liability may be invoked for judicial acts contrary to EU law.[14]

Five years after *Francovich*, the renowned *Brasserie* judgment[15] was reached by the CJEU. Although the factual background of the joined cases relates to damage caused by a legislative, and not a judicial act which infringed EU law,[16] the

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9 Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci et al. v Italy* [1991] ECR I-5357, par. 37

10 Tridimas notices how the Commission wanted to provide for adeqaute remedies for non-implementation of directives in order to alleviate the process of completion of the internal market. See: Tridimas, T., *The General Principles of EC Law*, Oxford University Press, 1999, p. 323-324

11 Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci et al. v Italy* [1991] ECR I-5357, par. 40

12 See *e.g.* Case C-392/93 *The Queen and H.M. Treasury, ex parte: British Telecommunications* [1996] ECR I-1631, par. 45

13 See *infra*, note 15, p. 3

14 Authors at that time placed priority in that regard to the need for protection of judicial independence and fostering a spirit of cooperation in national judges in matters concerning EU law. See: Steiner, J., *From Direct Effects to Francovich: Shifting Means of Enforcement of Community Law*, European Law Review, *vol.* 18, no. 1, 1993, pp. 3-22, p. 11

15 Joined cases C-46/93 and 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 (hereinafter: Joined cases C-46/93 and C-48/93 - *Brasserie*)

16 By now, the facts of these joined cases are widely known in legal scholarship. In essence, *Brasserie du Pêcheur* was a French beer brewer on whom Germany imposed restrictions on selling beer on its territory due to the fact that the beer did not meet German beer purity criteria, which practice was contrary

judgment is especially noteworthy due to its introduction of substantive conditions of liability, which are continually being applied even in contemporary cases regarding judicial breaches. The CJEU therefore successfully attempted to clarify the mere rudimentary vision of these conditions set forth in *Francovich*[17] and at the same time set out to "bridge the unbridgeable" non-contractual liability of the Union and the Member States for breaches of EU law.[18]

According to the opinion of the CJEU established for the first time in *Brasserie*, when individuals suffer a loss or damage due to an infringement of EU law by a Member State, the Member State may be held liable if the three following conditions are met: (i) the infringed rule of EU law is intended to confer rights upon individuals, (ii) the breach is sufficiently serious and (iii) there must be a direct causal link between the breach and the damage suffered.[19] The aforementioned conditions, which must also be satisfied nowadays for liability to be invoked, have in case-law always been the subject of meticulous analysis. With regard to the first condition, The CJEU will in every particular case focus on the rule in question, interpreting it from a teleological standpoint, rather than strictly analysing its form or wording.[20] On the other hand, the matter of causation is most often left to the national courts to deal with.[21] Without a doubt, it was the condition of a sufficiently serious breach that was considered to be the broadest and hence required further explanation from the CJEU. It already in *Brasserie* pointed out an open number of circumstances which should be taken into account when determining whether a breach was sufficiently serious.[22]

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to EU law according to *Brasserie*. On the other hand, in the *Factortame* case, Spanish fishermen were prohibited from registering their boats in The United Kingdom due to a Parliamentary Act which was determined by the CJEU to be contrary to EU law, after which they brought an action for damages against the British Government for sustained losses

17 Rebhahn, R., *Non-Contractual Liability in Damages of Member States for Breach of Community Law*, in: Koziol, H.; Schulze, R. (eds.), *Tort Law of the European Community*, Springer, 2008, p. 181

18 Van Gerven, W., *Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie*, International & Comparative Law Quarterly, *vol*. 45, no. 3, 1996, pp. 507-544, p. 507. See also: Brüggemeier, G., *Tort Law in the European Union*, Wolters Kluwer, 2015, p. 106

19 Joined cases C-46/93 and C-48/93 - *Brasserie*, par. 74

20 Dam, C. van, *European Tort Law*, Second Edition, Oxford University Press, 2013, p. 290

21 For a more detailed discussion of the problem of establishing a direct causal link, see *infra*, chapter 3.3.

22 These factors include but are not limited to *"...the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law."* - Joined cases C-46/93 and C-48/93 - *Brasserie*, par. 56

When it comes to liability for judicial breaches, these circumstances became even more important after *Bergaderm*, where the CJEU decided that the determination of a breach will rely on them in cases in which the Member State had a wide margin of discretion, as is the case with any judicial decision.[2324] And it should be noted that in *Brasserie* the Court explicitly mentioned the possibility that infringements of EU law may be attributed even to the judiciary, since all State authorities, including the national courts, must comply with EU law with which individuals' rights are regulated.[25]

This paper will therefore attempt to, among else, demonstrate how the legal thinking of primarily the CJEU, and consequently legal theory, developed throughout the years, from the point of outright refusing the notion of liability for judicial acts which are not in accordance with EU law, to providing for the possibility of holding national courts of highest instance liable for such infringements. Firstly, the importance of the *Köbler* case[26] which introduced for the first time the Member State liability framework for judicial decisions of national supreme courts contrary to EU law is analyzed in the following chapter. The third chapter will then provide an overview of CJEU's most recent case law on the subject which has not yet been discussed by legal scholars to a satisfactory extent, pointing out the theoretical and practical problems which unavoidably appear within the subject Member State liability framework, accompanied by a discussion of the impact that the latest developments could potentially have in national legal systems.

2. – THE KÖBLER JUDGMENT - EXPLICIT ACKNOWLEGDMENT OF MEMBER STATE LIABILITY FOR JUDICIAL DECISIONS INFRINGING EU LAW

The aforementioned opinion for the first time received absolute confirmation in the *Köbler* case, where the CJEU explicitly acknowledged that the effectiveness of EU rules conferring rights to individuals would be jeopardized if individuals

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23 Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission* [2000] ECR I-5291, par. 66

24 A breach of EU law may also be automatically considered sufficiently serious if it has persisted despite a judgment establishing the existence of that breach, or the Court's settled case-law that determined the breach to be as such. See: Joined cases C-46/93 and C-48/93 - *Brasserie*, par. 57; See also: Alto, P., *Twelve Years of Francovich in the European Court of Justice: A Survey of the Case-law on the Interpretation of the Three Conditions of Liability*, in: Moreira de Sousa, S.; Heusel, W. (eds.), *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle*, Academy of European Law, *vol*. 37, 2004, pp. 59-77, p. 70-71

25 Joined cases C-46/93 and C-48/93 - *Brasserie*, para. 34

26 Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR-I-10239 (hereinafter: Case C-224/01 – *Köbler*)

would be unable to obtain reparation when those rights were infringed upon by a judicial decision of a Member State court adjudicating at last instance.[27] It could have been expected that the decision would cause significant reaction from Member States, which now all of a sudden could have been held liable for decisions of their national courts in violation of EU law. Namely, even while the case was still being discussed, they were extremely concerned that by fully accepting this regime multiple legal principles and concepts, such as judicial independence,[28] *res judicata*[29] or legal certainty[30] would be violated. However, subsequently both the CJEU[31] and legal scholarship[32] concisely discarded their arguments.

According to the CJEU's viewpoint in *Köbler*, Member State liability may incur only in exceptional cases when the last instance court has manifestly infringed the applicable law, due to the specific nature of the judicial function and the legitimate requirements of legal certainty.[33] Whether an infringement is manifest or not

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27 *Ibid.*, par. 33. As is the case with Brasserie, the factual background of this case are also well known by now. In summary, Mr Köbler was a German professor who applied for a monetary increment in Austria on the grounds of length of service, available to professors teaching exclusively in Austria for a period of over 15 years. The Austrian court of last instance did not take into account the time Mr Köbler spent as a professor in Germany and rejected his application, which in Mr Köbler's view, infringed his rights stemming from EU law

28 The British goverment in its observation reiterated that the independence of the judiciary within the national constitutional order is a fundamental principle in all Member States. Case C-224/01 – *Köbler*, par. 26

29 In the observation of the French government, it is pointed out that the principle of res judicata is a fundamental value in legal systems founded on the rule of law, which would be called into question if State liability for infringements of EU law by a judicial body would be recognized. Case C-224/01 – *Köbler*, par. 23

30 The Austrian government observed, among else, that a re-examination of a legal appraisal by a national supreme court would be incompatible with its function of bringing disputes to definitive conclusions. Case C-224/01 – *Köbler*, par. 21

31 The CJEU already in *Köbler* ruled with regard to the principle of *res judicata* that recognition of the principle of State liability for decisions of national courts of last instance does not have the consequence of calling the aforementioned principle into question, since the liability proceedings neither have the same purpose nor the same parties as the proceedings which have acquired *res judicata* status. The CJEU also pointed out that there is no threat to judicial independence, as the State liability principle concers the liability of the State, and not the personal liability of the judge that rendered the infringing decision. See: Case C-224/01 – *Köbler*, par. 39 and 42

32 For scholarly arguments that recognized that the principle of State liability does not necessarily go against these principles, see *e.g.*: Kornezov, A., *Res Judicata of National Judgments Incompatible with EU Law: Time for a Major Rethink?*, Common Market Law Review, *vol.* 51, no. 3, 2014, pp. 809-842, p. 841; Scherr, K.M., *Comparative Aspects of the Application of the Principle of State Liability for Judicial Breaches*, ERA Forum, *vol.* 12, no. 4, 2012, pp. 565-588, p. 584; Hofstötter, B., *Non-compliance of National Courts: Remedies in European Community Law and Beyond*, TMC Asser Press, The Hague, 2005, p. 91-107

33 Case C-224/01 – *Köbler*, par. 53. Legal scholarship put more emphasis on the legitimate requirements of legal certainty, pointing out that legal certainty based concerns play a bigger role in this regard than

depends on a number of criteria already established in *Brasserie*,[34] but the CJEU here also added a criterion of the national court's compliance with its obligation to make a reference for a preliminary ruling to CJEU.[35] Nevertheless, one of the main issues with the *Köbler* decision was that it remained silent in view of the necessary threshold required for a breach to be considered manifest. It did specifically point out that an infringement shall be sufficiently serious if the decision in question manifestly breached previous case-law of the CJEU on the matter,[36] which was an opinion reiterated in many of its future decisions.[37] However, even though the Court recognized that individuals must not be deprived of the right to render the State liable for a judicial breach of their rights committed by a court of last instance,[38] professor Köbler did not obtain reparation because the breach in question was found not to be manifest and therefore not sufficiently serious.[39] At first glance, one could justifiably assert that by stressing the importance that individuals should always have a remedy at their disposal against the Member State even for judicial breaches, the CJEU strived to introduce a strict liability approach of the Member States.[40] But at the same time, by not explicitly defining the concept of manifest infringement and therefore not making the prerequisites of that liability clear enough, the remedy system that the CJEU intended to provide a solid footing to was considered in danger of becoming an "empty shell."[41]

The CJEU clarified in *Traghetti*[42] its standpoint on assessing a manifest infringement to a certain extent, specifically stating that Member State liability in cases of infringements of EU law by national courts of last instance is not unlimited.[43]

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the nature of the judicial function as a basis for a strict approach liability of national supreme courts. See: Davies, A., *State Liability for Judicial Decisions in European Union and International Law*, The International and Comparative Law Quarterly, *vol.* 61, no. 3, 2012, pp. 585-611, p. 599

34 See *supra*, note 22, p. 4

35 Case C-224/01 – *Köbler*, par. 55

36 *Ibid*., par. 56

37 See *e.g.*: Case C-620/17 *Hochtief Solutions AG Magyarországi Fióktelepe v. Fővárosi Törvényszék* [2019] ECLI:EU:C:2019:630 (hereinafter: Case C-620/17 – *Hochtief Solutions*), par. 43-44. In this decision, the CJEU did not immediately find a manifest infringement even though it already gave a preliminary ruling in the proceedings, which the national courts subsequently apparently went against. It rather determined that the referring national court is to take the manifest disregard of the relevant CJEU decision as one of the factors in establishing whether there was a sufficiently serious breach

38 Case C-224/01 – *Köbler*, par. 34

39 *Ibid*., par. 124

40 Rodríguez, *op. cit*., note 2, p. 612

41 Dam, *op. cit.*, note 20, p. 46

42 Case C-173/03 *Traghetti del Mediterraneo SpA v. Italy* [2006] ECR I-5177 (hereinafter: Case C-173/03 – *Traghetti*)

43 *Ibid.*, par. 32

Furthermore, it provided for the possibility of national law to define more criteria that pertain to the nature or degree of the breach necessary for invoking Member State liability, even though it prohibited such criteria of national law to be stricter than that of a manifest infringement of the applicable law,[44] which must not be as such to limit the liability exceptionally to cases of intentional fault and serious misconduct on part of the Court.[45] By holding onto the concept of a manifest infringement, the judgment was welcomed as it would discourage all unsuccessful parties to make a claim for damages whenever a judicial decision is not in their favour.[46] On the other hand, although *Traghetti* firmly upheld the *Köbler* judgment, it would appear that the Member States were subsequently left none the wiser with regard to the determination of when will an infringement be considered manifest. Indeed, it seems that by the decision in question the Court intended to keep only objective factors in play in discerning the liability of Member States, doing away with the previously established factor of fault.[47] At the same time, CJEU in *Traghetti* did distinctly refer to, among other *Köbler* factors, intentional infringement as being an indicator of a manifest infringement.[48] Legal scholarship interpreted this contradiction as the will of the Court to merely shift the (un)intentionality of an infringement from being a required condition of an infringement to be manifest to the plane of unlawfulness.[49] The fault criterion therefore retained its subjective nature, although it is determined in accordance with objective standards.[50]

In any event, the fact that the Court did not at all go into further detail with regard to fault and other criteria set out in *Köbler*, all one could have done to fully comprehend the CJEU's exact stance on the matter was to wait for its subsequent case-law. And although a more specific and comprehensive definition of a manifest infringement is non-existent even today, some of the criteria by which it is established, mainly the non-compliance with the obligation to refer a matter to a preliminary ruling, did receive substantial clarification.

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44 *Ibid.*, par. 44

45 *Ibid.*, par. 26

46 Anagnostaras, G., *Erroneous Judgments and the Prospect of Damages: The Scope of the Principle of Governmental Liability for Judicial Breaches*, European Law Review, *vol.* 31, no. 1, 2006, pp. 735-747, p. 743

47 Beutler, B., *State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?*, Common Market Law Review, *vol.* 46, no. 1, 2009, pp. 773-804, p. 786

48 Case C-173/03 – *Traghetti*, par. 32

49 Machnikowski, P., *The Liability of Public Authorities in The European Union*, in: Oliphant, K. (ed.), *The Liability of Public Authorities in Comparative Perspective*, Intersentia, Cambridge, 2016, p. 583

50 Valutyte, R., *Concept of Court's Fault in State Liability Action for Infringement of European Union Law*, Jurisprudencija, *vol.* 18, no. 1, 2011, pp. 33-48, p. 42

3. MANIFEST INFRINGEMENTS OF EU LAW BY NATIONAL COURTS IN CONTEMPORARY CASE-LAW

3.1. – Non-compliance of national courts to make a reference for a preliminary ruling in light of Ferreira da Silva – is the influence of the CJEU over supreme courts of Member States becoming overwhelming?

One of the factors which may be used to indicate whether an infringement is manifest mentioned in *Köbler* and *Traghetti* that mostly gave rise to significant discussion in comparison to others is the non-compliance of the national court to make a reference for a preliminary ruling pursuant to paragraph 3 of Article 267 TFEU. While the function of that rule was at first strictly qualified as securing uniform interpretation and application of EU law and not conferring rights upon individuals,[51] recent legal developments accepted that the breach of the national courts' duty to refer is complementary with a breach of a substantive individual right.[52] An example in that regard may be Article 47 of the Charter of Fundamental Rights of the European Union[53] which guarantees effective judicial protection to every individual. An injured party would not be successful in proving a manifest infringement by merely claiming a breach of Article 267 TFEU; they have to establish that by the national court's failure to refer, their right for effective judicial protection was infringed upon.[54] The obligation of national courts of last instance to make references for preliminary rulings has always been a rather sensitive issue. Since supreme courts represent the highest judicial authority in a certain Member State, the imposition of obligations on them by the CJEU is never taken quite lightly from a domestic legal perspective, due to the fact that uniformity of EU law may not always be the primary goal of national courts.[55] It was already considered exaggerated that national courts should refer every single case that within it has an element of EU law, however, a behaviour that would excessively incline in the opposite direction of complete non-referral may potentially have grave negative consequences for national treasuries in cases where the CJEU finds that an infringement did in fact take place.[56]

The question did receive substantive analysis even before Member State liability for judicial breaches was established by *Köbler*, when the CJEU in the landmark

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51 Hofstötter, *op. cit.,* note 32, p. 132

52 *Ibid.*, p. 133

53 Charter of Fundamental Rights of the European union, OJ C 326, 26 October 2012

54 Kornezov, A., *The New Format of the Acte Clair Doctrine and its Consequences*, Common Market Law Review, *vol.* 53, no. 5, 2016, pp. 1317-1342, p. 1340

55 Hofstötter, *op. cit.,* note 32, p. 108

56 Anagnostaras, *op. cit.,* note 46, p. 745

Cilfit judgment ruled that national courts against the decisions of which there are no judicial remedies available under national law are in fact obliged to bring the matter before the CJEU in cases where EU law is raised before them.[57] There are three important exceptions to this obligation, which include cases where the national courts have determined that: (i) the question raised is irrelevant, (ii) the CJEU has already interpreted the EU law provision in question (*acte* éclairé), or (iii) the correct application of EU law is obvious to the degree of leaving no room for any reasonable doubt (*acte clair*).[58] The CJEU later confirmed this regime in both *Intermodal Transports* and *X and van Dijk,* stressing that deciding whether the aforementioned circumstances are present in a certain case is solely the responsibility of national courts.[59]

A potential issue in that regard appeared in the more recent landmark ruling of *Ferreira da Silva*,[60] which was the first case in over fifty years where the CJEU found that a national court of last instance breached its obligation to make a reference.[61] In essence, the Portuguese Supreme Court of Justice dismissed the requests of the applicants to make a reference for a preliminary ruling to CJEU who desired a clarification on whether a decision of their dismissal as a collective redundancy was lawful during an alleged transfer of business between two airline companies. The Supreme Court stated that such an obligation of national courts of last instance *"exists only where those courts and tribunals find that recourse to EU law is necessary in order to resolve the dispute before them and, in addition, a question concerning the interpretation of that law has arisen."*[62] Given the previously established position of the CJEU, it did not come as a surprise that it was in disagreement with the Portuguese Supreme Court on the matter; it repeated the *Cilfit* exceptions of the duty to refer and added that the existence of such exceptions must be assesed in the light of the specific characteristics of EU law, difficulties in its interpretation and the risk of divergences in judicial decisions in the EU.[63]

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57 Case C-283/81 *CILFIT and others v. Ministry of Health and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415 (hereinafter: Case C-283/81 – *CILFIT*). See also: Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, OJ C 380, 8 November 2019, para. 6 and 7

58 Case C-283/81 – *CILFIT*, par. 21

59 Case C-495/03 *Intermodal Transports BV v Staatssecretaris van Financiën* [2005] ECR I-8151, para. 37; Joined cases C-72/14 and C-197/14 X v. *Inspecteur van Rijksbelastingdienst and T.A. van Dijk v. Staatssecretaris van Financiën* [2015] EU:C:2015:564, par. 58

60 Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v. Portugal* [2015] ECLI:EU:C:2015:565 (hereniafter: Case C-160/14 – *Ferreira da Silva*)

61 Limante, A., *Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a more Flexible Approach*, Journal of Common Market Studies, *vol.* 54, no. 6, 2016, pp. 1384-1397, p. 1391

62 Case C-160/14 – *Ferreira da Silva*, par. 16

63 *Ibid*., par. 38-39

However, the CJEU stated for the first time in *Ferreira da Silva* that in cases where a legal concept frequently causes difficulties in interpretation in various Member States, a national court against whose decisions there is no judicial remedy must make a reference to the Court *"in order to avert the risk of an incorrect interpretation of EU law."*[64] One may wonder whether by referring to the existence of a risk of an incorrect interpretation of EU law, the scope of the *acte clair* exception pertaining to the extent of the obligation for making references for preliminary rulings established by *Cilfit* becomes even more obfuscated when viewed from the perspective of *Köbler* as a factor in determining whether a breach was manifest. It is true that if the CJEU had already interpreted a provision of EU law and confirmed its interpretation multiple times in subsequent case-law, the situation should be clear enough for the national courts of last instance to prevent the need from referring the question for a preliminary ruling. Advocate General Bot adequately stressed the extreme importance of the matter of referrals, by stating that non-compliance to refer a question for a preliminary ruling consequently deprives the CJEU of its fundamental task to ensure that the law is observed in the interpretation and application of the Treaties.[65] The judgment in *Ferreira da Silva* may therefore be regarded by some academics as the CJEU's attempt to cease the abusive use of the *acte clair* doctrine which had been happening within many national courts.[66] Other parts of scholarship that commented it in a positive manner saw it as a method of dialogue enhancement between the CJEU and national supreme courts, by providing the latter with more trust and responsibility as 'European courts' and in that way decentralizing various areas of EU law.[67]

While the CJEU did rule in *Ferreira da Silva* that the concept of a transfer of a business has given rise to a great deal of uncertainty on the part of a larger number of national courts and tribunals[68] and provided sufficient explanation for that

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64 *Ibid.*, par. 44; The judgment is also noteworthy due to the fact that it removes another barrier of obtaining compensation by determining that EU law precludes a provision of national law which requires, as a precondition, the setting aside of the decision of the court of last instance which caused the damage, when such setting aside is practically impossible. See: Case C-160/14 – *Ferreira da Silva*, par. 60; This will affect not only the Portuguese legal system, but also the domestic legal systems of Belgium, the Czech Republic, Cyprus, Finland, Slovakia and Sweden, where such national law provisions exist. See to that extent: Varga, Z., *Why is the Köbler Principle not applied in Practice*, Maastricht Journal of European and Comparative Law, *vol.* 23, no. 6, 2016, pp. 984-1008, p. 990

65 Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v. Portugal* [2015] ECLI:EU:C:2015:390, Opinion of AG Bot, par. 102

66 Cairó Ruiz, E., Joined cases C-72/14 and C-197/14 X and case C-160/14 Ferreira da Silva: is the ECJ reversing its position on the *acte clair* doctrine?, 23 September 2015, European Law Blog, [https://europeanlawblog.eu/2015/09/23/] , accessed 18. March 2020

67 Kornezov, *op. cit.*, note 54, p. 1328

68 Case C-160/14 – *Ferreira da Silva*, par. 43

specific concept,[69] further general factors for determining when and if a particular legal concept gives rise to difficulties in interpretation were not stated. This omission could prove to be an issue in the future; since both EU law and national legal systems of the Member States are a constantly developing and changing legal areas, the subject of the overwhelming majority of cases before national courts of last instance in which EU law is in some way referred to, may very easily be a legal concept whose correct interpretation from the viewpoint of the CJEU could potentially leave room for reasonable doubt, as was in fact the case in *Ferreira da Silva.* As a consequence, the majority of such cases may carry a certain degree of risk of incorrect interpretation of that concept from an EU law standpoint. Taking into account that it was previously ascertained by the CJEU that national courts may completely freely refer questions which are already considered to be well-established in EU and national case-law,[70] it remains dubious, if *Ferreira da Silva* is to be applied consistently, why national courts of last instance against whose judgment there is no remedy should not simply, in order to fully avert the risk of misinterpreting EU law or the level of establishment of its case-law, refer every question in relation to the interpretation of EU law for a preliminary ruling. One could therefore argue that *Ferreira da Silva* reinstates on the part of national courts of last instance a deterrent effect with regard to non-compliance with the obligation to refer.[71] It presents to national courts an uncomfortable contemporary reminder that it is in fact fully possible that failure to do so will potentially open their Member State to liability in damages for committing a manifest infringement of applicable law and consequently have negative effects on the public perception of the quality of their national judicial system, as well as undesirable economic strains on the national budget.

A resolute solution to this discussion does not seem to be quite clear in legal scholarship and attracts many opposed opinions. A part of legal doctrine already noticed that mere references to the *Cilfit* criteria do not represent sufficient guidance to national courts with regard to their discretional limits in the interpretation of EU law and that the literal application of those criteria may lead to the conclu-

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69 *Ibid*., par. 24-27

70 Case C-260/07 *Pedro IV Servicios SL v. Total Espa***ña** *SA* [2009] ECR I-2437, par. 31. In this case, the CJEU explicitly acknowledged that a reference for a preliminary ruling cannot be determined inadmissible simply because the questions referred are already settled in well-established EU and national case-law, or even if a referred question is materially identical to previously referred questions. In other words, there are no negative consequences or sanctions for making a reference for a preliminary ruling

71 The subject judgment also puts into question previous opinions of legal doctrine which held that instituting proceedings for a breach of EU law due to non-compliance of national courts of last instance to their duty to refer is not an efficient way of enforcing that obligation. See: Lenaerts, K.; Maselis, I.; Gutman, K., *EU Procedural Law*, Oxford University Press, 2014, p. 102

sion that the CJEU indeed intended to discourage national courts from *acte clair* considerations in the first place.[72] One did not even have to wait until *Ferreira da Silva*; not long after *Köbler* certain scholars distinctly pointed out the growing concern that a highest national court that does not want to make its Member State liable should ask for a preliminary ruling in every case involving a question of a EU law provision that confers rights on individuals which was not yet answered by the CJEU.[73] This issue was also raised by the British governement in *Köbler* itself, which argued that the acceptance that national courts may make errors in EU law interpretation is inherent in their freedom to decide matters of EU law and that making them liable for its misinterpretation will not be beneficial for the relationship between national courts and the CJEU.[74] On the other hand, differing opinions of the immediate post-*Köbler* period claimed that courts that act *bona fide* in the application of EU law will not render the Member State liable,[75] as was determined in *British Telecommunications*.[76] The remedy of Member State liability for judicial acts is considered so exceptional that it will not result in a disbalance of power between national courts and the CJEU.[77] Advocate General Léger in *Köbler* also reiterated that in order to assess whether a national supreme court has committed an infringement, the decisive factor is not the failure to refer, but whether its error of law was excusable or inexcusable.[78]

Nevertheless, the fact remains that in *Ferreira da Silva* the CJEU held that the Portuguese Supreme Court indeed should have made a reference, without discussing whether it acted *bona fide* or whether such an error was excusable or not. It remains to be seen if the subject omission of the Portuguese Supreme Court will be considered grave enough to be considered manifest and justify an award in damages. But in any event, by referring to the notion of the aversion of risk of incorrect interpretation of EU law as an argument in favour of making references for preliminary rulings and by determining that a national court of last instance did not comply with that obligation, while concurrently establishing that non-compliance to refer is a criterion for determining if a judicial infringement was manifest, the incentive of national supreme courts to interpret on their own

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72 Limante, *op. cit.*, note 61, p. 1394 and 1386

73 Wattel, P.J., *Köbler, Cilfit and Welthgrove: We can't go on meeting like this*, Common Market Law Review, *vol.* 41, no. 1, 2004, pp. 177-190, p. 178

74 Case C-224/01 – *Köbler*, par. 27

75 Hofstötter, *op. cit.,* note 32, p. 119-120

76 Case C-392/93 *The Queen and H.M. Treasury, ex parte: British Telecommunications* [1996] ECR I-1631, par. 43

77 Hofstötter, *op. cit.*, note 32, p. 119

78 Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR-I-10239, Opinion of AG Léger, par. 139 and 153

whether a particular legal concept is already clearly defined and well-established in EU case-law becomes considerably blurred. Therefore, at this time one may only claim that the way in which both the CJEU and the national courts of last instance will further handle this issue and additionally interpret the *acte clair* doctrine in view of *Ferreira da Silva* for the time being remains strongly anticipated.

3.2. – The issues of lower national courts as potential tortfeasors and national procedural autonomy

The judgment in *Köbler* had two further notable obscurities that subsequent case-law had to address. Firstly, despite the fact that the case concerned infringements of EU law allegedly committed by the Austrian Supreme Administrative Court, it did not explicitly state whether the liability framework for manifest infringements done by the judiciary also includes lower national courts. The second problem pertained to the question of whether the Member State may be held liable in accordance with *Köbler* regardless of the fact that other usual legal remedies have not been utilized by the injured person, as well as the fact that applicable national law concurrently provides for different types of remedies, for example, an action for unjust enrichment against the tortfeasor. These questions are suitable to be analyzed simultaneously due to their complementarity.

First of all, it was believed that the intention of the CJEU was to actually recognize liability only in cases of breaches committed by courts of last instance. This could be concluded by referring to the CJEU's viewpoint on national procedural autonomy, which approves the principle of primacy of appellate review.[79] While the CJEU in *Francovich* did state that every Member State may designate the competent courts and establish procedural rules for safeguarding individuals' rights that stem from EU law,[80] it already in *Brasserie* manifested a more restrained approach, referring to the principle of equivalence and effectiveness as justifications for the limitations of procedural autonomy of Member States.[81] Namely, the principle of equivalence assumes that procedural conditions of national law governing actions for damages due to infringements of EU law must not be less favourable to the plaintiff than those relating to similar actions of domestic nature, while the principle of effectiveness implies that it must not be practically impossible for the plaintiff to exercise rights

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79 Scherr, K.M., *The Principle of State Liability for Judicial Breaches: The case Gerhard Köbler v. Austria under European Community Law and from a Comparative National Law Perspective,* Doctoral Dissertation, European University Institute, 2008, [https://cadmus.eui.eu/handle/1814/13165], accessed 19. March 2020, p. 38-39

80 Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci et al. v Italy* [1991] ECR I-5357, par. 42

81 Joined cases C-46/93 and C-48/93 - *Brasserie*, par. 67

which the national courts must protect.[82] These two principles were reaffirmed and referred to by the CJEU on many instances in its case-law since they were first mentioned.[83] On the other hand, the CJEU previously also established that not only do the national courts have to take care of the consistent application of these principles, but injured parties also have the obligation to show reasonable dilligence in limiting the extent of the damage which they suffered, or risk having to bear it themselves.[84] When proceedings are at the point when they take place before lower national courts, appellate review for alleged judicial wrongs is at the disposal of the injured party in virtually every Member State,[85] which is why such an option was considered to preclude Member State liability for manifest judicial infringements of EU law committed by lower national courts.[86]

Taking the above into account, the recent judgment of the CJEU in the *Tomášová* case[87] provided notable clarification on both fronts. The case, in essence, regarded the applicant's claim in damages against Slovakia for the breach of a District court, which upheld the judgment of an arbitral tribunal that ordered payment against the applicant, whose competence was established on the basis of an allegedly unfair contractual term.[88] The District Court referred the matter for a preliminary ruling, asking in essence may liability of a Member State arise before exhausting all available legal remedies, as well as exhausting the possibility of a claim for unjust enrichment, and if so, whether such conduct of the authority in the main proceedings represents a sufficiently serious breach of EU law. The matter of methods in

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82 Brüggemeier, *op. cit.*, note 18, p. 83-84. See also: Case C-69/14 *Dragoș Constantin Târșia v. Statul român and Serviciul Public Comunitar Regim Permise de Conducere si Inmatriculare a Autovehiculelor* [2015] ECLI:EU:C:2015:662, where these principles were specifically analyzed in more detail by the CJEU. For an in-depth doctrinal analysis of the prinicple of effectiveness, see: Reich, N., *The Principle of Effectiveness and EU Private Law*, in: Bernitz, U.; Groussot, X.; Schulyok, F (eds.), *General Principles of EU Law and European Private Law*, Wolters Kluwer, 2013, pp. 301-325

83 They were first referred to by the CJEU in Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR I-1989 and Case C-45/76 *Comet BV v. Produktschap voor Siergewassen* [1976] ECR I-2043. See also *e.g.*: Case C-160/14 – *Ferreira da Silva*, par. 43; Case C-429/09 *Günter Fuß v. Stadt Halle* [2010] ECR I-12167, par. 62; Case C-118/08 *Transportes Urbanos y Servicios Generales SAL v. Administración del Estado* [2010] ECR I-635, par. 31

84 See *e.g.* Joined cases C-46/93 and C-48/93 - *Brasserie*, par. 85

85 Moreover, some Member States provide for explicit rules in their Civil code stating that State liability may not be invoked before the injured party has exhausted all legal remedies. See *e.g.* §839 (3) of the German *Bürgerliches Gesetzbuch (BGBl. I S. 42, 2909; 2003 I S. 738)* which provides that liability for damage will not arise if the injured person has intentionally or negligently failed to avert the damage by having recourse to appeal

86 Scherr, *op. cit.*, note 79, p. 39

87 Case C-168/15 *Milena Tomášová v. Slovakia – Ministerstvo spravodlivosti SR and Pohotovosť s.r.o.* [2016] ECLI:EU:C:2016:602 (hereinafter: Case C-168/15 – *Tomášová)*

88 *Ibid*., par. 5-14

which the damage is to be assessed were also referred to the CJEU; the referring court wanted to determine whether the damage amounts to the sum claimed by the applicant, or the sum that would constitute unjust enrichment.[89]

On the subject of national procedural autonomy related to remedies, the CJEU reiterated that the relationship between the ordinary legal remedies and the claim for damages due to an infringement of EU law relies should be established according to the provision of national law of Member States with respect to the principles of equivalence and effectiveness.[90] That perspective also applies to the relationship between an action for damages caused by a breach of EU law and other legal actions available in the legal system of a particular Member State, such as the action for unjust enrichment.[91][92]

With regard to the question of Member State liability only for infringements committed by national courts of last instance, Advocate General Wahl stated in his opinion that such a conclusion seems to now be settled in CJEU's case-law, ensuring a fair balance between the necessity of effective guarantee of individuals' rights stemming from EU law and the specific features of the intervention of judicial bodies in Member States, as well as the difficulties that national courts face in the exercise of the judicial function.[93] The CJEU, although not explicitly citing the Advocate General's reasoning, did in fact agree with his perspective. It unambiguously pointed out for the first time that Member State liability for damage caused to individuals due to an infringement of EU law by a national court's decision, may be incurred only where it is made by a Member State court of last instance.[94] However, no further explanation was given at the time, possibly because such an opinion is fully in line with the Court's previous determinations in *Köbler* and *Traghetti*.

In subsequent decisions, the CJEU confirmed this approach, explicitly referring to recourse to a judicial remedy as the appropriate means of redressing breaches of EU law from lower national courts.[95] Although the non-contractual liability of

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89 *Ibid.*, par. 15

90 *Ibid*., par. 39

91 *Ibid*., par. 40

92 Examples of other alternative remedies may include a retrial (in Denmark, Finland, Lithuania, Malta, Sweden and the United Kingdom) and a constitutional complaint (in Austria, Belgium, Croatia, Cyprus, the Czech Republic, Germany, Hungary, Latvia, Slovakia, Slovenia and Spain). See: Varga, *op. cit.*, note 64, p. 994 and 997

93 Case C-168/15 *Milena Tom*ášová *v. Slovakia – Ministerstvo spravodlivosti SR and Pohotovost' s.r.o.* [2016] ECLI:EU:C:2016:260, Opinion of AG Wahl, par. 40

94 Case C-168/15 – *Tom*ášová, par. 36

95 Joined cases C-447/17 P and C-479/17 P *European Union and Guardian Europe S*à*rl* [2019] ECLI:EU:C:2019:672, par. 78

the European union is a matter that exceeds the scope of this paper, it is useful to mention that this perspective was also applied by the CJEU on the level of the EU in this ruling. Namely, the CJEU stated in *Guardian Europe Sàrl* that the characteristics of the EU's judicial system enable the General Court to be equated to a Member State court not adjudicating at last instance, as a result of which infringements of EU law arising from a decision of the General Court cannot invoke the liability of the EU.[96] Should then the CJEU be equated with a national court of last instance and therefore be potentially held liable for a manifest infringement of EU law? Wattel seems to think so and refers to this equation as a "requirement of justice", pointing out numerous times in which it could have been considered that the CJEU also erred in interpretation of EU law.[97] But since the CJEU remains the highest authority on the interpretation of EU law, it is unlikely that it would, at least in the near future, agree to such an arrangement and hold itself liable for infringements of EU law or develop a new liability system in which its decisions could come under judicial review by another court.[98]

Looking back at the principle of primacy of appellate review present across the domestic legal systems of the Member States, it appears that it has nowadays attained official uphodling by the ruling in *Tomášová*. Therefore, an action for damages suffered by an infringement of EU law committed in a decision of a national court of last instance is confirmed to be a remedy of the very last resort, as long as a national legal provision does not explicitly state otherwise. Varga reaches the same conclusion, claiming that this even seems to be the general idea inspiring the EU liability case-law.[99] Considering the above, one could, by analyzing *Tomášová* and the previous case-law on the subject, attain an impression that the procedural institute of a claim for damages sustained by a manifest infringement of EU law by the judiciary is quite efficient and well-established, as long as it is accepted to be the ultimate legal remedy for such a breach. While that impression is indeed correct from a purely theoretical point of view, such actions will unavoidably run into some practical problems which shall be discussed in the following sub-chapters.

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96 Joined cases C-447/17 P and C-479/17 P *European Union and Guardian Europe S*à*rl* [2019] ECLI:EU:C:2019:672, par. 82 and 84

97 Wattel, *op. cit.*, note 73, p. 184

98 AG Léger in his Opinion on *Köbler* stated that it cannot be inferred that the rules governing Member State liability and the rules governing EU liability should develop in strict parallel. He additionally points out that the EU may not be held liable for a decision of the CJEU, due to the fact that it is the supreme court in the EU legal order. See: Case C-224/*01 Gerhard Köbler v Republik Österreich* [2003] ECR-I-10239, Opinion of AG Léger, par. 94

99 Varga, Z., *National Remedies in the Case of Violation of EU Law by Member State Courts*, Common Market Law Review, *vol.* 54, no. 1, 2017, pp. 51-80, note 99 on p. 69

3.3. – Difficulty of establishing a direct causal link

The concept of Member State liability for EU law infringements committed by national courts has a strong theoretical foundation and elaboration. However, it may not always function with such a degree of quality in practice. As hinted in the title of this sub-chapter, one of the key issues that injured parties will face in their claims for damage compensation is to satisfy the liability condition of the direct causal link between the breach and the damage suffered. Although a deeper analysis of the theoretical background of this legal condition exceeds the scope of this paper, mainly due to the fact that many different Member States have different legal regulations of causation,[100] it will be briefly reflected upon here, as it may present one of the main obstacles in acheiving damage reparation for infringements of EU law committed by national courts of last instance.

Since causation most often represents a *quaestio facti*, the CJEU is not very keen on providing detailed explanation of a direct causal link and early on tended to leave that question to the national courts to be determined in accordance with provisions of national law. Legal doctrine noticed a short while after *Francovich* and *Brasserie* that the State may be viewed as too remote from the actual damage to be responsible for its causation, stressing that leaving such questions to national law could potentially fail to acheive a desired result.[101] It is possibly for this reason that the CJEU did show in the cases of *Brinkmann*[102] and *Rechberger*[103] an inclination towards a perspective that the matter of the existence of a direct causal link should stay with the national legal systems, but that it must be analyzed according to EU law principles,[104] namely, the principles of equivalence and effectiveness.[105] However, even though the CJEU did decide that there was a direct causal link

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100 This also leads to a different percentage of number of failed claims as a result of a failure to establish the existence of a causal link, especially when Angloamerican and Continental European legal systems are compared. See: Lock, T., *Is Private Enforcement of EU Law Through State Liability a Myth? An Assessment 20 years after Francovich*, Common Market Law Review, *vol.* 49, No. 5, 2012, pp. 1675-1702, p. 1689

101 Smith, F.; Woods, L.; *Causation in Francovich: The Neglected Problem*, The International and Comparative Law Quarterly, *vol.* 46, no. 4, 1997, pp. 925-941, p. 935-936

102 Case C-319/96 *Brinkmann Tabakfabriken GmbH v. Skatteministeriet* [1998] ECR I-5255

103 Case C-140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v. Republik Österreich* [1999] ECR I-3499

104 Biondi; Farley, *op. cit.*, note 2, p. 59. See also: Vaitkevičiūtė, A., *Member States Liability in Damages for the Breach of European Union Law – Legal Basis and Conditions for Liability*, Jurisprudence, *vol.* 18, no. 1, 2011, pp. 49-68, p. 61

105 Tomulić Vehovec, M., *The Cause of Member State Liability*, European Review of Private Law, *vol.* 20, no. 3, 2012, pp. 851-880, p. 855

between the breach of the State and the damage suffered in *Rechberger*,[106] this will not be a simple task when it comes to infringements commited by national supreme courts.

If one observes, as an example, the notion of manifest infringement of EU law by a decision of a national court of last instance for non-compliance to the obligation to refer a matter for a preliminary ruling, causation will almost certainly impede the attempt to obtain reparation. By failure to refer a matter which may be considered dubious, the national supreme court is in breach of the third paragraph of Article 267 TFEU. On the other hand, the injured party suffers damage as a result of a breach of a substantive rule which confers rights on individuals, and not as a result of the infringement of Article 267 TFEU itself.[107] Kornezov demonstrates the core of this issue by providing a reverse hypothesis, stating that if a judgment of a national court is actually determined to be compatible with EU law, the substantive right remains unaffected by the failure to make a reference.[108] It could be concluded that even if non-compliance with the duty to refer may go towards establishing that an injured party indeed suffered a manifest and a sufficiently serious breach, the Member State will manage to avoid liability on the grounds of non-existence of a direct causal link between the breach and the damage.[109] Does this indicate that a Member State may be held liable for judicial breaches only when the injured party relies exclusively on other criteria of determining a manifest infringement, such as the excusability of the error of law or the degree of clarity and precision of the infringed rule? That could possibly be so, but it would be better to be cautious and wait for the CJEU's more detailed guidance on the relationship between the concept of a manifest infringement of EU law by national courts of last instance and the notion of a direct causal link in such cases, before attempting to provide a more definite answer.

A step forward has recently been taken in that regard by the European Court of Human Rights, which demonstrated that injured persons are not completely devoid of the possibility of acheiving redress, even when faced with the problem of establishing a direct causal link. In *Schipani and others v. Italy*, the ECtHR found that the Italian Court of Cassation breached its obligation to refer a matter for a preliminary ruling, which was sufficient to establish an infringement of Article 6 paragraph 1 of the European Convention on Human Rights and Fundamental

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106 Case C-140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v. Republik Österreich* [1999] ECR I-3499, par. 75

107 See *supra*, notes 51 and 52, p. 7-8

108 Kornezov, *op. cit.*, note 32, p. 1332

109 See also Rodriguez, *op. cit.*, note 2, p. 618, where a similar conclusion was reached

Freedoms.[110][111] Irrespective of the infringement itself, the ECtHR pointed out that there is no causal link between this violation and the material damage that the applicants suffered, but it still recognized that the applicants sustained non-material damage as a result of the infringement, for which they were in fact compensated.[112] Therefore, until a better reconciliation of the concepts of a manifest infringement and a direct causal link is attained, plaintiffs in actions against Member States for failure of their national courts of last instance to refer a matter for a preliminary ruling will be unsuccessful to obtain reparation of material damage,[113] and should instead place the focus on their claim in non-material damages if they want to be compensated at least to a certain degree.

3.4. – Damage assessment and the problem of the infringement-committing court deciding about the damages for that infringement

Another issue that arises in relation to judicial infringements of EU law and that is tightly connected with the relationship between EU and national rules is the extent of compensation that the injured party should receive. According to the viewpoint of the CJEU, the criteria for determining that extent should be provided within national law of Member States, with the observance of not only the principles of equivalence and effectiveness,[114] but also that reparation is commensurate with the loss or damage sustained in order to achieve effective protection of individuals' rights.[115] In other words, when it comes to material damage, both actual loss and loss of profits fall within the scope of compensation which the injured party may receive.[116] The CJEU specifically stated in *Brasserie* that exclusion of loss of profits as a head of compensable damage would be contrary to the principle of effectiveness.[117]

Furthermore, even though actual loss is usually the easiest head of damage to prove, it could be possible that certain provisions of national laws preclude the

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110 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

111 For a more detailed analysis of the perspective of the ECtHR on preliminary references to the CJEU, see: Lacchi, C., *Multilevel Judicial Protection in the EU and Preliminary References*, Common Market Law Review, *vol.* 53, no. 3, 2016, pp. 679-707, p. 698

112 Judgment *Schipani and Others v Italy*, Application No. 38369/09, par. 87

113 There may be an exception to this, as recently demonstrated in *Hochtief Solutions* where it was ascertained that costs of proceedings constitute material damage which may be recovered. See: *infra*, note 119, p. 17

114 Case C-168/15 – *Tom*ášová, par. 39

115 Joined cases C-46/93 and C-48/93 - *Brasserie*, par. 83

116 Biondi; Farley, *op. cit.*, note 2, p. 77

117 Joined cases C-46/93 and C-48/93 - *Brasserie*, par. 91

injured party to obtain compensation for a particular form of actual loss. In that regard, the CJEU has never refrained from striking down such provisions.[118] A most recent example may be the ruling in *Hochtief Solutions* where the CJEU held that the costs of proceedings that a party incurred as a result of an infringement of a rule of EU law by a decision of national court of last instance are also included in damage that may be restituted, as an opposite provision of Hungarian law rendered it virtually impossible to obtain adequate compensation.[119]

Finally, some scholars also warned about the practical problem of the national court of last instance which will potentially have to decide about reparation of damages caused by a manifest infringement of EU law within a decision of that same court. Indeed, if a court of last instance allegedly committed a breach of EU law within its judicial decision, the injured party would in most Member States initiate restitution proceedings before a local court, after which the case may, on appeal, again arrive before the court of last instance. Van Dam indicates that this could further reduce the injured party's chances to have access to an effective remedy.[120] Wattel goes even further and unambiguously states that legal protection of individuals is ineffective if the same highest national court which committed a manifest infringement is competent to review that decision.[121][122] He continues by stating that the Member States will all have to create special procedures in order to tackle this issue, which will consequently result in more preliminary referrals, more procedure in general and more congestion of the CJEU.[123]

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118 Biondi; Farley, *op. cit.*, note 2, p. 79

119 Case C-620/17 – *Hochtief Solutions*, par. 47

120 Dam, *op. cit.*, note 20, p. 47

121 Wattel, *op. cit.*, note 73, p. 180

122 If the matter in question does not receive adequate attention and resolution, it may potentially lead to continuous ineffectiveness of legal protection of individuals' rights, i.e. to systemic violations of the principle of effectiveness, which could then create a further problem for Member States – the initiation of the "infringement procedure" against them pursuant to Articles 258, 259 and 260 TFEU (Lisbon). Failure by a Member State to act in accordance with the CJEU's judgment and remedy the subject infringement may even result in the imposition of financial sanctions against that Member State by the CJEU, either as a lump sum or a penalty payment. For a more detailed discussion about the infringement procedure, see: Ćapeta, T., *Sudski sustav Europske unije i njegov utjecaj na procesna prava država članica*, in: Garašić, J. (ed.), Europsko građansko procesno pravo – izabrane teme, Narodne novine, Zagreb, 2013, pp. 33-55; Petrašević, T.; Dadić, M., *Infringement procedures before the Court of justice of the EU*, Pravni vjesnik, *vol.* 29, no. 1, 2013, pp. 77-98.; Radivojević, Z.; Raičević, N., *Financial sanctions against Member States for infringement of EU law*, in: Duić, D.; Petrašević, T. (eds.), Procedural aspects of EU law – EU and comparative law issues and challenges series, Faculty of Law Osijek, 2017, pp. 171-191; Duić, D.; Petrašević, T., *Pet godina primjene prava Europske unije – Analiza postupaka zbog povrede prava Europske unije pokrenutih protiv Republike Hrvatske i prethodnih pitanja hrvatskih sudova*, Godišnjak Akademije pravnih znanosti Hrvatske, *vol.* 10, no. 1, 2019, pp. 65-95

123 *Ibid.*, p. 181

One may look towards the legislative branch for solutions to the subject procedural hurdle. Italy is a rare example of an EU Member State in which legislative recognition of the concept of a manifest infringement has already happened.[124] Other Member States, however, do not show a tendency to make any legislative changes in order to widen the liability of their judiciary. Although in some Member States there actually is a certain amount of willingness to apply the notion of manifest infringement in their decisions, it is demonstrated through judicial decisions, rather than legislative action.[125] However, this does not represent a sturdy solution to the subject problem, since occurrences of the same supreme court that decides a claim of damage restitution for a manifest infringement which that court committed may still easily happen. Either all Member States should therefore make special procedural changes which would prevent such a situation from occurring, or the CJEU should attempt to carefully reconcile this issue with the principle of effectiveness.

4. CONCLUSION

When we turn around and look back at the previous twenty years of the development of the framework of liability of Member States for infringements of EU law caused by the decisions of national courts of last instance, nobody could deny that there have been significant improvements to its theoretical and practical foundations. With the CJEU at the commands, the concept of this liability has been continuously shaped throughout the years, not only in order to strenghten the cooperation between the CJEU and the national supreme courts, but also more importantly, to achieve a satisfactory degree of effectiveness of EU law from the viewpoint of its citizens. While in the past it was merely hinted upon that damages may be awarded to individuals as a result of a breach of EU law by a national judicial organ, nowadays such a remedy is well-established within Europe and at the disposal of every individual who has suffered such a breach.

However, although the existence of an action against a Member State for judicial infringements is quite accepted, the research has demonstrated that individuals who desire to pursue such an action will meet several practical impediments which

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[124] *Legge 13 aprile 1988, n. 117., GU 15 aprile 1988, n. 8,* as amended by *Legge 27 febbraio 2015, n. 18, GU 4 marzo 2015, n. 52.* The Act is colloquially known as the Vassalli Act on Civil Liability of Judges. Article 2 par. 3. explicitly states that a manifest infringement of EU law constitutes fault, while Article 4 provides for the competence of courts of appeal to hear such cases. It is interesting to mention that in cases where the judge who has committed a manifest infringement of EU law with fault or gross negligence, the State is obliged to bring an action against the judge for reimbursement of compensated damage (Article 7. par. 1.)

[125] Varga, *op. cit.*, note 64, p. 992

seriously place its efficiency into question. Firstly, they will have to be certain that they have used all ordinary legal remedies at their disposal, as well as that other similar actions, such as a claim for unjust enrichment, a retrial or a constitutional complaint, cannot be or have also already been used in their case. Secondly, if there are no other remedies available, or they have all already been utilized, an individual may then commence an action against the Member State, but a manifest infringement of the national court of last instance is going to have to be proven by the individual. This presupposes that the individual will be able to establish that a national supreme court incorrectly interpreted a substantive EU legal norm or went against well-established case-law of the CJEU and at the same failed to provide sufficient reasons as to why did it not refer the matter for a preliminary ruling. The bar has indeed in this regard been set very high, and the case-law of the CJEU confirms such a perspective; the number of successful Member State liability cases based on conditions set by *Köbler* have indeed been extremely low, as breaches of obligations of national courts were very rarely ascertained. Thirdly, the most persistent individuals who have managed to tackle the first two obstacles will then also have to prove the existence of a direct causal link between the manifest infringement and the damage suffered. In present case-law, cases of manifest infringements by national courts of last instance have almost exclusively had to do with the criterion of non-compliance with their obligation to refer. In these cases, a direct causal link between the breach and the suffered material damage has been virtually impossible to establish, while on the other hand, some positive steps have been taken by the ECtHR to ensure the prospect of non-material redress for the injured parties. Lastly, in most Member States, even if individuals are successful in all of the above, they will still potentially have to face the daunting notion that their damage compensation case may then arrive before the same court that committed the manifest infringement and from that point on, merely hope that they will obtain redress.

It is doubtful to what extent may the principles of eqiuvalence and effectiveness be satisfied by imposing such strict practical barriers for obtaining reparation. The liability framework is undoubtedly a huge step forward for proper protection of individuals' rights conferred by EU rules, but the existing number of conditions and the overall standard of this liability remains too high for it to be called theoretically and practically effective. The CJEU should face this issue in its future case-law and "loosen the grip" on the strict interpretation of the necessary criteria for establishing Member State liability. Otherwise, if the number of cases where individuals actually managed to receive compensation of their damage remains insignificantly low when compared to cases in which their actions failed, the entire liability framework does indeed face the dangerous prospect of becoming "an empty shell."

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UDK 327.39(4-67EU): 332.144"Macron, E."
Preliminary communication

THE NEW METHODOLOGY OF NEGOTIATING WITH THE CANDIDATE COUNTRIES IN THE CONTEXT OF MACRON'S RESHAPING OF EUROPEAN UNION

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ABSTRACT

The enlargement policy of the European Union is known to be one of its best policies, as it has united a continent, stretched the single market and the common policies, thus conforming many aspects of economic and social life in the European countries. The Western Balkan has become, since the dissolution of ex-Yugoslavia, a very important geopolitical region, known also to be the soft belly of Europe. Thessaloniki Summit, held back in 2003, stamped the European perspective on the Western Balkans and declared it as a near future for the region. Since the entering of Romania and Bulgaria in 2007, it has tightened the negotiation rules, pointing out that the Rule of Law is the most important principle and measure of success for the candidate countries. Now, almost seventeen years from the Thessaloniki moment, the EU has stopped the enlargement policy, as the Member States have not found common ground as to open negotiation talks with North Macedonia and Albania. It seems fair to say that the enlargement does not have anymore its geopolitical relevance. It seems that the EU, due to the financial crisis in 2008, and then the migration crisis that followed, has lost its capacity to absorb new member states. However, France, which is starting to play a more central role in the European centerfield, is proposing a new approach to the Western Balkans, presenting a new methodology. The main point of the French proposal is to gradually include candidate countries in the club, by making them achieve certain rights by passing through various phases, seven of them exactly. One of the most important aspects is also the fact that the candidate countries would have access to structural funds, which they do not have today. However, the French proposal isn't peacefully accepted yet, as many countries have objected. From a geopolitical standpoint, how is this affecting Europe and how the Western Balkan region? Are Macron's proposals going to slow down the reform processes, thus endangering all that has been accomplished so far? In terms of common foreign and security policy, and the external action of the EU, can the new methodology play a role? In the context where the EU has to play a more active role in the neighbouring regions, it needs stability and more strength. Will Macron deliver just what is needed or will he turn the situation upside down?

Analytical and comparative methods will be dominantly relied upon throughout the paper allowing the author i.e. to draw the arguments supporting or challenging the above mentioned dilemmas and issues raised.

***Keywords**: European integration, Rule of law, Negotiation methodology, French Non paper*

1. INTRODUCTION

The enlargement policy has been regarded as one of the most successful EU foreign policy instruments, since the establishment of the European Coal and Steel Community (ECSC) by the Treaty of Paris in 1951. Six waves of enlargement rounds have increased the number of Member States from the initial six founders[1] to its current number of 27 countries.[2]

Besides geopolitical terms and popular narratives used to define the Western Balkans, that range from "dysfunctional institutional structures", "captured states", "hybrid regimes - falling in the wide spectrum between consolidated democracies and autocracies", to "competitive authoritarian systems",[3] the past two decades have been marked by strong and almost unequivocal advancement of these countries towards the EU. Meanwhile, the sole EU has been perceived as a panacea for the aforementioned disorders and problems respective countries were facing.

Despite the Thessaloniki promice, the Western Balkan States are still in the waiting room for accession to the EU, while Brussels is expecting substantial reforms and will accept only those countries that fulfil criteria of a fully democratic and liberty oriented system. However, there are certain aspects that have to be taken into consideration: the statecrafting happened since the dissolution of Yugoslavia and the time usually needed for new and young democracies to evolve. The process of European integration has already shown that it can be a fasting track towards the implementation of core principles upon which Democracy is built. The question arises whether the Rule of Law will prevail or the law of power in a delicate structure of young democracies, and what is the role of the EU.

The sort of metamorphosis, which a candidate state is supposed to go through, at the later stages should result in significant improvement of capacities of the respec-

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1 These countries are Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany

2 The current population of Europe is 747,479,037 as of Monday, February 24, 2020; Europe's population is equivalent to 9.78% of the total world population, [https://www.worldometers.info/world-population/europe-population/], accessed on 24. February 2020

3 Levitsky, Steven; Way, A. Lucan, *Competitive authoritarianism, Hybrid regimes after the cold war*, Cambridge University Press, Cambridge, 2010, p. 365-371; Keil, Soeren, *The Business of State Capture and the Rise of Authoritarianism in Kosovo, Macedonia, Montenegro and Serbia*, Southeastern Europe *vol*. 42, no. 1, 2018, p. 59–82

tive state to "shoulder the burden" which the EU membership inevitably imposes. In other words, becoming a fully-fledged Member State, means that a state should be capable of coping up with the competitive pressure at the EU market, act in a spirit of solidarity, develop functioning rule of law - being among the core principles and values upon which the Union is based.

Yet, progressing on the path towards joining the EU, shouldn't be regarded only as an important step for a certain aspiring state in its relations with the EU, but also as a clear testimony of the EU`s strength reflected in a continued commitment to the so-called European perspective of the Western Balkans. Nevertheless, developments within the EU and recent turmoil between the Member States, have provided a strong impetus for a deeper question of whether the EU delivers on its commitments, once a state pretending to become an EU candidate had met the conditions set out by the stakeholder, and whether the bumpy road of EU accession negotiations is rewarding to the extent as it has been previously thought?

The main motive fuelling this sort of discussions or "the straw that broke the camel's back" was famous French "non" to opening negotiation talks with North Macedonia and Albania, which paradoxically came after many assurances made by the EU leaders towards these countries - that precisely in light of these promises did some historical shifts, as it was signing of the Prespa agreement in case of North Macedonia.[4] This outcome suggesting that the Thessaloniki promise of future EU membership of the region in light of such moves, is fading into oblivion, provoked turmoil among EU member states.

Therefore, the explained recent scenario leads us to one of the core arguments of this study, which is that the mentioned overturn seriously questions the negotiation process itself. At the same time, it is posing a dilemma over whether it is justified to refer to it as a "merit based process", in which the pace of progress of an individual state primarily depends on its own ability to meet the requirements for membership.

Given the European destiny of the Western Balkans, the accession procedure gains much importance. While the candidate countries have to transform themselves, the accession process says a lot about the EU's consistency and the role some member states play. Geopolitics is a major factor that has influenced and still influences this process. It can shape many "historic moments" that can impact the transformation of candidate countries and question arises if it is the process itself

[4] North Macedonia signed the historical Prespa Agreement with Greece, and accepted the compromise solution to the decades-long dispute about its own name

that should be immune to that context changing. Isn't that the definition of coherence, but in this case the EU's one?

This brings us to the actual moment. As this article will try to highlight, Macron wants to put the accession talks out of the technocratic process, but he wants the Member States more involved politically. Analysing this impetus aimed at changing what has been believed to be just a procedure, this article will try to tackle the necessary role accession talks have and should have in the context of an evolving European Union and the world. What will be the starting assessment is that the accession talks are not a mere bureaucratic process, and that on the other hand, a sharper political involvement of the Member States could put the same process of Enlargement at the mercy of their internal political life. While the first would be beneficial for the Rule of law and democracy, the second aspect would mean itself a constant threat to the continuity of the process.

This paper assesses recent French and EU moves in order to make sense of the overall direction of the European enlargement policy and its wider impact on the current and future relationship between the European Union and the Western Balkans. First, it presents the rules and principles governing the negotiation processes, while it also describes its substance that is mirrored in a mixture of complex legal and (geo)political structures and trends shaping the overall process. Further, it discusses French Non paper and EU New negotiation methodology that are in a way rejecting entrenched "status quo" and "stabilitocracies" throughout the region by advocating for more substantial reforms in the area of fundamentals, e.g. rule of law, able to provide a breath of fresh air into EU enlargement policy. Therefore, this study closely scrutinizes the dynamics present in both the EU and WB in terms of trends, patterns and paradoxes beyond the procedural nexus of rules and principles governing the overall process leading to EU expansion. In conclusion, it reiterates main assessments that at the same time could be regarded as recommendations to Europe to help advance its policies towards its nearest neighbours.

In methodological terms, this article has emerged as a product of holistic approach, and use of various methods of scientific research. Legal, comparative, analytical methods have been widely relied upon for the sake of drawing some major conclusions of this article, as well as parallels between different approaches towards countries aspiring to membership. An important aspect of the comparative method used in this article is also reflected in the confrontation of ideas and proclaimed values with their actual outreach in the empirical sense. The methods used allowed for making conclusions about the potential directions in which EU enlargement policy could move - driven by two sorts of forces, namely the inward-oriented policies of certain members, or by community sentiments upholding the

basic values at the heart of the EU project. This approach also allowed for deduction of factors able to contribute to improvements in the overall strategy and vision of the Enlargement policy - that has largely been regarded as the sharpest tool of the EU foreign policy so far.

2. NEGOTIATION FRAMEWORK AND CORE NEGOTIATION PRINCIPLES

The accession process is much more than a bureaucratic procedure. It represents a stage where third states integrate with the family of EU member countries and become a part of a united community. Candidate countries are assessed in terms of their capacity to handle the membership, economically and politically. Therefore, the accession methodology should respect certain ground rules: namely, it should assess each country individually, in order to be really merit-based; it should respect each country's path and make it independent to foreign incognitas, such as political turmoils and changing of positions by individual member states, which could break the process or slow it down; it should gradually include them into the EU's framework, enabling them to develop their economy and political systems, to reach the level needed for the membership; it should, ultimately, treat the candidate countries as members of the same civilizational circle, same polity, even before their formal membership, which means first of all that the accession methodology has to defend EU's geopolitical influence over the candidate countries. This thesis can be synthesized in four principles: continuity, graduality, individuality and political unity. Based on these principles this article will tackle the proposals for new accession methodologies made by France and later on by the EU.

Ernst Haas, one of the leading theorists in this field, defined European integration as "a process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over pre-existing national states".[5] The overall process of European integration is being referred to as the 'Europeanization'[6] and it has been among the major challenges in the last thirteen years for the rapidly transforming legal systems of Western Balkan post-communist nations. This period could be also depicted as part of a broader post-communist legal crisis marked by "incompetent drafting of post-communist law, the immaturity of post-communist legal systems and judges adhering to textual

[5] Haas, B. E., *The Uniting of Europe*, Stanford University Press, Stanford, 1958, p. 139–140

[6] Eriksen, M., *Europeanization of the Balkans within an Identity-based Framework*, Politeja, no. 37, 2015, p. 193–208

positivism".[7] Although Western Balkan countries were facing different challenges during the mentioned period, they have also seen important legislative developments in various spheres that the EU *acquis* embraces and, therefore, regulates.

Before analysing the proposals for a new accession methodology and the state of play, it is necessary to recall the norms that regulate this process. The key principles that provide for a legal basis of the EU accession negotiation process are stipulated by Article 49 of the Treaty on European Union (hereinafter TEU), as well as by other relevant conclusions brought by the European Council, such as the conclusions of the 1993 European Council in Copenhagen.[8]

The essential prerequisites that an aspiring member state needs to satisfy in order to pass the first stage and acquire a candidate status are twofold. Firstly, it needs to respect and to be committed to promoting values, upon which the sole EU has been founded. These essential values are stipulated by the Article 2 of the TEU, namely respect for human rights, pluralism, tolerance, human dignity, freedom, democracy, equality, as well as the pervasive principle of the rule of law.[9] Secondly, certain degree of compliance with the membership criteria needs to be achieved, among which are the political criteria, laid out the Copenhagen and Madrid European Councils formulated in 1993 and 1995, respectively, as well as with the criteria introduced by the Council in 1997 within the Stabilization and Association process.[10]

The Copenhagen criteria laid down more precise political, economic, judicial and administrative conditions an applicant states needs to fulfil before it can enter the Union, such as: the stability of institutions guaranteeing democracy, human rights, functioning market economy, etc.

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7 Kühn, Z., *The Application of European Law in the New Member States: Several (Early) Predictions*, German Law Journal, *vol*. 6, no. 3, 2005, p. 563–582., [doi:10.1017/S207183220001381X], accessed on 02. March 2020

8 Treaty on functioning of the European Union (Consolidated version 2016) Art. 49, [2016] OJ C 202/43 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016M049], accessed on 23. February 2020

9 Appicciafuoco, L., *The Promotion of the Rule of Law in the Western Balkans: The European Union's Role,* German Law Journal, *vol*. 11, no. 7-8, 2010, p. 761, [doi:10.1017/S2071832200018824], accessed on 20. March 2020

10 As part of the Federal Republic of Yugoslavia, Montenegro and Serbia became participants in the Stabilization and Association process in November 2000, North Macedonia (the Former Yugoslav Republic of Macedonia) became part of the process in March 2004, Bosnia and Macedonia in July 2008, Albania in April 2009, Kosovo in November 2015

Furthermore, the common framework for relations with all Western Balkans countries until the date of their accession, called Stabilization and Association process[11] primarily focuses on development of closer regional ties established through good neighbourly cooperation. Although "good neighbourliness"[12] has been part of the enlargement conditionality since the beginning, in the case of the Western Balkan it became even more explicit and much more emphasised as a precondition of future enlargements. In the Communication on EU Enlargement Policy released in the first half of 2019, the European Commission made unequivocally clear its view that: "the EU cannot and will not import bilateral disputes and the instability they can entail".[13] For instance, in the case of Serbia these prerequisites are embodied in the so-called "visible and sustainable improvement/normalization in relations with Kosovo*".[14]

Overall, in addition to legislative alignment, the candidate states need to be capable of timely and effective implementation of the *Acquis communautaire*, which is constantly evolving. The Union *Acquis* encompasses various principles, values, political objectives stipulated by the Founding Treaties, case law of the Court of Justice of the EU, inter-institutional agreements, resolutions, guidelines, international agreements concluded by the EU, etc. Although "theoretical part" of the legislative alignment did not turn out to be problematic for the Western Balkan countries, they were struggling with implementation related issues - which roots are inevitably leading to the structural problems in functioning of Balkan "democracies" which are lacking a well-functioning and stable public administration,[15] independent and efficient judicial system. Moreover, the conditionality of the negotiating process puts the candidate countries in a position where they have to implement new legal norms created by the EU and are "binded" by them but

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11 Triantaphyllou, D. *et al.*, *The Balkans between Stabilisation and Membership*, in Partners and Neighbours: a CFSP for a Wider Europe, European Union Institute for Security Studies (EUISS), 2003, p. 69–71

12 Sjursen,H.; Smith, E. K., *Justifying EU Foreign Policy, the logics underpinning enlargement*, in: Tonra, B.;, Christiansen, T., (eds.), Rethinking European Union Foreign Policy (Europe in Change), Manchester University Press, Manchester, 2004, p. 134

13 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2019 Communication on EU Enlargement Policy, Brussels, OJ, 29 May 2019, 2019/260/EC

14 Commission Staff Working Document Serbia 2019, Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2019 Communication on EU Enlargement Policy, OJ, 29 May 2019, 2019/260/EC

15 Cardona, F., *Integrating national administrations into the European administrative space*, SIGMA Conference on Public Administration Reform and European Integration, March 2009, p. 26-27 [http://www.sigmaweb.org/publicationsdocuments/42747690.pdf], accessed on 23. February 2020

have no access to instruments and foras reserved for member states. Therefore, the proposal of gradually involving candidate countries in the EU's framework is much needed and would transform the negotiating process into a durable process of integration.

2.1. Time as an actor of the negotiation process

The European integration of Western Balkan states represents a parallel structural process to the one of state-crafting that has been happening since the 1990s. Indeed, Montenegro and Kosovo are the newest democracies in Europe, meanwhile, Bosnia and Herzegovina, Serbia, are countries that are still building up their institutions. The creation of solid institutions takes time and their political stability and democratic potential are directly proportionate to the length of time during which the country has been developing democracy. The European integration represents, in that regard, a fasting track and Serbia and Montenegro are going fast. The region, however, has put on that track other countries as well. The new methodology has to be appreciated in that context. What seems to be the answer is that Macron is advocating for a faster track, with probably a group rather than the *regatta* approach.

The lack of an effective accession methodology has produced the idea and need to tighten eventually the conditions for aspiring member states. As an *ad hoc* procedure, the methodology has been changing according to the need and political situation in the EU itself. The strict conditions for the Western Balkans states, in that context, represent just a culmination of distrust towards new members and need to slow the enlargement. The need for a slower enlargement is also a reflection of what is dominant political thought in the EU: we cannot accept more countries before we change the rules of the game.

The events from 2014, precisely the annexation of Crimea, marked the beginning of a new phase in the international arena, when the relations between the West and Russia plummeted. The EU, already challenged at various geopolitical fronts in its neighbourhood, now had one that took a lot of its political attention away from other matters. The Brexit process added a new and bigger worry. As a result, the accession process, shaped as a bureaucratic procedure that has to be initiated by a political will, suffered when the attention of the EU's and national policy-makers of the member states drew away from it, tacitly marking it as a secondary matter.

The EU is constantly changing, so is its surroundings. However, its goals, the ones that underpin the European project, those remain the same. European unity,

as a foremost economically driven project, declares that it wants the whole European continent in one community. The period of time it takes to accomplish these goals is equally important. The Eastern European ex-communist countries, that are seeing the European integration as a tool for effective state-crafting and implementation of the Western system of values, are proof that time is particularly important. The same goes for the Western Balkan states, where many problems inherited from the dissolution of Yugoslavia are still slowing down the velocity of their European integration. The EU, from the other side, can manage the process and eventually fasten it by means of supporting democratic processes.

Many authors confirm that democracy will be bolstered by the accession to the EU. In fact, in relation to the Eastern European Countries, it is said that:

"Accession will reconfigure political and discursive assets and incentives in ways that help the liberal-democratic and hinder the authoritarian political forces in new Member States. This is perhaps the best thing about the democracy dividend of the EU accession process".[16]

The negotiation process formally has two interlocutors: the candidate country and the European Commission. However, there are many more actors who unofficially influence the candidate country's path towards the accession: social actors within the candidate country, NGOs, but also Member states of the EU with their specific interests. The political momentum, which is expressed in the decision on the opening of new chapters, taken by the European Council - that is by single member states - has a far greater influence on the accession path and can eventually slow it down or bolster it. The continuity of the process is the first element that eventually suffers from political instability. However, it is the continuity that has to be guaranteed. The accession methodology should, therefore, primarily guarantee the stability of the process in time and neutralise negative political influences, which play a major role in the overall enlargement context.

Major part of the negotiations is subject to control and close scrutiny exercised by the Commission. The Commission acts as a "central body for administration and content during the course of negotiations".[17] It is, however, the Commission that should be empowered more in relation to the management of the process, as the European Council is the one that decides on opening of the chapters, taking the

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16 Sadurski, W.; Czarnota, A.; Krygier, M., *Spreading Democracy and the Rule of Law?, The impact of the EU enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders,* Springer, The Netherlands, 2006, p. 49

17 Barnes, I.; Barnes, P., *2010 Enlargement*, in: Cini M.; Perez Solorzano Borragan, N. (eds.), European Union Politics, 3rd edn, Oxford, Oxford University Press, p. 418–434

key element away from the Commission. The fact that the decision is a political one harms the integrity of the accession methodology, and puts the continuity of the process in second place to the political will of (some) member states. Furthermore, as the negotiating process lacks integrity, the enlargement process is open and vulnerable to malign political instrumentalization from third countries.

It seems fair to pose a question of whether the enlargement process should be immune to the historic momentum and therefore avoid being subject to the mercy of geopolicy's mood. The enlargement methodology should be the best guarantor of that immunity and it seems that Macron's deal would not seal it. The enlargement fatigue from one side and the negotiation fatigue from the other are reflections of the same inefficacy that could be fixed strengthening the institutional participation and involvement of candidate countries, the economic aid through access to structural funds and other forms of more substantial connections.

3. RULE OF LAW AND DEMOCRACY VS. LAW OF POWER AND AUTOCRACY

The Rule of Law is the ground basis for the development of Democracy. This is particularly important when it comes to the process of Europeanization of the Western Balkan states. In this particular context, it is critical to note that the accession methodology has to guarantee a stable pace of implementation of the Rule of Law principle. The current situation, where the enlargement policy is being put aside, demonstrates that the actual methodology is not effective. This can come as a result of two specific factors, which the accession methodology should have avoided: the EU's ineffectiveness in policy decision making, directly proportional to the heterogeneity and multipolarity of the geopolitical situation in the world, and the rather young age of the Western Balkan democracies. The slowing down of the process of enlargement, due to political events as mentioned above, delays the application of the Rule of Law principle and makes the process ineffective. An ineffective accession methodology, therefore, produces a risk of rise of authoritarianism on the one hand and geopolitical fails for the EU in its immediate neighbourhood, on the other hand.

Macron's proposal for a new methodology starts by announcing a stronger political involvement of the Member States and a phasal introduction of candidate countries to the EU's institutions, accompanied by the right to apply for grants directly to the EU's structural funds. Where the institutionalisation of candidate countries could have a firm impact on democratic development and a rather stabilisation effect, the political involvement of Member States does not seem promising. Macron wants to put the accession talks out of the technocratic process. By

directing it towards national parliaments and governments, this proposal commits an error. The political involvement could put the same process at the mercy of the political and bureaucratic procedures of single member states. While the first would be beneficial for the Rule of law and democracy, the second aspect would mean itself a constant threat to the continuity of the process.

Meanwhile, the state of play in the Western Balkans countries- "falling in the wide spectrum between consolidated democracies and autocracies"[18] was pointed out by many international actors that are monitoring the democratic trends in the region, among which by the EU, in its Communication on a credible enlargement perspective for the region, realised in 2018. In this strategy some major challenges the respective countries are facing, were brought in a rather straightforward way by stating "[…] the countries show clear elements of state capture, including links with organised crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests. All this feeds a sentiment of impunity and inequality."[19]

Therefore, the political situation and its trends have penetrated into a process that should have been immune to that and have produced a stalemate: the EU is not opening chapters as before to Serbia and Montenegro, and North Macedonia and Albania have been martyred because of the abovementioned negative image the Western Balkans have.

Furthermore, in the academic literature, many prominent authors in this field, namely Keil, Kmezić, Bieber,[20] Wunsch, Zweers provided plenty of arguments on how the rise of the authoritarian tendencies and widespread state capture hinder effective democratic transformation and prevent functioning rule of law in the case of Western Balkans. [21]

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18 Collier, D.; Levitsky, S., *Democracy with adjectives: Conceptual innovation in comparative research*, World Politics, *vol*. 49, no. 3, 1997, p. 430-451

19 European Commission, A credible enlargement perspective for an enhanced EU engagement with the Western Balkans, Strasbourg, 6 February 2018, 2018/65/EC, [https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf], accessed on 08. March 2020

20 Kmezić, M.; Bieber, F., *The crisis of democracy in the Western Balkans: An autonomy of stabilitocracy and the limits of the EU democracy promotion*, Belgrade: Balkans in Europe Policy Advisory Group, 2017, [biepag.eu/publications/the-crisis-of-democracy-in-the-western-balkans-authoritarianism-and-eu-stabilitocracy/], accessed on 08. March 2020

21 *Ibid.*

Although there is no great master plan behind the EU integration, [22] the phenomenon of the rise of new semi-authoritarian regimes also creates suspicion over the level of transformative power of EU integration processes. Marko Kmezić, states that "three decades since the beginning of democratization processes, the Western Balkan countries have built a democratic facade by holding elections",[23] further implying that something went wrong in the whole process.[24]

The EU and its Member States should not disregard the lessons learned from the past decade, which transcend deeper messages, among which that a continuation of the *status quo* will not lead to more democratisation, it will not stop corruption, or create more pro-European governments in the region. To the opposite, adhering to the *status quo* - the so-called "pax-Junckeriana" [25], could only lead to further consolidation of competitive autocratic regimes in the Western Balkans and to a decline in popular support towards Europeanization in its broadest sense. Overall, the paradox of moving closer to the EU but further away from democracy and the rule of law, and its negative effects should be seriously taken by both sides, the EU and respective states from the region, in their calculation of the pragmatic goals and priorities in the upcoming years, irrespective of how far they are looking at while acting.

It seems fair to state, however, that a political involvement of Member States puts the accession talks into internal political debate of those States rather than to the geopolitical arena, as the candidate countries would like. The political momentum of the negotiation process there has the potential of working against the interests of the candidate countries. Considering that the length of time for a stronger democratic institution is considerably longer than what is needed for a fast integration into the EU, the enlargement methodology has to work to better implement the Rule of Law principle. Therefore, it leads us to conclude that some elements of Macron's proposal would work for a swift enlargement and therefore a boost to democratic development of the candidate states.

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22 Borzel, T. A., *Building Member States: How the EU promotes political change in its New Members, Accession Candidates, and Eastern Neighbours*, Geopolitics, History, and International Relations, *vol.* 8, no. 1, 2016, p. 76–112, [www.jstor.org/stable/26806075], accessed on 19. March 2020

23 Kmezić, M., *Rule of law and democracy in the Western Balkans: addressing the gap between policies and practice,* Southeast European and Black Sea studies, 2020, p. 1

24 Zweers, W., *Between Effective Engagement and Damaging Politicisation: Prospects for a Credible EU Enlargement Policy to the Western Balkans*, Clingendael Institute, 2019

25 Srđan Cvijić is also member of the Balkans in Europe Policy Advisory Group (BiEPAG), this speech was delivered during the conference "The Western Balkans in the European Union: Enlargement to what, accession to what?" that took part on 05th April 2017

4. THE FRENCH PROPOSAL`S (GEO)POLITICAL IMPLICATIONS

The EU faces rift over enlargement policy after French "non" during the October 2019 summit. Due to that reason the EU polity is currently going through an intense period of contestation and challenge, and in order to distance itself from the French "non", the EU Parliament adopted a resolution on 24th October 2019, by which it expressed regret and deep disappointment over the EU's failure to agree on opening negotiation talks with North Macedonia and Albania.[26] This case demonstrates that the enlargement has shifted, in its political dimension, from the geopolitical arena to the domestic one, as indicated above. The Prespa agreement and reforms that Albania has done should candidate them at least for the opening.

The impasse triggered by the so-called French veto, besides having a negative impact on the credibility of the EU accession policy, it could also reflect negatively on the overall EU Common Foreign and Security Policy, as well as on the EU ability to speak with one voice and act efficiently in its nearer neighbourhood, as well as to become "an active player, and architect of tomorrow's world".[27] In other words, inward-oriented EU policies and further isolationism could substantially damage the EU's position, and hamper its ability to shape its neighbourhood, while leaving the door open to aspirations of some other global political players.

The protest that came from the EU itself indicated that the enlargement methodology was not within its range of competence, but that individual member States (politicians?) are calling the shots. Different aspects of the Non paper[28] have been discussed recently, reflecting deeply divided opinions on Macron's proposal within EU circles and wider.

On the one hand, the Non paper is described as an attempt by Paris to justify its prior position, that according to some authors has delivered "a heavy if not mortal blow to the EU's credibility in its nearest neighbourhood".[29] This view suggests that the mentioned French position has increased doubt among Western Balkan countries on their future EU prospects, and, in a way, pulled the drag on EU en-

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26 European Parliament resolution of 24 October 2019 on opening accession negotiations with North Macedonia and Albania, OJ, 24 October 2019, 2019/2883 RSP, [https://www.europarl.europa.eu/doceo/document/TA-9-2019-0050_EN.html], accessed on 19. March 2020

27 Annual State of the EU address by President Juncker at the European Parliament, State of the Union 2018, The hour of the European Sovereignty, Authorised version of the State of the Union Address 2018, [https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf], accessed on 19. March 2020

28 *Ibid.*

29 Fouéré, E., *Macron`s non to EU enlargement*, 22 October 2019, [https://www.ceps.eu/macrons-non-to-eu-enlargement/], accessed on 10. January 2020

largement policy.[30] In addition, it is stated that it seriously undermined some of the core principles and values, upon which the EU has been created, such as the principle of legal certainty - that in a way predetermines a moment when a country "deserves a certain dose of appreciation" of its efforts invested in the process of the EU accession negotiations. All of this as proof that the current accession methodology is not an autonomous process, but rather a technocratic procedure that is in hands of single member states, given the right to veto.

Some more optimistic views suggest that outlined changes in the negotiation procedure with the Western Balkan countries could actually allow aspiring countries to efficiently adapt to the EU rules before they enter the bloc's institutions. In the same tone, these interpretations support the thesis that Macron's Non paper reflects "unequivocal support" for the EU membership drives of the countries from the Western Balkans under the condition they are able to overcome some major challenges facing nowadays that require "the profound political, economic and social transformations [...] that continue to be too slow and the concrete benefits for citizens in candidate countries remain insufficient".[31]

5. COMMISSION`S NEW METHODOLOGY, BACKGROUND

In February 2020, the European Commission published a new enlargement strategy for the Western Balkans. The main purpose of the "new enlargement methodology" is to help the EU to overcome the impasse triggered by the so-called French veto. This document promises "a new reinforced negotiation process," and its delivery to be supported by the EU in different aspects, while also putting a stronger emphasis on the involvement of the sole Candidate states` structures in the overall process (making them acquire feeling that they have ownership over the process). Enlargement Commissioner Olivér Várhelyi, declared that the revised negotiation rules "are supposed to inject credibility, predictability, dynamism and a political steer into the increasingly moribund process. This is called a geostrategic investment".[32] Consequently, many Western Balkan officials welcomed the plan by expressing the hope that this revitalized approach will result in a win-win situation for all actors involved.

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30 Herszenhorn, M. D.; Momtaz, R., *France outlines proposal to overhaul EU accession process*, 18 November 2019, [https://www.politico.eu/article/france-outlines-proposal-to-overhaul-eu-accession-process/], accessed on 20. January 2020

31 Non-Paper, Reforming the European Union accession process, November 2019, [https://www.politico.eu/wp-content/uploads/2019/11/Enlargement-nonpaper.pdf], accessed on 10. January 2020

32 Makszimov, V., *Commission tries to breathe new life into EU enlargement,* 6 February 2020, [https://www.euractiv.com/section/all/news/commission-tries-to-breathe-new-life-into-eu-enlargement/], accessed on 03. March 2020

The pledge of greater importance being afforded to greater scrutiny over the reform processes is regarded to be good news for all actors wishing progress in the region that witnessed many challenges, corruption scandals, etc. in the past decade. In light of recent events "augmenting the trust"[33] in the sole EU integration process, which is capable of inducing genuine reforms within the countries involved, has become extremely important. Nevertheless, it remains to be seen what would be the practical results of such a strategy, and whether the European Union will devote greater attention to the area of the so-called "fundamentals", and whether all this together will provide an adequate impetus for the Western Balkans in the period ahead. Solutions that could lead to this desirable outcome are a more transparent, more credible approach accompanied by the merit-based awards, founded on the individual countries` accession efforts, which all together could make a difference.

6. THE EU METHODOLOGY, "STICK AND CARROT" APPROACH

The new EU Commission negotiations methodology provoked many different sentiments since its public revelation. These sentiments range from excitement about the fact that the EU finally put the topics related to Western Balkans accession on the list of its priorities, to some sceptic notions that the new methodology maybe overhauls the French veto, but that it does not convincingly address the real "elephant in the room". In other words, the new methodology highlights the geopolitical importance of the Western Balkans for the EU declaring that "[...] merit-based prospect of full EU membership for the Western Balkans is in the Union's very own political, security and economic interest. In times of increasing global challenges and divisions, it remains more than ever a geostrategic investment in a stable, strong and united Europe". On the other hand, it remains unclear to what extent this new methodology would be efficient, in terms of not only dealing with resentment caused by French "non", but also in light of the basic purpose of the strategy that should be embodied more "merit-based", "transparent, credible", and in general better approach towards the Western Balkans.

This new strategy, that the EU Commission advocates for, is following very the same logic of the previous enlargements containing the elements of stick and carrot policy. The major difference in the overall logic applied, seems to be the degree of severity of the stick, and the rewarding level of the carrot.

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[33] Verhaegen, S. *et al.,* T*he Effect of Political Trust and Trust in European Citizens on European Identity*, European Political Science Review, *vol.* 9, no. 2, 2017, p. 161–181., [doi:10.1017/S1755773915000314], accessed on 25. March 2020

Reflecting on the "stick side" of the strategy, the so-called reversibility of the negotiation process is not an innovative concept mentioned in the new Strategy. Calling upon the previous terminology used by the European Commission, it is a new term for the "clause of balance", which main goal was ensuring balance in the progress of negotiations across Chapters. According to this rule, if progress under the Chapters "judiciary and fundamental rights" and "justice, freedom and security", was significantly lagging behind, the Commission was allowed to recommend various measures until the imbalance is adequately addressed. These measures include withholding opening or closing negotiation chapters, reopening provisionally closed chapters, cutting down the EU funding, suspension or withdrawing benefits of closer integration, etc. The Council is a body entitled to decide upon introducing or lifting such measures proposed by the Commission, acting by a qualified majority voting rule. The logic present in the New methodology is pretty much the same.[34]

Nevertheless, *per se,* it does not mean much, but something that could really make a difference in this regard would be a diligent approach towards fulfilling the respective criteria in these critical areas, shown by all actors involved in the accession negotiation processes. Therefore, the practice of introducing reforms of declaratory nature, without proper implementation of rules, that has recently allowed countries to compete for the status of the "regional leader" in EU integrations, should be dismissed once for all. This sort of EU integration race that has been created so far, is not something that could be described as a healthy competition leading to growth or prosperity, as it has not been based on genuine respect of values and ideas upon which the sole process is based. Therefore, the narratives such as the "leader in the region" does not mean much in the current state of play, without emphasis put on substantial reforms conducted for the benefit of all countries involved and wellbeing of their citizens.

This endeavour will require stronger mechanisms for the enforcement of the rules and standards belonging to the EU *acquis*. Dabrowski, and other authors suggest that among these mechanisms should be "a regular Commission's assessment of member states' records in the area of fundamental rights and the rule of law, more active use of infringement procedure in case of failure to implement EU law, strengthening competences of the Court of Justice of the EU".[35]

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[34] Communication from the Commission to the EU Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Enhancing the accession process – A credible EU perspective for the Western Balkans, OJ, 5 February 2020, 2020/57/EC, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology_en.pdf], accessed on 28. March 2020

[35] Dabrowski, M., *Can the EU overcome its enlargement impasse?*, Bruegel, [https://www.bruegel.org/2020/02/can-the-european-union-overcome-its-enlargement-impasse/], accessed on 25. March

Moreover, a stronger political steer is envisaged to allow high representatives of the (potential) candidate states to be involved more systematically in monitoring and reviewing the process. This step could be also interpreted as beneficial in a way it would allow incumbent elites as well as the rest of society in the region to acquire a feeling they have greater ownership over the process.

The "carrot" aspect of the strategy implies prospects of the clearer and tangible incentives of the imminent interest to citizens such as increased funding and investments "through a performance-based and reform-oriented Instrument for Pre-accession support and closer cooperation with IFIs to leverage support", as well as "accelerated integration and "phasing-in" to individual EU policies, the EU market and EU programmes", as well as some other things such as greater clarity on what the EU expects from the (potential) candidate countries.[36]

The so-called "phasing in" was accompanied with a pretty vague explanation, while it also did not provide an answer over the concerns of whether it will be more comprehensive than integration provisions of Stabilization and Association Agreements. Furthermore, many concerns were raised over the new Multinational Financial Framework and its ability to allocate more funds for the pre-accession aid to the EU candidates.

While negative incentives in the process of the EU integrations were seem to be winning the battle recently, the EU should bear in mind that the critical issue in the overall process is keeping the Enlargement process affordable to the (potential) candidate states, which means that in the upcoming period the EU needs to demonstrate that it is able to deliver on its historical promise given to the Western Balkans at the Thessaloniki summit.

7. PROS AND CONS TO THE EU COMMISION`S METHODOLOGY

The opinions on the New EU Commission Strategy are pretty diverse.

In light of positive aspects of the new methodology, it is particularly important to mention those related to the stronger political steer over the process by both the EU as well as by the incumbent elites from the aspiring countries. First, by en-

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36 Communication from the Commission to the EU Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Enhancing the accession process – A credible EU perspective for the Western Balkans, OJ, 5 February 2020, 2020/57/EC, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology_en.pdf], accessed on 28. March 2020

couraging all actors from the EU circles to speak with one voice, the Commission seeks to push the EU as a whole to reaffirm loyalty and its genuine commitment to enlargement. Furthermore, enhancing loyalty between the EU Member States is of the crucial value as it is "at a comparatively high level of abstraction aimed to protect the Union's ability to act effectively on the international plane".[37] Second, the Commission undoubtedly wants to give greater public legitimacy to the cause, as the new proposal envisages innovative means to instigate and check the devotion of the region's authorities to the EU membership goal, among which are informed national-wide debates.

The new Commission proposal also embraces the so-called grouping of negotiations chapters into six thematic chapters. The Commission names few reasons making this new approach plausible. Firstly, it states that it will allow "a stronger focus on core sectors in the political dialogue". Secondly, it will help identify the most important and urgent reforms per sector. On the other hand, many concerns have been raised so far, over the Commission belief - that this approach could even speed up the overall negotiation process, as it could happen only if some secondary and less important issues would not hold the entire negotiation cluster. Currently, there are no guarantees for that, which makes this Commission's "belief" fragile, and potentially brings the rest into an uncertain position.

Looking from the perspective of the long-term benefits that this new methodology is offering to the countries concerned, it can be said that these benefits directly stem from the more intrusive scrutiny over the reform in the areas of rule of law, fight against organized crime and tackling corruption[38] in the Western Balkan countries. In other words, these reforms should be regarded as essential, due to the general atmosphere that improvements in these critical areas are precondition to any sort of meaningful progress of the countries belonging to the region - leading to the well-being of its citizens.

On the other hand, some authors who are criticising the methodology such as Bodo Weber, argue that the Commission's proposal does not address the fundamental problem of the EU enlargement policy, which is not the methodology, but it is related to the deeper dilemma of "what kind of the EU we actually want"? By saying this, he is actually opening a Pandora box of proposals for reforming the EU that the EU officials were not able to agree upon by date.

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37 Eckes, C., *Disciplining Member States: EU Loyalty in External Relations*, Cambridge Yearbook of European Legal Studies, 2020, p. 1–21

38 Mungiu-Pippidi, A. *et al., "A House of Cards?: Building the Rule of Law in the Balkans"* in *The Western Balkans and the EU: 'The Hour of Europe'*, in: Rupnik, J. (ed.), European Union Institute for Security Studies (EUISS), 2011, p. 155

Reforms related to the EU negotiating strategy, and to the general EU approach towards the Western Balkans, are indispensable for the benefit of the region, as they could bring end to the practices such as perpetuation of informal power structures, state capture and patronage that continue to thwart the region's democratic consolidation. Above and beyond, regional challenges are coupled with the necessity for internal consolidation of the EU - that should not happen at the expense of the countries that are waiting in line to join the EU. The EU internal consolidation could happen in parallel with continuing the negotiation processes with Western Balkan countries, therefore not endangering important aspects of the EU project, such as the capacity and credibility of its foreign policy.

Nevertheless, it remains to be seen whether the New strategy addresses convincingly the elephant in the room embedded in "deepening *vs.* enlargement dilemma", as well as the so-called sense of betrayal felt by Western Balkan citizens and governments, and a certain "loss of faith" in the European project in the wake of France's "veto" of accession talks for two Western Balkan states, etc. When entering into conclusions we need to bear in mind that idealistic visions of a *sui generis* community such as the EU, are beneficial to the extent they serve to remind us about the desired direction in which the EU should move, but on the other hand, reality we are facing is a slightly different and most of the time challenging. It often tests the level of solidarity and democracy that the EU itself and its members project between themselves and beyond. This reality check often calls into question idealistic visions, which is not a reason to abandon the idea of the EU. Conversely, the lessons learned should be a way to advance a community such as the EU, and this is precisely the goal to which all EU members, as well as the (potential) candidates, wishing peace and progress of the European continent, should strive to contribute.

8. CONCLUSION

In the previous decades the EU has been facing many challenges and many of the stone ideas constituting the essence of this peace project have been placed on some historical tests. However, the challenges on the road have not managed to discredit its direction of travel, and European integration project has proven to be exceptionally resilient.

This resilience also proves that the accession methodology is much more than a bureaucratic process, that the EU's core principles are much more than judicial norms. They respond to the most basic question of all: what do we stand for? The Western Balkan states came across a deep transformation, from a communist utopia to a market-based economy reality. The implementation of norms and

principles is the substantial address of the accession process, but it has to deal with the fact that the build-up of institutions, especially strong ones, takes time. Democracy needs time and stability to grow.

The idea of a new methodology comes from a genuine need and desire to change what has demonstrated not to be much effective: the Enlargement policy, as a sharp Foreign policy tool, has been blunted by geopolitics, and lack of coherence. The processes happening within the region or within the specific candidate state, are sometimes also coupled with anxieties related to the EU's own internal economic, political and institutional crises. This allows for scenarios, such as the recent one where Albania and North Macedonia were blocked on their path towards opening the negotiation process, that seriously calls into question the assumption of the "merit based" nature of the EU negotiation process.

As it has been indicated throughout the paper, the actual direction in which the European integration is going to move will depend on many factors. Here we should not neglect the influence of the inward-oriented policies, as well as presence of a broader (geo)political bargaining strategies among EU member states - with different tendencies, goals, perceptions of their own *raison d'etat*. It's precisely the enlargement methodology that should be the best guarantor of the immunity of the process from the inward-oriented policies or (geo)political calculations. The enlargement fatigue from one side, and the negotiation fatigue from the other, are a reflection of the same inefficacy that could be fixed by improving credibility of the overall EU approach towards the Western Balkans followed by some concrete steps such as strengthening the institutional participation and by providing them with support through access to structural funds, etc.

In light of recent events, a credible enlargement conditionality, based on the principles such as transparency, certainty, graduality, individuality, being at the heart of the EU Accession process, seems to be needed more than ever. Moreover, looking from the lenses of the Western Balkans the new accession methodology is expected to prove that the negotiation process is trustable and a strong impenetrable path, immune to (geo)political turmoils or political moods of member states. In order to achieve these goals, it is clear that the actual structure needs changes. With Non paper Macron is pointing at the right direction. However, it is only a basis, a solid ground for more ambitious ideas. One of these would be shifting decision-making power from the national capitals to the supranational level/EU institutions when it comes to decisive moments, in order to prevent aggressive political involvement of certain member states, leading to the scenario we have recently witnessed.

The Enlargement itself, seen as a change within the EU's ranks, has already demonstrated capacity to influence the EU's foreign policy, as some authors say. It gave greater salience to institutional arrangements in the area of human rights, development policies and the broadening nature of security policies".[39] Therefore, the enlargement is a tool for the enhancement of EU's policies as much as it is a tool for the transformation of candidate countries.

Another scenario, implying further distancing or leaving behind the Western Balkans that geographically belong to the EU, and which historical as well as cultural heritage is deeply interplexed with the heritage of the European Union, would equal to the failure of the European project meant to promote peace, stability and prosperity. It could also open doors to some other major forces having aspirations towards the Western Balkans.

Therefore, in order to secure its sphere of influence, the EU should collectively strengthen its efforts allowing its closest neighbours to join the Union both economically and politically. A stable and economically growing Western Balkans anchored within a stronger European Union is a win-win scenario for all actors involved.

On their part towards joining the ever-closer union, the Western Balkan countries are still left with some of the crucial tasks to do. The new methodology should, therefore, once for all dismantle "tick-the-boxes", "pay lip service" or similar strategies, as they are creating illusions potentially disruptive for the pervasive and transformative process such as the EU accession negotiation process. This novel approach should finally breathe the fresh air into the overall process. While waiting to see how the new system will work in practice, both the EU and the Western Balkans should be prepared to work hard while conducting the mission that will shape the lives of many generations living on the European continent in years to come. This isn't the moment to slow down, but rather to speed up, and this idea will transform itself into concrete political moves, such as the one Macron has made.

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Topic 3

EU criminal law and procedure

UDK 343.1(497.5)
Original scientific paper

CONSENSUAL JUSTICE IN CROATIAN CRIMINAL PROCEDURAL LAW: THE NEED FOR A SYSTEMATIC APPROACH*

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ABSTRACT

Croatian criminal procedure has undergone a number of reforms over the last twenty years, which have primarily been conditioned by harmonisation with European legal standards, but also by an effort to make criminal proceedings as efficient and economical as possible. Different forms of consensual procedures, even if they deviate from some fundamental principles of criminal procedure, may be appropriate tools for achieving faster and more efficient criminal proceedings, provided they are adequately regulated and applied. They also contribute to the humanisation of criminal justice, especially in the prosecution of less serious criminal offences. The paper analyses legislative developments and domestic research that have been conducted so far, which show that the Croatian legislator, following tendencies in comparative law, has gradually expanded the scope of the application of different consensual forms without adopting, at any time, a criminal policy platform for their introduction into Croatian criminal procedure. In addition, the legislator has not always been consistent when addressing various aspects of particular forms of consensual procedures, such as the gravity of criminal offences in relation to which a particular form of agreement is possible, the role of the court, and especially the power of the court to review the agreement of the parties, victims' rights and the procedural role of victims, as well as procedural and defence rights. A particular problem is that there are no clear distinctions, either at the legislative level or in practice, between the specific objectives of certain forms of agreements of the parties. Therefore, this research focuses on the problem of imprecision and inconsistency in the regulation of the fundamental aspects of various forms of consensual procedures, which harms the transparency of the criminal justice system. Finally, besides detecting and critically analysing the above-mentioned deficiencies, the paper offers possible guidelines on how to adopt a systematic approach in regulating different forms of consensual procedures at the normative level and in practice, and thereby provide more consistent and transparent use of consensual justice in Croatian criminal procedure.

Keywords: *consensual justice, negotiated justice, consensual procedure, criminal procedure*

* This work has been fully supported by the Croatian Science Foundation under the project "Systematic approach to models of negotiated justice in Croatian criminal procedure" (IP-2019-04-1275)

1. INTRODUCTION

The criminal justice systems of many continental European countries, including the Croatian one, have been minutely built on fundamental principles such as the principle of legality (or mandatory prosecution), the principle of *ex officio* prosecution, and the inquisitorial principle which implies the establishment of substantive truth. These principles are the mainstay of the inquisitorial model of criminal proceedings, while the cornerstone of modern national procedures is the principle of a fair trial,[1] proclaimed in international and European human rights documents and elaborated during the last few decades in the jurisprudence of the European Court of Human Rights. In complying with all the procedural principles, contemporary criminal procedure is becoming increasingly demanding, complicated and expensive, while at the same time domestic legal systems search for more economical, efficient and expedient criminal justice. Hence, modern legal systems face the challenge of balancing between the two tendencies by embracing *consensual*, *negotiated* or *"bargained" justice*.[2]

Introducing consensual justice into national legal systems has raised countless academic debates, for the very concept "seems to collide with the very structure of criminal procedure".[3] Transparent, modern criminal procedure, founded on the concept of a fair trial, still entails holding a fair, public hearing as its central stage, while different consensual forms generally exclude it, just as each one of them, to certain extent, deviates from other fundamental procedural principles. As Damaška pointed out, "avoiding public hearings reduces the transparency of the judiciary and makes it more difficult to control judicial activity".[4] In this sense, introducing consensual justice implies not only technical change in the process, but also a change of how the criminal justice system is perceived by the defendants, victims and the public in general.[5] At the same time, the ideas of restorative justice, resocialisation and humanisation of criminal law change the paradigm that criminal proceedings should serve exclusively "as an instrument of the functional-

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1 Krapac, D., *Kazneno procesno pravo, Prva knjiga: Institucije*, Narodne novine, Zagreb, 2015, p. 150–156

2 All these terms are used in literature and they refer to various models of consensual procedures, based on the consent of both parties to criminal proceedings. See Ivičević Karas, E.; Puljić, D., *Presuda na temelju sporazuma stranaka u hrvatskom kaznenom procesnom pravu i praksi Županijskog suda u Zagrebu*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 20, no. 2, 2013, p. 824

3 Jung, H., *Plea Bargaining and its Repercussions on the Theory of Criminal Procedure*, European Journal of Crime, Criminal Law and Criminal Justice, *vol.* 5, no. 2, 1997, p. 116

4 Damaška, M., *Napomene o sporazumima u kaznenom postupku*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 11, no. 1, 2004, p. 18

5 With regard to plea-bargaining, see Alkon, C., *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems*, Transnational Law & Contemporary Problems, *vol.* 19, 2010, pp. 356–357

ity of public punishment of offenders",[6] especially with regard to less serious criminal offences. Therefore, introducing and expanding the scope of application of different consensual forms in any legal system requires taking a careful, balanced and systematic approach to the issue.

Croatian criminal procedure has undergone a number of reforms over the last twenty years, which have primarily been conditioned by harmonisation with European legal standards, but also by the effort to make criminal proceedings as efficient and economical as possible. The trend of speeding up criminal procedure through the introduction of various forms of consensual procedures has been present in the comparative law of European countries of the continental legal tradition for the past few decades,[7] and the Croatian legislator started to follow the trend in the late 1990s. Most consensual procedures adopted by the Croatian legislator have been modelled on consensual forms developed in the systems of the Anglo-American legal tradition, or, more precisely, on variants of these forms adopted by European continental states. Since then, the possibility to use different consensual procedural forms in Croatian law has been gradually but significantly expanding.[8] One of the main goals of adopting the new Criminal Procedure Act in 2008 was speeding up the criminal procedure, *inter alia*, through the wider possibilities of using different consensual instruments.[9]

Meanwhile, several studies have been conducted on various forms of consensual procedures in Croatian law. Yet there has been no comprehensive and thorough study based on the systematic approach to the issue of consensual justice, and no satisfactory study that offers an analysis of the effects of expanding different consensual forms on the domestic criminal justice system as a whole. In the United States, whose consensual forms serve as role models to European legal systems, up to as many as ninety-five percent of all convictions are based on guilty pleas,[10,11]

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6 Krapac, D., *Presuda na zahtjev stranaka u stadiju istrage u hrvatskom kaznenom postupku*, in: Pavišić, B. (ed.), Decennium Moztanicense Rijeka, 2008, p. 138

7 Jimeno-Bulnes, M., *American Criminal Procedure in a European Context*, Cardozo Journal of International & Comparative Law, *vol*. 21, 2013, p. 452-453

8 See Ivičević Karas, E., *Trial Waiver Systems in Croatia, Towards a Rights-based Approach to Trial Waiver Systems*, LEAP, 2019, p. 12-13, accessible at: [https://www.fairtrials.org/sites/default/files/publication_pdf/20190513_Trial_Waivers_Croatia_Final.pdf], accessed 20. April 2020

9 Pavišić, B., *Novi hrvatski Zakon o kaznenom postupku*, Hrvatski ljetopis za kazneno pravo i praksu, *vol*. 15, no. 2, 2008, p. 517

10 Vitiello, M., *Bargained-for-Justice: Lessons from the Italians*, The University of the Pacific Law Review, *vol*. 48, 2017, p. 255

11 A conviction based on a guilty plea does not necessarily imply formal plea-bargaining. Garoupa, N.; Stephen, F. H., *Why Plea-Bargaining Fails to Achieve Results in So Many Criminal Justice Systems: A New Framework for Assessment*, Maastricht J. Eur. & Comp. L., *vol*. 15, no. 3, 2008, p. 324

while at least ninety percent of all criminal cases are resolved through plea-bargaining.[12] In Croatia, these percentages are still significantly lower.[13] The question now raised is whether the Croatian legal system should attempt to reach similar percentages to the American ones, by continuously expanding the possibilities of resolving criminal cases through different forms of consensual justice, or should the conduct of criminal proceedings, including public trials, still be the principal response to alleged criminal offences? The answer to this complex question is primarily a matter of criminal policy, which should provide a corresponding platform prior to any legislative initiative or reform in the area of consensual justice. This paper has no pretensions to try to offer such a platform; instead, in reference to the current state, it attempts to demonstrate whether the existing consensual forms in Croatian criminal procedure are coherent and clear and whether they provide transparency in proceedings, having in mind that transparency in proceedings and decision-making is still one of the basic conditions for achieving the purpose of modern criminal procedure.[14] This will not be done through a detailed study of each form of consensual procedure existing in Croatian law, but, instead, through a study of key issues that may be detected as problematic from an analysis of the normative framework and from the results of different studies conducted so far. These issues include the following elements: specific objectives of each form of consensual procedure, the gravity of criminal offences in relation to which a particular form of agreement is possible, the role of the court and especially the power of the court to review the agreement of the parties, victims' rights and the procedural role of victims, and, finally, procedural and defence rights. This paper argues that regulating (at a normative level and in practice) negotiated justice requires a systematic approach, which implies that all forms of consensual procedures should be mutually coherent in respect of the relevant elements, as well as transparent in application.

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12 Alkon, *op. cit.* note 5, p. 393

13 The latest statistics show that in 2019, 4.03% of all judgments of conviction were based on the agreement of the parties. Izvješće Državnog odvjetništva Republike Hrvatske o radu državnih odvjetništava u 2019. godini, Državno odvjetništvo Republike Hrvatske, Zagreb, travanj 2020., p. 43, available at: [http://www.dorh.hr/dorh05052020], accessed 03. May 2020

14 As Krapac defines it, the purpose of modern criminal proceedings is to "ensure the application of state instruments of public punishment through standardised rules for deciding on the existence of a criminal offence and the guilt of the perpetrator". Krapac, *op. cit.* note 1, p. 22

2. INTRODUCING CONSENSUAL JUSTICE IN CROATIAN CRIMINAL PROCEDURE: A BRIEF OVERVIEW OF DIFFERENT CONSENSUAL FORMS

The history of consensual justice in Croatian criminal procedure dates back to the relatively recent year of 1998, when the Criminal Procedure Act enacted in 1997 (CPA/97)[15] came into force. The CPA/97 was the first criminal procedure codification of the Republic of Croatia after its independence, where one of the legislative goals was to "unburden the criminal justice system and introduce such procedural forms that will, on the basis of strengthening party autonomy, open up opportunities for the faster and more efficient resolution of criminal cases".[16] The CPA/97, the original text and the legislative amendment of 2002, introduced five types of consensual procedures: the penal order, conditional deferral or withdrawal of criminal prosecution (so-called "diversion"), judgment at the request of the parties in the investigation, judgment in the case of a guilty plea at the trial (for less serious criminal offences) and a particular consensual form that could be considered as a precursor to the crown witness (see *infra* 2.3). The scope of application of these consensual forms gradually expanded, either through the amendments of the CPA/97, or in special legislation, or in the new Criminal Procedure Act of 2008[17] (hereinafter: CPA) which introduced another consensual form – witness immunity. Besides legislation, consensual forms are regulated in numerous instructions of the State Attorney General, which refer to different forms of consensual procedures,[18] and particularly in the Instructions of the State Attorney General on proceedings during bargaining with the suspect/defendant on terms of pleading guilty and the punishment[19] (hereinafter: Instructions). These Instructions are an internal document binding on all state attorneys and their deputies, and they regulate negotiating and agreeing with the defendant on a guilty plea and on sanctions in the case of a judgment based on the agreement of the parties, but also in the case of consensual forms applied for less serious criminal offences.

Some consensual procedures, regulated in the legislation in force, are based on the principle of legality (or mandatory prosecution) which still strongly dominates

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15 Zakon o kaznenom postupku, Official Gazette 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 115/06

16 Krapac, D., *Zakon o kaznenom postupku i drugi izvori hrvatskog kaznenog postupovnog prava*, Narodne novine, Zagreb, 2008, p. 10

17 Zakon o kaznenom postupku, Official Gazette 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19

18 See in Sirotić, V., *Uvjetna odgoda kaznenog progona punoljetnog počinitelja kaznenog djela*, Hrvatski ljetopis za kazneno pravo i praksu, *vol*. 19, no. 1, 2012, p. 166

19 Naputak o pregovaranju i sporazumijevanju s okrivljenikom o priznanju krivnje i sankciji, O-2/09, od 17. veljače 2010., accessible at: [http://www.dorh.hr/PresudaPoSporazumu], accessed 27. April 2020

in Croatian criminal procedural law and these consensual forms actually imply the conviction of the defendant who has expressly or tacitly agreed with the state attorney's charge and the proposed sanction. Other consensual forms are based on the principle of discretionary prosecution which allows the state attorney to give priority to some specific objectives over the conduct of criminal proceedings and reaching a conviction, but strictly under the conditions explicitly prescribed by law.[20] Furthermore, some consensual forms operate on the principle of an offer by the state attorney, which the defendant may accept or reject, while other forms include negotiation or bargaining between the parties.[21] Finally, some consensual forms are matched when it comes to the category of the criminal offences to which they may apply (i.e. only to less serious criminal offences, or only to serious criminal offences), or the specific purposes of negotiated justice (humanisation of criminal proceedings, economy, the acceleration of criminal proceedings, and obtaining evidence of another criminal offence and/or of another perpetrator), which will be analysed in detail *infra*.

2.1. Consensual procedures for less serious criminal offences: judgment in the case of a guilty plea at the trial, the penal order and "diversion"

The CPA/97 initially introduced two types of consensual forms into Croatian criminal procedure – the penal order and the conditional deferral or withdrawal of criminal prosecution ("diversion").[22,23] Both instruments were initially intended to be applied in proceedings for less serious criminal offences, punishable by a fine or imprisonment of up to three years. The penal order implied sentencing, without holding a trial, to less grave punishments excluding the unconditional prison sentence (Article 446 CPA/97). On the other hand, the conditional deferral or withdrawal of criminal prosecution[24] was based on the state attorney's decision not to prosecute, in the case of a lower degree of guilt and if the scale of the harmful consequences actually did not require criminal prosecution in the public inter-

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20 See in more detail Ivičević Karas, *op. cit.* note 8, p. 6-7

21 See Damaška, *op. cit.* note 4, p. 4

22 Diversion designates an "out of court settlement" as an alternative to formal criminal proceedings. Puharić, B.; Radić, I., *Primjena načela svrhovitosti u postupanju prema maloljetnicima*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 22, no. 2, 2015, p. 637

23 The term "diversion" has not yet become quite common in the Croatian legal lexicon, but it is used in the literature (see *ibid.*, and Sirotić, *op. cit.* note 18, p. 164-165)

24 Conditional deferral and conditional withdrawal of criminal prosecution are basically the same instrument –conditional deferral is applied before the initiation of criminal proceedings while conditional withdrawal is applied after the commencement of criminal proceedings. See Glasnović Gjoni, V.; Sirotić, V., *Uvjetni odustanak od kaznenog progona i praksa Općinskog suda u Puli – Pola*, Pravni vjesnik, *vol.* 32, no. 3-4, 2016, p. 159

est. In return, the defendant had to assume and fulfil certain obligations (Article 175 CPA/97), usually qualified as "informal sanctions".[25] This meant that the state attorney was actually granted the right to sanction "criminal wrongdoing" at the earliest stages of the procedure and out of court.[26] The instrument was first developed in juvenile criminal law[27] and was then transposed to regular criminal procedure with the intention of speeding up the pre-trial stage and enabling state attorneys to focus on more serious criminal offences.[28]

In the legislative amendment to the CPA/97 in 2002, the scope of application of the penal order was extended to criminal offences punishable by a fine or imprisonment of up to five years, and the same extension was provided for the conditional deferral or withdrawal of criminal prosecution in the new CPA of 2008. In addition, the new CPA extended the possibility to apply this instrument by omitting the requirements of a lower degree of guilt, or a smaller scale of harmful consequences of the criminal offence. Imprisonment of up to five years is still an upper limit for the application of both consensual forms, and their fundamental characteristics remained as described above.

Besides conditional deferral or the withdrawal of criminal prosecution and the penal order, the CPA/97 regulated a specific form of tacit agreement, introduced with the legislative amendment of 2002, applicable for criminal offences punishable by a fine or imprisonment of up to five years. In the indictment, the state attorney would propose a certain type and measure of punishment to the court, and if the accused pleaded guilty and agreed with the proposal, the court could not impose another type or greater measure of punishment than the proposed one (Article 442 (4,5) CPA/97). The same consensual instrument is regulated in the new CPA of 2008 (Article 417.a(6,7) CPA).

According to the legislation in force, all three described consensual forms refer to the same group of offences. While the penal order and judgment in the case of a

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25 These obligations (or "informal sanctions") included the obligation to repair or compensate the damage caused by a criminal offence, the obligation to pay a certain amount in favour of a public institution, for humanitarian or charitable purposes, or to a fund for compensation to victims of criminal offences, to pay alimony due, to carry out community service work while at liberty, to undergo treatment for particular addiction or psychosocial therapy in order to eliminate violent behaviour with the consent of the suspect to leave the family community during the therapy. Compare with the regulation in force in Ivičević Karas, *op. cit.* note 8, p. 6

26 Krapac, *op. cit.* note 16, p. 38

27 Carić, M., *Načelo svrhovitosti (oportuniteta) kaznenog progona iz članka 175. Zakona o kaznenom postupku i njegova primjena u praksi*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 8, no. 1, 2001, pp. 612-614

28 *Ibid.,* p. 604

confession at the trial are regulated in compliance with the principle of legality (or mandatory prosecution), the conditional deferral or withdrawal of criminal prosecution is based on the principle of discretionary prosecution. On one hand, issuing a penal order implies a conviction without holding a trial if, first, the court agrees with the state attorney's request for the issuance of a penal order (Article 541(1) CPA), and then the defendant tacitly agrees to this by not lodging an objection (Article 542 CPA). Lodging an objection against the penal order would result in holding a trial. The judgment in the case of a confession at the trial implies that the defendant explicitly agrees with the proposed punishment once the trial has started, which will result in a conviction. Judicial control is exercised in favour of the defendant, in the sense that the court may always pronounce a more lenient punishment than the agreed one, and, in order to be able to do so, the court is obligated to continue the hearing and to present evidence that is relevant to the decision on the punishment or other measure (Article 417.a(4) CPA).

On the other hand, the conditional deferral or withdrawal of criminal prosecution is, as already mentioned, based on the principle of discretionary prosecution, meaning that the execution of an informal sanction agreed between the defendant and the state attorney precludes further criminal proceedings and the conviction (Article 206.d CPA). The court is in no way involved in this consensual procedure, so there is no judicial control over the discretionary decision of the state attorney. Yet, the state attorney must obtain the consent of the victim or the injured party (Article 206.d(1) CPA), which is not required for the penal order.

The purpose of all three described instruments is economy and the acceleration of proceedings. The specific purpose of a penal order and the conditional deferral or withdrawal of criminal prosecution is also the humanisation of proceedings by sparing the defendant from the burden of a public trial and, as regards conditional deferral or withdrawal, also from all the consequences of conducting formal criminal proceedings. Therefore, the position of the defendant, who agrees to one of these two consensual forms, is significantly different, which will be discussed in more detail *infra* (3).

2.2. The Croatian model of plea-bargaining: Judgment based on the agreement of the parties

Judgment based on the agreement of the parties, based on the Anglo-American model of plea-bargaining, but also on its European versions – the Italian *pattegiamento*, the Spanish *conformidad*, or the German *Absprachen im Strafprozess*[29] – was

[29] Krapac, *op. cit.* note 16, p. 39

first introduced into Croatian criminal procedure, in the form of a judgment at the request of the parties in the investigation, in the legislative amendment to the CPA/97 in 2002.[30] It could be applied for criminal offences punishable by imprisonment of up to ten years, and for more than five years. More serious criminal offences were excluded from bargaining, as were less serious criminal offences, since there were other forms of consensual procedures which were considered more suitable (*supra* 2.1).[31] The basic feature of judgment at the request of the parties in the investigation, in which it differed significantly from the American model, was that the parties were not permitted to agree on the legal qualification of the criminal offence, but only on the type and measure of the punishment. This feature has been retained in the regulation of judgment based on the agreement of the parties, an instrument which replaced judgment at the request of the parties in the new CPA/08.

The main difference between the two instruments is that the latter may be applied to all criminal offences, notwithstanding their gravity. Therewith, the new law has greatly expanded the scope of this consensual form. The grounds for such expansion cannot be found in the reasoning given with the Proposal of the new CPA/08,[32] but it can be assumed that the legislator was motivated by efforts to strengthen the efficiency of criminal proceedings. Yet, in practice, judgment based on the agreement of the parties is often used as an instrument to obtain from the defendant data and evidence on other criminal offences and other perpetrators, as well as to secure testimony that the defendant will give in the capacity of witness in other criminal proceedings, against another perpetrator, and for another criminal offence, which will be discussed in more detail *infra* (3.1).

Judgment based on the agreement of the parties implies that the statement of the parties (on the agreement) is submitted to a court, which may refuse it if it is not in accordance with the sentencing prescribed by law, or if the agreement is not otherwise lawful (see *infra* 3.3) (Article 361(3) CPA). If the court accepts the statement, it is bound by the type and measure of the punishment specified in the submitted statement (Article 361 CPA).

The state attorney must obtain the consent of the victim only in cases of criminal offences against life and limb and criminal offences against sexual liberty, which

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30 Zakon o izmjenama i dopunama Zakona o kaznenom postupku, Official Gazette 58/02

31 Mrčela, M., *Presuda na zahtjev stranaka u istrazi*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 9, no. 2, 2002, p. 361. Also Krapac, *op. cit.* note 16, p. 373

32 Nacrt konačnog prijedloga Zakona o kaznenom postupku, p. 188, accessible at: [https://vlada.gov.hr/UserDocsImages//2016/Sjednice/Arhiva//57_13.pdf], accessed 24. April 2020

are punishable by imprisonment of more than five years (Article 360(1) CPA). If the direct victim died, consent should be given by close relatives.

2.3. Consensual procedures for the purpose of obtaining witness statements: The crown witness, abolishment or reduction of sentences and witness immunity

The crown witness and witness immunity, although regulated under rather different legal regimes, will be considered together, since the main purpose of both consensual forms is to obtain testimony that can be used to reveal and prove other criminal offences and perpetrators. The CPA/97 stipulated that the State Attorney General could decide not to prosecute a member of a criminal organisation/association for the purpose of discovering other offences and members of a criminal organisation/association, provided that it was proportionate to the gravity of the committed offences and the importance of the statement (Article 176 CPA/97). This instrument was then regulated in more detail in the new *lex specialis* enacted in 2001 – the Act on the Office for the Suppression of Corruption and Organised Crime (hereinafter: Act on USKOK),[33] which was replaced by a new Act in 2009.[34] According to the legislation in force, the procedure of granting the status of crown witness implies the application of a particular proportionality test. Thus, a member of a criminal organisation may only be granted the status of crown witness if there are circumstances allowing the mitigation or remission of punishment (Article 36(1)1 of the Act on USKOK). In addition, the statement must be proportionate to the gravity of the committed offence, as well as to its significance for revealing, proving and preventing other criminal offences of the criminal organisation/association (Article 36(1)2 of the Act on USKOK).[35] The status is granted by the court panel of the county court composed of three judges, at the request of the State Attorney General.

Another form of consensual procedure (Article 37 of the Act on USKOK), which resembles that of the crown witness, provides the possibility of abolishing or reducing the sentence, or releasing on parole a convicted member of a criminal organisation/association, in exchange for testimony. The testimony must be relevant for disclosing and proving other criminal offences committed within a criminal organisation/association, or perpetrators, or for preventing such criminal offences. The court decides at the request of the State Attorney General.

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33 Zakon o Uredu za suzbijanje korupcije i organiziranog kriminaliteta, Offical Gazette 88/01, 12/02, 33/05, 48/05, 76/07

34 Zakon o Uredu za suzbijanje korupcije i organiziranog kriminaliteta, Offical Gazette 76/09, 116/10, 145/10, 57/11, 136/12, 148/13, 70/17

35 Ivičević Karas, *op. cit.* note 8, p. 7

Finally, witness immunity was the last introduced consensual form in the new CPA/08. The state attorney may apply this instrument in a situation where a witness refuses to answer a particular question to avoid exposing himself/herself or a close relative to criminal prosecution, severe shame or significant material damage, while the answer to that particular question is important for proving another person's serious offence which is listed in the legal catalogue (Article 286(2) CPA). The instrument, similar to that of the crown witness, implies a particular proportionality test,[36] contained in the requirement that the criminal offence, for which the witness could be charged, must not be punishable by imprisonment of ten years or more, and in any case it must be punishable by a more lenient punishment than that of the criminal offence which is the object of the testimony and which must be, as mentioned, listed in the legislative catalogue (Article 286(4) CPA). The decision to grant the witness immunity is left to the discretion of the state attorney while the court is not involved in the procedure.

Comparing witness immunity to the crown witness, it can be noted that the two instruments coincide for a specific purpose – proving other, more serious criminal offences, especially organised crime and corruption, and revealing and prosecuting the perpetrators of such offences. They also coincide for the requested proportionality, as was previously explained. On the other hand, there are substantial differences between them. First, the status of crown witness is granted to a suspect or defendant, while witness immunity is granted to a witness, i.e. a person who is not (yet) under suspicion of having committed a criminal offence and whose answer to a particular question could (potentially) raise that suspicion. Secondly, granting witness immunity is completely entrusted to the state attorney, while granting the status of crown witness is under the jurisdiction of the court.

Finally, these two instruments can be compared with judgment based on the agreement of the parties, which may also have for its purpose the proving of other criminal offences and revealing and prosecuting the perpetrators of such offences, including corruption and organised crime. According to some research and the latest statistical data, judgment based on the agreement of the parties is used in approximately fifty percent of cases for criminal offences under the jurisdiction of the Office for the Suppression of Corruption and Organised Crime.[37] Research conducted at Zagreb County Court also showed that judgment based on the agreement of the parties is the main "tool" for finishing the criminal proceedings

[36] This test was introduced after the intervention of the Constitutional Court in 2012 (U-I-448/2009, points 143-146.3, Official Gazette 91/12). See *ibid.*, p. 7

[37] *Ibid.*, p. 4

in cases of organised crime and corruption.[38] This means that this instrument is a serious "competitor" to that of the crown witness which is designed as an instrument of consensual justice serving precisely the purpose of revealing and proving the most serious criminal offences, including corruption and organised crime, and particularly terrorism,[39] but it is rarely used in practice.[40] The problem, and the main distinction, is that judgment based on the agreement of the parties wholly neglects the requirements of proportionality and implies only limited judicial control, a problem which will be discussed *infra*.

3. SOME KEY ISSUES

3.1. The objectives of consensual procedures

Introducing consensual procedures into national legal systems, as explained in the Introduction, is most often justified by the need to increase the efficiency of proceedings and the need to reduce their costs, but also with attempts to humanise criminal prosecution. All of these purposes are commonly inherent in the consensual procedures that national legal systems envisage for less serious criminal offences: the penal order and the conditional deferral or withdrawal of criminal prosecution. Yet, even if both these consensual forms are envisaged for the same group of criminal offences, for basically the same purpose, the legal regime of their application is rather different, as is the legal position of the defendant. In a particular case, which of the two consensual forms should be applied depends on the discretion of the state attorney. The State Attorney General's Instructions do not offer more concrete guidelines on the issue. Research conducted so far has shown that this may result in rather inconsistent state attorney practice. For instance, there may be great discrepancy in the application of conditional deferral or withdrawal of criminal prosecution between different county state attorney offices, despite the existing internal instructions.[41] Besides, there is a great disproportion in the application of this instrument and the penal order. On one hand, according to the available statistics, the conditional deferral or withdrawal of criminal prosecution has very rarely been applied in practice: it was applied in 1.48% of

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38 Turudić, I.; Pavelin Borzić, T.; Bujas, I., *Sporazum stranaka u kaznenom postupku – trgovina pravdom ili?,* Pravni vjesnik, *vol.* 32, no. 1, 2016, p. 123, 148

39 See Labs, K., *Die Strafrechtliche Kronzeugenregelung - Legitimation einer rechtlichen Grauzone?* Tectum Verlag, Marburg, 2016, p. 28-29

40 There are no publically available data on the use of crown witness in practice. See Ivičević Karas, *op. cit.* note 8, p. 7

41 Sirotić, *op. cit.* note 18, p. 170

all dismissed crime reports against adults in 2015,[42] 1.2% in 2016,[43] and 1.7% in 2017.[44,45] On the other hand, the statistics show that from 2014 to 2017 the penal order was requested in nearly 40% of all indictments.[46] The dominant application of the penal order may be explained by its "less complicated" procedure,[47] even in cases where a conditional deferral or withdrawal of criminal prosecution could actually be a more appropriate instrument. The problem is that it requires the state attorney first to reach an agreement, and then to check whether the defendant has fulfilled the assumed obligations, which can last up to a year and requires the constant and significant engagement of the state attorney. Yet, such a large margin of discretion left to state attorneys puts defendants in an unequal position, it does not contribute to the transparency of consensual justice, and requires further and more detailed regulation at the normative level and in practice.

The particular purpose of bargaining – obtaining testimony, i.e. evidence on other criminal offences and/or other perpetrators – complements efforts to increase the efficiency of criminal proceedings: the efficiency of proceedings concluded with the use of a certain consensual form, and/or the efficiency of other criminal proceedings that will "benefit" from the testimony obtained from the "former" defendant, now questioned as a witness. Yet, this specific purpose of consensual justice is related to the problem of mixing procedural roles. In Croatian criminal procedure, as in most legal orders of the continental legal tradition, in the same criminal proceedings one person cannot be both a defendant and a witness.[48]

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42 Izvješće Državnog odvjetništva Republike Hrvatske za 2015. godinu, A-447/15, Državno odvjetništvo Republike Hrvatske, Zagreb, travanj 2016., p. 43-44, available at: [http://www.dorh.hr/IzvjesceDrzavnogOdvjetnistvaRepublikeHrvatske], accessed 29. April 2020

43 Izvješće Državnog odvjetništva Republike Hrvatske za 2016. godinu, A-561/16, Državno odvjetništvo Republike Hrvatske, Zagreb, travanj 2017., p. 37, available at: [http://www.dorh.hr/IzvjesceDrzavnogOdvjetnistvaRepublikeHrvatskeZa], accessed 29. April 2020

44 Izvješće Državnog odvjetništva Republike Hrvatske za 2017. godinu, A-643/17, Državno odvjetništvo Republike Hrvatske, Zagreb, travanj 2018., p. 37, available at: [http://www.dorh.hr/dorh07062018], accessed 29. April 2020

45 It should be stressed that the Reports for 2016 and 2017 state that in these cases, as a rule, "conditional opportunity" (i.e. "diversion") was applied, which means that cases of "unconditional opportunity" may also be included in this percentage. *Ibid.*

46 See Ivičević Karas, *op. cit.* note 8, p. 5. The most recent available statistical data refer to 2017 and show that the penal order was requested in 37.05% of all indictments against adult perpetrators. Statistički ljetopis 2018, p. 558, available at: [https://www.dzs.hr/Hrv_Eng/ljetopis/2018/sljh2018.pdf], accessed 07. May 2020. For the earlier period, see Bonačić, M., *Kritički osvrt na hrvatsko zakonodavno uređenje instituta kaznenog naloga*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 22, no. 1, 2015, p. 188

47 Sirotić, *op. cit.* note 18, p. 206

48 Ivičević Karas, E., *Prilog raspravi o problemu miješanja procesnih uloga u kaznenom postupku*, in: Turković, K.; Munivrana Vajda, M.; Dragičević Prtenjača, M. (eds.), Kazneno pravo: sinergija teorije i

This is because the defendant and the witness have different procedural functions, and therefore different procedural rights and duties: the defendant has the right to refuse to give a statement, but, if he/she does, he/she cannot be held liable for giving an untrue statement, unlike a witness who is obliged to testify truthfully, under the threat of criminal liability for giving false testimony.[49,50] Regulation of the matter is quite different in the legal orders of the Anglo-American legal tradition, where the defendant can decide whether to testify, but if he/she testifies, he/she is examined as a witness and is obliged to testify truthfully, under the threat of criminal liability for perjury.[51] This distinction is of particular relevance, knowing that consensual forms that serve this particular purpose, such as that of the crown witness, originated in Anglo-American legal systems.[52]

Two instruments that are clearly envisaged for this purpose in Croatian criminal procedure are the crown witness and witness immunity. As already explained, both of these instruments are applicable to facilitate prosecuting and proving more serious criminal offences, but they are excluded in respect of defendants who are or could be charged with the most serious criminal offences. On the other hand, judgment based on the agreement of the parties is the only consensual form based on the principle of legality applicable to the most serious criminal offences, with the possibility of the significant reduction of the bargained punishment. Yet, the problem of mixing procedural roles is particularly emphasised in the context of rendering a judgment based on the agreement of the parties for this specific purpose. In Croatian criminal procedure, if the criminal proceedings against co-defendants are separated, in the second proceedings a person who still has the role of defendant in the first criminal proceedings may not be heard as a witness (Art. 284 point 3 CPA). Thus, the defendant in the first proceedings now in the second proceedings, in the role of witness, would have to testify truthfully and thus he/she could incriminate him/herself as a defendant in the first trial.[53] But once the defendant becomes a convicted person, he/she may be questioned as a witness

prakse Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2019, p. 231

49 *Ibid.* See also Ivičević Karas, *op. cit.* note 8, p. 12

50 Pajčić points out that a witness, mainly treated as an object of criminal procedure, is in a much more unfavourable position than the defendant who is "(fortunately) much more a subject of the proceedings than he is an object". Pajčić, M., *Ugroženi svjedoci u kaznenom postupku*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 12, no. 1, 2005, p. 33

51 Ivičević Karas, *op. cit.* note 48, p. 231

52 Crown witnesses first appeared in England and later spread to the United States. Damaška, M., *Dokazno pravo u kaznenom postupku: orisi novih tendencija*, Pravni fakultet u Zagrebu, Zagreb, 2001, p. 77

53 See Pajčić, *op. cit.* note 50, p. 34

in another criminal procedure,[54] with regard to the same criminal offence and his/her former co-defendants. The rules on a unified criminal procedure against all co-perpetrators, which prevent the mixing of procedural roles, no longer apply after one of them is convicted. On one hand, it is possible to question the credibility of the testimony which was motivated by reaching a settlement, since "repentant witnesses have an interest in obtaining relief from justice by falsely charging another person".[55] On the other hand, there is no guarantee that the witness will testify exactly as he/she promised while plea-bargaining in the capacity of defendant.[56] Finally, there is no rule that would relativise the probative value of a testimony which is the result of plea-bargaining. Such relativisation is prescribed for the testimony of a witness granted witness immunity, or for the testimony of an endangered witness (and the crown witness will generally be an endangered witness), in such a way that a conviction cannot be based solely on the testimony of that witness (Article 298 CPA).[57] Therefore, there is obvious inconsistency in the regulation of these consensual instruments that may serve the same specific and delicate purpose: obtaining testimony for the needs of another criminal procedure. A simpler procedure involving fewer formalities, and the "full credibility" of the obtained evidence (testimony), may lead to the "excessive use" of judgment based on the agreement of the parties for the purpose for which the crown witness was actually especially designed.

3.2. Proportionality between the gravity of criminal offences and statements obtained through consensual forms

This brief overview of consensual forms in Croatian criminal procedure has shown the distinction between forms that are envisaged for less serious criminal offences, and those envisaged for more serious ones. The discussion on the objectives of consensual justice has shown that all existing instruments contribute to the efficiency and economy of proceedings. The penal order and the conditional deferral or withdrawal of criminal prosecution apply to the same group of criminal offences, punishable by imprisonment of up to five years, in compliance with trends in international law. In addition, the consensual approach may be relatively easily justified by the nature and gravity of the less serious criminal offences involved and consequently by the less accentuated public interest to prosecute. Yet, the huge disproportion in the application of these two instruments could indicate the

54 Krapac, *op. cit.* note 16, p. 433. See also Đurđević, Z., *Procesna jamstva obrane prema suokrivljeniku kao svjedoku optužbe*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 16, no. 2, 2009, p. 792

55 Damaška, *op. cit.* note 52, p. 78. See also Đurđević, *op. cit.* note 54, p. 795

56 Ivičević Karas, *op. cit.* note 48, pp. 240-241

57 *Ibid.*, pp. 241-242

need for the legislator to reconsider whether the scope of application of these two instruments really should coincide.

With regard to the specific purpose of bargaining, obtaining testimony revealing other criminal offences and perpetrators, the situation is more complicated. Forms that serve exclusively this purpose, the crown witness and witness immunity, are applicable in cases of the most serious criminal offences, and provided that the defendant has not committed any of the more serious criminal offences. The legislator prescribed the requirement of the strict proportionality of the importance of the statement (testimony) obtained through a particular consensual form on one hand, and the gravity of the criminal offence committed by the suspect/defendant or witness on the other hand, meaning that "the public interest in obtaining that person's testimony is stronger than the public interest in his/her criminal prosecution".[58] This is why the status of crown witness or witness immunity cannot be granted to persons who have committed particularly serious criminal offences. Proportionality is also guaranteed by limiting the application of these consensual forms to the most serious criminal offences that justify the application of the principle of discretionary prosecution. This follows comparative trends.[59]

Here again, judgment based on the agreement of the parties does not fit into the described legal framework, since it can be applied to all criminal offences. This is not in line with comparative law solutions.[60] In French law, for instance, even if the scope of application of the French version of plea bargaining – *la comparution sur reconnaissance préalable de culpabilité* – is gradually expanding, it is still not expected to cover the most serious offences from the group of medium serious criminal offences (*délits)*.[61] The Italian model of plea bargaining – *patteggiamento* – can be applied to criminal offences punishable by imprisonment of up to seven and a half years, while certain offences, including offences of organised crime and sexual crimes, are explicitly excluded from bargaining.[62] Finally, the interest of conducting a transparent criminal procedure, including a public trial and other fair trial guarantees, is particularly important with regard to more serious criminal offences,[63] so much so that the need to increase efficiency and reduce the costs of proceedings can hardly compete with it.

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58 Krapac, *op. cit.* note 1, p. 498

59 See Labs, *op. cit.* note 39, pp. 29-30

60 Ivičević Karas ; Puljić, *op. cit.* note 2, p. 843

61 See Perrocheau, V., *La composition pénale et la comparution sur reconnaissance de culpabilité : quelles limites à l'omnipotence du parquet?* Droit et Société, *vol.* 74, 2010, p. 60

62 Vitiello, *op. cit.* note 10, p. 260

63 Tomičić, Z.; Novokmet, A., *Nagodbe stranaka u kaznenom postupku – dostignuća i perspektive*, Pravni vjesnik, *vol.* 28, no. 3-4, 2012, p. 180; and Ivičević Karas; Puljić, *op. cit.* note 2, p. 844

Unlike judgment based on the agreement of the parties, the crown witness and witness immunity incorporate, as explained above, rather strict proportionality between the public interest of obtaining testimony and the public interest of prosecution. On one hand, this objection could be countered with arguments that a judgment based on the agreement of the parties, unlike the crown witness and witness immunity, actually implies conviction, which then satisfies the public interest for prosecution and condemnation. However, on the other hand, judgment based on the agreement of the parties may be applied to any criminal offence, without any proportionality test, while the bargained punishment may sometimes be considered only "symbolic", as the law allows for the significant mitigation of penalties prescribed by law for particular criminal offences in the case of plea-bargaining,[64] to such an extent that the punishment of imprisonment may be replaced by a fine or community service.[65] Pronouncing symbolic punishments for the most serious criminal offences does not contribute to the transparency of criminal justice and public trust in the system. Thus, this normative deficiency could be compensated through stricter judicial control over this consensual form, which will be discussed below.

3.3. Powers of the court (judicial control)

The role of the court in different forms of consensual procedures is quite justifiably a matter of lively debate. The concept of consensual justice implies the dominant roles of the two parties, while the role of the court, depending on the particular consensual form, may even be excluded or limited to a certain extent. It can be expected that the court will have a more important role in legal systems based on the inquisitorial principle and the principle of seeking material truth.[66] Yet, even if the court had rather limited possibilities to establish the relevant facts and "reveal the truth" within any consensual procedure, it should have the power to review whether the defendant waived his/her right to a fair trial voluntarily and whether the confession complies with the evidence gathered in the investigation

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64 The Criminal Code (Kazneni zakon, Official Gazette 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19) (hereinafter CC) prescribes that "the punishment may be reduced by up to half of the minimum punishment obtained by reduction", when the rules on punishment mitigation apply, "but cannot be any shorter that three months imprisonment" (Article 49(2) CC). See Ivičević Karas, *op. cit.* note 8, p. 10

65 See Turković, K. *et al.*, in: Turković, K.; Maršavelki, A. (eds.), *Komentar Kaznenog zakona* Narodne novine, Zagreb, 2012, p. 72

66 For instance, in German criminal procedure, the court actively participates in plea-bargaining. See Tomičić; Novokmet, *op. cit.* note 63, p. 169 – 170, 185

stage.[67] In the judgment *Deweer v. Belgium*, the European Court of Human Rights concluded that consensual forms of proceedings are not in themselves contrary to the right to a fair trial, as the defendant may waive the rights guaranteed in Art. 6 para. 1 ECHR, but a claim of waiver should be subjected to "particularly careful review".[68] Besides, the judicial review should guarantee "the fairness of the deal",[69] and mandatory and active judicial scrutiny is particularly important in cases of serious criminal offences.[70] Finally, the judge is actually the "main guardian" of the credibility of consensual justice, and should therefore have the authority to accept or refuse the reached agreement.[71]

In Croatian law, the principle of judicial control over the application of the principle of the legality of criminal prosecution during pre-trial proceedings has been raised at the constitutional level.[72] It implies that there is an efficient mechanism of judicial protection against unlawful, i.e. arbitrary, criminal prosecution,[73] and it is particularly important in consensual forms.[74] Therefore, the court has an active role in consensual forms that are based on the principle of mandatory prosecution (legality) – judgment based on agreement of the parties and a penal order, but also in a consensual procedure that results in granting a suspect or defendant the status of crown witness, which is based on the principle of discretionary prosecution, as described above. On the other hand, conditional deferral or withdrawal of criminal prosecution and granting a witness immunity, which are also based on the principle of discretionary prosecution, do not involve any judicial control.

With reference to consensual forms based on the principle of mandatory prosecution, judgment based on the agreement of the parties and penal orders, it should be stressed once again that both instruments imply a judgment of conviction and imposing a punishment. In the procedure of issuing a penal order, the role of the

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67 Frommann, M., *Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges*, Hanse Law Review, *vol.* 5, no. 1, 2009, p. 220

68 ECHR, *Deweer v. Belgium*, 6903/75, 27 February 1980, para 49. Harris, D. J.; O'Boyle, M.; Bates, E. P.; Buckley, C. M., *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights*, Oxford University Press, 2018, p. 410

69 Jimeno-Bulnes, *op. cit.* note 7, pp. 451, 453

70 Garoupa, *op. cit.* note 11, p. 355

71 Jung, *op. cit.* note 3, p. 121

72 See Novokmet, A.; Jukić, M., *Sudska kontrola prethodnog postupka – istraživanje prakse županijskih sudova u Osijeku, Splitu, Rijeci, Varaždinu i Zagrebu*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 22, no. 2, 2015, p. 454

73 *Ibid.*

74 See Đurđević, Z., *Osvrt na rezultate rada radne skupine Ministarstva pravosuđa za usklađivanje Zakona o kaznenom postupku s Ustavom Republike Hrvatske*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 20, no. 1, 2013, note 49, p. 23

court includes control of formal requirements, as well as whether the request for issuing a penal order is substantiated by sufficient grounds, i.e. sufficient data contained in the indictment, and also the appropriateness of the proposed punishment or other measure (Article 543 CPA). Though judicial control is provided, Bonačić pointed to some important deficiencies, such as the lack of control over whether the state attorney has complied with the deadlines prescribed for filing an indictment (once the preliminary investigation has come to an end), as well as the lack of control over whether the indictment contains all the prescribed parts.[75]

As concerns judgment based on the agreement of the parties, as previously stated, the court may refuse the statement (on the agreement of the parties) only if it is not in accordance with the sentencing prescribed by law, or if the agreement is not otherwise lawful (Article 361(3) CPA). Control of the "sentencing prescribed by law" should imply control not only of whether the punishment was imposed within the prescribed penalty, but also whether it was just and fair, and whether the agreed punishment has been assessed in accordance with the purpose of punishment,[76,77] i.e. whether all mitigating and aggravating circumstances prescribed by the Criminal Code have been taken into account.[78] There are good arguments in favour of such a position, including the one which relies on the Criminal Code which explicitly prescribes the possibility (and not the obligation) for the court to pronounce a milder punishment than the one prescribed for a particular criminal offence when the state attorney and the defendant have reached an agreement (Article 48(3) CC).[79] Yet, the Supreme Court took the opposite approach and explicitly rejected such interpretation, and specified that the court may only question whether the punishment fits the legislative framework, but not its adequacy from the point of view of the circumstances that are relevant for the choice of the type and the measure of the punishment.[80] In circumstances where the legislative framework allows, in plea-bargaining, a significant mitigation of the punishment

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75 Bonačić, *op. cit.* note 46, p. 205-206

76 Đurđević, *op. cit.* note 74, p. 93

77 The judgment at the request of the parties in the investigation, which preceded a judgment based on agreement, actually implied the power of the court to assess whether the proposed sanction was appropriate in the concrete case. Krstulović, A., *Nagodbe stranaka u suvremenom kaznenom postupku*, Hrvatsko udruženje za kaznene znanosti i praksu, MUP RH, Zagreb, 2007, p. 175

78 Turudić; Pavelin Borzić; Bujas, *op. cit.* note 38, p. 145

79 "The court may also impose a milder sentence than the one prescribed for a certain criminal offence when the state attorney and the defendant have agreed on that" (Article 48(3) CC). This is an optional circumstance for mitigating the sentence, since the court should have the possibility to intervene "as a guarantor of a fair trial, especially in cases of an insufficiently protected and weak defendant". Turković *et al.*, *op. cit.* note 65, p. 72

80 VSRH, Kzz 38/16-3, 21 September 2017, also Kzz 17/2018-8, 8 and 9 May 2018. Ivičević Karas, *op. cit.* note 8, p. 10

prescribed for a certain offence, including the most serious criminal offences such as corruption and organised crime, but also murder,[81] the attitude of the Supreme Court may be strongly criticised. As Garoupa and Stephen pointed out, judicial scrutiny of plea-bargaining serves to "mitigate the misalignment of goals between the prosecutor and the rest of the community".[82] Considering this issue, the Italian Constitutional Court declared the provisions of the new Italian Code of Criminal Procedure regulating *patteggiamento* unconstitutional, because the court was deprived of the possibility to assess the appropriateness of the sentence.[83,84] The problem was that the court was not explicitly attributed the power to control the compatibility of the agreed sentence and the seriousness of the offence, and therefore was deprived of the power to enforce the constitutional provision proclaiming that rehabilitation is the purpose of punishment.[85]

With regard to the conditional deferral or withdrawal of criminal prosecution and witness immunity, consensual forms that do not involve any kind of judicial control of the legality of their application, it is also possible to indicate important objections. As previously explained, the conditional deferral or withdrawal of criminal prosecution implies imposing informal sanctions, which in their content match the formal punishments and other measures prescribed in the Criminal Code, without any judicial control over the legality of prosecution and whether imposing such sanctions is substantiated by evidence contained in the case file. Even though it is true that the suspect or defendant will benefit from avoiding criminal sentencing and from not having the crime entered into his/her criminal record, and all the consequences this entails, the informal sanction imposed in a specific case may be even more grave than the formal one which could, for instance, be imposed with a penal order. However, the procedure is informal and the level of guaranteed rights is much lower than in formal criminal proceedings, which calls into question respect for the constitutional principle of the equality of all before the law.[86]

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81 About a judgment based on the agreement of the parties rendered in the case of a murder, see Cambj, N., *Sporazumijevanje prema Noveli Zakona o kaznenom postupku*, Hrvatski ljetopis za kazneno pravo i praksu, *vol*. 20, no. 2, 2013, p. 667. See also Ivičević Karas; Puljić, *op. cit.* note 2, p. 843

82 Garoupa; Stephen, *op. cit.* note 11, p. 355

83 La Corte Costituzionale, Sentenza N.313, 2 July 1990, available at: [http://www.giurcost.org/decisioni/1990/0313s-90.html], accessed 08. May 2020

84 Frommann, *op. cit.* note 67, p. 216

85 See Li, C., *Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience*, Journal of Politics and Law, *vol*. 1, no. 4, 2008, p. 17

86 Puharić; Radić, *op. cit.* note 22, p. 638

Finally, granting the status of witness immunity, without any judicial control over legality and proportionality, may disturb the transparency of criminal justice, especially in cases where a person has the role of witness, even though it is quite clear from the content of his/her testimony given at the (public) trial that that person should have actually been prosecuted and tried together with his/her alleged co-perpetrators. This again points to the problem of mixing procedural roles (*supra* 3.1).

In conclusion, the issue of effective judicial control of various consensual forms is key to ensuring the transparency of court proceedings and criminal justice in general. Only the court has the capacity to independently control the legality of all the aspects of the particular agreement. Yet, the precondition for this is that the legal regulation of each consensual procedure is complete, clear and harmonised in all relevant elements with other consensual forms.

3.4. Victims' rights

The role of the victim in criminal procedure had traditionally been neglected, mostly due to the understanding that the state attorney represents not only the public interest, but also the victims' interests in criminal proceedings. This certainly applies with regard to those consensual forms that are based on the principle of mandatory prosecution which is binding on the state attorney and which implies prosecution until the proceedings are closed with a final judgment. Yet, if we look at consensual forms in Croatian criminal procedure, we notice that the victim has a specific role in only two of them: conditional deferral or withdrawal of criminal prosecution and judgment based on the agreement of the parties. Requiring the victim's consent may be justified by pragmatic reasons, such as in the case of conditional deferral or withdrawal of criminal prosecution, knowing that in Croatian criminal procedure a victim has the right to take over the prosecution from the state attorney who desists from it. Still, there was no obstacle for the legislator to exclude that possibility for the victim. Therefore, it is possible to conclude that the legislator sought to include the victim into negotiations for specific reasons, related to the ideas of restorative justice that otherwise influenced the development of this consensual instrument.[87] Involving the victim may significantly improve his/her position, not only through consulting the victim on whether to prosecute, but also by adapting the content of informal sanctions to the interests of the victim.[88]

[87] See Carić, *op. cit.* note 27, p. 605-606

[88] See Sirotić, *op. cit.* note 18, p. 164

On the other hand, involving victims in the plea-bargaining procedure for serious criminal offences of a specific nature – against life and limb and sexual liberty – was probably motivated by the need to include the victim into the procedure, leading to a potentially significantly reduced sentence. The victim's participation was not originally envisaged, but it was prescribed in a legislative amendment of 2013. The inclusion of the victim into bargaining, as might have been expected, was not unanimously accepted. Some of the remarks pointed out that victims, or members of their families, would very rarely give their consent to the agreement,[89] and thereby would hinder the application of this consensual instrument in practice.

Finally, the role of the victim could perhaps be seen as compensation for not providing any kind of proportionality test in the application of this consensual form, especially in cases of serious criminal offences. Yet on the other hand, the most serious criminal offences, or certain types of criminal offences, should perhaps have been excluded from bargaining in the first place, which would provide at least a certain amount of proportionality. Having in mind that other consensual forms do not involve the victims' participation, the legislator's inconsistent approach to the issue is quite evident. In the light of the new position of the victim in criminal proceedings, and all the (procedural and extra-procedural) rights granted to the victim primarily by the Victims' Rights Directive,[90] the position of a victim in consensual justice should be reconsidered and the legislator should take a coherent approach to the issue.

3.5. Procedural and defence rights

3.5.1. *The right to plea-bargain?*

The problem of the defendant's procedural and defence rights, and the more general problem of the defendant's position in consensual justice, is the topic of many studies conducted so far. The temptation of assuring more lenient punishment on one hand, and the need to waive the fundamental guarantees of a fair trial, including the presumption of innocence in return, put the defendant in a very unfavourable position. These issues will not be discussed again here. Instead, the focus is on a specific peculiarity of Croatian criminal procedure – the right to plea-bargain. The CPA stipulates that the defendant has the right to agree on punishment and

89 Cambj, *op. cit.* note 81, p. 676

90 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Official Journal of the European Union, L 315, 14 November 2012

other measures prescribed in Article 360(4) CPA. In other words, the defendant has the right to negotiate and reach an agreement with the state attorney, which may result in a judgment based on an agreement of the parties. In the original text of the CPA of 2008, the defendant had an even broader right to "plead guilty and agree on a sanction". The reasoning given with the legislative proposal referred to the International Covenant on Civil and Political Rights, the ECHR and the Constitution of the Republic of Croatia, without reference to any concrete provisions,[91] so it remains unclear what inspired the legislator.

Yet, this proclamation does not comply with the regulation of this consensual form. The defendant may propose an agreement to the state attorney, but the state attorney has very broad discretion to decide whether to negotiate or not. The exercise of any right of the defendant may not entirely depend on the discretion of the state attorney. In addition, there is no effective legal remedy guaranteeing the defendant respect and protection of the proclaimed right. So, clearly, the defendant has no right to plea-bargain and the state attorney has no duty to negotiate.[92] Therefore, it remains to conclude that the Croatian legislator proclaimed this specific right of the defendant, without providing a mechanism for exercising this right, nor an effective remedy for its protection.

3.5.2. *Safeguards in the case of withdrawal from the agreement*

From the perspective of procedural and defence rights, it should be pointed out that if the parties withdraw from the agreement, the defendant's statement (which may include a confession) and all the documentation on the agreement must be excluded from the case file. This rule applies to consensual forms involving bargaining – the judgment based on the agreement of the parties (Article 362(2) CPA) and witness immunity (Article 286(6) CPA), but it is not explicitly prescribed for the crown witness. In this manner, the suspect or defendant should be adequately protected from any negative consequences of his/her willingness to negotiate and reach agreement.

3.5.3. *Mandatory defence?*

During the entire procedure of plea-bargaining, drafting a statement on the agreement and presenting it to the court, the defendant must be assisted by a defence counsel. Mandatory defence is a precondition for the lawfulness of the statement.

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91 Nacrt konačnog prijedloga Zakona o kaznenom postupku, *op. cit.* note 32, p. 173

92 This applies to the original model of plea-bargaining developed in the United States. See Mrčela, *op. cit.* note 31, p. 356-357

The same rule applies when the witness agrees with the state attorney on granting witness immunity – the witness must be assisted by a lawyer (Article 286(3) CPA). Yet, the same does not apply in the procedure of granting the status of crown witness, but it does when the State Attorney General negotiates on the abolishment or reduction of a sentence, or the release on parole of a convicted member of a criminal organisation/association, in exchange for a testimony (Article 37 of the Act on USKOK, supra 2.3). A possible reason for excepting the crown witness from explicit mandatory defence may be the presumption that the defendant will have counsel on some other basis for mandatory defence. But even then, a consistent approach by the legislator would require the prescribing of mandatory defence also for the procedure of granting the status of crown witness.

On the other hand, the conditional deferral or withdrawal of criminal prosecution, as well as the penal order, does not require the mandatory presence of a defence counsel, even though the first instrument implies imposing informal sanctions, and the latter means that the defendant will be convicted without the court holding a trial. Of course, lodging a complaint entails the risk of a harsher punishment pronounced at the trial, as well as not agreeing to the proposed informal sanction, and therefore the assistance of a defence counsel in those procedures would be valuable, not just to safeguard efficient defence rights, but also to safeguard the fairness of the proceedings, which is also of important public interest. It is true that both instruments apply to less serious criminal offences, but the complexity of the situation speaks in favour of providing an efficient defence, perhaps not necessarily in the form of mandatory defence, but then certainly through the mechanism of free legal aid which, at present, is not granted to all poor suspects in the earliest phases of proceedings for criminal offences punishable by a fine or imprisonment of up to five years.

4. CONCLUSION

This analysis has shown that there are a number of issues that demonstrate the legislator's inconsistent approach to consensual justice in Croatian criminal procedure and in the legal system as a whole. The field of application of different consensual forms has gradually expanded. But while certain instruments have been increasingly applied in practice (the penal order, judgment based on the agreement of the parties), others are hardly applied, although they may be a better designed and more appropriate instrument to achieve a specific purpose such as humanising criminal proceedings in specific cases (conditional deferral or withdrawal of criminal prosecution in comparison with the penal order) or obtaining witness testimony to reveal and prove other criminal offences and perpetrators in another

criminal procedure (the crown witness in comparison with judgment based on the agreement of the parties). The reason for this may lie in the pragmatic approach taken by practitioners, especially state attorneys who have huge discretionary powers in any agreement, meaning that they may in a particular case simply opt for the least complicated consensual form to reach a specific purpose.

Furthermore, at the normative level, there are many inconsistencies regarding the type and gravity of "negotiable" criminal offences, the purposes of particular consensual forms, judicial control, the role of the victim, and the effectiveness of procedural and defence rights. Taking a systematic approach to consensual justice in Croatian criminal procedure would involve a detailed analysis of each form of consensual procedure in respect of each of the stated elements, keeping in mind all other existing consensual procedures. Particular attention should be paid to harmonising all consensual forms in order for them to be coherent and for them to contribute to the transparency of criminal procedure and the criminal justice system as a whole.

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UDK 343.123(498)
Original scientific paper

TO CONTINUE OR TO GIVE UP THE PROSECUTION? CRIMINAL POLICY ASPECTS REGARDING THE PUBLIC INTEREST IN THE ROMANIAN PROCEEDINGS

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ABSTRACT

To punish or to forgive? This is the problem that the state has to answer every time it faces the violation of the criminal law norms by a certain individual. The obligation to take criminal responsibility, to collect evidence ex officio, to initiate the procedures for sanctioning those who commit such acts become notions attenuated by the possibility of appreciating the opportunity of criminal prosecution.

As noted in the doctrine, referring to the Resolution of the Fourteenth International Congress of Criminal Law in Vienna of 1989, "the need for a social reaction to the small crime (petite delinquance), understanding here the facts that formally they fulfill the conditions of an offense, but that by the minimum attainment brought to the social values does not justify the application of a punishment, has determined to find alternative solutions to the criminal penalties."

Therefore, depending on the ethical specificity we are in, different alternatives to criminal prosecution will have to be implemented, as it will not be possible to prosecute any criminal act, even of very small significance.

In this regard, it was established at European level that "prosecutors should consider, if appropriate and in accordance with the law, alternatives to criminal prosecution".

One of the main ways of accelerating the criminal process is to give up the criminal prosecution, expressly regulated by the Code of criminal procedure in the provisions of art. 318 Criminal Procedure Code starting with 2014, thus outlining a special form of stopping the criminal process.

Keywords: *give up the prosecution, to punish, to forgive, opportunity of criminal prosecution*

1. IS CRIMINAL PROSECUTION COMPULSORY?

Each state pursues, through its own criminal policy, the responsibility (harsher or more severe) of those who commit criminal acts, thus having a margin of appreciation of the procedural means of achieving this objective. [1] This assessment will be based on a number of factors (different from state to state), such as economic, social, demographic, but also historical ones, as it is very difficult (and perhaps even undesirable) for an absolute unification of the criminal prosecution practice.[2]

It has been stated in the doctrine[3] that "the law order corresponds more or less to the interests, motivations, general aspirations of the concrete societies and, therefore, it is specified: one is the law order in Sparta and another in Athens. You cannot ask for identity of law order in the Incas, as in the Danes, not even formal. Any ethical order of concrete law is the legal order modified privately and the public one, between them the connections acquiring differentiated contents."

Professor I. Deleanu stated in his paper[4] that "the cumulative conditional elements of the emergence, disappearance and resurrection of the state are three: the nation, the territory, the exclusive or sovereign political authority. It does not investigate the attributes of the state, but the attributes of the Romanian state, as Bergel discusses his own modern French law."

Radclliffe-Browne argued[5] that "law would be a type of social control that is appealed by the systematic use of the force of an organized political society." Part of the doctrine[6] considers such an idea as random, stating that "the theory may have coverage for example in the United Kingdom, not in China."

However, beyond the obvious controversies of the indicated problem, we agree with the existence of a wide and diversified range of approaches in the legal order of each individual state, making it very difficult to accept a uniform variant.

Therefore, depending on the specific ethics we are in, different alternatives to criminal prosecution will have to be implemented, as it will not be possible to prosecute any criminal act, even of very small significance.

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1 Extract from Graur, M.C., *Criminal action – between official and opportunity*, Ed. Hamangiu, Bucharest, 2019, p. 291 and next

2 For an analysis of the state's right to punish, see L. Proal, *Le crime et la peine*, quatrieme édition, Librairie Félix Alcan, Paris, 1911, p. 506

3 Gheorghe M., *Foundations of Law. The theory of legal responsibility*, *vo*l. V, Ed. C.H.Beck, Bucharest, 2006, p. 150

4 Deleanu, I., *Institutions and Constitutional Procedures*, *vol*. II, Lugoj, 2000, p. 11

5 Gheorghe, *op. cit.,* note 3, p. 150.

6 *Ibid.*

The Constitutional Court, in its jurisprudence, established that "free access to justice implies access to the procedural means by which the act of justice is performed. The legislator has the exclusive competence to establish the rules for conducting the trial before the courts, a solution that results from the constitutional provisions of art. 125 paragraph 3 and art. 128 of the Constitution. No category of persons or social group can be excluded from the exercise of the procedural rights, but, considering special situations, the legislator can establish special rules of procedure, as well as modalities for exercising the procedural rights, so that the free access to justice does not mean access, in all cases, to all judicial structures and to all remedies.[7]" Also, the constitutional judges noted that "free access to justice does not mean that it must be ensured at all the judicial structures, because the jurisdiction and the remedies are established exclusively by the legislator, who can set special rules, taking into account special situations."[8]

In this regard, it was established at European level[9]that "prosecutors should consider, if appropriate and in accordance with the law, alternatives to prosecution. They should be implemented with full respect for the legitimate rights and interests of the suspects and victims and provide the possibility of mediation or conciliation between the perpetrator and the victim. For this, prosecutors should pay greater attention to the nature and seriousness of the crime, the protection of the society and the personality and background of the offender."

To promote fairness, consistency and effectiveness of prosecutors' action, [10] "competent public authorities are encouraged to publish clear rules, guidelines and criteria for the effective and correct implementation of criminal policy regarding alternatives to prosecution. Alternative measures should never be used to circumvent the rules of a fair trial by imposing measures on an innocent person or who could not be convicted due to procedural obstacles, such as prescribing criminal liability. These measures should not apply even when there is doubt as to the discernment of the identified perpetrator or the extent of the harm caused by the crime."

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7 D.C.C. nr. 1/1994, M. Of. nr. 69 from March 16, 1994

8 D.C.C. nr. 129/1995, M. Of. nr. 105 from March 23, 1996

9 Pct. 2.3 parag. 28-32 from Explanatory note to Opinion no. 9 (2014) of the Advisory Council of European Prosecutors

10 Parag. 29 și from from Explanatory note to Opinion no. 9 (2014) of the Advisory Council of European Prosecutors

Minors are also receiving special attention, [11] stating that, "given the negative impact that criminal or other procedures could have on the future development of minors, prosecutors should, whenever possible, and in According to the law, consider alternatives to criminal prosecution for juvenile offenders, where they can provide an adequate legal response to the crime, taking into account the interests of victims and the general public, as well as the objectives of the juvenile justice system. Prosecutors should do their utmost to start criminal proceedings against minors only when strictly necessary."

This approach is yet another example where the appreciation of the public interest in juvenile matters (through the concrete application of the principle of opportunity) must be harmonized with the principle of legality (in accordance with the law).

As stated in the doctrine, [12] "no person free and responsible for his actions can be legally held legally liable unless it is found that certain conditions established in this sense by the law itself, in the stateized society are met." Starting from this idea, we agree with the position of the author, who argues that the statement "any responsible person is obliged to be held legally responsible for the consequences of his legal facts" is ambiguous.

Even if it is inevitable that we should accept that this should be the rule, we cannot help but ask the following question: Is it appropriate to bring criminal liability every time and by any means?

The answer, of course, will have to be a negative one, precisely applying the criteria of opportunity outlining exceptions to the rule of unconditional punishment.

2. CONDITIONS FOR WAIVING CRIMINAL PROSECUTION

The conditions[13] under which the prosecutor can give up the criminal prosecution are foreseen in a limited way, the doctrine emphasizing that the necessity of imposing conditions in the application of the opportunity analysis aims to: ensure transparency and remove any arbitrariness in the provision of measures that actually represent criminal policy options of the To the Public Ministry, ensuring efficient judicial control of the prosecutor's solutions based on the principle

[11] Pct. 2.3 parag 31 şi 32 from Explanatory note to Opinion no. 9 (2014) of the Advisory Council of European Prosecutors

[12] Gheorghe, *op. cit.,* note 3, p. 152

[13] Graur, *op. cit.,* note 1, p. 297

of opportunity, avoiding the excessive increase of the prosecutor's powers, which otherwise could have become the main actor in the criminal policy of the state.[14]

Reported on the conditions that must be fulfilled in the situation of disposing of a solution of renouncing the criminal prosecution, art. 318 para. 1 Code of Criminal Procedure establishes that "in the case of offenses for which the law provides for the penalty of the fine or the sentence of imprisonment for a maximum of 7 years, the prosecutor may renounce the criminal prosecution when he ascertains that there is no public interest in prosecuting it". Paragraph 2 establishes the criteria in relation to which the public interest will be analyzed, establishing that the "content of the deed and the concrete circumstances of its commissioning, the manner and means of committing, the purpose pursued, the consequences produced or what could have been taken into consideration" produces, the efforts of the criminal investigation bodies necessary for carrying out the criminal trial by reference to the gravity of the crime and the time elapsed from the date of its commission, the procedural attitude of the injured person or the existence of a clear disproportion between the expenses that would involve the conduct of the criminal trial and the gravity the consequences that may have occurred or which could have occurred through the commission of the crime ". "There will be no solution to waive the criminal prosecution in the case of offenses which resulted in the death of the victim", according to art. 318 para. 5 Code of criminal procedure.

From the content of the indicated legal text it follows that it is necessary to strictly comply with some conditions expressly provided by the law, conditions that must be met in order for the prosecutor to take into account the disposition of a solution for renouncing the criminal prosecution. In this respect, the conditions listed above relate to the admissibility of a waiver solution, creating for the suspect or the defendant a vocation for such a solution, by no means an absolute right.

The conditions stipulated by the law that must be fulfilled in order to be able to order a solution to renounce the criminal prosecution are the following:

- the criminal prosecution in question was initiated;
- criminal prosecution to target an offense for which the law stipulates the penalty of the fine or the sentence of imprisonment for a maximum of 7 years;
- the prosecutor finds that there is no public interest in pursuing the deed.

Thus, following the analysis by the prosecutor of the set of criteria and conditions listed by the legislator in the provisions of art. 318 para. 1-5 Criminal procedure

[14] Volonciu, N.; Uzlău, A., *Code of Criminal Procedure commented*, Ed. Hamangiu, Bucharest, 2014, p. 22

code, it can adopt a solution of renouncing the criminal prosecution, but can, at the same time, continue the process, considering that it is not necessary to stop it.

Therefore, the possibility of appreciation that the prosecutor has in the hypothesis of analyzing a potential solution of renouncing criminal prosecution gives rise to an important procedural moment in which the criminal prosecution bodies are called upon to assess subjectively whether it is appropriate to carry out further prosecution.

3. THE PUBLIC INTEREST

The criteria according to which the case prosecutor appreciates the opportunity for a solution to renounce the criminal prosecution are included in the provisions of art. 318 Criminal Procedure Code.[15]

From the beginning, it should be emphasized that art. 318 The Criminal Procedure Code is the only legal text within which the conditions of public interest are specified, as there are no other internal norms of law that guide the judicial bodies in assessing the opportunity of the solution.[16]

We specify that the provisions of art. 318 Criminal Procedure Code has undergone important changes following the adoption of O.U.G. no. 18/2016, the ordinance restating including the criteria regarding the assessment of the public interest. [17]

Subsequent to the amendments made by the above mentioned ordinance, art. 318 Criminal procedure code stipulates in the par. 2 the fact that "the public interest is analyzed in relation to:

a) the content of the deed and the concrete circumstances of the deed;

b) the manner and means of committing the deed;

c) the purpose pursued;

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15 For a broad presentation, see: Graur, *op. cit.* note 1, p. 310 and next

16 We mention that the phrase public interest is used by the legislator and in the field of administrative law, also benefiting from a legal definition, by the provisions of art. 2 paragraph (1) lit. l) of Law no. 554/2004 of the administrative litigation, with the subsequent modifications and completions

17 Prior to the entry into force of the O.U.G. no. 18/2016, the text of the law provided that "in the case of offenses for which the law stipulates the penalty of the fine or the sentence of imprisonment for a maximum of 7 years, the prosecutor may renounce the criminal prosecution when, in relation to the content of the deed, the manner and means of committing, with the consequences produced or that could have occurred through the commission of the crime, finds that there is no public interest in prosecuting it. " The text also stipulated that "when the perpetrator is known, the person of the suspect or the defendant, the conduct prior to the crime and the efforts made to remove or mitigate the consequences of the crime are taken into account when assessing the public interest."

d) the consequences produced or that could have occurred by committing the crime;

e) the efforts of the criminal investigation bodies necessary for carrying out the criminal trial by reference to the gravity of the deed and to the time elapsed from the date of its commission;

f) the procedural attitude of the injured person;

g) the existence of a manifest disproportion between the expenses that would involve the carrying out of the criminal trial and the gravity of the consequences produced or that could have been produced by committing the crime. "

Also, as in the case of the provisions preceding the amendments, the law provides that "when the perpetrator of the crime is known, the person of the suspect or the defendant, the conduct prior to the crime, the attitude of the suspect or the defendant are taken into consideration in the assessment of the public interest. after the crime was committed and the efforts made to remove or diminish the consequences of the crime ".

We notice that the new regulation enumerates in a broader way the criteria for the appreciation of the public interest. Thus, the new ones mentioned in letter no. e-f of art. 318 para. 2 Code of criminal procedure.

The recent doctrine[18] referred to a classification of the criteria of the public interest, bringing to the fore four types of such criteria, which differ from the contents of art. 318 Criminal Procedure Code.

Thus, the criteria for evaluating the public interest can be classified as follows:

- Criteria for the offense;
- criteria for the offender;
- criteria for the costs of criminal prosecution;
- criteria for the benefits of criminal prosecution.

All these elements for determining the public interest are confined even to the requirements of the Recommendation of the Committee of Ministers of the Council of Europe no. (87) 18 of September 17, 1987 on the simplification of

[18] Udroiu, M., *Criminal Procedure*, The special part, 4th Edition, Ed. C.H. Beck, Bucharest, 2017, p. 107

criminal justice, the national law approaching this time very close to the criteria highlighted at European level.

The natural question in these conditions, to which it is required in our analysis to find an answer, is whether these criteria, defined in the content of art. 318 Code of criminal procedure, are they or not limiting?

First, we mention that the phrase public interest does not have an express definition in the rules of criminal procedure.

Thus, the public interest will be analyzed at least by reference to the criteria mentioned above. The question may be asked whether these legal criteria, provided by art. 318 Code of criminal procedure, will they receive a limiting, rigid interpretation or will the prosecutor have the possibility of adding other conditions of assessment?

The contents of the Report[19] refer to the public interest, establishing that it does not have an express definition, an aspect that cannot be invoked as a lack of predictability. In this regard, we consider the condition of the predictability of the procedural law fully respected, in accordance with the requirements of the ECHR, the Court asserting countless times that the drafting of a text of law should not have absolute accuracy, the text of law cannot be predictable with absolute certainty, experience demonstrating that such certainty cannot be imposed. [20]

The court made constant references to the fact that the predictability of the law does not preclude a gradual clarification of the law, does not prevent the person interested in resorting to the recommendations of specialists, and this does not require an exhaustive definition of all relevant terms. [21]

Naturally, the need for interpretations given to the law by the judicial bodies, which are the first to apply the rules of law in this matter, fully responds to the requirement of clarity and predictability of the criminal procedural law.

To answer the question posed above, so in order to establish the character of the criteria listed by the legislator in art. 318 Criminal procedure code, we will consider the position of the Court in a famous case against Romania in the matter of

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19 Report of P.I.C.C.J., Short references on theoretical and practical approaches made by the P.I.C.C.J. since the entry into force of the New Codes in order to understand and apply the principle of opportunity correctly and uniformly, p. 32, [www.mpublic.ro], accessed on 04. July 2016

20 In this respect, see the Sunday Times c. Great Britain, 26 April 1979, Parag. 49, Kokkinakis c. Greece, May 25, 1993, Parag. 40, Cantoni c. France, November 15, 1996, Parag. 32, Rekvenyi c. Hungary, Parag. 34, [www.echr.coe.int], accessed on 04. July 2016

21 Report of P.I.C.C.J., p. 32

predictability. [22] The Court recalls, reiterating the principles set out in other cases, [23] that "the significance of the notion of predictability depends to a large extent on the content of the text in question, on the field it covers, as well as on the number and quality of its recipients. The predictability of the law does not preclude the idea that the person concerned should be determined to use clear guidance in order to be able to assess, to a reasonable extent in the circumstances of the case, the consequences that could result from a certain fact.

"Also, the Court found "both in the aforementioned judgment and in its previous settled case-law, that precisely in view of the principle of generality of laws, their formulation cannot have absolute accuracy. One of the regulatory-type techniques is the use of some categories rather general than exhaustive lists. Thus, many laws are used by the force of things of more or less vague formulas, in order to avoid excessive rigidity in order to adapt to the changes of situation. The interpretation and application of these texts depends on the practice.[24]"

The court also stated that "the decision-making function entrusted to the courts serves precisely to remove any doubts that may remain regarding the interpretation of the rules, taking into account the evolution of daily practice, provided that the result is consistent with the substance of the crime and reasonably foreseeable.[25]"

Therefore, even if the public interest does not receive an express definition in the legal text, the fact that it can be determined by using certain criteria set by the legislator marks the observance of the predictability of the procedural norm.

As stated in the doctrine[26], "the necessity of imposing conditions in the application of renouncing criminal prosecution is aimed at: ensuring transparency and removing any arbitrary provision of measures that represent in fact criminal policy options of the Public Ministry, ensuring efficient judicial control of the the prosecutor's solutions based on the principle of opportunity, avoiding the excessive increase of the prosecutor's powers, which otherwise could have become the main actor in the criminal policy of the state. "

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22 Dragotoniu and Militaru-Pidhorni c. Romania, 24 May 2007, Parag. 35 and next, [www.echr.coe.int], 04. July 2016

23 In this regard, see Groppera Radio AG and others c. Switzerland, 28 March 1990, Parag. 68, [www.echr.coe.int], 04. July 2016

24 Considerations resumed by the Court also in Kokkinakis c. Greece, 25 May 1993 and Cantoni c. France, 15 November 1996, [www.echr.coe.int], accessed on 04. July 2016

25 Considerations resumed by the Court also in S.W. c. United Kingdom, 22 November 1995, Parag. 36, [www.echr.coe.int], accessed on 04. July 2016

26 Udroiu, M., *Code of Criminal Procedure. Comment on the articles*, Ed. C.H. Beck, Bucharest 2015, p. 59

It was stated[27] that these general criteria were established "in order to avoid the arbitrary disposition of the solution of renouncing the criminal prosecution by the prosecutor", and in all cases, the opportunity should be related only to the public interest, in which reasons must not be found for " political opportunity ".

Therefore, it has been correctly stated in the Report[28] that, although not expressly defined, the notion of public interest is "definable (its content can be identified)". Thus, it was shown[29] that "justice is a public service that responds to a public interest (the realization and enforcement of the law order), a public interest which, in a criminal trial (regarded as one of the particular forms of justice), consists in identifying the facts. antisocial acts that constitute crimes, of the persons who committed them and the criminal liability, according to the law, a law that reflects the conception of the state on the basis of its right to punish (exclusively the feeling of justice as a foundation of the right to punish, reflected in the principle of legality / obligation of criminal prosecution or exclusively the social utility as a basis of this punitive right, reflected in the principle of availability or the combination of the two principles."

We note that the new conception of opportunity can give the impression of a dilution, to a certain extent, of the applicability of the principle of legality. In this regard, it is important to emphasize that the principle of legality will not be confused with that of the obligation of criminal prosecution. Specifically, the fact that the prosecutor will appreciate that the public interest does not require the pursuit of a certain fact (or of a certain perpetrator, if we guide ourselves according to the criteria of the public interest in relation to the person who committed the deed) will not mean that the principle of legality is not respected.

On the contrary, applying the opportunity in a situation where, perhaps, some time ago the obligation of criminal prosecution was imposed, will succeed in respecting the legality of the criminal process precisely because the organic law (the criminal procedural provision) provides for such a possibility.

As long as the prosecutor will respect the criteria established by art. 318 Code of criminal procedure in the assessment of the public interest, the solution of the classification in opportunity can only be a legal one.

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27 *Ibid.,* p. 60

28 Report of P.I.C.C.J., p. 32

29 Report of P.I.C.C.J., p. 32

The French doctrine of public law[30] has consistently shown that the public interest is the cornerstone of political and legal thinking, being considered the ultimate goal of public action. Therefore, the public interest was considered a common ideal, materialized through the collective satisfaction of the common social values. [31]

Therefore, we appreciate that even in our domestic legislation, the identification of the criteria of public interest could be made by reference to the provisions contained in art. 318 Criminal Procedure Code. Thus, we do not think that it can be claimed that the public interest will be determined strictly according to the criteria of paragraphs 2 and 3, being able to imagine us also situations in which the prosecutor identifies another criterion, expressly provided by law, but which satisfies the legal requirements. . Of course, in this hypothesis the problem of a possible addition to the law can be posed, the extension of the criteria could become dangerous in terms of the predictability and legality requirements.

We can consider, however, that the prosecutor is not bounded by the criteria mentioned above, but any other new criterion, not explicitly identified in the text of law, should however be limited to one of the ones provided in par. 2 and 3 of art. 318 Criminal Procedure Code.

We support this in view of the changes made by the O.U.G. no. 18/2016, which increased the scope of appreciation of the public interest, adding other criteria, previously unforeseen. However, from their analysis, it turns out that they are nothing more than general criteria, which cover to a large extent the requirements of the public interest assessment.

By Decision No. 23 of 20 January 2016[32], the Constitutional Court resolved the exception of unconstitutionality of the provisions of Art. 318 Code of Criminal Procedure.

In relation to the criticisms made, the Court began its analysis by reference to the phrase public interest in Art. 318 par. 1 Code criminal procedure, criticism that it would be ambiguous, not defined in the Criminal Procedure Code or Criminal Code. [33]

Therefore, what the Court had to do first was to ascertain whether the text criticised contains sufficient evidence to determine the content of that phrase.

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30 *Rapport public du Conseil d'État, Etudes at documents*, no. 5, 1999 , [www.conseil-etat.fr], 30. January 2018

31 See Report of P.I.C.C.J., p. 33 și urm

32 Published in the Official Gazette no. 240 of 31.03.2016

33 The recitals of the Decision examined at length in Graur, *op. cit.,* note 1, p. 318 and next

Thus, the analysis was started by reference to Decision No 732 of 16 December 2014[34] in order to establish the requirements for clarity, precision and predictability of the criminal procedural law. The Court held that "the recipients of the criminal norm of criminal criminalisation must have a clear representation of the constituent elements, of an objective and subjective nature, of the offense, so that they can foresee the consequences resulting from failure to comply with the norm and adapt their conduct according to it". It is also referred to paragraph 29 of the same decision, where the Court held that "the essential feature of the rule of law is the supremacy of the Constitution and the obligation to respect the law". The Court also held in other decisions[35] that "the rule of law ensures the supremacy of the Constitution, the correlation of all laws and all normative acts with it. This aspect implies that the rule of law is an excellent state in which the rule of law is manifested." [36]

At the same time, the Court took into account Decision No 1 of 10 January 2014, published in the Official Gazette No. 123 of 19 February 2014 (Parag. 225), where he noted that "one of the requirements of the principle of compliance with laws relates to the quality of normative acts and that, in principle, any normative act must satisfy certain qualitative conditions, including predictability, which implies that it must be sufficiently clear and precise to be applied. Thus, the wording with sufficient precision of the normative act allows the persons concerned, who may, if necessary, appeal to the advice of a specialist, to provide to a reasonable extent, in the circumstances of the case, the resulting consequences." [37]

As regards the case law of the European Court of Human Rights, the Court referred to the judgments of 4 May 2000, 25 January 2007, 24 May 2007 and 5 January 2010, delivered in Rotaru v. Romania (Parag. 52), Sissanis c. Romania (Parag. 66), Dragotoniu and Militaru-Pidhorni c. Romania (Parag. 34) and Beyeler c. Italy (Parag. 109) [38], in order to analyse the quality of the law as a guarantee of the principle of legality. In these judgments it was noted "the obligation to ensure these standards of quality of the law as a guarantee of the principle of legal-

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34 Published in the Official Gazette no. 69 of 27 January 2015 (Parag. 25)

35 Decision No. 232 of 5 July 2001, published in the Official Gazette no. 727 of 15 November 2001, Decision No. 234 of 5 July 2001, published in the Official Gazette no. 558 of 7 September 2001, Decision no. 53 of 25 January 2011 published in the Official Gazette no. 90 of 3 February 2011

36 For this purpose, see Decision No 13 of 9 February 1999, published in the Official Gazette No 178 of 26 April 1999

37 To that end, see Decision No. 903 of 6 July 2010, published in the Official Gazette No. 584 of 17 August 2010, Decision No 743 of 2 June 2011, published in the Official Gazette No. 579 of 16 August 2011, Decision No 1 of 11 January 2012, published in the Official Gazette No 53 of 23 January 2012, Decision No 447 of 29 October 2013, published in the Official Gazette no. 674 of 1 November 2013

38 Online at [www.echr.coe.int], accessed on 17. July 2016

ity, provided by Article 7 of the Convention.[39]" Thus, it is recalled that "the position of the European court in Sissanis v. Romania (Parag). 66), where it has been noted that the phrase provided by the law requires that the measure criminalised must have a basis in national law, but it also concerns the quality of the law in question – it must be accessible to the individual and predictable with regard to its effects. Furthermore, in order for the law to satisfy the requirement of predictability, it must specify with sufficient clarity the extent and modalities of exercising the discretion of the authorities in that field, taking into account the legitimate aim pursued, in order to provide the person with adequate protection against arbitrariness'. It was also stated that "the law can only be regarded as a rule laid down with sufficient precision in order to allow the citizen to control his conduct. The citizen may resort to the need for expert advice in this matter, but he must be able to reasonably foresee the consequences of the case, which could result from a certain fact."

In the case of Rotaru c. Romania (Parag. 52), the European Court recalled its settled case-law, according to which 'the law means not only a certain legal basis in national law, but also the quality of the law in question, and thus it must be accessible to the person and predictable'. Also in the case of Dragotoniu c. Romania (Parag. 34), it was stated that "the concept used in Article 7 of the Convention corresponds to the concept of law appearing in other articles of the Convention, and it encompasses the right of origin both legislative and case-law and implies qualitative conditions, inter alia, of accessibility and predictability."

The Constitutional Court continues to treat the phrase public interest[40], starting from the analysis previously carried out in terms of predictability and accessibility of the law. She notes that "the listing in the provisions of Art. 318 par. 1 Code Criminal Procedure of the elements relating to the content of the act, the manner and means of committing, the intended purpose, the concrete circumstances of the commission and the prosecutions caused or which may have occurred by committing the offense, in addition to which Art. 318 par. 2 Code criminal procedure indicates that, when the perpetrator is known, the assessment of the public interest is to be considered for the criminal interest's being committed, and the offender's previous efforts are not to clarify the offender's efforts and the previous offenders.

Thus, the Court finds that "the meaning of the public interest is not determined by the legislator by the provisions of Art. 318 par. 1 and 2 Criminal Procedure

[39] European Convention on Human Rights

[40] Parag. 15 of the Decision

Code, and the elements listed in them as criteria for determining the public interest are not such as to define the concept, which constitute criteria for individualisation of penalties, in case a court finds the commission of offenses."

The Court held in this regard that "the meaning of the public interest is not determined by the legislator by the provisions of Art. 318 par. 1 and 2 Criminal Procedure Code, and the elements listed in them as criteria for determining the public interest are not such as to define the concept, which constitute criteria for individualisation of penalties, in case the court finds the commission of some offenses." [41]

The Constitutional Judges took into account Decision No. 390 of 2 July 2014, published in the Official Gazette no. 532 of 17 July 2014 of the Constitutional Court[42], where it was established that "a legal notion may have a different content and meaning autonomously from one law to another, provided that the law using that term defines it.

In the light of the foregoing, the Court held that "the legislator must lay down precisely the obligations of each judicial body, which must be circumscribed to the concrete way of carrying out their duties, by establishing, unequivocally, the operations which they perform in the exercise of their duties. [43] In the resolution of the case, the prosecutor cannot depart from its content, making delimitations which fall within the competence of the legislative power." [44]

Therefore, the Court found that the text criticised "does not meet the standards of clarity, precision and predictability of the criminal law, violating the principle of legality of the criminal process, regulated by Art. 2 Code Criminal Procedure and therefore the provisions of Art. 1 par. 5 of the Constitution."[45] According to the constitutional provisions, it establishes the obligation to respect the Constitution, its supremacy and laws in Romania.

Therefore, the Court found that "by regulating the institution of relinquishing the prosecution under Art. 318 Criminal Procedure Code, the legislator did not strike an adequate balance between the application of the principle of legality, specific to the continental law system, existing in Romania, and the application of the principle of opportunity, specific to the Anglo-Saxon legal system, giving prevalence to

41 Parag. 15 of the Decision

42 Parag. 31 of the Decision

43 Parag. 15 of the Decision

44 *Ibid.*

45 Parag. 16 of the Decision

the latter, to the detriment of the former, by regulating among the powers of the prosecutor certain acts specific to the judicial power." [46]

Thus, the Court establishes that "the prosecutor has the possibility to drop the criminal investigation and, consequently, to replace the court, in the performance of the judicial act, in the case of approximately three quarters of all the offences provided for in the Criminal Code and in the special laws in force."

The decision of the Constitutional Court on Opportunity – no. 23/20.01.2016, had legislative effects, declaring the provisions of Art. 318 Criminal Procedure Code as unconstitutional requiring the immediate modification of the legal provisions regarding the waiver of criminal investigation.

Thus, the adoption of the GO no. 18/2016[47], brought a new vision on the plan of relinquishing the prosecution, an early solution and at the date of the decision of the Constitutional Court.

Thus, Art. II, item 82 of the GO no. 18/2016 amended Art. 318 Criminal Procedure Code, essential being 2 aspects in the plan of relinquishing the criminal investigation.

Firstly, the modification increased the number of public interest criteria, increasing the scope of elements to be taken into account when assessing it by the case prosecutor, which I highlighted when discussing the conditions of public interest in the matter of opportunity.

Secondly, the institution was introduced to confirm the solution to waive the prosecution by the Preliminary Chamber Judge.

In this regard, the provisions of Art. 318 par. 12-16 Code criminal procedure establish this time the procedure for confirming the solution of renunciation, which remains final only after it has been verified by a judge.

The most important amendment was the correlative one of the essential criticisms of the decision of unconstitutionality, namely the regulation of the obligation to submit, ex officio, all solutions of renouncing the prosecution of the Preliminary Chamber Judge. [48]

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46 Parag. 30 of the Decision

47 Published in M. Of. Number 389 of May 23, 2016

48 In this respect, see Barbu, A.; Tudor, G.; Şinc, A. M., *Code of Criminal Procedure*, Ed. Hamangiu, Bucharest, 2016, p. 665

The need for such proceedings gave rise to controversy, given that, even before the amendment, the solution could be challenged by the person concerned with a complaint against the non-trial solution.

Moreover, the possibility of giving up on the grounds of opportunity, without a mandatory verification by a judge, was also provided for in the previous criminal proceedings[49], when the prosecutor analysed the lack of social danger as a feature of the offense.

However, the adoption of a mandatory verification, in all cases, by the Preliminary Chamber Judge, of the solution to waive the criminal investigation, may appear as unjustified, especially if a series of criminal acts on which a solution to waive the criminal investigation will be ordered will be of little significance.

4. THE PRINCIPLE OF OPPORTUNITY IN THE LEGISLATION OF OTHER STATES

It is important in our endeavor to understand the origin of the opportunity, as a principle in the criminal process, by reference to other laws, in the wish to realize the concrete way in which the judicial bodies can (or sometimes are even obliged) to stop a criminal investigation in progress. [50]

Specifically, the materialization of the opportunity on a procedural level is achieved by renouncing the criminal prosecution, an institution regulated by the provisions of art. 318 Criminal Procedure Code.

The possibility of giving up the criminal prosecution is found, in different forms (some very similar to our legislation) in most states with principles of modern criminal law, the source of this institution being, among others, the overcrowding of prosecutor's offices with criminal cases which sometimes have a very small significance , but also the need to speed up procedures.

In this sense, relevant is the report of the Prosecutor's Office attached to the High Court of Cassation and Justice[51], a report prepared and submitted to the Constitutional Court of Romania in 2015, when the constitutional judges analyzed the constitutionality of the provisions of art. 318 Criminal Procedure Code.

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49 Prior to 1 February 2014

50 See Graur, M.C., *Criminal action – between official and opportunity*, Ed. Hamangiu, Bucharest, 2019, p. 275 and next

51 Online at [www.mpublic.ro], accessed on 27. June 2016

In the mentioned report, brief references were made regarding the theoretical and practical approaches made by P.I.C.C.J. from the entry into force of the New Codes in order to understand and correctly and uniformly apply the principle of opportunity.

In order to make the prosecutor's activity more efficient in the P.I.C.C.J., at the level of the Prosecutor's Office attached to the High Court of Cassation and Justice, a comparative law study has been carried out, mainly in order to understand the mechanism of opportunity in the context of diversifying the principles in the criminal process.

Thus, if a few years ago, the judicial bodies did not conceive (mainly due to the regulatory tradition) "deviation" from the rules of legality and the truth, we are today in the context of a rewriting of the concepts of criminal procedural law.

Based mainly on the social evolution, which, of course, cannot be neglected by the legislation in this area, the principle of opportunity succeeds, but also with much controversy, among the fundamental principles of the Romanian criminal process.

As stated in the Report, "the permission granted to prosecutors in a large part of the world's states to apply some extra-legal considerations[52] is a recognition that, in a society where there are competing interests and values, they must be reconciled, and the prosecutor is probably in the best position to operate a cost/benefit analysis regarding a possible prosecution or continuation of criminal prosecution."[53]

In United States of America, this principle entrust the prosecutor with the discretionary choice of whether or not to prosecute a case.[54]

The opportunity principle "allows the prosecutor to dismiss a case despite sufficient evidence to charge when, according to his/her asseessment, a prosecution would not be in line with the public interest. Thus, the opportunity principle accepts that not all crimes may deserve prosecution, trial and, ultimately, punishment. By doing so, the opportunity principle provides prosecutors with leeway to determine the criminal enforcement policy of the day."[55]

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52 We will observe in our analysis that these considerations are not exactly „extralegal", the appreciation of the opportunity being guided by the principle of legality, and the criteria of the public interest being defined by the law

53 Report of P.I.C.C.J., Short references on theoretical and practical approaches made by P.I.C.C.J. since the entry into force of the New Codes in order to understand and apply the principle of opportunity correctly and uniformly, p. 12, online at [www.mpublic.ro], accessed on 27. June 2016

54 Brown, D. C.; Turner, J. I.; Weisser, B., *Prosecution in common law and civil law jurisdiction, The Oxford Handbook of Criminal Process,* Oxford University Press, U.S.A., 2019, p. 151

55 *Ibid.*

In the U.S., US Attorney's Manual Title 9 - Art. 9[56] establishes that the prosecutor, when considering the opportunity, "to decide on the renunciation of the accusation due to the lack of a substantial federal interest, will consider all the relevant considerations, including:

1. federal law enforcement priorities;

2. the nature and seriousness of the crime;

3. the discouraging effect of the trial;

4. the degree of guilt of the person towards the deed;

5. the criminal record of the person;

6. the person's willingness to cooperate in investigating or prosecuting others;

7. the probable conviction or other consequences of the conviction. [57] "

It is important to note that the list mentioned above is exemplary in nature and is not limiting, and the analysis of these criteria must be performed as a whole. Basically, the recourse to both the mentioned criteria and to other criteria depending on the specific circumstances of the case, must outline the lack of public interest in the continuation of the federal investigation.

In Canada, with the same reasons as in the U.S. or the United Kingdom, the DPP (Director of Public Prosecution) [58] Guide has been developed. Among other things, when the Crown Counselor examines the opportunity for a criminal investigation, he must answer a series of questions: [59] "if there is a reasonable likelihood of conviction based on the evidence that could be administered? In the case of an affirmative answer, should an indictment serve the public interest best? "

In the United Kingdom and Northern Ireland, a Code of Crown Prosecutors - The Code for Crown Prosecutors - has been implemented at the level of prosecutors. [60] In its contents, art. 3 mentions that "prosecutors, police or investigating agencies decide whether or not to accuse a perpetrator based on the provisions of the Crown Prosecutors Code, as well as the indications in the guidelines on the accusations elaborated by the Director of Public Prosecution (DPP)."

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56 Report of P.I.C.C.J., p. 14, online at fwww.justice.gov], accessed on 28. June 2016

57 *Ibid.*

58 Public Prosecution Service of Canada, online at [www.ppsc-sppc.gc.ca], accessed on 28. June 2016

59 The aforementioned aspects were presented in detail and in the Report of P.I.C.C.J., p. 16 and next

60 Online at [www.cps.gov.uk], accessed on 29. June 2016

If, previously, regarding the US legislation, I mentioned the so-called test of the prosecution decision, this time the legislative regulations designate a Full Code test. This implies, therefore, both the analysis of the probationary concerned in order to verify the extent to which it is capable of leading to a conviction, but also the subsequent verification of the public interest in conducting the investigations.

The criteria according to which this interest is determined are set out in the Code, [61] the judicial bodies being forced to answer several questions:

1. How serious is the crime committed?
2. What is the type of guilt of the suspect?
3. What are the circumstances and the injury caused to the victim?
4. Was the suspect's age under 18 years of age?
5. What is the impact of the crime on the community?
6. Is the accusation and prosecution a response commensurate with those previously established?
7. Should information sources be protected or not?

In Spain, the criminal procedural law refers to the inapplicability of the principle of opportunity in the case of offenses for which the criminal action is initiated ex officio. At the same time, it is recalled about the principle of maximum simplicity, applicable in order to eliminate the non-essential acts and activities in order to fulfill the demands regarding the speed of the act of justice. [62]

In Italy, the prosecutor has the possibility of investigating any crime, but the existence of a criminal complaint does not oblige him to initiate the criminal prosecution. There is thus an appreciation of the criminal prosecution body, before any procedural action, which will balance the concrete damage and the public interest in the criminal prosecution.

The analysis of the principle of opportunity has also been made in the recent doctrine of other European states, an example in this respect being the Czech Republic.

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61 Presented widely and within the Report of P.I.C.C.J., p. 19 and next

62 *Ibid.*

It was held[63] that "the principle of legality and the principle of opportunity can be seen as contradictory at first sight because only the first mentioned is considered to be a traditional pillar of criminal procedures in continental European countries."

So it is important to determine the role of the principle of opportunity in the Czech criminal procedure and to summarize basic institutes which express this principle.

It is also important to determine which is the rule and which is the exception as to the applicability of the two principles. How much is the principle of opportunity activated? How dominant is it in relation to the general application of the principle of legality?

"The system of essential principles has to be understood as a coherent unit where individual principles are linked together and built on each other."[64]

Thus, the Czech system of criminal procedure does not refer to a particular principle in particular, but takes into account the principles of criminal procedural law as a whole. [65]

Very plastic, the authors refer to the relationship between the principle of legality and that of opportunity as a complicated relationship. [66] It is mentioned[67], that "the principle of opportunity can be characterised as a possibility given to the public prosecutor not to prosecute all the criminal offences which he gets to know about. The public prosecutor can use this possibility in cases where the prosecution would not be useful, effective or even unjust, which would cause that the purpose of the criminal procedure would not be achieved."

We identify in that sense "the motives of regulating opportunity according to the Polish lawyer Cieślak: a procedural and material motive. Procedural motive occurs while prosecuting minor crimes, which often results in inefficiency of criminal procedure because pursuing the whole criminal process with engaging the court

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63 Kristková, A.; Kandalec, P., *The Principle of Opportunity in the Czech Criminal Procedure Code*, p. 239, [www.studiaiuridica.umcs.pl], accessed on 20.March 2020

64 *Ibid.*, p. 240

65 "The essential principles have to be interpreted in the essence of the Constitution and the Charter of Fundamental Rights and Freedoms. A very specific role plays the provision of the Art. § 4 of the Charter which states that while employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted. The Criminal Procedure Code (CPC) undoubtedly is a norm providing the mentioned limits."

66 Kristková; Kandalec, *op. cit,* note 63, p. 243

67 *Ibid.*

does not pay off. On the other hand, the material motive emphasizes the possible injustice of criminal proceedings at minor crimes."[68]

The authors manage to identify three essential elements in the analysis of the opportunity:

a. discontinuing of criminal procedure due to lack of public interest;

b. diversions as a result of a weakened public interest;

c. new concept of opportunity in a form of a cooperating witness.

a. The first element "is connected to the idea that the offenses of a less gravity should not be prosecuted if there is lack of public interest, in the most cases it means that prosecution is not worthy. The Czech Criminal Procedure Code also knows such provisions. A public prosecutor can discontinue a criminal procedure if it is clear that the goal of the criminal procedure was already achieved (in brief – because the facts of the case prove that the committed crime is of a lower gravity than other crimes of this kind)."[69]

b. The second element - the diversions – "definitely constitute a more simple procedure of achieving justice at minor offenses but, at the same time, they are an expression of a restorative justice concept which prefers rehabilitation of criminals to strict punishing them by the sentence of imprisonment. The Czech CPC distinguishes among the following kinds of diversions11: – conditional discontinuing of criminal procedure, – agreement on guilt and punishment."[70]

c. The third element - cooperating witness - "is a typical instrument of a new pragmatic use of opportunity.[71] Weigend states that the increase in complicated organized crime and difficulties in obtaining evidence induced the situation that the state bodies resigned to fulfil the essential purpose of criminal procedure and chose to trade with justice by using the institute of a crown witness."[72] This institute serves for simpler revealing of organized crime where in many cases the facts of the case cannot

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68 M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa 1984, p. 292 *apud* Kristková; Kandalec, *op. cit.* note 63, p. 243

69 Kristková; Kandalec, *ibid.*, p. 244

70 *Ibid.,* p. 245

71 The authors refer to Ambos, K. *International Criminal Procedure – Adversarial, Inquisitorial or Mixed?*,, International Criminal Law Review, no. 3, 2003, p. 18

72 *Ibid.,* p. 247

be revealed by other means than by using somebody from the inside of such an organized group.

Following the analysis of the system of Czech criminal procedural law, by referring to the analysis of the principle of opportunity, it is appreciated that the principle of opportunity provides an effective possibility how to deal with overloaded justice. Based on this fact, the principle of opportunity should be considered as a complementary principle to the principle of legality.

Therefore, like domestic law in Romania, the analysis of the public interest, by activating the opportunity, is not bounded by legality. This is due to the idea of legality in any point of the criminal process, regardless of the specific institution that becomes applicable.

Therefore, both the analysis of the Romanian system of procedural law and of other states, such as the Czech Republic for example, shows that, in fact, the so-called conflict between the principle of opportunity and that of legality appears rather as a perfect couple. The two principles are drawn together, the opportunity being based on its legality. Any solution ordered by the judicial bodies, even if it is determined as a result of activating the opportunity, is based on a series of rules provided by law (the principle of legality).

In the Lithuanian law system[73], "it is recognised that modern criminal proceedings embrace a wide range of procedural forms, with a tendency toward the widening of the opportunities for the application of simplified forms of criminal proceedings. The exercise of the discretionary criminal prosecution as an expression of the principle of purposefulness (expediency) is on of the methods of resolving a criminal conflict in criminal procedure. The marked tendency of the new Criminal procedure code of Lithuania (2003) is that there are wide possibilities for terminating the pre-trial investigation (Article 212 of CCP). The author concludes that the regulation of alternative forms of settlement of criminal conflicts in the Lithuanian law of criminal procedure is substantially in line with the global trends of criminal proceedings development."

The liberalisation of criminal law and criminal procedure allowed "alternative measures" to be legalized and applied.[74]

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[73] Ažubalytė, R., *Alternative Methods Of Resolving A Criminal Conflict In Criminal Procedure Of Lithuania*, Days of Law: the Conference Proceedings, 1. edition. Brno : Masaryk University, 2009, p. 1

[74] *Ibid.*, p. 2

We note that the criminal procedure law of Lithuania also allows the use of alternative means to the classical process, in order to resolve the conflict of criminal law, departing from the classical conception.

And the German law allows the prosecutor to assess the public interest, filtering out the less important cases and thus giving alternative solutions to the trial.[75]

5. PRACTICAL ISSUES IN DOMESTIC LAW IN ROMANIA

A controversial example is that, even if the prosecutor realized the application of the principle of opportunity, having a solution of renouncing the criminal prosecution, the judge, being invested with the analysis of the soundness and legality of the solution, considered that an even more favorable solution to the suspect is required, that of the classification.

We note in the example that we are going to present a situation where, in practice, the prosecutor "rushed" to appreciate the lack of public interest, given that he had at hand a much more "advantageous" solution to the suspect - the classification by reference to the lack guilt.

This example shows that the principle of opportunity should not be applied only as a subsidiary, when a classification solution cannot be ordered, the fact investigated covering all the conditions of a crime, but lacking the public interest in continuing the investigations.

By the application registered on 02.07.2018 in the role of the Timisoara Court under no. 17195/325/2018[76], The Prosecutor's Office attached to the Timisoara County Court requested the confirmation of the ordinance from 26.06.2018 for renouncing the criminal prosecution in the file no. 7135 / P / 2017.

It was shown that by order dated 14.07.2017, it was ordered to start the criminal prosecution in rem for the offense of putting into circulation or driving on public roads of a vehicle or tram not registered or registered provided by art. 334 para. 1 CP, and subsequently, by the ordinance of 05.04.2018 of the Prosecutor's Office attached to the Timisoara Court, arranging for further criminal prosecution against the said S.I. under the aspect of committing the offense of putting into circulation or driving on public roads an unregistered or unregistered vehicle or tram provided by art. 334 para. 1 CP, stating that, on 14.07.2017, around 3:40

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75 See Damaska, M., *The Reality of Prosecutorial Discretion: Comments on a German Monograph,* Faculty Scholarship Series, 2011, p. 29, online at [www.digitalcommons.law.yale.edu], accessed on 11. June 2020

76 Unpublished

pm, it was found driving the Mercedes Benz brand car with the registration number of the trial (Italy) Will pS 1234 on DN 59, km.8 , on the radius of the city of Timişoara, from the direction of Şag towards Timişoara. Following the checks carried out by the police, it was found that the car was cleared from circulation by the Lithuanian authorities on 22.09.2016, and the registration plates of evidence (Italy) Va pS 1234 are not included in databases for registration in Italy.

Analyzing the documents and works of the file, the preliminary chamber judge holds that according to art. 318 para. 12 et seq. CPP, the order of the prosecutor ordering the renunciation of criminal prosecution is transmitted, for confirmation, within 10 days from the date on which it was issued, to the preliminary chamber judge from the court to whom, according to the law, the competence to judge the case in the first instance.

According to the provisions of art. 318 para. 15 Code proc.pen., The preliminary chamber judge verifies the legality and the soundness of the solution of renouncing the criminal prosecution on the basis of the works and the material from the criminal prosecution file and of the new documents presented and, by the conclusion, admits or rejects the request for confirmation made by the prosecutor.

In case he rejects the confirmation request, the preliminary chamber judge rescinds the solution of renouncing the criminal prosecution and can order the classification, according to the provisions of art. 318 para. 15 lit. b Code proc.pen.

The preliminary chamber judge finds that in this case the priority analysis of the incidence of the impediment to the commencement of the criminal action is required prev. of art. 16 paragraph 1 bed b thesis II Code proc.pen - the deed was not committed with the guilt stipulated by the law.

Thus, the preliminary chamber judge finds that the suspect S.I. was found driving the Mercedes Benz car with the registration number (Italy) Va pS 1234 on DN 59, km.8, on the radius of the city of Timisoara, from the direction of Şag to Timisoara. Following the checks carried out by the police, it was found that the car was cleared from circulation by the Lithuanian authorities on 22.09.2016, and the registration plates of evidence (Italy) Va pS 1234 are not included in databases for registration in Italy.

Regarding the offense retained in its task, that of putting into circulation or driving on public roads an unregistered or unregistered vehicle or tram provided by art. 334 para. 1 PC, the preliminary chamber judge finds that under the aspect of the objective side, the conditions for taking criminal responsibility are fulfilled.

Thus, as a result of the checks, it turned out that the license plates mounted on the car driven by the suspect were not included in the registration database, being valid only in Italy, San Marino, Germany and Austria.

However, from the perspective of the subjective side, the preliminary chamber judge finds that the suspect did not commit the deed intentionally, not watching or accepting the production of the socially dangerous outcome.

Thus, the evidence administered during the criminal investigation phase outlines the absence of the suspect's intention regarding the driving action on the public roads of an unregistered vehicle.

In this regard are the statements from the file, the suspect stating that he took the car from his son, the owner of the car, having his heel and not knowing that the registration plates are not valid. He mentioned that his son borrowed his car for short distances.

The suspect's statement is also supported by the statement of the witness C.L. (f. 22), a police officer, who specified that the suspect said after stopping that he did not know the numbers were not valid and the car belonged to his son V.A., who assured him that it was okay.

In the same sense is the statement of witness V.A. (f. 29) which stated that he had transmitted all the documents to his father to the car, passing through countless times or the border without the police to find any problem.

Also, the preliminary chamber judge finds that, according to the address M.A.I. - I.G.P.F. - The Oradea Contact Point (f. 9), addressed to the Center for International Police Cooperation, the registration numbers used by the suspect are valid in Italy, as well as in the other countries with which it has signed bilateral treaties, such as San Marino, Germany, Austria. In these circumstances, the vehicle, thus registered, has or does not have the right of movement in relation to the national legislation of each state and the acceptance of this type of registration numbers.

Therefore, the preliminary chamber judge finds that there is a need for a reasonable proportion regarding the obligation of the drivers to ensure that they comply with the legal requirements in the road matters and to bring them to criminal liability for non-compliance with the rules.

Thus, it appears from the file data that the suspect has done all the reasonable diligence in such a situation, making sure that he respects the legal provisions when he took the car from his son.

In this sense, the analysis of the guilt in criminal matters must be anchored in the factual, concrete reality, by reference to a diligent driver, but in a reasonable and predictable way.

However, the preliminary chamber judge finds that the suspect S.I. did not follow or accept the production of the result, being the case of preventing the criminal action in respect of the guilt provided by law.

The preliminary court judge finds that the evidence administered in the criminal prosecution phase outlines the lack of intent in the act of the suspect by the S.I.

For the foregoing, the preliminary chamber judge will reject the request to confirm the solution of renouncing the criminal prosecution formulated by the Prosecutor's Office attached to the Timisoara Court.

Pursuant to art. 318 para. 15 lit. b Code proc.pen., will order the cancellation of the ordinance of renunciation to the criminal prosecution dated 26.06.2018 issued by the Prosecutor's Office attached to the Timisoara Court in the file no. 7135 / P / 2017 in the aspect of committing the offense of driving an unregistered vehicle, provided by art. 334 para. 1 Criminal Code, against the suspect S.I.

Pursuant to art. 318 para. 15 lit. b rap. in art. 16 paragraph 1 bed b thesis II Code proc.pen., will order the classification of the case having as object the offense of driving an unregistered vehicle, provided by art. 334 para. 1 Criminal Code, against the suspect S.I.

The case-law example outlined above highlights the obligation of the case prosecutor to order a closing solution whenever it finds the existence of one of the cases stipulated by Art. 16 Code of Criminal Procedure, even if the conditions for dropping the criminal investigation provided by Art. 318 Code of Criminal Procedure would be fulfilled.

It is important to stress that a solution of closure is prevailed over the solution of relinquishing the prosecution in the light of the consequences of the solution.

The situation premiss for a solution to waive prosecution is the very existence of the crime. If, for example, the prosecutor finds that the act does not meet the constituent elements of an offense, he will order the case to be closed, not to drop the criminal investigation.

6. BETWEEN CONFIRMING AND DISPROVING THE SOLUTION OF RELINQUISHING THE PROSECUTION – JUDGE'S ANALYSIS

In a case before the Timis Court[77], the Preliminary Chamber Judge found that, in relation to the actual circumstances of the commission of the offence, the object of the infringement and the resulting result, having regard to the existence of a manifest disproportion between the costs incurred by the criminal proceedings and the seriousness of the prosecutions caused by the offence, there is no public interest in the pursuit of the present offence. Thus, the act committed consists of mounting a pipe from the PPR on the ceiling of the common corridor, with a view to supplying water to its commercial space. The act was not carried out using means such as to disturb public order and tranquility or create a sense of uncertainty or fear among the co-locators. The purpose of the works was to ensure the supply of water to commercial space, and the consequences are of a non-patrimonial nature. Furthermore, the suspect had a collaborative attitude with state institutions.

In another case[78], the judge found that it is true that in relation strictly to the manner and circumstances of the commission of the act, the result produced, materialised in the relatively small damage, i.e. 986,62 lei, fully recovered, the act affects the social values defended by criminal law. However, the perpetrator is known, and his criminal record shows his conviction for an impressive variety of crimes. In relation to the rich criminal activity of the suspect it can no longer be relevant that he had an attitude of recognition and regret after the discovery of the crime committed. Consequently, the court rejected the request to confirm the waiver of the criminal investigation filed by the Prosecutor's Office attached to the Timisoara Court and, consequently, abolished the order for relinquishing the prosecution dated 08.06.2017 issued by the Prosecutor's Office attached to the Timisoara Court in case no.xxxxxx/P/2016 and ordered the referral of the case to the prosecutor in order to complete the criminal investigation in respect of the commission of the offence of theft provided by Art. 228 par. 1, with the application of Art. 41 para.1.

A similar aspect to both of the above-mentioned reasonings is that of the person of the perpetrator, in relation to his criminal past, but also to the collaboration with judicial bodies after the commission of the act.

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77 Decision no. 446/2017 of 19.07.2017 of the Timis Tribunal, unpublished

78 Decision no. 1219/2017 of 19.10.2017 of the Court of Appeal Timisoara, unpublished

Thus, certain circumstances outside the actual act, which are related to the person of the offender, are thus highlighted, determining circumstances in the analysis of the public interest.

What follows is a varied caselaw in the procedure of confirmations or infirmations of solutions to waive the criminal investigation, and the conclusion is that for the same type of act, committed in similar circumstances, different solutions can be ordered, depending on the person of the perpetrator.

7. CONCLUSIONS

The basic rules of the criminal process are norms of criminal procedure with a character of fundamental principles, these representing the expression in the form of legal norms of the content of the conception and the principles of criminal procedural policy that serve to elaborate the Code of criminal procedure. [79]

These words still retain their essence today, but the social evolution, periodically determining the reinforcement of the mentioned principles, thus giving rise to current norms of law, appropriate to the times in which we live.

If some time ago the accomplishment of the criminal justice did not conceive the deviation from the principle of officiality only in totally exceptional situations[80], at present, we are in the presence of a rethinking of the purpose of the criminal prosecution.

Thus, the obligation of the judicial bodies to carry out ex officio the documents necessary to carry out the criminal trial is rewritten, the exceptions from this rule becoming more frequent and becoming alternative solutions to the criminal prosecution.

Social discipline played a rather important role, but only partially, the change in attitudes coming from the state. Time has proved that not only the individuals targeted by criminal law must show a change of attitude, but even those who legislate on behalf of the state, and then those who effectively enforce the criminal rules. Reporting on the criminal phenomenon reaches a turning point, which follows from this on focusing on a justice system concerned about the long-term social impact.

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[79] In this regard, see Dongoroz, V. *et al.*, *Theoretical explanations of the Romanian Code of Criminal Procedure. The general part*, *vol.* I, Ed. Academy – Institute of Legal Research, Bucharest, 1975, p. 40

[80] An example in this regard is the offenses for which the initiation of the criminal action is carried out at the prior complaint

In particular, with the effective application of the new criminal procedural provisions starting on 1 February 2014, it takes place among the rules of criminal judicial investigations, not shy, the principle of opportunity being expressed mainly in the way of regulating the institution's dismissal of the criminal investigation.

The assessment of the ordering of such a solution[81] is crystallised around the analysis of the public interest, by reference both to the act committed, to its consequences, but also to the person who committed it, in the situation in which the author is known.

We can say that opportunity also works in reverse: It is appropriate to continue the prosecution and refer the matter to the court, with the public interest demanding that the author be punished. Therefore, even if modern doctrine, by constantly referring to the principle of opportunity, examines its application mainly by reference to the solution to waive the prosecution, we consider that the broad view of this principle must take into account the other side of it – the opportunity to pursue the prosecution (active opportunity), which, in fact, is not an exception to the principle of officiality.

The aforementioned theory, leading the opportunity on the two planes, may seem nonsense, but this is supported by the very way in which judicial bodies appreciate the public interest.

The distinction between the modalities of opportunity shall be made according to the outcome of the public benefit test. [82]

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[81] The solution to relinquish the prosecution (classification in opportunity) can only be ordered by the prosecutor, with criminal investigation bodies having only the possibility of drawing up a report with a proposal in this regard

[82] Opportunity test

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UDK 34.037: 343.123.1
343.14
Original scientific paper

CONSEQUENCES OF INCOMPLETE REASONING IN COURT ORDER FOR COVERT MEASURES

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ABSTRACT

After several decisions of the European Court of Human Rights (ECtHR) against Croatia because of incomplete reasoning in a court order for covert measures (cases Dragojević, Bašić, Matanović and Grba), statutory regulations were not amended, but in the case-law an attempt was made to change the interpretation regarding exclusion of gathered evidence. The author researches this issue in order to determine the trends in the Supreme Court's (SC) interpretation, and impact of the ECtHR case-law over the past 12 years (N=67). The results show that for a long time the SC has argued that a deficiency in reasoning is an irregularity, but not as serious to lead to exclusion of covert recordings and other evidence.

One of the SC chambers issued a decision in 2017, which it called "the revision", in which it expressed a different view that it was necessary to exclude all evidence gathered using incomplete court order, referring to some rules in few ECtHR decisions. The author therefore analyses the ECtHR's rules on the judicial review, the exclusion of illegal evidence, and other available safeguards to reduce court arbitrariness. The results indicate that exclusion of evidence is not primary remedy for improving lawfulness of procedure. Problems with compliance with the Convention law could continue to arise due to a lack of other appropriate safeguards in Croatian legislature.

***Keywords**: covert evidentiary measures, court order, reasoning, deficiency, ECtHR*

1. INTRODUCTION

Special evidentiary actions are very intense interference in the fundamental rights of citizens, and that is the main reason why they are regulated in much more detailed manner and with more safeguards compared to classic evidence gathering measures. One of statutory rules in Croatia requests that they can be determined solely by a court order (authorisation), which must, among other conditions, con-

tain a reasoning (explanation) of grounds for suspicion and grounds for subsidiarity (Article 332 of the Criminal Procedure Act – CPA).[1] The purpose of such provisions with many prerequisites is to reduce the arbitrariness and discretion of authorities and to protect the defendant's rights.

It is not explicitly prescribed in the Article 335(5) CPA that the violation of rule on court order reasoning leads to exclusion of evidence. For many years, the courts didn't exclude evidence. Even though some court decisions have sought to differ from this long existing interpretation, they had difficulties in finding legal basis in domestic law, and tried to refer to international level. The aim of this research is to conduct a more systematic analysis of changes in domestic practice and to determine the impact of decisions delivered by the European Court of Human Rights (ECtHR).

Covert investigative actions have so far been designated with different legal terms in Croatian legislation and they are currently referred to as special evidentiary actions. These actions include: surveillance and recording of communications, monitoring of computer data, surveillance and recording of premises, surveillance and recording of persons and vehicles, undercover investigator, simulated purchase or sale, simulated business and surveillance of delivery (Article 332 CPA).

This issue is very important for crime investigation. Police often initiates proceedings for approving covert evidentiary measures. After preparing necessary documentation and submitting the motion, the state attorney drafts the request and then the court makes prior judicial control and issues the order or refuses the request. If the judge of investigation refuses to issue an order, it is the judicial panel who shall make a final decision. There is a particular problem for police when it prepared a large documentation that justifies the required level of suspicion and supports the conclusion that other actions would not be successful, but a court did not include it in the reasoning of its written order.

Although an existence of satisfactory level of facts at the time of issuance of the court order, or providing grounds for suspicion, could be subsequently verified, one decision of the Supreme Court of the Republic Croatia (SC) did not widen possibilities to check reasoning, but instead recommended exclusion of all evidence collected by covert actions. That particular decision was called "the revision".[2] Given that the inadmissibility of evidence is the ultimate measure, espe-

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1 Criminal Procedure Act (Zakon o kaznenom postupku), Official Journal no. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19

2 Case SCRC (Supreme Court of the Republic Croatia), I Kž-Us 116/17, 5 November 2017. A revision is unknown term in Croatian criminal procedure law. Despite this, the decision is emphasising that it

cially concerning credible materials such as recordings and photos are, the goal of this research is to analyse the interpretations about exclusion of evidence as a legal remedy in cases of inadequate reasoning of the court order on special evidentiary actions.

This issue has been of great relevance for years so it is rather strange that so far there was no scientific discussion or domestic publications on this important topic. Problem of insufficient reasoning did not attract reflections in foreign literature either. Some authors are describing requirement that a judgment should be reasoned, or they are explaining its main standards, but the reasoning of a court order is not commented.[3] The Case *Dragojevic* is mentioned in few sources but without wider elaboration,[4] while in some other publications no judgments have been mentioned from this field at all.[5] Therefore, this research also involves insight and selection of relevant ECtHR case-law.

The paper analyses evolution of interpretation in the case-law over last 12 years. For the research presented in this paper, a sample of 67 decisions that have been delivered by the SC in the period from 2008 to the end of 2019 was collected. All the decisions were dealing with the issue of insufficiently extensive reasoning in a court order on special evidentiary actions. One of the goals of the research is to determine the period during which views of some SC chambers have been changed, and to determine the extent to which the ECtHR practice has influenced those changes. Besides that, the research included some additional issues, which shall be analysed in a separate study, as well as a number of decisions on this issue delivered by the Constitutional Court of Republic Croatia.

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is making "the revision" of previous interpretations of the SC. The revision is an extraordinary remedy in some other branches of law. Some subsequent SC decisions are referring to the decision as "the revision" too; Case SC, I Kž 373/17, 12 September 2017

3 Trechsel, S.; Summers, S., *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2005, p. 106; Dijk, P. van; Hoof, G. J.; Van Hoof, G., *Theory and Practice of the European Convention on Human Rights*, Martinus Nijhoff Publishers, Hague, 1998, p. 428; Reid, K., *A Practitioner's Guide to the European Convention on Human Rights*, Sweet and Maxwell, London, 2011, p. 237

4 Müßig, U., *Reason and Fairness: Constituting Justice in Europe from Medieval Canon Law to ECHR*, Legal History Library, Brill, Boston, 2019, pp. 443, 446; Gerards, J., *General Principles of the European Convention on Human Rights*, Cambridge University Press, Cambridge, 2019, p. 216

5 Brems, E.; Gerards, J., *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, Cambridge, 2014; Flogaitis, S.; Zwart, T.; Fraser, J., *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength*, Edward Elgar Publishing, Cheltenham, 2013

2. RESEARCH SAMPLE AND BASIC DATA

2.1. Sample in general

The SC case-law was collected by combining multiple types of searches using keywords in official database. The search was conducted by combining the keywords "reasoning" and "court order", as well as legislative terms for particular covert investigative actions as they are designated in the CPA. In this manner, over a hundred decisions were collected and each one of them was reviewed individually in order to make a selection of decisions which actually meet the research objectives. In addition, the court database was searched by the labels of particularly important decisions in order to find out to what extent and in which concrete cases those decisions were cited.

The research pointed out 67 decisions in which the court ruled on the (in)sufficiency of the reasoning contained in the court order on special evidentiary actions. Among those decisions, 53 were from the "I Kz Us" register, which refers to cases where proceedings are initiated under special USKOK (State Prosecutor's Office for the Suppression of Organized Crime and Corruption) legislation aimed to supressing organised crime and corruption. Such cases represented approximately 79% of all cases gathered in the sample. These were mostly complex cases, and the process of gathering evidence by using ordinary investigatory action was very difficult. In those cases, covert measures were actually necessary to gather evidence that could not otherwise be collected because of clandestinity of crimes. Key incriminating activities that constitute offences could be committed in a very short time by a verbal conversation, a secret message by communication device, or any other concealed *modus operandi* without producing any visible physical evidence that could point to organisers on higher level in the criminal network.

2.2. Type of offenses

Analysis of the type of criminal offenses covered by the sample, shows that most of them relate to various forms of narcotic drug trafficking or smuggling (14 cases). This offence is followed by abuse of service or authority committed by officials (9 cases), receiving or giving bribe (8 cases) and certain forms of participation in organised crime (8 cases), and various other offenses at a lower frequency. This situation corresponds with data from previous category confirming that these are complex crimes.

For the most part, investigation of such crimes do not start with the common victim as initial source of detection. In these types of criminal offenses, all stages of crime investigation are different than traditional types of criminal offenses, and

therefore it is easier to substantiate conclusion on subsidiarity. Besides that, these offenses are very rare compared to other types of crimes. Exclusion of evidence for such offenses may have negative effect on confidence of citizens in judiciary.

2.3. Type of covert investigative actions

The sample data indicate a very high incidence of communication surveillance, with other covert actions occasionally used. In 48 covered decisions, such surveillance was used, representing about 72% of the sample. This means that in most of the cases, constitutional rights related to privacy of communications were affected.

Looking from the position of crime investigation goals, executing of communication surveillance can take months and can be very challenging in terms of listening to recordings, making recording and transcripts, interpretation of terms, selection of incriminating statements, translation, analytics and many other accompanying actions. In connection with the data showing that these criminal offenses are very rare, and that such covert actions cannot be carried out very frequently, it follows that there is not a simple possibility of repeating the same evidence by any other investigatory actions if key evidence is excluded.

2.4. Frequency of decisions in certain periods

Decisions are divided into three groups to make it feasible to observe their frequency over main periods defined by key decisions. The first group of decisions was delivered by 2015 when the first ECtHR decision on this issue against Croatia was declared (Case *Dragojević*).[6] Up to that year, a total of 24 decisions were found. The second group are decisions from 2015 to mid-2017 when "the revision" was made by one SC chamber,[7] with 8 decisions found in that group. The revision decision was delivered in the period when *Dragojević* judgment was followed by ECtHR decisions in the Case *Bašić* in late 2016,[8] and in the Case *Matanović* in early 2017.[9] After those decisions a judgment in the Case *Grba* was delivered.[10] This indicates that decision-making of the SC could be critically influenced by these ECtHR decisions. The third group consists of decisions beginning with "the revision" decision until the end of 2019, and covers a total of 25 decisions.

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6 Judgment *Dragojević v Croatia*, no. 68955/11, 15 January 2015

7 Case SCRC, I Kž-Us 116/17, 5 November 2017

8 Judgment *Bašić v Croatia*, no. 22251/13, 25 October 2016

9 Judgment *Matanović v Croatia*, no. 2742/12, 21 February 2017

10 Judgment *Grba v Croatia*, no. 47074/12, 23 November 2017

This development shows that the third group covers the most decisions, although it is not a long period of time since it lasts only about two years. In contrast, the first period is almost three times longer lasting (about six years) but it does not involve as many decisions. Similarly, the period of approximately two years between the first ECtHR decision and the revision decision also does not cover as many decisions as the post-revision period. Total number of SC decisions in certain period implies that this became important issue in domestic law, and that this fact could have impact on the ECtHR to use rigorous scrutiny in Croatian cases.

It seems that here could be some kind of interaction identified. The ECtHR's first decision has incited higher number of appeals on this issue, and on the other side, higher number of appeals is raising importance of this issue and provokes stricter scrutiny. Appealing on the legality of the evidence is the simplest form of defence in criminal procedure, so that fact maybe attracted more complaints too.

3. FREQUENCY OF INTERPRETATION IN THE SC CASE-LAW

3.1. The SC viewpoint on the exclusion of evidence

Observed sample contains a total of 33 decisions in which the SC expressed a view that even if the reasoning in the court order was defective, or if the reasoning was not completely specified in the court order, this very fact should not affect the admissibility of evidence. In all of those cases, the court explained that there was no legal basis to exclude evidence for such a minor ground as the insufficient reasoning of the court order is. It is a very large proportion (49%) of decisions in which the court expressed its view on admissibility of evidence gathered on the basis of the incomplete court order. In 28 decisions, the court did not rule on whether a defect in the court order could lead to the illegality of the evidence, but rather discussed other issues on court order reasoning (42%).

The opposite view is that a failure to write (sufficient) reasoning in an order constitutes a violation that should lead to the exclusion of the evidence collected. Such view is represented in only 6 decisions in the entire sample (9%). In explaining such position, the court often referred to the SC "revision" or cited some of the rules from the ECtHR's decisions on the impossibility of retrospective justification. Data shows that most of these decisions were delivered after 2017 so it seems they are trying to make a new path in the case-law.

3.2. The SC's interpretations by the periods

In the following part of the analysis, the interpretations on exclusion of evidence were divided in key periods. In the first group of 24 decisions delivered in the

period between 2008 and 2015, in 19 decisions the SC expressed that a defective order should not lead to unlawfulness of evidence. Such decisions cover about 80% of that period. During this period, only one decision was stating opposite interpretation that evidence should be inadmissible because of an irregularity in the reasoning of a court order. This single decision was pronounced at the beginning of the observed period (in 2009) and there were no similar decisions for a long period afterwards. It is possible that this decision was made as a result of the initial uncertainty as to direction in which the interpretation could head. Two decisions from this group did not express any view on this issue.

The situation is very similar in the period after mid-2015 to 2017, in which the court delivered a total of 18 decisions. In 10 decisions the court reached a conclusion on whether the deficiency could lead to exclusion of the evidence (56%), and in 8 decisions no conclusion was delivered on this issue. All 10 decisions expressed the interpretation that there was no need to exclude evidence. There is not a single decision in this group that would express a contrary view, indicating that the court probably thought that other legal remedies could be used when it came to minor irregularities in the court order.

In the third period, 25 decisions were delivered since 2017 when the SC issued a revised opinion. There are 5 decisions in this group representing a view that evidence should be excluded. That accounts for 20% of the group. However, in 16 decisions none of position was presented on the said issue. It is important for the goal of analysis that in this period there are still different decisions expressing quite the opposite view (4 decisions; 16% of this group). In those decisions court argued that there was no need to exclude evidence just because of an irregularity in the reasoning of the court order, which means that such views did not disappear after the SC revision decision. These results indicate that the revision does not necessarily mean a harmonization of the case-law in the field of criminal procedure law, concerning it is not familiar in this branch law and this issue should be wider researched too.

3.3. Content of appeals

In total sample of 67 decisions, most of the defendants' complaints expressed a remark that the reasoning was insufficient (11), whereas after 2015 this ground of appeal was expressed only twice. The most common allegations in this period were that a court's reasoning literally copied allegations from the state attorney's request, or that the grounds stated in the court order were contradictory. This situation indicates that in the observed sample there was a change in the allegations in the post-2015 period. Appeal allegations do not necessarily indicate that there

has been a change in the manner in which court errors are perceived, because this depends on the quality of the court orders too.

4. FREQUENCY OF ECTHR CASE-LAW IN DECISIONS OF THE SC

4.1. The ECtHR case-law in the SC decisions

The SC referred to ECtHR practice in a very small number of cases before 2015. In this period, there were only two decisions delivered in 2008 and 2009. The decisions do not specify certain ECtHR judgments, but only few provisions of the Convention law (Articles 6 and 8). Such short reference is common in the SC case-law, given that it usually has brief decisions. In both of these decisions which are invoking Convention law, the court expressed a view that failure to state reasons in the court order should not lead to the exclusion of evidence collected.[11]

Between 2015 and 2017, 4 decisions were found in which the SC expressed compliance with the ECtHR standards, but these were also short references only. Data show that in the period from 2015 to 2017, the number of ECtHR references was doubled compared to the previous period, but there is still a low representation in the total sample (around 6%). In one decision, the court merely referred to European standards in half of sentence,[12] or court briefly cited the judgment *Dragojević*,[13] or more extensive quotes the decision of *Dragojević*,[14] or citing particular provisions of the Convention.[15] In the next three decisions, the SC also reiterated the view that irregularities in the reasoning of court order did not lead to the illegality of collected evidence (recordings etc.).

In the period following the 2017 SC revision decision, the court delivered 7 decisions invoking certain aspects of the Convention law, which is about 10% of the entire sample. Although the level represents an increase over this period, most of these decisions only briefly list references too. These decisions were following the SC revision decision in a conclusion that the evidence should be excluded as illegal.[16] It is very interesting that during this period one decision of the SC was delivered, in which the court decided completely contrary to the 2017 SC revision decision and stated that irregularities in the court order should not lead to the illegality of the evidence, and evaluated this interpretation in accordance with the

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11 Case SCRC, I Kž 61/09, 3 February 2009; Case SCRC, I Kž 116/08, 1 April 2008

12 Case SCRC, I Kž-Us 148/15, 22 December 2015

13 Case SCRC, I Kž-Us 97/16, 12 October 2016

14 Case SCRC, I Kž-Us 131/16, 17 November 2016

15 Case SCRC, I Kž-Us 59/16, 25 October 2016

16 Case SCRC, I Kž-Us 58/18, 26 September 2018; Case SCRC, I Kž-Us 165/17, 8 February 2018, etc

Convention standards too.[17] There were few more decision of that kind but they did not refer to the Convention law.

This situation indicates that there are conflicting views about the same Convention standards, what urges a need to clarify which Convention rules govern this area. It would not be appropriate to use the ECtHR judicature as a general phrase to justify any interpretation. The limitation of the above data is that the Convention practice can influence the opinion of individual judges, although they do not explicitly invoke any reference.

4.2. Frequency of the ECtHR case-law in appeals

The share of the ECtHR's references among defendants' complaints was analysed too. In only four cases (less than 6%) appeals were referred to the Convention judicature. Direct reference to the judicature in the appellate allegations was very rare, indicating that the ECtHR case-law was not represented at a high level. One case is from 2016, two from 2017 and only one from 2018.[18] No reference to any ECHR violation was made before 2015. Notwithstanding explicit reference, the increase in appeals indicates that this has become a significant issue thanks to the influence of ECtHR law.

5. DISCUSSION ON THE SC CASE-LAW

5.1. Estimation of the seriousness of violation

In the 2017 revision decision, one SC chamber concluded that the irregularity in a court order constitutes breach of such gravity that collected evidence should be excluded similarly as in the cases of some other more serious violations defined in international law.[19] In the earlier case-law, the SC stated that errors in reasoning of court order are irregularities, but they are not as serious as other enlisted statutory violations. The SC earlier held that there was no explicit legal provision which could lead to the illegality of evidence.[20] Only for the most serious violations in the CPA it is explicitly prescribed that evidence should be excluded as illegal. The list is very extensive and it already includes more than forty violations in the

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17 Case SCRC, I Kž -Us 134/17, 24 January 2018

18 Case SCRC, I Kž-Us 97/16, 12 October 2016; Case SCRC, I Kž-Us 53/17, 13 September 2017; Case SCRC, I Kž-Us 134/17, 24 January 2018; Case SCRC, I Kž-Us 77/18, 20 December 2018

19 Case SCRC, I Kž-Us 116/17, 5 November 2017

20 Turudić, I.; Pavelin Borzić, T.; Bujas, I., *Evidence Obtained through Surveillance and Technical Recording of Telephone Conversations and Other Distance Communications in the Light of Article 8 of the European Convention on Human Rights*, Rijeka Law Faculty Collected Papers, *vol.* 38, no. 1, 2017, pp. 595-630

whole CPA, what makes domestic system one amongst widest in exclusion of illegal evidence.[21] In the field of covert measures, these include violations such as performing measures without any court warrant at all, or exceeding deadlines, or instigating by undercover agent (*agent provocateur*), or if measures are directed on minor crimes, or other enlisted violations in the CPA. Concerning that, it is not unusual that the SC earlier concluded that irregularity is not so serious to be prescribed as unlawful evidence,[22] or that there is no provision linking the unlawful evidence with the quality of the court order.[23]

One of the main objection to the revision is that it disproportionately equalizes violations of different severity. The revision is raising position of minor defects in the court order at the level of very serious violations, what leads to negative consequences in many other areas. Generally labelling all such covert actions as illegal could neglect the differences between a completely arbitrary or unfounded court order, from a substantially (materially) founded court order which just does not have complete reasoning written.

The SC observed in 20 decisions that the court has reviewed all materials and that it has agreed with the request, or it would otherwise refuse to issue an order. For example, the SC concludes that the issuance of a court order implies that the court accepted the request of state attorney with all facts stated therein,[24] or that as soon as it issued the order it precludes that it accepted the request,[25] or that the order undoubtedly implies that it accepted all facts,[26] or that court would otherwise express dissent.[27]

Neither it was stated by the ECtHR that violation in the court reasoning was so serious to inflict negative consequences on the fairness of whole procedure. The SC revision is much rigorous than the Convention law. Violation of fairness was not found neither in the Case *Dragojević* nor in any other subsequent decision against Croatia (*Matanović*, *Bašić*, *Grba*). Compared to other examples of violations found in the ECtHR case-law in this field, Case *Dragojević* does not constitute serious injury like some other cases. This is not situation similar to the Case *Szabo and Vissy v Hungary* where surveillance was performed without any judicial

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21 Karas, Ž.; Štrk, D., *Exclusion of Illegally Obtained Real Evidence in Comparative Law*, Zagreb Law Review, *vol*. 2, no. 2, 2013, pp. 185-212

22 Case SCRC, I Kž-Us 7/17, 7 February 2017

23 Case SCRC, I Kž-Us 59/16, 25 October 2016

24 Case SCRC, I Kž 665/16, 19 December 2016

25 Case SCRC, I Kž-Us 101/18, 18 December 2018

26 Case SCRC, I Kž-Us 134/17, 24 January 2018

27 Case SCRC, I Kž-Us 69/10, 4 November 2010

authorisation.[28] The Court has consistently held that the use of evidence obtained in breach of the right to privacy does not render the proceedings unfair.[29]

In the Case *Hambardzumyan* a domestic court issued a court order for the execution of two covert measures that were not enlisted in the statutory provision at all.[30] Even such violation did not have impact on the admissibility of evidence. Defendant was able to verify the credibility of the recordings and the ECtHR concluded that "secretly-taped material did not conflict with the requirements of fairness".[31] Such violation had no influence on the admissibility of credible secret recordings,[32] and the ECtHR position has not been altered in the much lighter cases against Croatia.[33] Incomplete reasoning in the court order in the Case *Dragojević* and other cases is not as serious, for example, as violation in the Case *Kvasnica v Slovakia* in which the court issued an order for surveillance against a lawyer, based on an oral request of officer, without any documents presented by police.[34] Although the SC revision is referring to breach of international standards as an argument for exclusion of evidence (Article 10(2)2 CPA), it is clear that cases against Croatia are not containing such serious violation that should by European standards lead to the exclusion of evidence.

5.2. Police response to serious violation in court order

Exclusion of evidence adversely affects the investigatory work of authorities that have prepared materials for covert measures. If these bodies acted properly within the limits of their lawful authority, and if they fulfilled all legal preconditions for submitting covert actions, it is disputable what purpose the exclusion of evidence could achieve. Excluding of evidence does not have any effect on the court which was mistaken and endangered fundamental rights of defendant. If actions of police and state attorney were completely lawful, they did not contribute to violation of defendant's rights. A defective court order cannot nullify materials that existed

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28 Judgment *Szabó and Vissy v Hungary*, no. 37138/14, 13 May 2014

29 Thommen, M.; Mojan S., *The Bigger the Crime, the Smaller the Chance of a Fair Trial?: Evidence Exclusion in Serious Crime Cases Under Swiss, Dutch and European Human Rights Law*, European Journal of Crime, Criminal Law and Criminal Justice, *vol*. 24, no. 1, 2016, p. 78

30 Judgment *Hambardzumyan v Armenia*, no. 43478/11, 5 December 2019, §66

31 *Ibid.*, §80

32 Meese, J., *The use of illegally obtained evidence in criminal cases: a brief overview*, ERA Forum, *vol*. 18, no. 3, Springer, Berlin-Heidelberg, 2017, p. 307

33 Martinović, I.; Damir K., *Nezakoniti dokazi: Teorijske i praktične dvojbe u svjetlu prakse Europskog suda za ljudska prava*, Hrvatski ljetopis za kaznene znanosti i praksu, *vol*. 23, no. 2, 2016, p. 320

34 Judgment *Kvasnica v Slovakia*, no. 72094/01, 9 June 2009, §87

earlier. The SC revision does not explain why it would be necessary to disregard the use of results of lawful work?

It is very important to emphasise that in all of the cases covered in the sample, the SC did not find a single violation in police proceedings. Covert evidentiary actions are prepared in police units that have specific forms of supervision, precisely with an aim to reduce possible irregularities in their work. According to the results of the research, in 17 decisions the SC explicitly respected the lawful conduct of police in the preparation of material and expressed an opinion that there were extensive contributions of police and state attorney's files. Out of these cases, 5 were delivered after the SC revision, what shows that some SC chambers are still pointing out that short reasoning in court order does not mean that there was no appropriate material available. For example, in some decisions it was found that the court order was supported by police documentation,[35] or that the request submitted to a court was fully substantiated,[36] or that there was a very extensive police report before a court.[37]

The SC revision puts police in very compromising situation at the time when police receive a defective or questionable court order because it is not obvious that such order represents a criminal offence. If it is not obvious that court order is part of criminal offence, police have no authority to refuse a dubious court order, and it also have no ability to make an appeal. The police have no legal remedy on minor deficiencies in a court order.[38] The police would be in position to execute an order although the revision decision considers it to represent a very serious violation. If this irregularity is as serious as it is evaluated by the revision decision, it could mean that maybe the police should not enforce such court order. A literal adherence to the viewpoint contained in the revision decision would mean that the police may be expected to respond in the same way as it would to substantial violations in a court order.

For example, if the police were to receive a court order with obvious intentional breaches, it would have a duty to report the unlawful work of judicial bodies. For example, in a hypothetical case where the court would arbitrarily issue an order for communication surveillance, contrary to all statutory provisions, police would not be able to join such illegal activity. For example, such illegality would be if a court order is delivered although a case is not a criminal offense at all, but it is only misdemeanour, and if the order was, for example, issued for apparently over-

35 Case SCRC, I Kž-Us 38/18, 16 May 2018

36 Case SCRC, I Kž-Us 58/18, 26 September 2018

37 Case SCRC, I Kž-Us 117/09, 26 September 2011

38 Case SCRC, I Kž-Us 98/09, 17 February 2010

stepping duration of five or ten years, and if there was not any official request for issuing an order.

A remedy should not inflict damages to the interests of society by releasing perpetrators such as bribed officials or organised crime figures. If we could evaluate responsibility of police using the Convention case-law, we can see that in none of the aforementioned decisions against Croatia, the ECtHR did not state that police have violated any rule. For this reason, it is rational to consider that neither should the negative consequences be aimed at undermining police investigation results. Given that police are an executive body, it would be feasible to introduce additional monitoring measures by an authority that may have such authority, for example certain remedies could be invoked through the higher judicial authorities.

6. SAFEGUARDS TO PREVENT ARBITRARINESS IN COURT ORDER

6.1. Legal remedies to improve lawfulness of court order

6.1.1. *Judicial review*

Instead of excluding the evidence as suggested by the SC revision,[39] it was more appropriate to reinforce some existing remedies and to add some new forms of solving problematic parts. It would be appropriate to use some remedies that could enhance review of a court order in earlier stages of procedure. Safeguards in procedures and supervision are necessary in democratic society.[40] Secret surveillance is usually regarded as a measure that could restrict democracy, so maybe that feature surely has some impact on strict reasoning of the ECtHR.

In a number of decisions, the SC has taken the standpoint that a subsequent review may be conducted to determine whether the court order corresponds to the facts in records. Such scrutiny may be exercised, for example, by an indictment panel which has to determine whether a court order correctly reflects the situation in the file. Such view was expressed by the SC when it concluded, for example, that the indictment panel was required to verify the circumstances at the time of its issuing,[41] or when the court may subsequently check whether the conditions existed at the time of issue.[42]

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39 Case SCRC, I Kž-Us 116/17, 5 November 2017

40 Eskens, S.; van Daalen, O.; van Eijk, N., *Standards for Oversight and Transparency of National Intelligence Services*, Journal of National Security Law and Policy, *vol.* 8, no. 3, 2015, pp. 567

41 Case SCRC, I Kž-Us 116/16, 24 October 2016

42 Case SCRC, I Kž-Us 7/17, 7 February 2017

The revision ignores judicial review as a remedy in earlier or later stages, naming it by a derogatory term "retroactive justification" instead of suggesting to improve its features.[43] The ECtHR used a similar term because it wanted to emphasize that existing judicial control was flawed and should be improved rather than abolished. Court review cannot be rejected as a matter of principle. For example, in a hypothetical situation where the reasoning of the court order would include untrustworthy information, the court would subsequently have obligation to inspect all materials in order to compare facts in the file with facts stated in a court decision. Many remedies can review credibility or lawfulness during appeal proceedings.

6.1.2. *Strengthening supervision in certain stages of procedure*

It was possible to supplement legal provisions so that court orders would pass some additional scrutiny or checkpoints before being sent to police. Such additional checks could be carried out either obligatory or exceptionally at the request of certain bodies or defendant. Given that there is not a large number of court orders per year for secret surveillance nor other special evidentiary actions in domestic system, the obligation of a court panel or a higher court to check or validate each court order reasoning, should not impose an overload. Such measure would also help to remove issues on police responsibility if it is performing a questionable court order.

In comparative law there can be found various forms of subsequent action in order to correct irregularity. One example is when certain bodies have authority to correct mistakes found in court orders before sending them for execution. In the Case *Kennedy v The United Kingdom* there is mentioned that subsequent supervision by a commissioner can use the powers of rectification.[44]

An example of safeguards is introduction of an additional appeal procedure that could be opened within a certain period after the targeted person has been officially informed that a covert measure has been completed. In some countries, such appeal could be submitted six months after a person has been officially noticed that a covert measure had finished,[45] whether or not incriminating evidence has been gathered. In addition to these, there are various possibilities of introducing many other safeguards.

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43 Case SCRC, I Kž-Us 116/17, 5 November 2017

44 Judgment *Kennedy v The United Kingdom*, no. 26839/05, 18 May 2010, §149

45 Decision *Weber and Saravia v Germany*, no. 54934/00, 29 June 2006, §49

6.2. The ECHR rules on certain legal remedies

6.2.1. *Characteristics of judicial review*

The ECtHR is suggesting in its cases against Croatia that there should be introduced additional safeguards to enhance lawfulness of the proceedings. The ECtHR makes remark that authorities have not shown that there exist other forms of checks or appeals in the event of privacy violations.[46] The ECtHR requires involvement of *a priori* or *a posteriori* review with an aim to ensure that covert measures are not ordered irregular.[47]

It is unusual that instead of reinforcing the weaker parts of procedure, the attention towards them has been neglected. For a judicial review in appeal proceedings, the ECtHR uses the term "retrospective justification" which clearly indicates that it does not consider them to be of appropriate quality. This is particularly evident when the ECtHR further states that such control cannot represent sufficient safeguard, because it opens a space to arbitrariness.[48] The ECtHR remarks that check of lawfulness of evidence is only existing legal remedy in relation to a defective court order, and moreover, it is limited and does not check substantial issues.[49]

These remarks are central to the analysis of the ECtHR judgments, as they emphasize the importance of widening appeal process. The ECtHR appears to have concluded that a judicial review in domestic proceedings represents an automatic justification of omissions of lower courts. The ECtHR states that relevant domestic law, as interpreted by the courts, did not provide sufficient clarity and did not provide adequate safeguards against abuses, and that the procedure for ordering and monitoring was not fully in accordance with the requirements of lawfulness.[50] Therefore, it is clear from decisions against Croatia that several factors contributed to the injury, what means one-sided approach could not be enforced effectively. The main role is being played by the lack of safeguards and insufficient judicial review, which finally led to unclear interpretations by higher courts.

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46 "the Government have not provided any information on remedies – such as an application for a declaratory judgment or an action for damages", Judgment *Dragojević v Croatia, op. cit.*, note 6, §100

47 Kusak, M., *Mutual admissibility of evidence in criminal matters in the EU: A study of telephone tapping and house search*. IRCP-series, *vol.* 53, Maklu, Antwerpen, 2017, p. 56, 57

48 Judgment *Dragojević v Croatia,* op. cit., note 6, §98

49 "competent criminal courts limited their assessment of the use of secret surveillance to the extent relevant to the admissibility of the evidence thus obtained, without going into the substance of the Convention requirements", Judgment *Dragojević v Croatia, op. cit.*, note 6, §100

50 Judgment *Dragojević v Croatia, op. cit.*, note 6, §101; *Matanović v Croatia*, *op. cit.*, note 9, §114; *Grba v Croatia*, *op. cit.*, note 10, §86; *Bašić v Croatia*, *op. cit.*, note 8, §34

In all decisions against Croatia, the ECtHR considers that a judicial review of lawfulness circumvented the obligation to provide a detailed reasoning at the time the order was issued.[51] If a judicial review of lawfulness would not be limited and if it could be focused on substantive issues, the ECtHR would probably accept it as a sufficient safeguard and would not consider it as an opportunity to circumvent the legal obligations.

Such context for the evaluation of judicial review is evident by comparison with other comparative law systems in which the ECtHR held quite the opposite conclusion that a judicial review is a satisfactory safeguard. The ECtHR has explicitly stated that judicial review may offer sufficient safeguards because it is impossible to disclose a covert action to a defendant at the time of its execution.[52] A judicial review offered a sufficient safeguard against arbitrariness in similar case of covert movement surveillance.[53]

It follows that judicial review must be focused on certain fields, and it must have certain characteristics in order to be accepted as satisfactory. Breaches were seen in some other countries as well as in Croatia. For example, the ECtHR found in the Case Šantare that the domestic system did not provide an effective remedy.[54] In the Case *Liblik* it was found that the court made only superficial and declaratory statements in the court order.[55] The ECtHR also concluded that the obligation to state reasons at the time of issuance of court order cannot be replaced by the possibility of justification at later stages of the proceedings when many other evidence is already collected.[56]

Sometimes it is hard to determine seriousness of a breach comparing some of the cases delivered against different countries, because of unclear criteria which are used. That guided some authors to conclusion that the ECtHR case-law is inconsistent. Some scholars have doubts if their system of safeguards could pass strict scrutiny of that kind.[57] Some authors analysed ECtHR surveillance cases and divided them into two groups of low and strict scrutiny cases, with an aim to find connection with variables such as type of crime, means of interception, conviction

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51 Judgment *Dragojević v Croatia, op. cit.*, note 6, §98; *Matanović v Croatia, op. cit.*, note 9, §114; *Grba v Croatia, op. cit.*, note 10, §86; *Bašić v Croatia*, *op. cit.*, note 8, §34

52 Judgment *Sommer v Germany*, no. 73607/13, 27 April 2017, §62

53 Judgment *Uzun v Germany*, no. 35623/05, 2 September 2010, §72

54 Judgment Šantare *and Labazņikovs v Latvia*, no. 34148/07, 31 March 2016, §62

55 *op. cit.* §137

56 Judgment *Liblik and Others v Estonia*, no. 173/15 etc., 28 May 2019, §141

57 Lindeman, J., *Dragojevic t. Kroatië – annotatie*, Jurisprudentie Bescherming Persoonsgegevens, no. 57, Utrecht, 2016, pp. 41, 44

etc. Scrutiny by the ECtHR was low when terrorism was in case, but very strict when protesters against government or economic crime was at issue. The Case *Dragojević* falls into a group of strict scrutiny applied by the Court.[58] Maybe some other factors contributed to strict scrutiny, such as large number of appeals on this issue in domestic system, what indicates a significance of a problem similar as in some other judgment like *Ekimdzhiev*.[59] Very strict approach of the ECtHR in the Case *Dragojević* is explained by some scholars as consequence of a general impression about state surveillance left by the Snowden allegations.[60]

6.2.2. *Exclusion of collected evidence*

The ECtHR considers that the exclusion of illegal evidence is not a main tool for improvement of safeguards, so it is unclear why the SC revision has an opposite opinion and expects that it could solve all causes which are contributing to occurrence of the violations. Emphasis should be placed on other remedies to limit the discretion of certain authorities.[61] Initiating a procedure to assess the legality of evidence or to seek its exclusion does not constitute a tool for improving the lawfulness.[62] If covert measures were not accompanied by adequate safeguards, that opens a space for arbitrariness,[63] regardless of the possibility of exclusion of unlawful evidence at later stages of procedure. Exclusion of evidence could be labelled as excessively rigid instrument if it does not achieve a right purpose.

The main disadvantage of exclusion is that it is not a remedy for protection of rights prior to the violation, nor it is a prompt remedy after the disputed covert

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58 Malgieri, G.; De Hert, P, *European Human Rights, Criminal Surveillance, and Intelligence Surveillance: Towards 'Good Enough' Oversight, Preferably But Not Necessarily by Judges*, Cambridge Handbook of Surveillance Law, 2017, p. 8

59 After having noted some shortcomings, the ECtHR cited that more than 10.000 warrants were issued over a period of two years, what led to conclusion that „system of secret surveillance is … overused … which may in part be due to the inadequate safeguards", Judgment *Ekimdzhiev v. Bulgaria*, no. 62540/00, 28 June 2007, §92

60 Sharpe, S., *National Security, Personal Privacy and the Law: Surveying Electronic Surveillance and Data Acquisition*, Routledge, London, 2019, pp. 49, 51 etc

61 "Given the absence of specific regulations providing safeguards, the Court is not satisfied […] to request the exclusion of its results as unlawfully obtained evidence met the 'quality of law' requirements described above", Judgment *Akhlyustin v Russia*, no. 21200/05, 7 November 2017, §45

62 "Given the absence of specific regulations providing safeguards, the Court is not satisfied that, as claimed by the Government, the possibility for the applicant to [..] request the exclusion of its results as unlawfully obtained evidence met the above requirements", Judgment *Bykov v. Russia*, no. 4378/02, 10 March 2009, §80

63 "open to arbitrariness and were therefore inconsistent with the requirement of lawfulness", *op. cit*. §46

action has been taken.[64] Exclusion of evidence is applied later in criminal proceedings and it gives benefit to perpetrators only, but not to other persons against whom the same violation is committed and incriminating recordings or other evidence was not found. In a hypothetical case when a court order for surveillance would be issued contrary to statutory conditions and in excess of judicial authority, and no single evidence is found, exclusion doesn't have any effect. If no evidence of a serious crime is found because the target person had not committed it, a serious violation of privacy rights exits, but the person is unable to use exclusion of evidence as a respond to arbitrariness.

The ECtHR does not think that fairness would require the launch of exclusion of credible evidence, such as photos or recordings.[65] The ECtHR has long favoured the credibility of evidence and considers it sufficient if the defendant had opportunity to verify authenticity of evidence.[66] The SC revision decision states otherwise when it is emphasising that the ECtHR concluded that "the task is only to determine whether the defendant was able to question the lawfulness of any evidence before a domestic court".[67] However, it is clear from the ECtHR's decisions that, in assessing the fairness of the proceedings it sought the opportunity to challenge the authenticity of recording, and not the lawfulness.[68] The SC revision suggests that exclusion of evidence should be basic remedy by the Convention law, but such interpretation is not supported. The current situation does not seem to be in line with the ECtHR rules. That means violations can further appear despite this attempt. There has been applied too strict tool that does not cover all key issues that need to be addressed. Factors which contributed to the violation are just ignored.

7. CONCLUSION

The analysis shows that most of the time the SC had uniform interpretation about consequences of deficiencies in court order reasoning. The court held that omissions do constitute an irregularity, but they are not of such significance that recordings and other evidence collected through such covert actions should be excluded. Some decisions made references to the ECtHR standards in supporting

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64 Karas, Ž.; Štrk, D., *Exclusion of Illegally Obtained Real Evidence in Comparative Law*, Zagreb Law Review, *vol*. 2, no. 2, 2013, pp. 185-212

65 Krapac, D., *Unlawful evidence in criminal procedure according to the case law of the European court of human rights*, Zagreb Law Faculty Collected Papers, *vol*. 60, no. 6, 2010, pp. 1207-1240

66 Judgment *Schenk v Switzerland*, no. 10862/84, 12 July 1988

67 Case SCRC, I Kž-Us 116/17, 5 November 2017

68 Judgment *Dragojević v Croatia, op. cit*., note 6, §132, *Matanović v Croatia, op. cit*., note 9, §50, *Bašić v Croatia*, *op. cit*., note 8, §44

this conclusion. The Convention law holds that breaches in this area are not causing negative effects on the fairness of the whole procedure. In no single decision against Croatia did the ECtHR found that the fairness of proceedings was impaired by the use of secret recordings as evidence in criminal proceedings. Besides that, the ECtHR made remark that the review of lawfulness of evidence constitutes a limited remedy without a substantive role.

Regardless of such viewpoint, one of the SC chambers issued a decision in 2017 naming it "the revision", and expressed a completely different standpoint on the exclusion of evidence, even though the statutory provisions were not changed in the meantime. Such a major change, which is contrary to a longstanding SC's case-law and is even more demanding than the Convention law, should have been substantiated on more extensive argumentation. Factors that contributed to occurrence of violations are neglected, and remedy that is recommended – the exclusion of evidence, cannot solve problems, but can only result in severe procedural consequences. The results of analysis indicate that earlier interpretation of the SC (which was dominant before 2017) was not contrary to the Convention standards, and that the newly proposed "revision" may be considered as too harsh and without targeted action.

The ECtHR pointed out several circumstances in Croatian cases that contributed to the violation of lawfulness in Article 8. The most significant factors were the lack of appropriate safeguards and the lack of adequate judicial review that could prevent circumvention of legal obligations. Compared to some similar cases from other countries, it seems that the ECtHR used rigorous scrutiny in Croatian cases, probably under the influence of high number of appeals on this issue. Intrusive actions are seen as a problem because they present potential danger to democratic society.

Exclusionary rule cannot replace other remedies that may provide more adequate, targeted reaction in case of procedural violations. The results of this research suggest that "the revision" should not be considered as a final interpretation of the Convention standards. Even after 2017 there are still interpretations, in certain SC chambers, that are contrary to "the revision". This inconsistency in the case-law could be problematic in terms of adhering to ECtHR rules, probably until adequate additional safeguards would be fully provided at the statutory level.

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UDK 343.144(497.7):343.1
Original scientific paper

FACTUAL SUPPORT OF THE GUILTY PLEA AND SENTENCE BARGAINING DURING THE CRIMINAL PROCEDURE - THE MACEDONIAN EXPERIENCE

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ABSTRACT

As part of its EU accession agenda, Republic of North Macedonia has performed series of reforms of its legal system in order to reach EU legal standards. As part of this agenda, improvement of the efficiency of the criminal trials was marked as highly relevant. New Law on Criminal Procedure, consisting many modern adversarial trial instruments, enacted in 2010, supposed to improve the efficiency of the Macedonian criminal trials. However, after a certain period we deem that it is necessary to reevaluate the effects of these reforms and their practical implementation. Hence, the author evaluates the Macedonian court's practice of implementation of the defendant's guilty plea during the main hearing of the criminal procedure together with the reasons for decline in the use of these instruments into the court's practice. The main reasons for such decline of the implementation in practice can be located in several areas. Such areas are improper implementation of the law, legal imperfections together with the length of the criminal trials, lesser sanctioning policy and absence of proper instrument for providing of the expected sentence as an outcome from the bargaining procedure. However, besides these already known weak areas concerning the implementation of these instruments in practice the author has detected an additional problematic area about the factual support of the guilty plea during the main hearing. In addition, the author analyzes the practice of evaluation of additional evidence in case of guilty plea, and the amount and the quality of evidence provided by the prosecutor as support to the defendant's guilty plea. Author concludes that there is a gap between the theoretical definitions of the guilty plea and its practical implementation, and provides practical proposals for improvement of the provisions of the Law on Criminal Procedure. He concludes that these amendments are necessary for proper implementation of the Law and of the protection of the defendant's rights and pertaining the impression of just criminal procedure in cases when defendant pleads guilty.

Keywords: *sentence bargaining, guilty plea, evidence, factual support*

1. INTRODUCTION

As part of its EU accession process, Republic of North Macedonia has undertaken vast reform of the national criminal justice system in the past decade. In this sense, we are counting ten years from the enactment of the new Law on Criminal Procedure (LCP)[1] as part of the reform process inspired and designed to increase the efficiency and effectiveness of the criminal justice system, together with the need to increase the level of trust and confidence in the system and to improve the defendant's rights. Finally, one of the main goals of this reform was trough the improvement of the fairness of the criminal procedure to advance the legitimacy of the criminal trials, and to accept and implement the EU acquis in the area of criminal justice into the national system.

One of the biggest changes on this path was the enactment of the new Law on Criminal Procedure. This Law on Criminal Procedure was enacted in 2010 and has marked the biggest shift of the concept of the criminal procedure from inquisitorial, or euro-continental criminal procedure, towards more adversarial criminal trial.[2] However, besides this shift from the legal doctrine, the new LCP has also incorporated the latest trends of the evolution of the protection of the defendant's rights as already sketched in several EU Directives and determined from the ECtHR practice. The most notable novelties of the Macedonian criminal justice system reform, were the introduction of guilty plea and sentence bargaining[3] as part of this adversarial criminal procedure. Besides the complete restructure of the main hearing, most important contextual changes of LCP are the passivation of the judge during the investigative phase and main hearing, together with the im-

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1 Official Gazette of the Republic of Macedonia, no 150/2010

2 See: Matovski, N.; Kalajdziev, G., '*Efficiency of Prosecutorial Investigation in Contrast to Efficiency of the Defense in Reformed Criminal Procedure (with a particular view of the new Macedonian CPC)',* in: Jovanović, I.; Petrović-Jovanović, A., (eds.), Prosecutorial investigation regional criminal procedure legislation and experiences in application, OSCE Mission to Serbia, 2014; Buzarovska, G.; Kalajdziev, G., *'Reform of the Criminal Procedure in the Republic of Macedonia*', Iustinianus Primus Law Review, *vol.* 1, no. 1, 2010

3 These two aspects or instruments of the criminal procedure, also recognized by the *CoE's Recommendation No. (87) 18, of the Committee of Ministers to Member States Concerning the Simplification of the Criminal Justice*, were envisioned as one of the so-called "holy grail" instruments, which would increase the effectiveness and efficiency of the criminal trials in Republic of North Macedonia, while at the same time with equal success would protect defendants' rights to fair trial. Also see: Buzarovska, G.; Misoski, B., *'Plea Bargaining under the CPC of the Republic of Macedonia'*, in: Jovanovic, I.; Stanisavljevic, M. (eds.), Simplified Forms of Procedures in Criminal Matters – Regional Criminal Procedure Legislation and Experiences in Application, OSCE Mission to Serbia, 2013

provement of the position of the prosecutor during the investigative phase as sole and most important figure for gathering and investigating evidence.[4]

Since 10 years have elapsed from the enactment of this completely new in concept LCP, and more than 7 of its practical implementation, we deem that we have appropriate time distance for evaluation of the effects of these newly introduced legal transplants into our modernized criminal procedure doctrine and courts' practice.

Considering the implementation of the sentence bargaining and guilty plea, it is fair to mention that immediately after the enactment of the new LCP in 2010 the criminal justice professionals were divided regarding the dilemma whether sentence bargaining and guilty plea is the real answer to clean-up the court dockets and speeding up the criminal trials. Hence, there were doubts in these institutes whether they offer fair and just model that can generate just judgments having into consideration Macedonian legal mentality.[5]

The dilemmas regarding the introduction of these instruments were present since they are controversial even in their founding legal systems, such as US legal system and the UK legal system.[6] Furthermore, from comparative perspective, there are many ongoing discussions and debates concerning its fairness and open questions remain regarding its proper implementation.[7] Since from the enactment of the sentence bargaining and guilty plea several problematic areas are present, we think that it is appropriate to reevaluate their practical and proper implementation in the Macedonian criminal justice system. Main issues that have risen from its implementation, so far, are issues based upon legal imperfections together with the length of the criminal trials, lesser sanctioning policy and absence of proper instrument for providing of the expected sentence as an outcome from the bar-

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4 Калајџиев, Г., '*Замки и заблуди на реформата на истрагата*' in Зборник на трудови на *Правните факултети во Скопје и Загреб*, ПФ Скопје/PF Zagreb 2009; Kalajdziev, G. *et al.*,'*Rearrangement of the Main Hearing in Republic of Macedonia*', МРКПК, бр. 2-3, 2008, pp. 213-234

5 Although, more structured dialogues were more frequent in our surroundings states than in North Macedonia, since, somehow this trend of modernizing the criminal procedure was simultaneous in the area of Western Balkan states. See: Jovanovic, I.; Stanisavljevic, M. (eds.), *'Simplified Forms of Procedures in Criminal Matters – Regional Criminal Procedure Legislation and Experiences in Application*', OSCE Mission to Serbia, 2013

6 See: Fisher, G., *'Plea bargaining's triumph: a history of plea bargaining in America*', Stanford University Press, 2003; McConville, M., *'Plea Bargaining: Ethics and Politics*', Journal of Law and Society, *vol.* 25, no. 4, 1998, pp. 562-587

7 See: Herzog, S., *'Public support for Plea Bargaining Practices*', Crime and Delinquency, *vol.* 50, no 4, 2004; Boari, N.; Fiorentini, G., *'An Economic Analysis of Plea Bargaining: the Incentives of the Parties in the Mixed Penal System*', International Review of Law and Economics, *vol.* 21, no. 2, June, 2001, pp. 213-231; Yue, M., *'Prosecutorial Discretion and Plea Bargaining in the USA, Germany, France and Italy: A Comparative Perspective*', International Criminal Justice Review, *vol.* 12, 2001, pp. 22-48

gaining procedure. Finally, the level of persuasion of the court while accepting the guilty plea or draft-settlement as result of the sentence bargaining has risen as one of the main obstacles that diminish the public trust into the fairness of these instruments in Republic of North Macedonia. In order to have proper evaluation of these dilemmas, we think that initially it is necessary to make a brief legal explanation of the concept of the LCP's provisions that regulates these two legal transplants.

2. GUILTY PLEA AND SENTENCE BARGAINING IN LCP OF THE REPUBLIC OF NORTH MACEDONIA

The LCP regulates sentence bargaining and guilty plea with several articles. More specific, the sentence bargaining is regulated within the provisions of the Chapter 29 of the LCP, which statutes the implementation of this institute during the early stages of the criminal procedure.[8]

2.1. This means that, in essence, **sentence bargaining** is generally defined as an instrument for early resolution of the criminal case during the investigative phase, while guilty plea is reserved for the later stages of the criminal procedure. Hence, further specific of Macedonian sentence bargaining procedure is the absence of the explicit guilty plea for introduction of this instrument during the pretrial procedure. The theory behind this legislative decision rests upon two facts. The first one is that at this stage it is too early to discuss the formal guilty plea, since in this phase there is no formal indictment submitted to the court. In addition, during this phase the court is still not involved regarding the factual determination of the guilt, since, as regulated in the LCP, only the court determines the guilt of the defendant in a criminal case. Due to this, at this stage the court serves only as a guarantee for the legality of the undertaken legal actions of the prosecutor and protector of suspect's rights. Additionally in some cases, it might be possible that the whole evidence is not discovered or known to the prosecution, and due to this the prosecution might not expect that suspect will plead guilty.

As regulated within the Macedonian LCP, implementation of the sentence bargaining procedure during the investigative phase of the criminal trial rests solely upon the wish of the suspect. Hence, the suspect, together with his attorney, can enter into sentence bargaining procedure, where they can bargaining only over the

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[8] See: Buzarovska, G.; Misoski, B., *'Plea Bargaining in the New Law on Criminal Procedure in Republic of Macedonia'*, Iustinianus Primus Law Review, *vol.* 1, no. 2 2010; Misoski, B., *"Delayed Justice - Macedonian Experience with Guilty Plea and Sentence Bargaining"*, SEEU Review, *vol.* 11, issue 1. 2016, available online: [https://content.sciendo.com/view/journals/seeur/11/1/article-p99.xml], accessed 20. June 2020

type and severity of the criminal sanction, while it is not allowed bargaining over the composition of the charges due to the strict principle of legality of charging. The consequences of these provisions is that the prosecutor is obliged to prosecute or indict for every crime that the suspect has committed, and at this stage the decision to step into early and speedy resolution of the criminal case rests solely upon the decision of the suspects.

In cases when a suspect decides to enter into bargaining with the prosecution, during the bargaining process over the types and severity of the criminal sanctions, the prosecutor and suspect together with defense attorney[9] should reach mutual acceptable solution transformed into a draft-settlement that must be verified by the court.[10] The suspect is entitled to express his defense freely and he/she cannot be forced to accept the settlement. The suspect does not have any obligation to provide facts that will harm him/her or his/hers close relatives and has a privilege of non-self-incrimination. Furthermore, he/she has a right to state all the relevant facts that may be of benefit to his/hers position. In virtue of this solution, an addition to the draft - settlement could only be the request for reparation of the damages submitted by the victim of the crime.[11] However, the indemnification request cannot be something upon which the suspect and the prosecutor can bargain over. This means that within the draft-settlement the request for indemnification by the damaged person can be only accepted in full as it was requested earlier or it would not be part of the draft-settlement. In later case the damaged person will be informed to exercise his/hers right to indemnification in civil procedure. Hence, by virtue of his authority, the Public prosecutor protects the rights of the damaged person, but the damaged person is not an active participant of the sentence bargaining process. Finally, constituent part of the draft – settlement is the proposed sanction of a certain type and severity, which can be mitigated to the legal minimum for the particular criminal act determined in the Criminal Code.[12]

During the phase of sentence bargaining, the pretrial phase judge in charge of evaluating the legality and willingness of the parties to submit the draft-settlement is not involved in the process of bargaining between the parties.[13] Through this legal provision, the judge would keep its unbiased position and would not be affected by the statements given by the parties during the sentence bargaining

9 See article 74, LCP

10 See: articles 483 to 490, LCP

11 See: article 483, LCP

12 See: particularly articles 484 to 487, LCP

13 See: article 487, LCP, Misoski, B.; Ilikj Dimoski, D., *'Judges' Role in the Evaluation of the Defendant's Plea within the Sentence Bargaining Procedure'*, Journal of the Faculty of Security, University St. Klement of Ohrid, Bitola, 2016

procedure. This solution is in essence very close to the original model and desired role of the court during the bargaining process.[14]

The pretrial phase judge decides upon the submitted draft-settlement, as noted above.[15] The pretrial phase judge evaluates the legality of the draft - settlement at a special hearing. At this hearing, pretrial judge particularly examines whether the draft – settlement is voluntarily submitted and whether the defendant is aware of and understands the legal consequences of the court's acceptance of the draft – settlement. Furthermore, the court examines the consequences related to the request of the damaged person for restitution of the damages if it is included in the draft – settlement, together with the court fees. During this phase, the parties can withdraw from the submitted draft-settlement, but if they do not, and if the court accepts it, then the court delivers verdict, which is final, and cannot be objected by the parties with the regular legal remedies. [16]

There are two possibilities for the parties to depart from already submitted draft – settlement. The first possibility for the parties to withdraw from the submitted draft – settlement is in the phase when the court is examining this draft-settlement where the parties can express its grounds and reasons for non-acceptance. This practically covers the cases when the draft-settlement was not voluntary, if it was exhorted by force by the prosecutor, or if parties have broken their promises given during the bargaining process. Second possibility covers the situation when the court does not accept the submitted draft-settlement due to fact that the proposed sanction does not adequately reflect the conditions and factual basis determined by the submitted evidence enclosed to the draft – settlement. In these both possibilities, the court delivers formal decision for rejection of the draft – settlement.

Providing the opportunity to the pretrial phase judge to evaluate the enclosed list of evidence in support to the submitted draft-settlement, basically, means that the Macedonian legislator has accepted the solution where the draft – settlement must be grounded with sufficient evidence in order for the court to accept it. Henceforward, in essence the court, besides evaluating the legality and voluntary nature of the settlement, must examine whether there is enough evidence in support of the court's verdict.[17]

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14 See: Alschuler, A. W., *'The Trial Judge's Role in Plea Bargaining, Part I'*, Columbia Law Review, *vol.* 76, no. 7, 1976, pp. 1059-1154

15 See: article 485, LCP

16 See: article 488, LCP

17 See: article 489, LCP

2.2. On the other hand, **guilty plea** under the Macedonian LCP can be submitted to the court on three occasions. In any of these cases, prior to the guilty plea given by the defendant, there must be formal indictment submitted by the public prosecutor to the court. First possibility for the defendant to plead guilty is upon receiving the indictment.[18] Second possibility for the defendant to plead guilty is during the phase of examination of the legality of the submitted indictment,[19] while the third possibility is during defendant's first hearing of the trial.[20]

In any of these cases the defendant can plead guilty for one, several or every account of the indictment. In such case, the judge or the judicial council, depending on the severity of the crime, must schedule a hearing to determine whether the defendant's guilty plea is voluntarily and whether the defendant is aware of the legal consequences of the guilty plea. The court must also evaluate whether there is enough evidence supporting the defendant's guilty plea.

In order to prevent any misuse of the defendant's guilty plea in further court proceedings, the LCP prohibits the court to use defendant's guilty plea in any subsequent phases of the criminal trial if this guilty plea was rejected by the court. In such cases any records that contain the defendants guilty plea are put aside of the case file and cannot be used in any further court proceedings.[21]

Guilty plea submitted before the main hearing of the criminal trial, serves as a starting point for initiation of the sentence bargaining procedure.[22] This means that in cases when the indictment is submitted, defendant's guilty plea is a starting point for commencement of the sentence bargaining procedure between the defendant and his/hers defense attorney and the public prosecutor. In such case, the same provisions that are regulating the sentence bargaining procedure during the investigative phase of the criminal procedure are in power for regulating the sentence bargaining procedure during the phase of control of the indictment.[23] If both parties reach mutual acceptable solution regarding the type and severity of criminal sanction, they submit the draft-settlement to the court. Prior to the evaluation of the submitted draft-settlement, court must determine that the guilty plea was voluntary and intelligent, and after that, court evaluates the submitted

[18] See: articles 329 and 330, LCP

[19] See: articles 333 to 336, LCP

[20] See: articles 380, 381, LCP

[21] See: article 335, LCP

[22] See: article 334, LCP

[23] See: articles 335 and 485, LCP

draft-settlement upon the same grounds as the evaluation of the draft-settlement during the investigative phase.[24]

If the defendant pleads guilty at the first hearing of the main trial, then the procedure is slightly different and the parties will not commence the sentence bargaining procedure. In such cases, the court will only shorten the evidentiary phase of the main hearing and will examine only the evidence that are important for deliberating the type and severity of sanction upon the crimes for which the defendant has pleaded guilty. Guilty plea can be submitted to the court immediately after the opening statements from the parties, and before the procedure for presentation of the evidence of the parties. In such situation, the court is also obliged to evaluate whether the defendant's guilty plea is intelligent and voluntary.[25]

It has to be noted that the court does not allow the parties to bargain over the sentence. It means that in this case, the court may mitigate the sanction upon the defendant's guilty plea, but this is not mandatory, since this guilty plea is considered only as a mean for abbreviation of the evidentiary phase of the main hearing and due to this, the court must provide elaborate explanation for this mitigation within the verdict's rationale. When the evidentiary hearing, as part of the main hearing, is abbreviated due to the defendant's guilty plea, the court will deliberate the verdict taking into consideration the guilty plea together with the presented evidence. Upon the verdict where the court has accepted the defendant's guilty plea, the parties are not allowed to submit legal remedies for undetermined factual state.[26]

In cases when court does not accept the defendant's guilty plea, the main hearing will proceed with regular dynamics.

3. PRACTICAL PROBLEMS IN THE IMPLEMENTATION OF THE GUILTY PLEA AND SENTENCE BARGAINING

Considering the fact that legal transplants are, in most cases, adapted to the legal culture and local tradition, it is possible that sometimes even the noblest ideas will lose their edge within the practical implementation. We can state that something similar happened to the Macedonian experience with the sentence bargaining and guilty plea instruments that were initially introduced as a specific tool for improvement of the national legal system.

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24 See: article 334, LCP

25 See: article 381, LCP

26 See: article 381, LCP

At the beginning, we should state the most obvious fact that these instruments are not used as frequently as the legislator expected, and due to this, in a sense they have failed with their mission to reduce the court dockets and save the scarce court resources.

Statistically, the level of resolved cases using these legal instruments has declined over the years of their implementation.[27] For example, an NGO[28] that monitors court proceedings in Republic of North Macedonia in its Annual reports have noticed that the numbers have dropped from 40 guilty pleas in 2017, over 26 in 2018, to just 7 in 2019. The same situation can be observed from the Annual reports from the courts and Public Prosecution Offices. For example, State Prosecution for Organized Crime and Corruption have concluded 36 draft-settlements in 2014-th, 28 in 2015-th, 19 in 2016-th, 2 in 2017 and 9 in 2019.[29]

Reasons for such decline might be located in several aspects. First aspect is the legal imperfection that has provided several legal lacunas particularly in the interpretation of the idea of these legal provisions. Additional reason for this was the absence of legal documents or commentaries from the higher courts, such as legal opinions or general guidelines for judges that would provide further theoretical and practical support to the practitioners in the implementation of these legal instruments.[30]

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27 See the data from the Annual reports of the courts available on: [http://www.sud.mk/wps/portal/osskopje1/sud/izvestai/svi/!ut/p/z1/hZDBboJAEIafxQNHmTFQWL2tltIqjYmVCnNpgGwXEmDNukj69lLrpUmlc5vJ9_2TGSBIgNrsXMnMVKrN6qFPyfuY46M3W64w2m58hvw1DqI4fFlHDy4croAXui6yDUbsbbdEHqDP9nOO4RMCjfvvQEBFp7VoDaRGd-IWOeJ8R-Kd4jj49B-yBpK1yn8O5G3uMAmkxafQQtudHsalMcfTwk-IL-763pVKyFnahGgv_Ukp1MpD8JuH5umf8O8cmbqYJTin_cno5mVwA7bpoKQ!!/dz/d5/L2dBISEvZ0FBIS9nQSEh/?categoryValue=%2Fpublic_design%2FIzvestaii%2FTip_na_izvestaii%2FGodisen&yearCat=0&reportTypeSel=%2Fpublic_design%2FIzvestaii%2FTip_na_izvestaii%2FGodisen], accessed 20. June 2020

28 See: Misoski, B.; Avramovski, D.; Petrovska, N., *'Anlysis of the Data Collected from the Court Proceeding Monitored in 2017'*, Coalition All for Fair Trials, Skopje, OSCE, 2018; Misoski, B.; Avramovski, D.; Petrovska, N., *'Anlysis of the Data Collected from the Court Proceeding Monitored in 2018'*, Coalition All for Fair Trials, Skopje, OSCE, 2019; Misoski, B.; Avramovski, D.; Petrovska, N., *'Anlysis of the Data Collected from the Court Proceeding Monitored in 2017'*, Coalition All for Fair Trials, Skopje, OSCE, 2020

29 See the Annual Reports of the Public prosecution Office in Republic of North Macedonia, available: [http://jorm.gov.mk/category/dokumenti/izvestai/], accessed 20. June 2020

30 In this sense, even the Prosecutors Bylaws that ware enacted by the State Prosecution Office in 2013 in order to improve and unify the prosecutors' practice while implementing sentence bargaining and guilty plea are declared as confidential and are unavailable for further public scrutiny and possible improvement

Another problem, that supports this reduction of the practical implementation of these instruments, may be based upon the lenient court policy towards the perpetrators of the crimes. The combination of lenient court sanctioning policy and the length of the criminal procedure instigates the perpetrators to lose their incentive for speedy resolution of the criminal trial.[31] In this sense, we conclude that in cases when the court procedure is lengthy, with no guarantee that the outcome will be final in near future, the defendants might be motivated to play with the length of the criminal procedure rather than its outcome. Furthermore, in such cases defendants may hope that some evidence will not be available to be discovered in front of the court or they can successfully tamper them, or even in some cases they hope that the statutory limitations for criminal prosecution may appear.[32]

In addition to the lenient court's sanctioning policy, another factor is the lack of guidelines for expected criminal sanction.[33] Henceforward, absence of an instrument for expected sanction delivered as result of guilty plea or participation in the sentence bargaining has great impact towards the decrease of the popularity of these measures.[34] This results in a situation where the defendants are not aware, or cannot recognize the benefits from their participation within these legal mechanisms for acceleration of the criminal procedure, nor can they feel in their own case that the court acknowledges and adequately accredits their participatory or constructive role during the criminal procedure.

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31 See: Груевска Дракулевски, А.; Мисоски, Б., '*Компаративна анализа на механизмите на упатства за одмерување казна: Упатството за одмерување казни во САД*', МРКПК, год. 21, бр. 1, 2014, available at: [http://maclc.mk/Upload/Documents/06.pdf], accessed 20. June 2020

32 For example, this has happened on one of the cases called 'Traektorija' from Special Prosecution Office in Charge for prosecuting the perpetrators of the crimes appeared or connected with illegally wiretapped communications. See: Petrovska, N.; Amet, S.; Hadzizafirov, Z., *'Efficient Criminal Justice: Analysis of the SPO Cases,* FIOOM, 2020, (in Macedonian), available at: [https://all4fairtrials.org.mk/wp-content/uploads/2020/04/BP-TA2020-FK-MKD.pdf], accessed 20. June 2020

33 Historically, in 2016 a Law on determining of the type and severity of the criminal sanctions was enacted, which is now void, due to its controversial decisions. See more: Каневчев, М., *За некои (контроверзни) решенија од Законот за определување на видот и одмерување на висината на казната*, МРКПК, год. 24, бр. 1, 2017, available at: [http://maclc.mk/Upload/Documents/Metodija%20Kanevchev%202.pdf], accessed 20. June 2020; Тупанчески, Н.; Деаноска Трендафилова, А., *Една година од примената на Законот за одредување на видот и одмерување на висината на казната – проблеми и предизвици*, МРКПК, год. 24, бр. 1, 2017, available at: [http://maclc.mk/Upload/Documents/Tupanceski,%20Deanoska.pdf], accessed 20. June 2020; Лажетиќ Бужаровска, Г., *'Невоедначената казнена политика и нејзиното влијание врз спогодувањето за кривична санкција според Законот за кривичната постапка'*, МРКПК, год. 21, бр. 1, 2014, available at: [http://maclc.mk/Upload/Documents/03.pdf], accessed 20. June 2020

34 For example similar to the UK sentence canvasing, see more: Sprack, J., *'A Practical Approach to Criminal Procedure'*, Oxford University Press, 10-th Edition 2005, pp 92

Due to this, guilty plea or sentence bargaining as specific instruments, are until now mostly used only for resolution of the court cases for lesser crimes, for which the sanction is up to 5 years of imprisonment and where the summary criminal procedure is commenced.[35]

Poor practice of implementation of these provisions in action is creating an environment where these instruments might be abused by the courts in specific cases without considering the defendants' rights. This not only decreases the number of such cases, but also diminishes the public trust in the courts. In addition, improper use of these instruments may in fact protect the real perpetrators and use the defendants as scapegoat. Due to this, in some cases the unbiased spectator can easily conclude that the judges may even glorify the suspects' or defendants' guilty plea without taking any consideration regarding the factual support of this plea.

Finally, besides the abovementioned reasons for such declined number of sentence bargaining and guilty plea by the Macedonian courts, another reason may be based upon the controversial nature of these measures.[36] Due to this, defendants, prosecutors and judges are not always expressively prepared to use these measures without serious doubt into their fairness and justness.

This list of reasons for such poor practical implementation of these instruments is not exhausted, and they raise vast dilemmas and request further analysis in order to provide specific answers for their improvement. Furthermore, we can comment that most of them are similar and exist in other criminal justice systems that have opted to implement guilty plea and plea-bargaining as a tools for improving the courts efficiency.

However, it seems that North Macedonia, rather shy, but obvious casts another specific malpractice of the guilty plea and sentence bargaining. This is primarily based on the level of factual support and requested evidence of the guilty plea. Hence, we have observed the practice[37] where the judges were reluctant to examine further factual support to the guilty plea and sentence bargaining when these instruments were introduced in front of the courts. In addition, they were more prone to accept these guilty pleas and draft settlements without scrutinizing the factual support behind them.

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35 See, for example, Annual Report of the Data from the court proceedings, Coalition All for Fair Trials of 2017, 2018 and 2019

36 For the discussions, see supra note no. 6

37 See: Annual Report of the Data from the court proceedings, Coalition All for Fair Trials of 2019

4. LEVEL OF FACTUAL SUPPORT OF THE GUILTY PLEA AND DRAFT-SETTLEMENT

The level of factual support of the guilty plea or the burden of persuasion of the court rests upon the prosecutor. This means that the prosecutor must discover sufficient amount of evidence in order to support the court's decision for accepting the sentence bargaining agreement, or to have sufficient amount of evidence in support of the defendant's guilty plea during the main hearing.

By definition, the prosecutor must discover sufficient evidence which initially should persuade himself/herself, and after that the court, that the suspect or the defendant has committed the crime and that the defendant is guilty for the committed crime. This means that in any case the prosecutor must have sufficient amount of evidence that can persuade the court beyond reasonable doubt that the defendant is guilty for the charged crime.[38]

Additionally, the suspect's guilty plea or statement should not serve as a fact-finding instrument or the suspect's statement cannot be the sole and only evidence upon which the verdict is based.[39] This means that during the investigate phase the prosecutor should accept the suspect's initiative for sentence bargaining only in cases when the prosecutor, upon the available facts, is persuaded on the level higher than preponderance of evidence and closer to beyond reasonable doubt of the suspects' guilt.[40]

However, in Macedonian scenario it was noted that in some cases the abovementioned principles were not observed or were poorly observed. In practice we have seen that the guilty plea can serve as a fact-finding instrument, while the courts have developed the practice of rare examination of additional evidence besides the defendant's guilty plea and prior convictions.[41]

The statistical data, coupled with data from focus groups with judges point to the conclusion that in most of the cases when the defendant has pleaded guilty or when the court receives the draft-settlement during the pretrial procedure, the judge usually examines only the legality of the guilty plea. This means that in

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38 See: Hall, D. E., *'Criminal Law and Procedure'*, 5thEdition, Delmar Cengage Learning, 2009, pp. 394; Tapper, C., *'Cross and Tapper on Evidence'*, 12th Edition, Oxford University Press, 2010

39 See more at: Damaška, M., *'Okrivljenikov iskaz kako dokaz u suvremenom krivičnom procesu'*, Narodne Novine, Zagreb, 1962, pp. 65 *ff.*

40 See: Viano, E., *'Plea Bargaining in the United States: a Perversion of Justice'*, Revue Internationale De Droit Penal, *vol.* 83, no. 1-2, 2012, available at: [https://www.cairn.info/revue-internationale-de-droit-penal-2012-1-page-109.htm#], accessed 20. June 2020

41 As is usually performed in the US Federal courts, when judge examines the guilty plea

such cases, judges are only evaluating whether the guilty plea was voluntary and whether this plea was intelligent. In rare cases judges request additional evidence for support of this guilty plea. Furthermore, in the focus groups it was noted that when defendant has pleaded guilty the judge's position is only formal. They stated that when the judge is faced with a guilty plea they treat it as a confession, unfortunately connecting this guilty plea with the establishment of the long abandoned principle of formal truth.[42]

Hence more, we have not been able to witness situation in court when the judge evaluates the defendant's guilty plea in such manner where the judge would ask the suspect or the defendant to provide detailed explanation how was the crime committed. This is important as necessity to connect this statement or explanation with the submitted list of evidence as integral part of the indictment.[43]

This observed judges' position of over estimating the prosecutors' professionalism, and not taking any additional steps to double check the veracity of defendant's statement may be based upon narrow interpretation of the legal provisions of the LCP. From the observed court cases we can conclude that the judges are narrowly interpreting the provisions of the article 381 paragraph 3, of the LCP, where it is regulated that after the defendant's guilty plea and the evaluation whether this plea is intelligent, voluntary and whether the defendant is aware of the consequences of the guilty plea (paragraph 2 of the article 381), the court will examine only the evidence that are relevant for determination of the criminal sanction.

Due to this, in practice when there is guilty plea, the court usually examines only the evidence connected to the defendant's prior conviction.[44] This situation relates to the fact that in *stricto sensu* of the law only the prior conviction is the evidence that is important to determine whether the defendant is a recidivist and in such cases to determine more severe sentence. However, it is needless to mention that under our legal doctrine we do not understand any distinction between the evidence, meaning that there is no distinctive division between the evidence related to the determination of guilt and evidence related to the determination of the

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42 This was obvious from the discussions over the presentation of the report. 2019

43 See: Israel, J. H.; Kamisar, Y.; LaFave, W. R., *'Criminal Procedure and the Constitution, Leading Supreme Court Cases and Introductory Text'*, Thomson West, 2003; Ingram, L. J., *Criminal Evidence*, 12-ed. Elsevier, 2015

44 Even more, from the Annual Reports of the Coalition All for Fair Trials we can conclude that evidence of prior conviction is the most common and usually the only evidence in support to the guilty plea. In over 95% of the analyzed guilty pleas, while only in several cases (only in 5 cases in the period of 3 years) the court evaluates additional evidence such as expert-witness opinions regarding the defendants' mental health or other evidence, such as financial expert-witness testimony. See CAFT Annual Reports for 2017, 2018 and 2019

criminal sentence. Furthermore, in some cases, the same evidence could be used for proving the guilt of the defendant, but at the same time, it could be used for determination of the sanction. For example, the evidence of defendants' gambling debts could serve as a proof of the defendant's motive for murdering his/hers grandparent in order to inherit theirs asset, which could serve as evidence for determination of both the type of the murder and the length of the prison sentence.

However, taking into consideration the LCP's provisions that regulates the sentence bargaining and guilty plea, we deem that in such cases, judges do not need to be strict. Henceforward, by the virtue of the law, the judges may request examination of any evidence from the list of evidence that is part of the indictment, which judges need as a factual support or for rebuttal of the defendant's guilty plea.

This idea rests upon the provisions of the article 334, line 2, of the paragraph 1, which states that while examining the guilty plea, given during the phase of evaluation of the indictment, court examines whether there are sufficient evidence in support to this defendants guilty plea. Despite the fact that this type of guilty plea rarely occurs in practice, the above-mentioned court's position should serve as a model for the evaluation of the guilty plea, which by Macedonian experience, occurs in most cases either when there is sentence bargaining during the investigative procedure, or as a guilty plea during the main hearing. In ideal situation, this would mean that during the examination of the defendant's guilty plea, the court should hear the whole testimony from the defendant, based upon the listed evidence into the indictment. Meaning that the defendant's plea should be in structural connection with the listed evidence, in a way of providing a no contradictory story of one life situation supported with the listed facts.

Further support of this possibility for broader interpretation of the LCP are the provisions of the article 483 paragraph 2, which regulates that after the sentence bargaining procedure the public prosecutor within the signed draft-settlement is obliged to provide all evidence, together with the signed defendant's statement regarding the type and the amount of the indemnification. Meaning that while the court examines the draft-settlement, all evidence should be placed in front of him/her.

This interpretation rests upon the fact that the provisions of the LCP are interconnected and cannot be read individually; however, it is only partial solution for improvement of the above-noticed situation.

Hence, we think that in order to improve the courts practice we need to undertake several activities. First, is to provide detailed commentary of the provisions of the

LCP, which are regulating the sentence bargaining and guilty plea. Possibly, more important is the need for further legislative improvements and amendments of the LCP's provisions. This improvement will clarify these provisions and make them more strict and precise. In this fashion, LCP should have clear provisions that will regulate the sentence bargaining and guilty plea in a way that will allow the judge to examine any evidence from the list of evidence or from the draft-settlement that judges think is necessary to examine as a factual support to the acceptance of the submitted draft-settlement or guilty plea. Such changes may be simple transformation of the provisions of the article 381 of LCP, or with simple deletion of the word: "sentence" in this paragraph, which would mean that the judges should examine the evidence in support to the defendant's guilty plea.

Additional possibility for improvement of the court's position for evaluation of guilty plea is through the model of information of the defendants' rights while explaining the indictment. This means that in cases when there is guilty plea, the court may request from the defendant to provide detailed plea and detailed explanation of the circumstances of the crime, connecting his/hers statement with the facts from the listed evidence, in connection to the opening speeches of the prosecutor and defense. Furthermore, if defendant is expressing readiness for pleading guilty, but states that he/she does not understand the indictment, than the court should explain the indictment to the defendant, but only in a manner which would simplify the legal jargon to defendant and will not tamper defendant's statement how things have happened. Furthermore, if defendant does not understand the charges even after the courts explanation, we deem that the guilty plea should be consider as unacceptable. Such changes to the article 380 of the LCP will provide further clarification of the guilty plea and will support the court's fact-finding position concerning the evaluation of the veracity of the guilty plea.

Further legislative intervention, than might improve the veracity of the court's practice with the implementation of the sentence bargaining and guilty plea is institutionalization of the sentence hearing.[45] This is another legal transplant from the original US federal criminal procedure, which will improve the factual support of the guilty plea and sentence bargaining while not jeopardizing the efficiency and effectiveness of the court hearings. This means that in such cases when the defendant has pleaded guilty, the judge should move forward with the procedure to the sentence hearing where the judge would have some type of inquisitorial role of deciding upon the amount of the evidence that should be examined as a support to the guilty plea.

[45] See: Sprack, *op. cit.,* note 34; Israel; Kamisar; LaFave, *op. cit.,* note 43

Although, it seems that such scenario shifts the burden of proof from the prosecutor to the court, in fact it only strengthens the judges' position to request the prosecutor to discover evidence in open court upon the courts need. However, before introduction of this possible solution into the amendments to the LCP's provisions, we think that there should be additional research in order to evaluate its impact towards the concept of the criminal procedure.

5. CONCLUSION

Guilty plea and sentence bargaining as two powerful instruments, well known from the comparative criminal procedures, for accelerating the criminal procedure at the same time protecting the scarce judicial assets while not jeopardizing the justice, seems that have not passed the test within the Macedonian criminal justice system. Although there are several legislative issues that need to be improved, we deem that there are serious misinterpretations regarding the practical implementation of these instruments.

Due to these legislative and practical partially inconsistent interpretations of the provisions of the LCP the number of these two instruments is in obvious decline. In this occasion, we have tried to identify the real reasons for such decline of the number of cases resolved using sentence bargaining or guilty plea and to try to determine proper answer to these situations.

One of the biggest flaws, by our opinion, is the fact that while using these instruments judges tend to provide greater trust to the prosecution's case while at the same time strictly and narrowly interpreting the legal provisions in regard to the evaluation of the factual support to the draft-settlement and guilty plea. We think that it is necessary for the judges to improve their proceedings in a way of providing additional effort into critical examination of the evidence in particular cases when there is guilty plea in open court. We deem that the courts while examining whether the defendant's guilty plea is intelligent and voluntary, at the same time must be assured beyond preponderance of evidence and closely to beyond reasonable doubt that the plea is true and it is properly factually supported. Only through such court's practice, we could expect increase of the number of these instruments for accelerated justice in practice and only then, we could expect that the general population will accept these instruments and increases the level of trust and confidence into the judiciary. Hence, it is necessary to undertake several amendments to the LCP that would reduce the possibility of free interpretation of the legal provisions in practice and would make legal provisions clearer and easier to interpret.

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Review article

PROCEDURAL RIGHTS OF SUSPECTS AND ACCUSED PERSONS DURING PRE-TRIAL DETENTION – IMPACT OF DETENTION CONDITIONS ON EFFICIENT EXERCISE OF DEFENCE RIGHTS

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ABSTRACT

The paper analyses the possibilities of detainees to effectively exercise their defence rights during the pre- trial detention. Deprivation of liberty presupposes limited abilities of detainees to move and to take actions and, consequently, it may affect their possibilities to exercise the rights guaranteed by the law. Hence, a correlation between material conditions of detention and defence rights can be perceived. Inadequate detention conditions, in addition to leading to inhuman and degrading treatment, can also pose an obstacle for the full enjoyment of procedural rights, primarily the right of access to a lawyer, the right to have adequate time and facilities for the preparation of defence. In this regard, detention conditions can lead to the violation of the right to a fair trial. On the other hand, effective exercise of the right to access to a lawyer is one of the most important guarantees of protection against torture, inhuman and degrading treatment during detention. Therefore it is necessary not only to legally prescribe the special procedural guarantees for suspects and accused deprived of their liberty but also to provide such material conditions, which are often limited and insufficient within the prison systems, for the enforcement of the pre-trial detention in a way which will enable the full and efficient exercise of the defence rights guaranteed by the law.

In the paper, the author analyses the procedural guarantees for detainees which are enshrined within the EU directives on procedural rights of suspects and accused persons and the ECtHR case law in the light of detention conditions. Special attention in paper has been given to the Croatian law and an assessment of the procedural rights and detention conditions in pre-trial detention within the national legal framework and case law.

Keywords*: pre-trial detention, detention conditions, procedural rights, right of access to a lawyer, inhuman and degrading treatment*

1. INTRODUCTION

The analysis of pre-trial detention as the coercive measure of deprivation of liberty in criminal proceedings entails two different aspects.[1] On the one hand, the procedural aspect encompasses procedural requirements for ordering a pre-trial detention under criminal procedure law. On the other hand, the penitentiary aspect relates to detention conditions in pre-trial detention. Even though these two aspects differ in their content and regulatory framework,[2] they are correlated and interdependent. The procedural requirements are the basis for the application of detention and therefore indispensable for avoiding excessive use of pre-trial detention and, consequently, overcrowding of prison system.[3] However, inadequate detention conditions, in addition to leading to inhuman and degrading treatment, can pose an obstacle for the successful exercise of procedural rights, primarily the right of access to a lawyer or the right to have adequate time and facilities for the preparation of defence.

Deprivation of liberty and all further inherent restrictions may affect the ability to prepare a proper defence in the criminal proceedings. Such circumstances which do not exist on the part of the defendants at liberty may further increase the differences in the procedural position of the defendant deprived of liberty in relation to the public prosecutor in the criminal proceedings. Therefore, it is necessary to ensure not only additional procedural guarantees for the defendants deprived of liberty but also such objective conditions for the execution of the measure of deprivation of liberty that will enable the full exercise of defence rights guaranteed by the criminal procedure legislation.

In the course of time, the European Court for Human Rights (ECtHR) developed an extensive and abundant case law on pre-trial detention under Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and on procedural rights of defendants under the right to a fair trial (Article 6). Yet, in the last decade the European Union has been intensifying its legislative activity regarding the procedural rights of defendants in the criminal procedure. In the framework of the Roadmap for strengthening procedural

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1 In the context of this paper, pre-trial detention relates to the procedural measure of deprivation of liberty determined by a court before or during the criminal proceedings, i.e., it includes all detainees not serving the final sentence. The analysis does not include the police arrest or police detention

2 Detention conditions and prisoners' rights are mainly regulated by the penitentiary soft law documents: European Prison Rules, UN Mandela Rules

3 Van Kempen, P. H., *Pre-trial detention in national and international law and practice: a comparative synthesis and analyses*, in: Van Kempen, P. H. (ed), Pre-Trial Detention: Human Rights, Criminal Procedural Law and Penitentiary Law, Comparative Law, Cambridge – Antwerp – Portland, Intersentia, 2012, p. 38

rights of suspects and accused in criminal proceedings, six directives on procedural rights have been adopted so far. One of the issues covered in the Roadmap (measure F), that has not been subject to the EU directive yet, is pre-trial detention.[4] Despite the identified problems in the practice of EU Member States in relation to pre-trial detention, there is currently no consensus among the Member States on such EU legislative activity in the field of detention that would result in the harmonisation of detention rules.[5] The analysis of Member State responses to the European Commission Green Paper on Detention[6] indicates that excessive use of pre-trial detention is not caused to such an extent by legislative shortcomings as it is caused by the inappropriate implementation of existing national legislation in practice. Hence, some authors indicate that additional common standards on pre-trial detention are unlikely to substantially improve the criminal procedural rules of EU Member States.[7] However, there are calls for further action at the EU level to strengthen the rights of suspected or accused persons in criminal proceedings aimed, *inter alia*, at taking measures regarding pre-trial detention.[8]

Additionally, ECtHR case law and research indicate that detention conditions in EU Member States still fail to comply with the established international standards and that the excessive number of pre-trial detainees is still one of the main factors leading to prison overcrowding in some EU Member States.[9] According to the Council of Europe Annual Penal Statistic, 22% of inmates held in the European prisons on 31st January 2019 were not serving a final sentence.[10] The Republic of

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4 Van Ballegooij, W., *Procedural Rights and Detention Conditions, Cost of Non - Europe Report*, European Parliamentary Research Service, Bruxelles, 2017, p. 63, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf], accessed 24. June 2020

5 For details on EU activity in the field of pre-trial detention see Pleić, M., *Pritvor u pravu Europske unije,* Zbornik radova s međunarodnog znanstvenog savjetovanja "Europeizacija kaznenog prava i zaštita ljudskih prava u kaznenom postupku i postupku izvršenja kaznenopravnih sankcija", Split, 2017, pp 269 – 273

6 European Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327 final, Brussels, 14.6.2011

7 Coventry, T., *Pretrial detention: Assessing European Union Competence under Article 82(2) TFEU*, New Journal of European Criminal Law, *vol.* 8, no. 1, 2017, p. 61

8 Hence, the European Criminal Bar Association (ECBA) proposes adoption of a new Roadmap on minimum standards of certain procedural safeguards Riehle, C.; Clozel, A., *10 years after the roadmap: procedural rights in criminal proceedings in the EU today*, ERA Forum 20**,** 321–325, 2020, [https://doi.org/10.1007/s12027-019-00579-5], accessed 24. June 2020

9 Van Ballegooij, *op. cit*. note 4, p. 7, 10

10 Aebi, M. F.; Tiago, M. M., *SPACE I - 2019 – Council of Europe Annual Penal Statistics: Prison populations*, Strasbourg: Council of Europe, 2020, p. 48, The percentage of detainees not serving a final sentence varies broadly across countries, ranging from 2.8% to roughly 48% in countries with at least one million inhabitants, and reaching 83% in smaller countries. Aebi, M. F.; Tiago, M. M., *Pris-*

Croatia is at the 13th place with 31%. Although the median prison density for European countries was below 100 (89.5%, and 80.0% for Croatia) on 31 January 2019, prison density rates for several EU Member States (Belgium, Italy, Hungary, France, Denmark, Czech Republic, Austria, Slovenia) indicate overcrowding.[11] Nevertheless, there is currently no EU legislation providing harmonised standards on detention conditions.[12]

In the past decade, ECtHR has delivered several pilot judgements identifying structural deficiencies of the national prison systems, however the recent case law indicates that these problems still affect certain EU Member States.[13] In fact, in the most recent judgement issued in 2020, *J.M.B. (no. 9671/15) and Others v. France,* the Court concluded that the occupancy rates of the prisons in question disclosed a structural problem.[14] Similarly, in 2019 in *Petrescu v. Portugal,* the Court recommended that the Portuguese State envisage the adoption of measures which will ensure that prisoners were provided with conditions of detention compatible with Article 3 as well as remedy to be made available to prevent the continuation of an alleged violation or to enable prisoners to secure an improvement in their conditions of detention.[15]

Although detention conditions, i.e. the prison regime, primarily belong within the competence and responsibility of the Member States, this issue affects the EU to the extent that inadequate detention conditions which fall under the scope of Art. 4 of Charter of Fundamental Rights of the European Union (CFREU) and Art. 3 of ECHR can undermine the principle of mutual trust and effective judicial cooperation between the Member States.[16] Hence, the Court of Justice of the European Union (CJEU) confirmed in its ruling *Aranyosi/Căldăraru* that mutual

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ons and Prisoners in Europe 2019: Key Findings of the SPACE I report, p. 6, [http://wp.unil.ch/space/files/2020/04/Key-Findings-2019_200406.pdf], accessed 24. June 2020

11 SPACE I - 2019, *op. cit*. note 10, p. 72

12 Conditions of detention are mentioned in the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings. Van Ballegooij, *op. cit*, note 4, p. 64

13 See *Ananyev and others v. Russia,* app. no. 42525/07 60800/08, 10.1.2012, *Torreggiani and others v. Italy,* app. no.43517/09, 8.1.2013, *Vasilescu v. Belgium*, app. no. 64682/12, 25.11.2014, *Neshkov and Others v. Bulgaria,* app. no. 36925/10, 27.1.2015, *Varga and Others v. Hungary*, app. no. 14097/12, 10.3.2015, *Rezmiveș and Others v. Romania,* app. no. 61467/12, 25.4.2017

14 Court found violation of Article 13 in respect of 32 applicants and a violation of Article 3 in respect of 27 applicants. *J.M.B. (no. 9671/15) and Others v. France, §§ 221, 302, app. no.* 9671/15, 20.1.2020

15 Similar conclusion regarding violation of Article 13 was reached in relation to 25 applicants in *Koureas and Others v. Greece,* § 911, app. no. 30030/15, 18.1.2018

16 See Pleić, M., *Challenges in cross-border transfer of prisoners: EU framework and Croatian perspective*, in: Duić, D.; Petrašević, T. (eds), EU and Comparative Law Issues and Challenges, Osijek: Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek, 2018, p. 386 - 388

trust does not imply blind trust,[17] and set an obligation for the executing Member States to assess detention conditions in the issuing Member States before executing the European Arrest Warrant.[18] In its recent case law (*ML* and *Dorobantu* cases), following the *Aranyosi/Căldăraru* case, the CJEU further elaborated on how to conduct an individual assessment of whether there is a real risk of inhuman and degrading treatment.[19]

The following chapters present the analysis of the procedural guarantees for detainees which are enshrined within the EU law and the ECHR case law in the light of detention conditions within which these rights have been exercised. The analysis is followed by the assessment of procedural rights and detention conditions in pre-trial detention within the national (Croatian) law.

2. DEFENCE RIGHTS OF PRE-TRIAL DETAINEES IN THE LIGHT OF DETENTION CONDITIONS IN EUROPEAN LAW

2.1. Procedural guarantees for suspects and accused persons deprived of liberty under the EU law

Even though the pre-trial detention procedure is not regulated by EU legislation, the procedural rights directives, deriving from the premise that deprivation of liberty requires the accused to be granted stronger guarantees than in the regular cases,[20] prescribed additional requirements to the Member States in relation to suspects and accused persons deprived of liberty in criminal proceedings. Hence, the first measure adopted under the Roadmap, Directive 2010/64/EU on the right to interpretation and translation, considers the decision depriving a person of his liberty to be the essential document requiring written translation if the suspects or accused persons do not understand the language of the criminal proceedings.[21]

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17 van der Mei, A. P., *The European Arrest Warrant system: Recent developments in the case law of the Court of Justice*, Maastricht Journal of European and Comparative Law 2017, *vol.* 24, no. 6, p. 899, [http://journals.sagepub.com/doi/pdf/10.1177/1023263X17745804], accessed 24. June 2020

18 Joined Cases C404/15 and C659/15 PPU, *Pál Aranyosi* and *Robert Căldăraru***,** [2016] EU:C:2016:198

19 Case C-22/18 PPU, *ML* [2018] ECLI:EU:C:2018:589, Case C-128/18, *Dorobantu*, [2019] ECLI:EU:C:2019:857, see European Union Agency for Fundamental Rights, *Criminal detention conditions in the European Union: rules and reality*, Luxembourg, 2019, p. 11, available at: [https://fra.europa.eu/en/publication/2019/criminal-detention-conditions-european-union-rules-and-reality], accessed 15. July 2020

20 Quattrocolo, S., *The Right to Information in EU Legislation*, in: Ruggeri, S. (ed.), Human Rights in European Criminal Law, New Developments in European Legislation and Case Law after the Lisbon Treaty, Springer International Publishing Switzerland 2015, p. 86

21 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, *OJ L 280, 26.10.2010,* p. 1–7

This right is a prerequisite for challenging the lawfulness of detention of a defendant who does not understand the language of proceedings.

The provision of information to the suspects and accused persons regarding their rights and the charges brought against them represents the precondition for an efficient defence. The research has shown that the defendants deprived of liberty are placed in an inherently more stressful situation and the impact of this is apparent in both their understanding of their rights and their ability to exercise them.[22] Considering the peculiar situation of arrested and detained persons,[23] the Directive on the right to information in criminal proceedings[24] requires more extensive information to be provided to suspects or accused persons deprived of liberty in relation to the ones at liberty. In that sense, the Directive went beyond the requirements of ECHR and ECtHR as it requires a written letter of rights to be delivered to the defendants deprived of liberty.[25] In addition, according to Article 6 of the Directive, arrested or detained persons must be promptly informed about the reasons for the arrest or detention, which corresponds to the procedural safeguard guaranteed in article 5 §2 ECHR.[26] The third aspect of the right to information relates to the right of access to the materials of the case. This right also implies an additional guarantee for the suspects and accused deprived of liberty. In that sense, the Directive requires that the documents which are essential to effectively challenging the lawfulness of the arrest or detention be made available to the arrested persons or their lawyers.[27]

Since the right of access to a lawyer is at the core of defence rights, the Directive on the right of access to a lawyer adopted under a considerable influence of the ECtHR case law (*Salduz*) strengthened the existing guarantees and set a higher level of obligations for the situations in which the suspect or accused person is deprived

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22 European Union Agency for Fundamental Rights, *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, Luxembourg: Publications Office of the European Union, 2019, p. 42, available at: [https://fra.europa.eu/en/publication/2019/rights-practice-access-lawyer-and-procedural-rights-criminal-and-european-arrest], accessed 15. July 2020

23 Quattrocolo, *op. cit*. note 20, p. 86

24 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, *OJ L 142, 1.6.2012, p. 1–10*

25 See Cras, S.; De Matteis, L., *The Directive on the rights to information*, Eucrim 1/2013, p. 26, 27

26 Allegrezza, S.; Covolo, V., *The Directive 2012/13/EU on the right to information in criminal proceedings: Status Quo Or Step Forward?*, in: Đurđević, Z.; Ivičević Karas, E. (eds), European Criminal Procedure law in service of protection if the Union financial interests: State of Play and Challenges, Zagreb, 2016, p. 46

27 Art 7 Directive

of liberty.[28] It guarantees access to a lawyer without undue delay after the deprivation of liberty. Furthermore, confidentiality of communication is guaranteed in absolute terms. Humanitarian aspect, as one of the purposes of the right to legal assistance highlighted by *Trechsel*, is especially important in relation to the defendant deprived of liberty whose feelings of desperation are particularly strong.[29]

Even though the Directive on the right of access to a lawyer, as well as other directives, aims primarily to safeguard the defence rights of the defendant in criminal proceedings, there is a noticeable link between the procedural rights guaranteed by the Directive and the detention conditions in which these rights should be exercised. In that sense, in the Recital the Directive refers to the conditions in which the suspects or accused persons are deprived of liberty and calls for full respect of the established European standards. Furthermore, it is emphasised that the lawyer providing assistance under this Directive should be able to raise a question with the competent authorities regarding the conditions in which that person is deprived of liberty,[30] which is in line with the ECtHR case law.

Besides the pivotal right of access to a lawyer which is guaranteed to all suspects and accused persons irrespective of whether they are deprived of liberty, the Directive guarantees the rights directed specifically towards the persons deprived of liberty, namely the right to have a third person informed of the deprivation of liberty, the right to communicate with third persons while deprived of liberty and the right to communicate with consular authorities. These rights in a special way aim at strengthening the protection of the persons deprived of liberty against potential abuses during detention. The Directive does not precise the manner (means, frequency, duration, conditions) in which the latter rights will be exercised as these issues affect the penitentiary regime and go beyond the scope of the Directive.[31] It is left to a Member States to make practical arrangements for the exercise of these rights taking account of the need to maintain good order, safety and security in the place where the person is being deprived of liberty. However, considering that inadequate detention conditions may undermine the exercise of the right to

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28 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, *OJ L 294, 6.11.2013, p. 1–12,* Recital 28, see Cras, S., *The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings*, Eucrim 1/2014, p. 36

29 Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford, 2005, p. 246

30 Recital 22 of Directive

31 Bachmaier Winter, L., *The EU Directive on the Right to Access to a Lawyer: A Critical Assessment*, in: Ruggeri, S. (ed.), Human Rights in European Criminal Law, New Developments in European Legislation and Case Law after the Lisbon Treaty, Springer International Publishing Switzerland 2015, p. 126

communicate with a third person, it would have been appropriate to highlight the need that the exercise of this right is not subject to unjustified conditions by the Member States.[32]

The last measure on procedural rights adopted under the Roadmap, the Directive on the right to legal aid,[33] aims to ensure the effectiveness of the right of access to a lawyer by making available the assistance of a lawyer funded by the Member States[34] to persons who lack sufficient resources to pay for the assistance of a lawyer when the interests of justice so require.[35] The deprivation of liberty is one such situation where the interests of justice require legal aid,[36] and in that sense, the Directive prescribes the merits test, which the Member States may apply in determining whether legal aid is to be granted, should been deemed to have been met where a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings and during detention.[37]

Finally, in the context of procedural rights of the suspects and accused deprived of their liberty, it is important to address the presumption of innocence as the backbone of the defendant's legal position in the criminal proceedings. Although the presumption of innocence should apply equally to defendants regardless of whether they are deprived of their liberty or not, the fact of deprivation of liberty and the inherent restriction of other rights can additionally call this guarantee into question. In that sense, the Directive on the presumption of innocence sets higher requirements, especially in relation to public references to guilt and presentation of suspects and accused persons.[38] The latter is of particular significance in relation to pre-trial detainees and the manner in which they are brought and held in court. Hence, the Directive requires from the competent authorities to abstain from presenting the suspects or accused persons as guilty, in court or in public, through the use of measures of physical restraint, such as handcuffs, glass boxes, cages and

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32 *Ibidem*

33 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, *OJ L 297, 4.11.2016,* p. 1–8

34 Recital 1 of Directive

35 Article 4 of Directive

36 Cras, S., *The Directive on the Right to Legal Aid in Criminal and EAW Proceedings, Genesis and Description of the Sixth Instrument of the 2009 Roadmap*, Eucrim 1/2017, p. 40

37 Article 4

38 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, *OJ L 65, 11.3.2016,* p. 1–11

leg irons, unless the use of such measures is required for case-specific reasons.[39] This practice of placing a defendant in a glass cage during the hearing has occasionally been examined in the context of the guarantee of the presumption of innocence under Article 6 (2) of the Convention but later the Court began to examine the practice also from the standpoint of Article 3 of the Convention as inhuman and degrading treatment.[40]

2.2. Impact of detention conditions on efficient exercise of defence rights of pre-trial detainees

2.2.1. *Right to have adequate facilities for preparation of defence*

One of the minimum defence rights guaranteed by Article 6(3)(b) ECHR is the right to have adequate time and facilities for the preparation of defence. This right overlaps with the right to legal assistance stated in Art 6(3)(c) and they are both particularly significant to the persons in pre-trial detention,[41] as confirmed by the ECtHR case law.

The Court reiterated in its practice that the States' duty under Article 6 § 3 (b) includes an obligation to "organise the proceedings in such a way as not to prejudice the accused's power to concentrate and apply mental dexterity in defending his position".[42] When a person is detained pending trial, exercise of this right depends not only on the procedural norms and criminal procedure authorities but also on the detention conditions and prison authorities. In that sense, ECtHR explained that "the notion of *facilities* may include such conditions of detention that permit the person to read and write with a reasonable degree of concentration".[43] The conditions of detention transport, catering and other similar arrangements are relevant factors to consider in this respect.[44]

The right to adequate facilities presupposes the access to the case file, and the deprivation of liberty raises the question of the possibility for detainees to access

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39 Art. 5 Directive, Recital 20 of Directive

40 *Khodorkovskiy v. Russia,* §123, app. no. 5829/04, 31.5.2011

41 Harris, D.J. *et al., Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights*, Oxford University Press, 2014, p. 472

42 See *Makhfi v. France*, §§ 40-41, app. no. 59335/00, 19.10.2004

43 *Moiseyev v. Russia*, app. no. 62936/00, 9.10.2008, §221, see Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb), Council of Europe/European Court of Human Rights, 2020, p. 72, available at: [https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf], accessed 18. Jul 2020

44 Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb), 72

the case file in a way that will enable the actual benefit of that right under their limited possibilities for movement and exercise of other fundamental rights. Even if guaranteed by the law, this right may be limited in terms of the time in which the defendant can access the file, the possibility of copying certain parts of the file. These problems were emphasised in *Dolenec v. Croatia* where the Court found a violation of Art 6(1) taken together with Art. 6(3).[45] The Court noted that during the entire trial, save for two days, the applicant was in detention and thus not in a position to freely consult his case file. He had the opportunity to examine the case file, which was quite voluminous, and copy certain documents only once during the trial. He made several requests to consult the case file, but all of his requests remained unanswered.[46]

In *Moiseyev,* the Court concluded that the applicant's trial was unfair because the prosecuting authority had unrestricted discretion in the matter of visits by counsel and exchanges of documents, access by the applicant and his defence team to the case file and their own notes was severely limited, and the applicant did not enjoy adequate conditions for the preparation of his defence.[47] These inadequate conditions relate to the transport between the remand centre and the courthouse for more than one hundred and fifty times in prison vans, which were sometimes filled beyond their designated capacity, without adequate ventilation and lighting, and with unreliable heating. Furthermore, having regard to the cumulative effect which these conditions of transport had on the applicant, the Court found that they amounted to inhuman treatment within the meaning of Article 3. Hence, the same circumstance led to the violation of prohibition of inhuman and degrading treatment and of the right to a fair trial. The Court reiterated here its assessment provided in *Khudoyorov v. Russia,* where it examined for the first time the compatibility of transport conditions between the detention facility and the courthouse with the requirements of Article 3,[48] that the applicant was subjected to such treatment during his trial or at the hearings regarding the applications for an extension of his detention, i.e., when he most needed his powers of concentration and mental alertness.[49] However, in *Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia*, even though the intensity of the court hearing schedule did not reach a sufficient level of severity to qualify as inhuman or degrading treatment within the meaning of Article 3, the Court concluded that it affected the first applicant's ability to effectively participate in the proceedings and to instruct his lawyers con-

45 *Dolenec v. Croatia*, app. no. 25282/06, 26.11.2009., § 218

46 *Ibidem*, §§ 209 - 218

47 *Moiseyev v. Russia*, app. no. 62936/00, 9.10.2008, § 224.

48 *Khudoyorov v. Russia,* app. no. 6847/02, 8.11.2005, § 118-120

49 Moiseyev v. Russia, §135, *Khudoyorov v. Russia*, § 120

trary to the requirements of Article 6(1) and (3) (b). The cumulative effect of exhaustion caused by lengthy prison transfers leaving less than eight hours of rest, repeated for four days a week over a period of more than four months, seriously undermined the first applicant's ability to follow the proceedings, file submissions, take notes and instruct his lawyers and therefore he had not been afforded adequate facilities for the preparation of his defence.[50]

2.2.2. *Right of access to a lawyer*

The importance of the right of access to a lawyer as a fundamental safeguard against ill-treatment of pre-trial detainees was repeatedly emphasised in the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Court confirmed it in *Salduz v Turkey.*[51] In the concurring opinion on *Salduz,* it was pointed out that the fact that the defence counsel may see the accused throughout his detention in police stations or in prison is more apt than any other measure to prevent treatment prohibited by Article 3 of the Convention.[52] The Court has acknowledged this on numerous occasions since the *Salduz* and recently in *Beuze v Belgium,* where it emphasised that account must be taken, on a case-by-case basis in assessing the overall fairness of the proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and finally verification of the conditions of detention.[53]

As ECtHR repeated on several occasions, assigning counsel to represent a party at the proceedings does not in itself ensure the effectiveness of the assistance.[54] The issues in the relationship and communication between the defendant and the lawyer may especially arise in cases where the defendant is deprived of liberty when the possibility of contact and the development of trust are relatively limited. Thus, in *Moiseyev* the Court noted that the counsel was required to seek special permits to visit and confer with the applicant. Permits, which were issued by the authority in charge of the case, were valid for one visit only and the lawyers' attempts to have their period of validity extended proved to be unsuccessful. Hence, for the entire duration of the criminal proceedings against the applicant, the visits by the

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50 *Razvozzhayev v.Russia and Ukraine and Udaltsov v. Russia*, app. no. 75734/12 and others, 19.11.2019, §§254-255

51 *Salduz v Turkey*, app. no. 36391/02, 27.11.2008, § 54

52 *Salduz v Turkey*, *Concurring opinion of Judge Zagrebelsky, joined by Judges Casadevall and Türme*

53 *Salduz v Turkey*, § 136

54 *Mader v Croatia*, app. no. 56185/07, 21.6.2011, § 161

applicant's counsel were conditional on authorisation by the authorities.[55] In the light of the above, the Court found that the control exercised by the prosecution over access to the applicant by his counsel undermined the appearances of a fair trial and the principle of equality of arms.[56] Furthermore, in Öcalan v. Turkey, the Court considered that the restriction of the number of visits and the length of the applicant's meetings with his lawyers was one of the factors that hindered the preparation of his defence. The applicant was allowed only two one-hour visits a week from his lawyer which was insufficient, given the complex charges and a voluminous case file.[57] Yet, in *Mađer v Croatia* the Court concluded that the lack of contact between the applicant and his officially appointed defence counsel, who had visited the applicant only once while in pre-trial detention, did not prejudice the applicant's defence rights to a degree incompatible with the requirements of a fair trial since the appointed defence counsel attended all hearings before the trial and actively participated by making relevant proposals and examining the witnesses.[58]

In *Dolenec*, the applicant was represented by various officially appointed defence lawyers throughout the proceedings, save for two days, but it appears that there was a problem with communication as the applicant complained to the presiding judge that he had not been able to contact his counsel. The applicant further requested permission for a visit from his counsel in prison, but there was no answer to this request and there was no evidence that the counsel actually visited the applicant at all. It is important to reiterate the Court's view that the relevant prison authorities should keep a record of the appointed counsel's visits to the applicant in prison in order to make sure that the defence rights of the accused were respected.[59] This view confirms and highlights the importance of the active role of the prison administration in setting the preconditions for the exercise of guaranteed rights of defence.

The precondition for efficient exercise of defence rights, primarily the right of access to a lawyer, is the confidentiality of communication between the defendant and the lawyer. The issue of confidentiality and uninterrupted communication between the defendant and his/her lawyer is not disputable when the defendant is at liberty, but the problems may arise when the defendant is deprived of liberty and his/her possibilities of communication and contact with the outside world are

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55 *Moiseyev v. Russia*, § 204

56 *Ibidem,* § 207

57 Öcalan v. Turkey, app. no. *46221/99,*12.5.2005, § 134 - 135

58 *Mađer v Croatia*, § 164, 168 – 169

59 *Dolenec v Croatia*, § 212.

limited and under the control of state authorities.[60] ECtHR found a violation of Art 6(3)(c) when the accused, who was in pre-trial detention, was not allowed to consult with his layer out of hearing of a prison officer.[61] It is important to emphasise the Court's conclusion that a measure of confinement in the courtroom, which we have already mentioned in relation to the presumption of innocence and inhuman and degrading treatment, may also have an impact on the exercise of the accused person's rights to effectively participate in the proceedings and to receive practical and effective legal assistance. In *Khodorkovskiy and Lebedev v. Russia (No. 2),* the applicants were separated from the rest of the hearing room by glass, a physical barrier which made it impossible for them to have confidential exchanges with their legal counsel, as they were physically removed from them, and any conversations between the applicants and their lawyers would be overheard by the guards in the courtroom.[62]

The right of confidential communication with the lawyer does not only apply to oral communication or face-to-face meetings but also to other forms of communication, such as telephone and written correspondence.[63] The issues concerning prison correspondence have generally been considered under Article 8 ECHR within the right to respect for correspondence, even though the Court has also assessed this issue under Article 6 in the case when a delay in proceedings was caused by monitoring the defendant`s correspondence with the lawyer.[64]

3. PROCEDURAL RIGHTS AND DETENTION CONDITIONS OF PRE-TRIAL DETAINEES IN CROATIAN LAW

3.1. Procedural rights of pre-trial detainees

In the Croatian criminal procedure law, the pre-trial detention, as the most severe measure for securing the presence of a defendant, is based on the constitutional principle of proportionality and, in accordance with the constitutional requirements,[65] regulated in detail by the Criminal Procedure Act (the CPA).[66] The

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60 See Trechsel, *op. cit*., note 29, p. 278

61 *S v. Switzerland*, app. no. 12629/87; 13965/88, 28.11.1991, § 48 – 51. See Harris, *et al.*, *op. cit*., note 41, p. 482

62 *Khodorkovskiy and Lebedev v. Russia* (No. 2), app. nos. 51111/07 and 42757/07*,* 14.11.2020, §648

63 See Trechsel, *op. cit.* note 29, p. 280

64 *Domenchini v Italy*, 101/1995/607/695, 15.11.1996, § 39, see Harris, *et al.*, *op. cit*. note 41, p. 472

65 Article 22 of Constitution of Republic of Croatia, Official Gazette 56/90, 135/97, 113/00, 28/01, 76/10 i 5/14

66 Criminal Procedure Act, Official Gazette 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19. For details see Đurđević, Z.; Tripalo, D., *Trajanje pritvora u*

CPA prescribes the grounds for pre-trial detention, duration of pre-trial detention which depends on the severity of the crime, jurisdiction (it can only be ordered by a judicial authority), procedure for ordering and vacating pre-trial detention, periodical *ex officio* control of its soundness and the optional control upon the appeal of the parties.[67] Despite the fact that the Croatian legislation has set an appropriate procedure for pre-trial detention, ECtHR has found a violation of Article 5 ECHR in several judgements regarding the implementation of legislation in practice. The identified violations refer to the excessive length of pre-trial detention and the lack of sufficient justification for the extension of detention (Art 5(3)).[68] In several judgements, including the recent *Oravec v. Croatia,* the Court has found that the Constitutional Court's practice of declaring constitutional complaints inadmissible where a fresh decision extending detention has been adopted before it has given its ruling is contrary to Article 5 § 4.[69] Following the ECtHR findings, the Constitutional Court has decided to re-examine its practice.[70]

As regards the procedural position of pre-trial detainee during the criminal proceedings, the Croatian legislation has set the rules of procedure that seek to neutralise the unfavourable position of a defendant deprived of liberty in relation to a defendant at liberty, which is reflected in the limited possibilities of movement and consequent restriction of other fundamental rights.[71] Therefore, the CPA requires special urgency of proceedings when the defendant has been deprived of liberty.[72] The legislation concretises this requirement by prescribing shorter deadlines for undertaking certain procedural actions and for initiating and conducting certain stages of the procedure.

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svjetlu međunarodnih standarda te domaćeg prava i prakse, Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), *vol*. 13, no. 2, 2006, p. 568 *et seq*.

67 Article 122 – 134 CPA

68 *Dragin v. Croatia*, app. no. 75068/12, 24.6.2014, § 120 -121; *Margaretić v. Croatia*, app. no. 16115/13, 5.6 2014; *Perica Oreb v. Croatia*, app. no. 20824/09, 31.10.2013, §121 -122; *Peša v. Croatia*, app. no. 40523/08, 8.4.2010, § 91; *Dervishi v Croatia*, app. no. 67341/10*,* 25.11.2012, §144-145; *Trifković v. Croatia*, app. no. 36653/09, 6.11.2012

69 *Oravec v. Croatia*, no. 51249/11, 11.7.2017, § 74. Before this, the Court made the same conclusion in *Peša v. Croatia*, § 126,; *Hađi v. Croatia*, app. no. 42998/08, 1.7.2010, § 47; *Bernobić v. Croatia*, app. no. 57180/09, 21.6.2011, § 93,; *Krnjak v. Croatia*, app. no. 11228/10, , 28.6.2011 § 54; Šebalj v. Croatia, app. no. 4429/09, 28.6 2011, § 223,; *Getoš-Magdić v. Croatia*, app. no. 56305/08, 2.12.2010, § 106,; *Trifković v. Croatia*, §§ 139-140,; *Margaretić v. Croatia*, §§ 119-21

70 For details see Graovac, G., *Nadležnost Ustavnog suda Republike Hrvatske ratione materiae glede istražnozatvorskih ustavnih tužbi*, Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb), *vol*. 24, no. 1, 2017, p. 125 *et seq.*

71 For more details see Pleić, M., *Standardi izvršenja pritvora u kaznenom postupku*, doctoral dissertation, Zagreb, 2014, p. 222

72 Article 11(2), Article 122 (3) CPA

In accordance with the Directive on the right to interpretation and translation, the CPA guarantees the right of written translation of pre-trial detention ruling to the defendant who does not speak or understand the language of proceedings. Furthermore, the amendments to the CPA made in 2013[73], which transposed the Directive on the right to information into the Croatian national law, introduced the written letter of rights for the arrestee and the obligation of delivery of the written letter of rights to the defendant together with the ruling on pre-trial detention.[74]

As mentioned above, the right of access to the file as part of the right to information is one of such rights the exercise of which may be hindered by the fact of deprivation of liberty, which may call into question the principle of equality of arms and the exercise of the right to adequate time and facilities to prepare a defence.[75] The Croatian legislation provided, in accordance with the Directive on the right to information, for a substantive restriction on the possibility of denial of the right of access to the file so that all the evidence listed in the decision on the pre-trial detention, as the basis for ordering pre-trial detention, must be made available to the pre-trial detainee.[76]

The Croatian legislation has recognised the potential obstacles entailed by the deprivation of liberty in relation to the position of the defendant in the criminal proceedings and his/her ability to effectively prepare defence. Considering the fact that the right of access to a lawyer stands at the core of the right to defence,[77] the Croatian legislation prescribes mandatory defence from the first moment of deprivation of liberty, i.e. from the issuance of the decision on the defendant`s provisional confinement or pre-trail detention.[78] In addition, in criminal proceedings for offences punishable by imprisonment of more than five years, the suspect who is subject to pre-trial detention proposal is entitled to a provisional legal aid at the expense of the state budgetary funds before the pre-trial detention hearing.[79] However, the legislation should not have limited this right only to criminal proceedings for more severe criminal offences because it thus limits the scope of the

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73 Act on Amendments to the CPA, Official Gazette 145/2013. For details on transposition of this Directive see Ivičević Karas, E.; Burić, Z.; Bonačić, M., *Unapređenje procesnih prava osumnjičenika i okrivljenika u kaznenom postupku: pogled kroz prizmu europskih pravnih standarda*, Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb), *vol.* 23, no. 1, 2016, p. 36 – 39

74 Art 239 (a) CPA, Art 4 Directive on right to information

75 Pleić, *op. cit*. note 71, p. 252

76 Art 184a (4) CPA

77 Jimeno-Bulnes, M., *The Right of Access to a Lawyer in the European Union: Directive 2013/48/ EU and Its Implementation in Spain,* in: Rafaraci, T.; Belfiore, R. (eds.), EU Criminal Justice, Springer Nature Switzerland AG 2019, p. 58

78 Article 66 (1)(3) CPA

79 Art 72a (2) CPA

Directive on the right to legal aid and makes it difficult for the defendants to efficiently contest the prosecutor's proposal for pre-trial detention.

In accordance with the Directive on the right of access to a lawyer which sets higher standards in relation to the right to confidential communication than the ECtHR case law, the amendments to the CPA made in 2017 deleted the provisions on the restriction of this right to the extent that it is now guaranteed as an absolute right. In addition to the general provision on free and confidential communication between the defendant and his/her lawyer (Art 64), the CPA emphasises said right in relation to the pre-trial detainee.[80] Furthermore, the Ordinance on house rules in prisons for the execution of pre-trial detention prescribes that a detainee has the right of free, undisturbed and unsupervised communication with the defence counsel, in a room designated for that purpose.[81] The authorised official supervises the visit visually and without the possibility of listening. The authorised official may interrupt the visit if the prisoner or defence counsel violates the order and security in the prison or the usual orderly behaviour. Telephone communication and correspondence with the defence counsel shall be performed in a manner that guarantees the confidentiality of correspondence or telephone calls.[82]

The deprivation of liberty also raises the issue of the possibility of participation or presence of the defendant at the hearing and sessions of the panel during the trial. In that sense, the CPA prescribes the possibility of a defendant to participate in certain procedural activities (hearing for ordering, extending or vacating pre-trial detention, evidentiary hearing, session of the second instance panel). In relation to that, the amendments to the CPA made in 2013 deleted the part of the provision of Art. 475 stating that the presence of the pre-trial detainee at the second instance panel meeting depended on the assessment of the president of the court regarding the purposefulness of his presence,[83] as this provision put the accused deprived of liberty in an unequal position in relation to the other party to the proceedings. The Constitutional Court of Republic of Croatia found a violation of the right to fair trial when the applicant's chosen defence counsel was prevented from participating at the session of the appellate panel and the applicant was not transported from detention, so his legal interests were protected only by the *ex officio* defence counsel whose representation power had been previously revoked by the applicant due to a disagreement over the defence strategy.[84]

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80 See Pavlović, Š., *Zakon o kaznenom postupku*, Rijeka, 2017, p. 139 -140

81 Ordinance on house rules in prisons for the execution of pre-trial detention, Official Gazette 8/10

82 Article 18 of the Ordinance

83 Official Gazette 145/2013

84 Decision of Constitutional Court of Republic of Croatia, U-III-64667/2009, Zagreb, 1.3.2011

3.2. Detention conditions in pre-trial detention

Although the Criminal Procedure Act, in the chapter Execution of pre-trial detention and treatment of pre-trial detainees (Art 135-143), and the Ordinance on house rules in prisons for the execution of pre-trial detention nominally comply with the standards set by the international instruments on the protection of the rights of persons deprived of liberty, these standards have not been implemented adequately in practice.

ECtHR and the Constitutional Court of Republic of Croatia on several occasions found a violation of Article 3 regarding the prison conditions in the Republic of Croatia, and some of these decisions relate to pre-trial detainees. One of these cases is *Longin v. Croatia* where the Court concluded that the detention conditions of the applicant confined in an overcrowded cell for twenty-two hours a day amounted to a degrading treatment incompatible with the requirements of Article 3 ECHR.[85] Furthermore, the Constitutional Court, when examining the violation of Art. 23 and 25 of the Constitution and Art 3 ECHR, specifically emphasised that the applicant was a pre-trial detainee, hence his constitutional rights to personal liberty in terms of the presumption of innocence must be less restricted than that of a convicted prisoner. However, the national legislation granted more rights to convicted prisoners than to pre-trial detainees during the execution of pre-trial detention.[86]

In addition to the problems with implementation due to overcrowding, there were also some legislative deficiencies in the system of legal remedies for the pre-trial detainees regarding their complaints on detention conditions which precluded detainees from effective judicial protection of their rights. A major step towards the protection of detainees' rights during the execution of pre-trial detention and towards establishing jurisdiction for deciding constitutional complaints of pre-trial detainees was made in 2008 by the decision of the Constitutional Court of Republic of Croatia which equated the legal remedies for the protection of detainees' rights with those guaranteed for prisoners.[87] Thus the Constitutional

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85 There were at least five beds to each cell, together with a dining table and chairs which did not leave much space for moving around. Furthermore, the sanitary facilities in the detention cells were not fully separated from the living area where the detainees were accommodated. *Longin v. Croatia*, app. no.49268/10, 6.11.2020, § 60 – 62. For details on judgements against Croatia see Ivičević Karas, E:, *Ljudska prava i temeljne slobode u hrvatskom penitencijarnom pravu,* in: Krapac, D. (ed.), Profili hrvatskog kaznenog zakonodavstva, Zagreb, 2014, p. 186 – 194

86 Constitutional Court of Republic of Croatia, U-III-4182/2008, 23.4.2008

87 Considering the fact that the CPA deficiently regulates the protection of detainees` rights during the execution of pre-trial detention, while at the same time the Croatian penitentiary law adequately protects the rights of (convicted) prisoners, which are listed in the exhaustive catalogue contained in

Court overcame a jurisdictional barrier, i.e. lack of their competence in this field, and established a legal basis for the constitutional review of violations of detainees' rights during the execution of pre-trial detention.[88]

However, the legislation and the case law were not harmonised for some years afterwards, and the problem of overcrowded prison system was still present.[89] Such circumstances and the failure of the Government to fulfil positive obligations in order to establish adequate detention conditions in the prison system compelled the Constitutional Court to issue a Report on the detention conditions in the Republic of Croatia listing three categories of measures, in accordance with the European standards, which should have been implemented for the resolution of the detected problems.[90] Finally, the recent amendments to the CPA made in 2017 introduced an effective legal remedy for the complaints of the pre-trial detainees,[91] and in the meantime, the overcrowding has been somewhat decreased.[92]

The recent statistics show the worrisome trend of increase in the number of pre-trial detainees. In the five-year period (from 2014 to 2018), the share of pre-trial detainees in the total prison population increased by as much as 10%, while a more considerable increase is particularly discernible in 2017 and 2018. In fact, in 2014, the share of pre-trial detainees in the total prison population was almost

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Article 14 para. 1 of the Execution of Prison Sentence Act, the Constitutional Court found that courts, applying the powers of an enforcement judge in relation to the request for the protection of prisoners' rights, are obliged to apply those same powers in relation to the complaints of detainees regarding the violations of their rights during detention. U-III-4182/2008, § 20

88 Krapac, D., *Pretpostavke za pokretanje i vođenje ustavnosudskog postupka zaštite individualnih ustavnih prava i sloboda: Pravni okvir i stvarne granice („procesnost") hrvatskog modela ustavne tužbe*, Hrvatsko ustavno sudovanje d*e lege lata* i *de lege ferenda*, Okrugli stol održan 2. travnja 2009. U palači HAZU u Zagrebu, HAZU, Zagreb, 2009, p. 180. For more details on the constitutional protection of pre-trial detainees see Pleić, *op.cit.*, note 73, pp. 322 - 332

89 In 2016, the Constitutional Court found a violation of Art 23 and 25 of the Constitution and Art 3 ECHR in relation to inadequate detention conditions in Lepoglava Prison where the applicants had not been provided with adequate personal space in their cells in accordance with the national law in the periods of six and nineteen months. Constitutional Court of Republic of Croatia, U-IIIBi-890/2012, 4.5.2016; Constitutional Court of Republic of Croatia, U-IIIBi-2475/2016 Zagreb, 5.10.2016, § 10

90 Constitutional Court of Republic of Croatia, U-X-5464/2012, 12.6.2014

91 According the Article 141(3) CPA, the investigating judge or the presiding judge or the single judge before whom the proceedings is conducted, who received the detainee's complaint shall examine the allegations in the complaint and the findings, as well as the measures taken to eliminate the observed irregularities, will notify the applicant in writing within thirty days of receiving the complaint

92 However, recently ECtHR found violations of Art 3 due to a lack of personal space in detention, though these judgements relate to situations in prison system from earlier period (2010, 2011) In *Muršić v. Croatia*, the Court recapitulated its practice related to the personal space of persons deprived of their liberty in cells with several prisoners. *Muršić v Croatia,* app. no. 7334/13, 201.0.2016, § 172. See also *Ulemek v Croatia*, app. no. 21613/16, 31.10.2019, § 129 – 131

30%, and in 2018 it increased to almost 40%. In addition, the absolute number of pre-trial detainees increased significantly.[93] It is evident that the declining trend in the number and share of pre-trial detainees in the total prison population, which began in 2008 (with the exception of 2013, when a sharp increase was recorded), has changed. A worrisome tendency to increase the number of pre-trial detainees has been detected in the recent years, especially if we take into account that the number of accused and convicted persons has been declining significantly in the same period. In 2008 there were over 30 thousand accused persons and in 2017 slightly less than 15 thousand,[94] which means that in a ten-year period the number of accused and convicted persons has halved, while the number of pre-trial detainees does not follow such a trend.

4. CONCLUSION

For the efficient exercise of defence rights of a person deprived of liberty, it is primarily indispensable to set up a strict procedure of ordering a pre-trial detention with certain guarantees which will prevent abuse and excessive use of pre-trial detention. However, even if the legislation has set the appropriate legal framework for the protection of defence rights and the defendant has been granted the right of access to a lawyer, a number of factors related to detention conditions may adversely affect the full exercise of these rights and simultaneously lead to the violation of the right to a fair trial and inhuman and degrading treatment, as evident from the ECtHR case law.

A deficient legislation and the improper application of pre-trial detention create a vicious circle where excessive use of pre-trial detention leads to the overcrowding of the prison system. Consequently, the violation of the fundamental rights of detainees and inadequate prison conditions hinder the procedural position of defendants in criminal proceedings and disable efficient exercise of their procedural rights.

In order to prevent this, all measures, including normative and state authority measures, should take into account the interrelation between both aspects of pre-trial detention: procedural and penitentiary. Criminal procedure authorities

[93] On 31.12.2015 there were 729 pre-trial detainees in the prison system, and on 31.12.2018 nearly a thousand pre-trial detainees (998). Izvješće o stanju i radu kaznionica, zatvora i odgojnih zavoda za 2018. Godinu, Vlada Republike Hrvatske, Zagreb, 2020., p. 21, [https://www.sabor.hr/sites/default/files/uploads/sabor/2020-01-03/162702/IZVJESCE_KAZNIONICE_2018.pdf], accessed 18. July 2020

[94] Statistički ljetopis Republike Hrvatske 2018., Državni zavod za statistiku Republike Hrvatske, Zagreb, 2018, p. 572, [https://www.dzs.hr/], accessed 15. July 2020

should take more account of these circumstances from the perspective of the defendant deprived of liberty in order to prevent and avert their unequal and inferior position in criminal proceedings. However, it is important to reiterate ECtHR's stance on the importance of the active role of prison administration in setting the preconditions for the exercise of guaranteed rights of defence.

Legal assistance in the cases of deprivation of liberty is not only desirable but also mandatory in the Croatian legislation due to aggravated possibilities of exercising the right to defence. In that aspect, the Croatian legislation goes beyond the requirements of the European standards. Even though the Croatian legislation has set an appropriate legal framework for pre-trial detention, there is a worrisome trend of increase in the number of pre-trial detainees which raises an issue of improper application of the pre-trial detention procedure and furthermore creates a risk of overcrowding the prison system.

In view of the above, the pre-trial detention procedure and detention conditions indeed affect and concern the EU functioning since the excessive use of pre-trial detention and inadequate detention condition infringe the fundamental rights of the suspects and accused persons and hamper mutual recognition. Considering the situation in the EU Member States, it would be advisable to strengthen the procedural rights of detainees with the EU common standards on pre-trial detention and detention conditions even though these problems arise more from the improper implementation and less from a deficient legislation. This issue has been present and reopened for some time now, and following the firm tendency to harmonise the criminal procedure law in the EU, the tackling of this issue seems logical and beneficial, especially in the context of smooth functioning of mutual recognition instruments required for setting the standards of pre-trial detention.

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UDK 343.541:341.645(4-67EU)
Original scientific paper

STRENGTHENING THE RIGHTS OF SEXUALLY ABUSED CHILDREN IN FRONT OF THE EUROPEAN COURT FOR HUMAN RIGHTS – A TALE OF JUSTICE, FAIRNESS AND CONSTANT NORMATIVE EVOLUTION*

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ABSTRACT

In recent years, numerous studies have focused at the phenomenon of child sexual abuse (hereinafter, the CSA) offering valid conclusions about its phenomenological structures, etiological causes and impact on victims and society as a whole. Although the bulk of research has furthered our understanding of different aspects of CSA, scientific work that would focus on child victims' rights from constitutional and criminal law perspective is still scarce. Seeking to fill the noted gap, the author presents the first academic study on standards for protection of sexually abused children's rights set by the European Court for Human Rights (hereinafter, the ECtHR or the Court). Relaying on Faye Jacobsen set of blended methodologies, 10 judgments related to protection of rights of sexually victimised children are retrieved from the HUDOC system and analysed in detail. A special attention has been paid to safeguards and guarantees under the Article 3 and 8 of the Convention as well as their critical evaluation with respect to already established constitutional legal solutions. The qualitative analysis has revealed that judicial activism in the Strasbourg Court case law has been for years a driving force to enhance the protection of sexually abused children, and that today, this protection has significantly evolved, forming a concept of particularly vulnerable victims and child-sensitive approach within the context of child friendly justice. Although the evolutive line of the scope and content of CSA protection standards created by the Court can be noted, judicial reasoning techniques behind their development are susceptible to criticism.

Keywords*: child sexual abuse, the European Court for Human Rights, development of normative standards, protection of child victim's rights, vulnerability*

* This work has been fully supported by the University of Rijeka under the project number [uniri-drustv-18-86]. The article also presents preliminary research results of the Croatian Science Foundation project "Life in the Time of COVID-19 - Social Implications on the Security and Well-Being of Vulnerable Groups in the European Context"

1. INTRODUCTORY REMARKS - THE PHENOMENON OF CHILD SEXUAL ABUSE AND THE NEED FOR MORE SPECIFIC RESEARCH

In scientific and general community, a widely accepted consensus exists that CSA is a highly negative social phenomenon with multiple long and short-term consequences. Sexual crimes against children are considered as one of the most serious and heinous prohibited behaviours that eclipse all other crimes.[1] Once the crime is discovered, the awareness of it deeply convulses a community. In most cases, there is a strong need not to acknowledge the incident or to believe that such cases are separate, individual excesses which usually happen to someone else. Recent studies have shown that broader societal denial of the scope of the problem, together with other negative factors, may induce embarrassment, stigma, and fear that can silence victims and dissuade members of their family from reporting the offence.[2] Not surprisingly, the infringement of child's sexual integrity has been, therefore, vailed with secrecy and disavowal for years. In the last 1970s, the social silence was broken by humanitarian organizations, for instance the UN, UNICEF and the WHO, and women movements that begun to draw attention to the CSA and correlated social problems such as interpersonal violence and social violence and the magnitude of their impact on women and children. A number of studies soon followed questioning the abuse and sexual exploitation of children from numerous standpoints trying to estimate its phenomenological extent and occurrence variations as well as etiological characteristics.[3] Due to the bulk of research in the field of criminal law, medicine, medical health, psychology, sociology, the CSA turned out to be "the most researched form of child maltreatment".[4]

Almost five decades of empirical and theoretical research has broadened our knowledge about different aspects of CSA and offered a valid basis for framing comprehensive social policies. According to numerous studies, subjecting children to sexual acts may cause a wide range of psychological and interpersonal problems as well as immediate and long-term detrimental health consequences. Vic-

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1 Adler, A., *The Perverse Law of Child Pornography*, Columbia Law Review, *vol.* 101, no. 2, 2001, pp. 227 – 228

2 Azzopardi, C. *et al.*, *A Meta-Analysis of the Prevalence of Child Sexual Abuse Disclosure in Forensic Settings*, Child Abuse & Neglect, *vol.* 93, no. 2, 2019, p. 292

3 Bidarraa, Z. *et al.*, *Co-Occurrence of Intimate Partner Violence and Child Sexual Abuse: Prevalence, Risk Factors and Related Issues*, Child Abuse & Neglect, *vol.* 55, no. 2, 2016, pp. 10 –11

4 Ajduković, M. *et al.*, *Gender and Age Differences in Prevalence and Incidence of Child Sexual Abuse in Croatia*, Croatian Medical Journal, *vol.* 54, 2013, p. 470

tims of CSA can experience anxiety problems,[5] depression,[6] post-traumatic stress disorder,[7] aggression and substance abuse.[8] The suicidality is also associated with sexual abuse during the childhood. Angelakis and a group of authors highlighted that their comprehensive metanalytical research showed a clear causal connection between CSA and suicidal ideation and suicide attempts in adult survivors.[9] The list of negative consequences is not exhausted, and different studies revile that CSA presents a significant potential for revictimization later in life,[10] unwanted pregnancy and poor overall health.[11] Although research conclusions on CSA may vary in scientific literature due to inconsistent CSA definitions, methodological issues like use of retrospective studies or official criminal justice statistics, the CSA professionals mutually agree that we are dealing with a serious, pervasive, worldwide phenomenon, a sort of social continuance that can be found throughout the years in different cultures and among different social groups. Therefore, the protection of victims' rights should be positioned at the forefront of human rights policies.

2. METHODOLOGICAL ATTRIBUTES AND CONCEPTUALISATION OF THE RESEARCH SAMPLE

Although the growth associated with CSA research has increased in both the quantity and the quality, scientific analysis of child victims' rights and adequateness of relevant criminal offences from a legal perspective fall behind. The same trend can be noted in Croatian research community. The systematic literature research using the *Hrčak* and *Heinonline* electronic databases revealed that only five scientific articles scrutinising the criminal justice responses to CSA were published in Croatian scientific journals between 1993 and 2020, none of them focusing on the EC-

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5 Manigliol, R., *Child Sexual Abuse in the Etiology of Anxiety Disorders: A Systematic Review of Reviews*, Trauma, Violence & Abuse, *vol.* 14, no. 2, 2013, p. 96

6 Judgement *D.P. & J.C. v. the United Kingdom* (2003)

7 Hébert, M. *et al.*, *Agression sexuelle et violence dans les relations amoureuses: Le rôle médiateur du stress post-traumatique*, Criminologie, *vol.* 50, no. 1, L'agression sexuelle commise sur des mineurs: les victimes, les auteurs, 2017, p. 160

8 Domhardt, M. *et al.*, *Resilience in Survivors of Child Sexual Abuse: A Systematic Review of the Literature*, Trauma, Violence & Abuse, *vol.* 16, no. 4, 2015, p. 482

9 Angelakis, I. *et al.*, *Childhood Maltreatment and Adult Suicidality: A Comprehensive Systematic Review with Meta-Analysis*, Psychological Medicine, *vol*, 49, 2019, p. 1060

10 Walker, H. *et. al.*, *The Prevalence of Sexual Revictimization: A Meta-Analytic Review*, Trauma, Violence & Abuse, *vol.* 20, no. 1, 2019, p. 75

11 Hilden, M. *et al.*, *A History of Sexual Abuse and Health: A Nordic Multicentre Study*, BJOG: an International Journal of Obstetrics and Gynaecology, *vol.* 111, 2004, p. 1126

tHR practice.[12] However, legal researchers specialising in theoretical conceptualisation and practical analysis of the ECtHR jurisprudence have long acknowledged the significance of this Court. According to Letnar Černič, the Strasbourg Court was transformed "from Sadurski's "benign paradox" to a fully-fledged human rights court addressing the most heinous human rights violations".[13] The Court has evolved into the largest judicial entity in the world with a clear international profile and Court's judgments have had a significant influence over the national legislation and court practice. Moreover, when certain legal issues are subjected to close scrutiny and involved in a heavy debate, the Court influence may overpass its jurisdictional boundaries and may be used as an argumentation tool in other human rights systems, and additionally, in the global human rights discourse.[14] Children rights advocates have also recognised the ECtHR influence as a crucial factor in children's rights development. Even though in recent years the increase is noted in number of published scholarly works dedicated to the ECtHR case law, to the best of author's knowledge, this is the first academic study looking into the standards for protection of sexually abused children's rights set by the Court.

Having all this in mind, the aim of this study is, first of all, to research the prevalence of CSA cases in front of the ECtHR. Using the quantitative methodology, we will reveal the number of cases that reached the Court in Strasbourg and were adjudicated from criminal justice perspective. Moreover, the qualitative linguistic analysis will identify how the Court reasoning, in interpreting the Convention, has created the scope and content of CSA protection standards, which should be implemented in criminal justice systems operating in the state parties to the Convention. The final goal of the current study is to identify evolving trends in defining these standards, and with critical scrutiny, to explore whether the new standards, e.g. the concept of vulnerability and child-sensitive approach, erode

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12 Kovčo Vukadin, I., *Organizirani kriminalitet: pedofilija i prostitucija*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 5, no. 2, 1998, pp. 641 – 679; Kovco Vukadin, I., *Stigmatizacija počinitelja seksualnih delikata*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, *vol.* 24, no, 2, 2003, pp. 819 – 842; Radić, I.; Radina, A., *Zaštita od nasilja u obitelji: obiteljskopravni, prekršajnopravni i kaznenopravni aspekt*, Zbornik radova Pravnog fakulteta u Splitu, *vol.* 51, no. 3, 2014, pp. 727 – 754; Rittossa, D., *Seksualni delikti na* štetu *djece: hrvatski kaznenopravni okvir kroz prizmu zahtjeva iz Direktive 2011/93/EU*, Hrvatski ljetopis za kaznene znanosti i praksu, *vol.* 25, no. 1, 2018, pp. 29 – 63; Rittossa, D., *Kažnjavanje počinitelja najtežih seksualnih delikata na* štetu *djece u RH: zakonski okviri i postojeća sudska praksa*, Hrvatski ljetopis za kaznene znanosti i praksu, *vol.* 25, no. 2, 2018, pp. 417 – 445

13 Letnar Černič, J., *Impact of the European Court of Human Rights on the Rule of Law in Central and Eastern Europe*, Hague Journal on the Rule of Law, *vol.* 10, 2018, p. 113 citing Sadurski, W., *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, The Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, Human Rights Law Review, *vol.* 9, no. 3, 2009, p. 409

14 Procaccini, K., C., *Constructing the Right Not to Be Made a Refugee at the European and Inter-American Courts of Human Rights*, Harvard Human Rights Journal, *vol.* 22, no. 2, 2009, p. 273

already established doctrinal institutes in ECtHR jurisprudence, e.g. the margin of appreciation. The quantitative and qualitative methods present a simplified version of Faye Jacobsen set of blended methodologies to explore children's rights in the ECtHR practice in a wider context.[15]

In order to apply the first nominated research method, HUDOC database was searched using a keywords' search strategy. The keywords "child", "sexual abuse", "sexual assault", "criminal offence" and "crime" were carefully chosen to build the query given that the enumerated keywords are the most cited key terms in research papers on CSA. Bearing in mind all the factors that may impact the formulation and the execution of the query to retrieve cases from the HUDOC system, the terms from the list of keywords were used individually as well as in combination for coding. After the exclusion of irrelevant and repeated cases, the query in the HUDOC database revealed that there have been 10 judgments related to protection of sexually abused children's rights,[16] 3 of them holding that there was no violation of the Convention[17] and remining 7 confirming the violation of relevant Convention Articles.[18]

The research results clearly indicate that the child protection against sexual abuse has not been an issue that dominates Court's adjudication processes. It seems that the discourse related to child's rights not to be sexually abused that had surfaced in international policies and human rights movements almost half a century ago did not substantially reflect on the ECtHR case law. The first application related to child victim's rights in a sexual abuse case had been lodged with the European Commission of Human Rights on 12 February 1997, and almost 2 years later

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15 Faye Jacobsen, A., *Children's Rights in the European Court of Human Rights – An Emerging Power Structure*, International Journal of Children's Rights, *vol.* 24, 2016, pp. 548 – 574

16 The case of *Z and Others v. the United Kingdom* (2001) was not included within the research sample due to the fact that the case concerned overall ill-treatment of four child applicants who had suffered appalling neglect over an extended period and physical and psychological abuse directly attributable to a violent criminal offense. Two of them had also shown signs of sexual abuse but the judgment is silent on the issue of its nature and intensity. Moreover, the inclusion criteria were not met in case of *X and Y v the Netherlands* (1985) bearing in mind that the central issue was whether the Netherland's criminal justice system offered the protection against sexual abuse of persons with mental difficulties over the age of 16, a criminal offence not belonging to the category of sexual offences against children. In *K.U. v. Finland* (2009), the ECtHR concluded that online bullying of 13-year-old boy had made him a target for approaches by paedophiles, and therefore, amounted to invasion of his private life under Article 8 of the Convention. Due to the nature of violation, the case in question was left out of the research sample

17 Judgement *A and B v. Croatia* (2019); *M.P. and Others v. Bulgaria* (2012); *D.P. & J.C. v. the United Kingdom*, *op. cit.*, note 6

18 Judgement *M.S. v. Ukraine* (2017); *M.G.C. v. Romania* (2016); *Y. v. Slovenia* (2015); *O'Keeffe v. Ireland* (2014); *Söderman v. Sweden* (2013); *C.A.S. and C.S. v. Romania* (2012); *M.C. v. Bulgaria* (2004)

transmitted to the Court.[19] The second case, *M.C. v. Bulgaria*, had originated in an application by the end of the same year, and reached the Court's agenda a year later.[20] In 2005, the ECtHR received another application raising several complaints alleging repeated rape of a seven year old boy[21] and in next 10 years all the other cases followed.

Although the small number of ECtHR decisions concerning the CSA cases might be expected due to the procedural constraints imposed by the principle of subsidiarity originating from Article 35 § 1 of the Convention,[22] the scarcity of the case law confirms that criminal justice reports underestimate the CSA prevalence. The significant number of cases remain unreported, and therefore, unknown to state's prosecutorial bodies. Moreover, reporting incidences of CSA depends on a set of diverse and interrelated factors emerging from political, societal and cultural currents. As the judges in dissent in *O'Keeffe v. Ireland* rightly pointed out, the silence creates the major difficulty in investigating sexual child abuse.[23] Even if the case is successfully reported, a pathway that leads to the ECtHR might be paved with problems and obstacles. In the era of child right's industry, children are still predominantly seen as sub-human or not-yet-fully-human and their rights are defined in terms of care, needs and special protection. While depending on parents, guardians, family members, educators and state agents, children are entitled to rights which do not have the same power strength as those recognised to adults.[24] Due to the absence of specific constitutional provisions and provisions within the Convention acknowledging children's rights, these rights are largely "invisible".[25] It is of no surprise that children rarely have a status of applicant before the ECtHR.[26]

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19 Judgement *D.P. & J.C. v. the United Kingdom*, *op. cit.*, note 6

20 Judgement *M.C. v. Bulgaria*, *op. cit.*, note 18

21 Judgement *C.A.S. and C.S. v. Romania*, *op. cit.*, note 18

22 The scope of the Article 35 is to promote and establish the subsidiarity of the ECtHR case law to national law. The states have obligation to protect human rights defined in the Convention first and foremost within their own legal systems. By reading the Article 35 in conjunction with Article 13, it comes to the view that it is the obligation of the state to provide an effective remedy at the national level for violation of Convention rights before the involved citizen has to find a recourse in international machinery of applications with the ECtHR

23 Joint partly dissenting opinion in *O'Keeffe v. Ireland*, *op. cit.*, note 18

24 Alderson, P., *Children's rights and power*, in: Jones, S., (ed.) 30 Years of Social Change, London, Philadelphia, 2018, p. 81

25 Collins, T. M., *International Child Rights in national Constitutions: Good Sense or Nonsense for Ireland*, Irish Political Studies, *vol*. 28, No. 4, 2013, p. 594

26 Faye Jacobsen, *op. cit.,* note 15, p. 553

Bearing in mind that children generally have to count on others to present their claims and represent their interests, the Court has rejected the restrictive, technical approach in interpreting the position of children as individual applicants under Article 34 of the Convention. According to the Court, any serious issues vis-à-vis respect for child's rights, comprising the right to an effective investigation into the sexual abuse, should be examined.[27] Children's representation in national court and ECtHR proceedings is, without any doubts, highly necessary, however, at the same time, it might enfeeble the power of child participation rights with respect to access to courts and court proceedings. In order to ameliorate the unavoidable dichotomy, the power and relationship between children and adults have to be put in the right balance especially if there is a risk of invoking child's rights in instrumental way. The qualitative analysis of the ECtHR judgments recognising rights of sexually abused children will show whether the standards set by the Court have offered such a valid solution or simply disregarded the necessity to moderate sexually abused children's rights in accordance with higher constitutional principles of fairness and justice.

3. THE ECTHR CASE LAW – CRUCIAL POINTS FOR THE PROTECTION OF RIGHTS OF SEXUALLY VICTIMISED CHILDREN

3.1. Convention Rights Violations and Discourse on State Obligations in CSA Cases

A detailed analysis of the CSA cases discussed in front of the ECtHR has revealed that the attack on sexual integrity of a child may present a violation of prohibition of torture (Article 3)[28] or right to respect for private and family life (Article 8)[29] or both[30] and in certain cases the right to an effective remedy (Article 13).[31] According to Article 3, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."[32] The legal construct behind the cited article demands a mandatory and complete elimination of acts that violate the right to personal integrity and dignity of an individual. In legal doctrine and court practice the complete and mandatory wording has been transformed in a mutual consensus

27 Judgement *M.S. v. Ukraine, op. cit.*, note 18

28 Judgement *O'Keeffe v. Ireland*, *op. cit.*, note 18

29 Judgement *M.S. v. Ukraine, op. cit.*, note 18; *Söderman v. Sweden, op. cit.*, note 18

30 Judgement *C.A.S. and C.S. v. Romania*, *op. cit.*, note 18; *M.C. v. Bulgaria*, *op. cit.*, note 18; *M.G.C. v. Romania, op. cit.*, note 18; *Y. v. Slovenia*, *op. cit.*, note 18

31 Judgement *D.P. & J.C. v. The United Kingdom*, *op. cit.*, note 6; *O'Keeffe v. Ireland*, *op. cit.*, note 18

32 Article 3 ECHR

that the rights under Article 3 are *erga omnes* rights that have absolute and non-derogable nature even in situations of emergency, such as war, threat of war, terrorism or similar public danger menacing the life of the nation.[33] Consequently, the prohibition of torture may not be overpassed with measures curtailed under the principle of proportionality and balancing of state and individual interests, nor can it be subjected to derogation under Article 15 or constructed according to victim's status. The highest level of protection associated with the rights envisaged in Article 3 derives from firm standing that these rights reflect "fundamental values of the democratic societies making up the Council of Europe".[34]

The normative parameter of freedom from ill-treatment as to Article 3 refers to various forms of conduct divided in three different cohorts depending on their gravity. The torture should cover the most atrocious forms of ill-treatment while lesser gravity is expected in case of inhuman and degrading treatment. The Court has established a notable practice on determining what kind of maltreatment falls within the specific Article 3 category, and in view of the firmly rooted principle in its case law that the Convention "is a living instrument which must be interpreted in the light of present-day conditions",[35] forged the rule that prohibited acts could be classified differently in future as to increase the standards of protection of Article 3 rights.[36] No matter the considerable attention given to these issues in its previous practice, the Court is silent as to defining the nature of CSA and evaluating its severity according to the three-tier scale of Article 3 prohibited forms of ill-treatment. The Court is confident that serious acts such as rape and other forms of sexual abuse of children, including sexual battery, present a direct attack on fundamental values, and consequently, fall within the ambit of Article 3.[37] A glimpse of indications of severity test could be found in *O'Keeffee v. Ireland* when Court concluded that 20 sexual assaults on 9 year old victim administered by her teacher in 6 month period amount to ill-treatment within the scope of Article 3.[38] Due to the fact that this was not contested, the Court did not engage in further scrutiny

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33 Škorić, M., *Obiteljsko nasilje u praksi Europskog suda za ljudska prava s posebnim osvrtom na presude protiv Republike Hrvatske*, Hrvatski ljetopis za kaznene znanosti i praksu, *vol.* 25, no. 2, 2018, p. 394

34 Mowbray, A., *Cases, Materials, and Commentary on the European Convention on Human Rights*, Oxford University Press, Oxford, 2012, p. 195

35 According to the partly dissenting opinion of Judge Serghides in *Khlaifia and Others v. Italy*, the Convention as a living instrument principle, together with the principle of effectiveness, has formed the "bedrock" of Court's evolutive interpretation

36 Separate opinion of Judge Serghides in Judgment *Volodina v. Russia* (2019), § 4; *Al-Saadoon and Mufdhi v. The United Kingdom* (2010), § 119; Concurring opinion of Judge Villiger in *Davydov and Others v. Ukraine* (2010); *Hénaf v. France* (2004), § 55; Öcalan *v. Turkey* (2005), § 193-194; *Selmouni v. France* (1999), § 101

37 Judgement *A and B v. Croatia*, *op. cit.*, note 17, § 110

38 Judgement *O'Keeffe v. Ireland*, *op. cit.*, note 18

whether the assaults amount to torture, inhuman or degrading treatment. This is particularly surprising given that the lack of particular assessment is contrary to the Court's position that "the right to human dignity and psychological integrity requires particular attention where a child is the victim of violence".[39]

Non-derogable and absolute nature of the Article 3 rights has placed them at the top of the hierarchy scale of Convention rights. Scholars predominantly agree that the Court has created a well-established practice according to which the prohibition of Article 3 ill-treatments is an absolute right in all its applications, and to invoke its protection, the threshold of severity has to be met.[40] If the violation of personal integrity of a child does not amount to severity needed under this threshold, the CSA may constitute a violation of the right to respect for private life under Article 8, which is, as to its interpretative character, a less protected right. Therefore, there should be a clear margin of severity between the CSA acts that present a breach of Article 3 and Article 8. However, the analysis has showed that there is a complete absence of this normative distinction in ECtHR jurisprudence. While in certain cases the Court explicitly reiterates that the acts of sexual abuse of a child undoubtedly meet the threshold of Article 3, the explanation why there is a need to consider it as well as a privacy violation is unfortunately missing.[41] Moreover, the Court has applied two different approaches with respect to its reasoning. In certain cases, the factual and legal substrate is analyzed in a separate part of the judgment dedicated solely to Article 3 and solely to Article 8.[42] In more recent decisions, the Court has abandoned the clear-cut analysis due to the fact that boat provisions are assessed simultaneously under the presumption that the violation of child's sexual integrity might present at the same time a breach of Articles 3 and 8 of the Convention. One of the possible explanations for this phenomenon could be related to Court's recent policy of benefiting the children and the other vulnerable members of society from state protection where their physical and mental well-being are threatened.[43] In order to strengthen child rights protection, the Court in Strasbourg has departed from previous canons of Article 3 and Article 8 division and developed a double clause strategy. Although the recent shift in judicial reasoning techniques is justified by the rule requiring that

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39 Judgement *A and B v. Croatia*, *op. cit.*, note 17, § 111; *C.A.S. and C.S. v. Romania*, *op. cit.*, note 18, § 82

40 Omejec, J., *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava*, *Strasbourški acquis*, Zagreb, 2013, p. 912

41 Judgement *C.A.S. and C.S. v. Romania*, *op. cit.*, note 18, § 73

42 Judgement *D.P. & J.C. v. The United Kingdom*, *op. cit.*, note 6; *Y. v. Slovenia*, *op. cit.*, note 18

43 *Guide on Article 8 of the European Convention on Human Rights, Right to Respect for Private and Family Life, Home and Correspondence*, Council of Europe, European Court of Human Rights, Strasbourg, 2019, p. 13

the Court is master of the characterization to be given in law to the facts of the case, the noted approach has not gained an unconditional support from human rights professionals. The Strasbourg Court was criticized for a lack of transparent guidance, consistency in ruling and interpretative confusion.[44] Except for noted practical and theoretical implications, the Court decision whether to examine the CSA complaints under Article 3, Article 8 or both normative provisions, reflects on the typology and scope of state's positive obligations to protect children from sexual abuse.

With respect to prohibition of outrages upon personal integrity and dignity of a child, the state has a negative obligation to sustain from inflicting harm on children under state control (e.g. in detention centres, social welfare institutions, schools, hospitals or in other state institution).[45] Although in recent years much of attention is given to CSA at the institutional level, there is not a single case in which the ECtHR has found the breach of state's negative obligations to refrain from ill-treatment. According to the ECtHR case law, the sexual abuse of children predominantly occurs in relationships between individuals not involving the state. The traditional understanding of human rights invoking state commitments of negative character, therefore, has been completely disregarded in Strasbourg jurisprudence related to CSA and prohibition of child ill-treatment. Furthermore, demanding standards on state parties were imposed in the area of positive obligations to protect children from sexual assaults at the hands of private actors. In a certain number of decisions, the Court has concluded that Article 3 imposes an obligation upon states to take protective measures in order to prevent subjecting persons within their jurisdictions to ill-treatment even if the ill-treatment is administrated by private individuals.[46] Besides, the adoption of effective measures in the sphere of the relations of individuals between themselves can be rightfully expected from a state as to comply with the positive obligations arising from Article 8.[47] The vertical and the horizontal effects are both, hence, embodied within the Article 3 and 8 of the Convention. If the state fails to implement measures in order to prevent offenders from committing sexual offences against children or to reply to, investigate and remedy the sexual abuse that already happened, the failure for not taking necessary steps leads to state's responsibility for the violation of the Convention.

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44 O'Mahony, C., *Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations*, International Journal of Children's Rights, *vol.* 27, 2019, p. 668-669

45 Judgment *Blokhin v. Russia* (2016)

46 *M.C. v. Bulgaria*, *op. cit.*, note 18; *Y. v. Slovenia*, *op. cit.*, note 18

47 *X and Y v. the Netherlands*, *op. cit.*, note 16; *See* also Buxton, R., *Private Life and the English Judges*, Oxford Journal of Legal Studies, Vol. 29, No. 3, 2009, p. 413

3.2. The Adequacy of Legal Framework to Protect Children from CSA

A wide variety of measures might be appropriate to fulfil state's duty to secure prohibition of ill-treatment of children and respect for their private life. Depending on the issues covered within the particular CSA case, states enjoy different levels of margin of appreciation in protecting and guaranteeing children's right not to be sexually abused. The margin of appreciation doctrine, according to scholars, is an important tool to reach consensus on level of rights' protection and appropriateness of state positive obligations when legal traditions and cultures interact or collide.[48] While we have to share the unanimous conclusion that rights from the Convention are universal human rights recognised throughout Europe, national differences in standards of their protection are acceptable if are within the margin allowed to the state. The idea behind the doctrine of margin of appreciation when positive obligations are concerned has been to recognise a certain amount of state discretion in deciding on the means of protection according to state's constitutional values and legal traditions. If asked to act and develop a policy, the states should enjoy some leeway.[49] Unfortunately, the Court's review process does not offer a clear guidance on what is the precise amount of state's discretion. The noted ambiguity may cause uncertainty about what is exactly expected from the state parties to comply with the obligation, however, a rule - the more important right or freedom the narrower margin of appreciation, might shed some light on this issue.

The above mentioned rule should have been taken into account in *M.C. v. Bulgaria*, a leading case on state's positive obligations in CSA situations in the Strasbourg case law. The case involved an applicant who alleged that she had been raped by two men two months before her 15th birthday. After two and a half years of criminal investigation, the case was officially closed due to insufficient evidences to conclude that sexual intercourses were unwilling and committed by threats or force. According to the applicant, Bulgarian law and practice in rape cases were defective due to the fact that victim's active resistance was a key condition to prosecute the offenders. Defective prosecutorial and court jurisprudence taken together with the ineffective investigation in her own case amounted to a violation of state's positive obligation to protect her physical integrity and private life. The Court acknowledged that states undoubtedly enjoy a wide margin of appreciation when deciding about the means to adequately protect individuals against rape within their jurisdiction bearing in mind that means have to be defined according to cultural

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48 Gerards, J., *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, Human Rights Law Review, *vol.* 18, 2018, p. 498

49 Lemmens, K., *The Margin of Appreciation in the ECtHR's Case Law. A European Version of the Levels of Scrutiny Doctrine?*, European Journal of Law Reform, *vol.* 20. no. 2-3, 2018, p. 90

factors, local circumstances and traditional approaches.[50] Although we can expect divergent national standards in the area of rape protection, the Court's conclusion not to narrow state's margin of appreciation is problematic for different reasons.

First of all, it contradicts its own conclusion that in this particular case, the fundamental values and essential aspects of private life are at stake, and consequently, effective deterrence against rape demands effective criminal law provisions.[51] One of the basic principles of the doctrine of criminal law is a position that in a democratic society criminal law serves as a last resort in order to protect certain constitutional value, i.e. the *ultima ratio societatis* principle. The criminal law and application of sanctions are, therefore, the exact implementation of the state's *ius puniendi*. Consequently, in cases involving the state's positive obligations within the criminal law normative framework, the margin of appreciation has to be narrow. Moreover, the constraints on the doctrine of margin of appreciation have to be imposed in order to apply more intensive review. There should be a greater clarity in ECtHR review standards involving the state's criminal law provisions especially if the provisions refer to children and other vulnerable individuals entitled to effective protection. The stronger scrutiny has to be applied also in case if the provisions are assessed under Article 3 of the Convention. We have to bear in mind that the margine of appreciation doctrine will be abandoned in most Article 3 cases due to the absolute and non-derogable nature of rights arising from that article. However, the theoretical position on the margin of appreciation applicability in the ambit of child applicant's rights under the Convention was not followed in *M.C. v. Bulgaria* case. Due to the fact that there was no clear demarcation line between the alleged rape as a violation of Article 3 or Article 8 rights, the Court's standard of review, which should have elucidated the margin of appreciation doctrine, seems a quite ambiguous and incomplete.

The above detected problems relate to the general uncertainty that rules over the positive obligation standards in ECtHR case law. The role of causation presents another issue, which adds to the ambiguity flowing from the Court's practice. In order to find the link between the harm suffered by the 14 year old applicant and Bulgarian government's omissions, the ECtHR has relied on the significant flows test. According to the Court, its task was to scrutinize "whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles

[50] Judgment *M.C. v. Bulgaria*, *op. cit.*, note 18, § 154

[51] Judgment *M.C. v. Bulgaria*, *op. cit.*, note 18, § 150

3 and 8 of the Convention."[52] In another words, in order to confirm a breach in state's positive obligations, the Court has to establish significant, not ordinary, common or more expected flaws, errors and omissions, in national legislation and its application. Although the introduction of the significant flaws test could have meaningfully illuminated state's liability for omissions under the Convention, the Court's assessment related to the test rests here. As Lavrysen rightfully concluded, the notion of significant flows in the remaining paragraphs of the judgment was not used, nor it was revealed what had to be understood by this notion.[53] The Court has simply concluded that positive obligations arising from Article 3 and 8 were not met because the lack of resistance by the applicant was transformed in the defining element of the rape offence and because the investigation was not conducted in a context-sensitive but rather restrictive manner.[54] The wording of the norm itself was not problematic, but in fact the issue arose from its interpretation by prosecuting authorities. Consequently, the *M.C. v. Bulgaria* ruling does not oblige state parties to the Convention to criminalise rape in a pure voluntaristic sense but rather to relinquish the criminal prosecution practice built on evidence of victim's resistance. The core of judicial review outcome in this particular case has been wrongly interpreted many times and manipulatively used in no-means-no debate in the national legislation area, which led to new doctrinal and practical problems and a lowering of standards on protection of sexually abused victims.[55] It seems that the absence of precise guidelines on causation by omission when criminal legislation is invoked is a result of Court's simple assumption that criminalisation of rape contributes to better protection of human rights.[56]

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52 Judgment *M.C. v. Bulgaria*, *op. cit.*, note 18, § 167. The significant flaw test was also used in the *M.G.C. v. Romania* judgment, *op. cit.*, note 18, § 60

53 Lavrysen, L., *No 'Significant Flaws' in the Regulatory Framework: E.S. v. Sweden and the Lowering of Standards in the Positive Obligations Case-Law of the European Court of Human Rights*, Human Rights & International Legal Discourse, *vol.* 7, no. 1, 2013, pp. 153-154

54 Judgment *M.C. v. Bulgaria*, *op. cit.*, note 18, § 177, 182

55 No matter the warnings from scholarly contributions which have confirmed certain negative outcomes of voluntarist conception of sexual offences in legal theory and court practice, in 2019 Criminal Code Amendments the Croatian legislator has introduced the new definition of offence of rape. The rape is now identified with the offence of non-consensual sexual intercourse from Article 152 §1 of the Criminal Code previously in force, and consequently, the act of rape consists of any sexual intercourse or a sexual act equated with sexual intercourse without victim's consent. For more information related to the offence of rape in Croatian criminal law doctrine and court practice, *see* Vuletić, I.; Šprem, P., *Materijalnopravni aspekti kaznenog djela silovanja u hrvatskoj sudskoj praksi*, Policija i sigurnost, *vol.* 28, no. 2, 2019, pp. 130-155; Rittossa, D.; Martinović, I., *Spolni odnošaj bez pristanka i silovanje – teorijski i praktični problemi*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 21, no. 2, 2014, pp. 509-548

56 Stoyanova, V., *Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights*, Human Rights Law Review, *vol.* 18, 2018, pp. 343-344

In accordance with the principle od subsidiarity, state parties have a primary responsibility to secure the rights and freedoms under the Convention, and therefore, the national legal framework, as it was demonstrated in *M.C. v. Bulgaria*, should provide efficient criminal law provisions to address the sexual abuse of children. In less serious cases of violation of psychological integrity the civil law remedy may suffice. Nevertheless, what if a repugnant act was not covered by any criminal or civil law norm and the question of effectiveness cannot be imposed because the norm simply does not exist? The Court has resolved the dilemma in *Söderman v. Sweden*.owever, Ho[57] The case involved applicant's allegations that the Swedish legal system did not provide measures to protect her against stepfather's actions who covertly tried to film her in a bathroom while she was undressing before taking a shower for sexual purposes. At the time of the incident, the applicant was 14 years old. The Court reiterated that the acts in question had constituted a violation of the applicant's personal integrity. She was affected in highly intimate aspects of her private life as to considerable aggravated circumstances (the applicant was a minor, the incident had taken place in her family home, the offender was a person whom she was entitled and expected to trust), and therefore, the Court departed from the standing in *M.C. v. Bulgaria* and concluded that the margin of appreciation allowed to the state was narrower.[58] Moreover, the Strasbourg Court also decided to partially reject the significant flaw test. While the test is considered to be "understandable in the context of investigations, (it) has no meaningful role in an assessment as to whether the respondent State had in place an adequate legal framework in compliance with its positive obligations under Article 8 of the Convention since the issue before the Court concerns the question of whether the law afforded an acceptable level of protection to the applicant in the circumstances."[59] The acceptable level of protection was the new standard that replaced the significant flaw test, but again, no additional guidelines were provided by the Court, either as to the determination of its particular criteria, or as to the assessment of the exact level of burden on the state. Is the test another *in casu* constitutional standard related to positive obligations or decisive criterion generally applicable in CSA cases, the answer to this question solely depends on Court's judicial activism and creativity in cases that will fallow.[60]

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57 Judgment *Söderman v. Sweden, op. cit.*, note 18

58 The same approach was applied in the *M.S. v. Ukraine*, *op. cit.*, note 18, § 59

59 Judgment *Söderman v. Sweden, op. cit.*, note 18, § 79, 86, 91

60 The acceptable level of protection test was a starting point of the Court's interpretative journey in Škorjanec *v. Croatia* (2017) and *Irina Smirnova v. Ukraine* (2017). In the latter case, the ECtHR applied the test while assessing the adequacy of Ukrainian non-criminal legal framework to provide protection against intrusions on applicant's privacy and enjoyment of home

3.3. The Effectiveness of the Legal Framework Implementation in Practice

As it was shown in the above presented text, Article 3 and 8 of the Convention place fairly demanding obligations upon national authorities to prevent, replay to, investigate and remedy the infringement of sexual integrity of children. The procedural layer has been added to the scope of the right to personal integrity and dignity and the right to private life as to erode the procedural injustice that applicants may encounter while seeking protection in national justice systems. Except from fulfilling substantive positive obligations, the states, therefore, have to establish procedural safeguards against unfairness in the course of a judicial procedure. The effective deterrence against sexual abuse of children goes hand in hand with the effective investigation of CSA complaints in order to achieve a coherent, meaningful and comprehensive protection for the rights of children not to be sexually abused. In *C.A.S. and C.S. v. Romania* the ECtHR has pointed out that the right to an effective official investigation into the alleged sexual abuse of a child extends to cases in which the abuse has been inflicted by private individuals. The Court has also offered specific explanations what elements have to be fulfilled in order to have an "effective" investigation. The inquiry is regarded as an effective if "capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means." [61] The core issue in the procedural obligation of effective investigation concerns the manner and length of conducting the investigation, not the final result.[62] No one hast the right to demand from state agents to prosecute a specific individual and to conclude the investigation and court proceedings with a conviction judgment. The Court's focus is always been on maintenance of a proper standard of protection.

In the light of the principle that positive obligations should not impose excessive burden on the state parties to the Convention, the Court has restated in a number of cases that the procedural authorities are under obligation to take reasonable steps available to them to secure the evidence regarding the incident including but not limited to eyewitness testimony, forensic evidence etc.[63] The standard of reasonableness, hence should be interpreted within the margin of national criminal procedural justice and in the light of available evidence. The ECtHR has a sub-

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61 Judgment *C.A.S. and C.S. v. Romania*, *op. cit.*, note 18, § 69, 70

62 Stoyanova, V., *Due Diligence versus Positive Obligations: Critical Reflections on the Council of Europe Convention on Violence against Women*, in: Niemi, J.; Peroni, L.: Stoyanova, V. (eds.), International Law and Violence Against Women: Europe and the Istanbul Convention, 2020, [https://ssrn.com/abstract=3384607], accessed 15. April 2020

63 Judgement *A and B v. Croatia*, *op. cit.*, note 18, § 108; *C.A.S. and C.S. v. Romania*, *op. cit.*, note 18, § 70; *M.S. v. Ukraine, op. cit.*, note 18, § 63; *Y. v. Slovenia*, *op. cit.*, note 18, § 96

sidiary role in assessing evidence and no power to replace the procedural authorities in the evaluation of the facts of the case. The Court's scrutiny is, first of all, focused on the question whether the procedural steps taken to obtain and evaluate evidence amount to shortcomings in the investigation prohibited under the procedural aspect of a certain right. Current research has acknowledged that in most CSA cases the signs of child abuse are unclear and the only direct evidence of the crime will be the child statement.[64] This could pose a problem bearing in mind that the truth-seeking system generally prefer direct evidence to circumstantial evidence.[65] Therefore, it is no surprise that the Court acknowledged that the national authorities had been faced with a difficult task while conducting the investigation. It cannot be contested that CSA cases are embroiled with sensitivity often arising from conflicting versions of events, inconclusive expert opinions and nonexistence of physical evidence supporting either the applicant's or alleged offender's version of the events.[66] However, the Court's recognition of difficulties in investigating and prosecuting sensitive matters is not used as a basis for applying more lenient approach to the effectiveness of the investigation when procedural obligations are concerned. In *Y. v. Slovenia* the Court precisely stated that in case of allegations under Article 3, a particularly thorough scrutiny has to be applied, even if certain domestic proceedings and investigations have already taken place.[67] The exercise of investigation powers by state authorities and officers must therefore be subjected to strict scrutiny for compliance with procedural standards arising from the freedom from ill-treatment. Bearing in mind that the fundamental importance of the privacy rights under Article 8 is to a certain extent diminished with respect to Article 3, the standard of review for procedural requirements implicit in Article 8 should be less demanding.

The analysis of Court's decisions in CSA cases has showed that the clear distinction between the standards of review related to Article 3 and Article 8 is unfortunately missing. For example, in *C.A.S. and C.S. v. Romania* the Court held that the national judicial authorities' lack of effort to weigh up the conflicting evidence and establish the facts by engaging in a context-sensitive assessment in a case involving sexual violence against a 7 year old boy augmented to failure to carry out an effective investigation. Additional factors influencing the Court's decision were related to the fact that the investigation had not started promptly, nor was

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64 Harlin Goodno, N., *Protecting Any Child: The Use of the Confidential-Martial-Communications Privilege in Child Molestation Cases*, University of Kansas Law Review, *vol.* 59, no. 1, 2010, p. 25

65 Heller, K. J., *The Cognitive Psychology of Circumstantial Evidence*, Michigan Law Review, *vol.* 105, no. 2, 2006, p. 255

66 Judgement *A and B v. Croatia*, *op. cit.*, note 17, § 127; *Y. v. Slovenia*, *op. cit.*, note 18, § 97

67 Judgement *Y. v. Slovenia*, *op. cit.*, note 18, § 96

conducted in a reasonable time. Three weeks passed before medical examination of the boy was ordered and additional 2 months before an official statement was taken from the main suspect. After 5 years, the procedural authorities officially closed the investigation, and 7 years after the incident, the alleged offender was exonerated. To much weight was given to the fact that boy's family had not immediately reported the offences and, to a certain extent, that he had hesitated in reporting the abuse. The investigation was neither prompt, nor rigorous or child sensitive bearing in mind the length of the procedure and domestic authorities' failure to understand vulnerability and psychological reactions of sexually abused children.[68] While Court's judicial reasoning was created upon factual interpretation and terminology related to procedural effectiveness, sensitivity and child vulnerability, contemporary constitutional standards regarding the procedural obligations inherent in Article 3 and Article 8 were simply merged and left without any particular clarity of the judicial review. The standards of review are even less understandable if we compare a highly similar language used in *M.S. v. Ukraine* where the Court held that insufficiently thorough inquiry burdened with a 2 year delay in securing the statement of allegedly abused child, unjustified number of decisions discontinuing investigation and excessively lengthy proceedings has only constituted a violation of Article 8.[69]

The general uncertainty that clouds judicial review standards concerning the procedural obligations can be noted in other CSA cases discussed in front of the ECtHR. The restrictive approach in the prosecution of rape of a 14 year old girl the Court in Strasbourg proved relaying on reasonable arguments and a lack of Government's disproval in *M.C. v. Bulgaria*.[70] Consequently, the less demanding standards of reasonable grands were applied during the assessment of both Article 3 and Article 8 procedural obligations, which is, again, contradictory to the logic of Court's reasoning on "thorough scrutiny", the stricter standard of review than the reasonableness test.[71] The omissions in investigation like domestic court's inability to assess all the surrounding circumstances (i.e. evidences on environmental coercion, credibility of defence witnesses), to attach enough weight to the particular vulnerability of sexually abused child and handle the investigation without significant delays led the ECtHR to conclude that Bulgarian criminal justice system was defective and fell short of the requirements of effective investigation and prosecution of CSA cases. Similarly, a predominant practice of not making content-

68 Judgment *C.A.S. and C.S. v. Romania*, *op. cit.*, note 18, § 78-81

69 Judgment *M.S. v. Ukraine, op. cit.*, note 18

70 Judgement *M.C. v. Bulgaria*, *op. cit.*, note 18

71 For more information on different layers of strict scrutiny test and reasonable grounds test, *see* Sinnar, S., *Rule of Law Tropes in National Security*, Harvard Law Review, *vol.* 129, no. 6, 2016, p. 1605

sensitive assessment of the evidence in CSA cases in Romania was declared to be a breach of positive obligations inherent in Article 3 and 8 in *M.G.C. v. Romania*, another groundbreaking case. In the ambit of domestic courts' practice, a failure to take into consideration chid-specific relations to trauma and sensitively assess the fact that the victim did not disclose the abuse to her parents or did not scream for help during the incident presents a direct breach of Romania's positive obligations under both Articles 3 and 8.[72] Although blurring the standards of review is a point of contention, the Court's judgments are illuminating for the task of child-sensitive assessment, the positive obligation standard forged in the ambit of research conclusions in the child psychology and depth and rigour of the criminal justice assessment.

A certain pathway which will lead us closer to more clarity on the judicial review standards in Article 3 and 8 procedural obligations might offer the case of *Y. v. Slovenia*.[73] The case concerned allegations of sexual assaults on a 15 year old girl by a 40 year older family friend. A number of longer periods of complete inactivity, some of which were contrary to the domestic procedural rules, together with the excessive length of the proceedings were used as a factual basis for the Court to conclude that procedural obligations under Article 3 were not fulfilled. The Article 8 of the Convention was invoked in relation to completely different issue – the protection of the applicant's personal integrity in the criminal proceedings. The violations of Article 3 were related to the "classical" procedural issues while allegations of a breach of Article 8 concerned facts that are specific to the personal integrity within the privacy domain. The judicial reasoning in *Y. v. Slovenia* is, therefore, more consistent with the canon of legal certainty. This was possible due to the fact that for the first time in its practice, the Court in Strasbourg examined the right to respect for private life and child victim's personal integrity in the context of the manner in which the victim had been questioned during the criminal proceedings. The normative substance of victim's Article 8 rights was observed in the light of procedural safeguards guaranteed to the accused abuser under Article 6 §3 (d). Although the Court's scope was "to strake a fair balance" between these rights,[74] no balancing test was performed. While scrutinising the domestic criminal proceedings, the ECtHR accepted the conclusion that the right to a fair trial had required an opportunity for the accused to cross-examine the applicant, a young woman at the time of questioning, bearing in mind that her testimony had been the only direct evidence and other gathered evidence, conflicting. The personal cross-examination by the accused was not in and of itself a violation of

[72] Judgment *M.G.C. v. Romania, op. cit.*, note 18, § 70

[73] Judgment *Y. v. Slovenia*, *op. cit.*, note 18

[74] Judgment *Y. v. Slovenia*, *op. cit.*, note 18, § 104

victim's Article 8 rights but the manner of questioning raised a serious concern. The length of questioning of 4 trial hearings over 7 months and quality of questions aimed at attacking the applicant's credibility and degrading her character were a primary cause of distressing experience for the applicant. In the presence of risk of further traumatisation of the victim, domestic courts had to, but failed, "to subject personal cross examination by the defendant… to most careful assessment, the more so the more intimate the questions are… Cross-examination should not be used as a means of intimidating and humiliating witnesses… It was first and foremost the responsibility of the presiding judge to ensure that respect for the applicant's personal integrity was adequately protected at the trial."[75] Relaying on research conclusions related to secondary victimisation of sexually abused victims, the Court has extended the procedural obligation of national courts to apply the sensitive approach to the conduct of the criminal proceedings involving child victims and witnesses. Factors that created particular sensitivity and called for additional procedural authorities' actions were the pre-existing relationship between the applicant and the victim, her young age at the time of the offence and the intimate nature of the subject matter. Once again, the judicial activism of the Court was rooted in interdisciplinary research outcomes, and consequently, the judicial discretion in *Y. v. Slovenia* was limited as it may be by rigour of scientific argumentation.

3.4. The Historic v. Activist Approach

Professional and academic research results were of crucial importance to create the Court's guiding principles of state's responsibility to ensure the protection of children from sexual abuse in the primary education system under Article 3 of the Convention in *O'Keeffe v. Ireland*. Relying on 4 different reports revealing statistical evidence of prosecutions and complaints made to state authorities about the CSA in Ireland, the Court acknowledged that the state was aware of the level of sexual offences against children and the risk of sexual abuse within the educational settings if there was no appropriate mechanism of their protection back in 1973. The conclusions were part of the causation test and determination whether the state had, or ought to have had, knowledge of the risk of sexual abuse of children by teachers in the National Schools, and whether the state, being aware of the risk, took reasonable steps and applied effective measures to protect children from such risk. While affirmatively answering both questions, the *O'Keeffe v. Ireland* judgment stands out in the Court's case law for couple of different but interrelated reasons. First of all, this is the only Strasbourg Court's decision that concerns a

[75] Judgment *Y. v. Slovenia*, *op. cit.*, note 18, § 106; 108-109

general risk of sexual abuse to unidentified children.[76] There was no dispute that the applicant in the age of 9 had been subjected to approximately 20 sexual assaults for around 6 months by the principal of a primary school run by the Catholic Church. She complaint that the state had failed to organise its primary education system to ensure protection of children from ill-treatment. Furthermore, the risk was assessed from the point of view of facts and standards existing in 1973. The judicial reasoning was built on cannons of historical interpretation as a sign of fairness bearing in mind the fact that the level of public awareness in society today of CSA in educational institutions is considerably higher that it was at the material time.

The factual and legal context of the *O'Keeffe v. Ireland* has attracted a considerable scientific attention and the judgment was subjected to the critical analysis in a short time. Although the outcome of the case was not disputed, scholars have argued that the holding was to broad and that it created uncertainty in the interpretation of inherent positive obligations.[77] In the light of the fact that risk of CSA does not have to be real and immediate, the causation standard is broader than the one in the context of protective positive obligations from earlier Court's practice,[78] and it is left quite unclear why Ireland should have known of the risk in the National Schools. The above mentioned official reports were concerned with the widespread nature of the CSA in Ireland, however, none of them referring to the case of conviction from the 1920s to 1973 in which a primary school teacher was found guilty for sexually assaulting a pupil.[79] The criticism is consistent with research findings according to which most of the alleged abuse occurred between the 1950s and the mid-1970s, nevertheless, national investigations emerged in the past 3 decades.[80] Furthermore, the Court's methodology in historical interpretation raised concern vis-à-vis the historical application of the Convention. The Court's reasoning suffers from serious flaws due to the fact that the Court referred to international documents as a source of Ireland's obligations in 1973 that were

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76 O'Mahony, *op. cit.*, note 44, p. 669

77 Lee, H., *O'Keeffe v. Ireland: The State's Obligation to Protect Children from Sexual Assault in State Schools*, Boston College International and Comparative Law Review, *vol.* 40, no. 3, 2017, p. 39

78 Gallen, J., *O'Keeffe v Ireland: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education*, The Modern Law Review, *vol.* 78, no. 1, 2015, p. 158

79 Keane, R., *O'Keeffe v. Ireland in Strasbourg: Punishing the Guilty*, Dublin University Law Journal, *vol.* 38, no. 1, 2015, p. 187

80 Gallen, J., *Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice*, International Journal of Transitional Justice, *vol.* 10, 2016, p. 335

ratified in 1989.[81] The Convention was not interpreted by majority as understood in 1973 and as then in force. At that time, there was no relevant case law to support the majority's view of the scope and nature of positive obligations at issue. For example, the hypothesis on vulnerability, its nature and gradation across the spectrum of Convention rights, has been invoked in the doctrinal discussion and ECtHR case law in last 2 decades. Although the universal fairness demands imposing obligations on states to ensure protection of children from ill-treatment in a primary education through the adoption of detection and reporting mechanisms, particularly when the abuser exploits authority over the child, the cost of confirming such positive obligations should not be lowering the standards of judicial review. As judges in dissent pointed out, "the standards of today based on experience up to today are not necessarily how conduct in the past is fairly to be judged."[82]

A clear example of the evolutive outcome of judicial review standards is the last year's judgment of the ECtHR *A and B v. Croatia*. Unlike the *O'Keeffe v. Ireland*, the judgment is not preoccupied with the past, rather it stands out as potentially the most coherent Court's decision that illuminates a substantive nature of sexually abused children's rights under the Convention and their reach and practical recognition in regard to positive obligations of the state parties and the Court itself. In its 6 decades of practice, the Court for the first time issued a request to the Bar Association of a member country for appointment of a separate representative to overcome a strong risk of invoking the rights of the applicant child in an instrumental way by her parents who were in a mutual conflict and incompetent to protect the best interest of their child. The representative was trusted with the task to duly present child's views and interests due to the fact that the alleged abuser of a 4 year old girl was her father. Although the Convention nor the Rules of the Court regulate the issue who should represent the child under such circumstances, the Court has decided to fill the lacuna with *ad hoc* solution relying on the relevant European rules within the context of child friendly justice.[83] The concept of child friendly justice is a normative umbrella that merges rules from different legal

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81 In his concurring opinion, Judge Ziemele has warned the majority that two International Human Rights Covenants (i.e. the ICCPR and the ICESC) were adopted in 1966, Ireland signed them in 1973 and ratified them even later, in 1989

82 Joint partly dissenting opinion in *O'Keeffe v. Ireland*, *op. cit.*, note 18

83 Art. 24 of the Council Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L315/57; Article 31 § 4 of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Konvencija Vijeća Europe o zaštiti djece od seksualnog iskorištavanja i seksualnog zlostavljanja), Official Gazette, International Agreements, No. 11/2011, 13/2011, 15/2011; Section D, 2, 37, 42-43 of the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice

branches and positions them in a comprehensive normative unity guided under the principles rooted in international child rights framework in order to adopt judicial and state administrative system to the specific rights, interests and needs of children. Under this concept, the child is perceived as a rights holder rather than a mere object of protection and care,[84] and justice is afforded to children according to their best interest, "an interpretative principle of superior judicial consideration".[85]

In *A and B v. Croatia* the Court examined 3 important issues. The first issue demanded an exhaustive analysis of Croatian regulatory and legal framework to protect the applicant child's rights guaranteed under Article 3 and Article 8 of the Convention. Next, the Court was concentrated on the concrete application of the framework with respect to procedural obligations of effective investigation. The final Court's task required a meticulous assessment of state authorities' conduct in order to conclude whether applicant's rights as a child victim of sexual abuse were sufficiently taken into consideration. The enumerated issues present an essence of standards of children's rights protection form sexual abuse created over the years in ECtHR jurisprudence. Except form the fact that the Court examined everything what was possible to examine within the boundaries set by the application, the Strasbourg judicial authority clearly stated that "in cases of sexual abuse children are particularly vulnerable".[86] This is an intriguing novelty having in mind that in previously delivered CSA judgments the Court's statements on vulnerability were wrapped in general rhetoric about "children and other vulnerable individuals". A common presumption has been that the youngest members of society belong to vulnerability or particular vulnerability group, nevertheless, the exact meaning and effects of its gradation as well as repercussions on other classical ECtHR institutes like the issue of causation have never been reviled. In *A and B v. Croatia* the Court clearly reiterated that investigative bodies have a duty to implement the criminal law mechanisms to address "the particular vulnerability of the applicant as a child of a young age, who had allegedly been a victim of sexual abuse by her father, taking the child's best interests as a primary consideration and in this connection to afford protection to her victim's rights and avoid secondary victimisation".[87] As a result, the assessment tool for evaluation of state authorities'

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[84] Liefaard, T., *Child-Friendly Justice: Protection and Participation of Children in the Justice System*, *Temple Law Review*, *vol*. 88, no. 4, 2016, p. 906

[85] Mazzinghy, A., *Child-Friendly Justice behind Bars: A Comparative Analysis of the Protection Mechanisms of the Rights of Arrested Children in the Practice of the Working Group on Arbitrary Detention and of the European and Inter-American Courts of Human Rights*, American University International Law Review, *vol*. 35, no. 2, 2020, p. 325

[86] Judgement *A and B v. Croatia*, *op. cit.*, note 17, § 111

[87] Judgement *A and B v. Croatia*, *op. cit.*, note 17, § 121

diligence in conducting the investigation was a three-step test that focuses on culpable disregard, discernible bad faith and a lack of will on the part of investigative or prosecuting agents. The test was already applied in *M.P. and Others v. Bulgaria* 7 year earlier,[88] however, this time, the Court has extended its application merging it with the standard of reasonableness and the best interest principle. According to the Court, "the domestic authorities did everything that could have reasonably been expected from them to protect the rights of the applicant, a child allegedly victim of sexual abuse, and to act in her best interest".[89] In the Court's reasoning, it is clearly visible the tension between the child-centred approach supported by the institute of vulnerability and the best interest principle on the one hand, and, on the other, the standard of reasonableness, a more lenient causation standard which goes in line with the margin of appreciation doctrine. It seems that judicial activism in Strasbourg is considerably limited with political constraints which demand not strict but rather a reasonable implementation of ECtHR standards no matter the value of the right protected under the Convention.

4. FINAL REMARKS

In recent years much has been said about the role given to the ECtHR in challenging endeavour of creating the pathway to universal recognition of basic human rights. The bulk of scientific literature confirms a gatekeeper's position of this Court for maintaining a minimal level of collective enforcement of human rights and fundamental freedoms within the Council of Europe. The interpretative authority combined with a firm determination to promote European human rights values have positioned the Court in an avant-garde composition of human rights law. While relying on the dynamic interpretation of the Convention and discourse of practical and effective rights, the Court in Strasbourg has developed a clear evolutive line of human rights standards. The standards set by the Court to safeguard the rights of sexually abused children fall within the margin of evolutive approach in interpreting the rights inherent in both Article 3 and Article 8 of the Convention. The Court's judicial review methodology in CSA cases has developed gradually starting from almost incidental enumeration of guiding principles in its early case law and concluding with the comprehensive standards tailored within the context of child friendly justice. The notions of child's particular vulnerability and child sensitive assessment have become a guiding force for reinforcing specific child applicant's rights, like the freedom from ill-treatment and right to personal integrity and dignity. Interpreted together, these 2 basic rights have been used to

[88] Judgement *M.P. and Others v. Bulgaria*, *op. cit.*, note 17, § 113

[89] Judgement *A and B v. Croatia*, *op. cit.*, note 17, § 129

create a tight net of state's positive obligations to prevent, respond to, investigate and prosecute the sexual abuse of children. In case of CSA the state has an obligation to safeguard the physical and psychological integrity of children, and in order to fulfil it, firstly, the state has to adopt an adequate legal framework with effective deterrent effect, secondly, apply the framework according to acceptable procedural standards and thirdly, take sufficient consideration of rights of sexually abused children in practice. The required obligations (TRiO) impose a quite demanding task to national legislators and prosecuting authorities, and last year, the state oriented TRiO was transformed by the Strasbourg Court itself in an obligation to appoint a separate representative for a child applicant in *A and B v. Croatia*. The identification of a potential conflict of interest between parents was sufficient for the Court to create a new procedural means aimed at ensuring the independent submissions on behalf of the child as to her best interests. The set of novel standards with dual binding effect spreading over the state and ECtHR level is a clear sign of Court's potential to create and steadily upgrade a norm in the ambit of jurisprudential developments.

The noted trends in the Court's case law confirm a normative evolution legitimized by the principle that "mankind owes to the child the best that it has to give".[90] However, it has to be recalled that the HUDOC search engine discovered 10 judgments related to protection of sexually abused children's rights, and this fact calls for further analysis whether the ECtHR is accessible enough to children and whether the justice it creates is child friendly indeed. The analysis has also revealed that judicial reasoning techniques used by the Court present another important concern. The Court has places child's vulnerability and sensitive approach in the centre of its doctrinal discourse, however, the explanations related to their nature and effect on other "classical" institutes is rather vague. The lack of clarity in Court's reasoning and consistency in applying constitutional principles and relevant tests can be seen in a number of examples. It is still ambiguous under which circumstances the CSA amounts to torture, inhuman or degrading treatment or only constitutes a violation of the right to respect for private life under Article 8. The level of discretion left to the states under the margin of appreciation doctrine in CSA cases has remained unclear and the rule - the more important right or freedom the narrower margin of appreciation, inconsistently applied. The absence of precise guidelines on thorough scrutiny and standard of reasonableness related to effective investigation is another sign of insufficient judicial preciseness. It seems that the Court is concentrated on setting the standard and the question of its implications is simply left to the states. Except from the fact that this strat-

[90] Geneva Declaration of the Rights of the Child of 1924, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924)

egy may lower the quality of Court's reasoning, it adds to the general uncertainty that clouds the positive obligation standards in ECtHR case law. If the standards are not embodied with sufficient legal certainty, the question remains whether the Strasbourg Court protective policy has a doctrinal power to be adequately implemented within the national jurisdictions, and therefore, a potential to reach fair and just protection of children from sexual abuse within the Council of Europe.

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UDK 343:621.39
Review article

MEMORIES OF THE FUTURE: SWEETIE AND THE IMPACT OF THE NEW TECHNOLOGIES ON THE CRIMINAL JUSTICE SYSTEM

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ABSTRACT

The new age of technology has made its mark on all dimensions of social life. The justice system did not escape this influence, currently facing the need to adapt its principles and standards of criminal justice as a result of using Artificial Intelligence in the criminal investigation phase as well as in other stages of the criminal process. "Sweetie" is by far one of the most disputed means of criminal investigation that puts both the theory and the criminal procedural practice to the test.

Through this interdisciplinary study we propose an analysis regarding the new means of investigation, trying to identify the advantages and disadvantages of using new technologies in the criminal trial, with a detailed description of the instrument "Sweetie" and of some cases in which it was used.

***Keywords**: Sweetie, Criminal investigation, Criminal justice system, Artificial Intelligence, Preparatory acts, Criminal attempt*

1. NEW TECHNOLOGIES AND THE CRIMINAL INVESTIGATION. THE NEED FOR ADAPTATION

The investigative phase of the criminal process is of utmost importance since, during it, evidence is gathered by the judicial organs in order to support accusations and prove criminal conduct and culpability. Being such a difficult process and requiring extreme care, perseverance and much attention to detail, it consumes time, human and financial resources. At the same time, humans involved in this process, depending on the amount of work and quantity of data they need to analyze, are exposed to error, and errors are difficult and costly to be removed and

repaired. As stated in the doctrine, "especially in large crime investigations, investigators are faced with a mass of unstructured evidence of which they have to make sense. They have to map out the possible hypotheses about what happened and assess the potential relevance of the available evidence to each of these hypotheses". [1]

Facing all these issues, the law enforcement agents need to find ways, tools and means to ease their work and achieve expected results in the fight against the crime phenomenon. These new ways could be based on Artificial Intelligence (AI) and telematic tools as they could meet the standards of rapidity, objectivity and efficiency. "Software could offer such tools by supporting crime investigators in expressing their reasoning about a case in terms of arguments on the relevance of evidence to the various hypotheses using common knowledge. In the current practice of crime investigation and similar fact-finding processes, software for managing and visualizing evidence is already being used"[2].

Specific forms of crime which are number increasing are critically linked to internet and online tools to be committed, thus the investigator should use similar tools in order to discover and catch the perpetrators. One example is child pornography, which tends to become a dangerous global phenomenon. It was stated that, at any time of the day, an estimated 750,000 men are looking for online webcam sex with children[3]. Facing this huge number of perpetrators, the law enforcement agents cannot rely solely on the current methods of detection and on the reporting by the victims. Even if they could appeal to undercover operations, it is utopic to expect significant results while human and financial resources are limited while the speed of state reaction is essential. In these troubled times state agents need to show imagination, be creative and use the best of the existent tools in the fight against crimes. Such a creative example is Sweetie – a chatbot that could be the best way of discovering crimes of child pornography without human victims and before any perpetrating acts are committed. Creation and use of such novel tools is conditioned by the acceptance of the policy makers and the cooperation between them and the private sector which is the main actor in the Artificial intelligence domain but focused solely on profits. "As long as outdated views of policy makers on crime prevention and profit-centered approach of the private sector

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1 Bex, F. *et al., Sense-making software for crime investigation: how to combine stories and arguments?*, Law, Probability and Risk, *vol.* 6, issue 1-4, March 2007, pp. 145–168, [https://doi.org/10.1093/lpr/mgm007], accessed 13. April 2020

2 *Ibid.*, p.146

3 [https://www.savesweetienow.org], accessed 13. April 2020

prevail over unconventional methods of fighting crimes, these types of theoretical solutions are doomed to stay on paper". [4]

2. FUTURISTIC METHODS OF CRIME DETECTION

In the context of new ways of committing crimes arising, with technological and transnational components, it is imperative for the law enforcement agents to adapt and use adequate means of investigation, as stressed in the first section of the present study. Reluctance for innovative tools and approaches and deferment in using Artificial Intelligence algorithms could dramatically affect the criminal investigation and allow perpetrators to escape criminal consequences.

Thus, the scholars have been preoccupied to identify futuristic methods and tools for crime detection, anchored in the new technological dimension of crime phenomenon. Until now, several AI methods are currently trialed and used in the investigative phase: chatbots, Big Data analysis by VoIP companies, specific software used to manage evidence or block the spread of crime forms[5].

2.1. Chatbots

A chatbot is a software application used to conduct an online conversation (text or speech) instead of providing direct contact with a live human agent[6]. The chatbot is designed to simulate human behavior in a conversation and typically requires continuous adjustment and testing. Chatbots are usually used for various purposes: customer service, request routing, information gathering and lately, their area of use has widened to crime investigation and identification of potential perpetrators of crimes.

Chatbots have evolved from totally dependent devices of human actors to almost independent software. As dependent to human actors, chatbots are "puppets" manipulated by humans, thus their "conduct" is the conduct of the human operator. Automated chatbots act independently and learn from their own experience and could create new crime prevention strategies. However, not even the latest ver-

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4 Açar, K.V., *Webcam Child Prostitution: An Exploration of Current and Futuristic Methods of Detection*, International Journal of Cyber Criminology, January – June 2017, *vol.* 11, no. 1, p. 98–109, [DOI: 10.5281/zenodo.495775], accessed 13. April 2020

5 K.V. Açar (*ibid.*) points out three futuristic methods for crime detection: 1.Fully automated chatbots; 2.Big Data Analysis of Metadata by VoIP companies and 3.Big Data Analysis of Content Data by VoIP Companies.

6 Crăciun V., *Ce este un chatbot?* ["What is a chatbot?"], Today Software Magazine, Nr. 72, 2018, [https://www.todaysoftmag.ro/article/2645/ce-este-un-chatbot], accessed 15. April 2020

sion of Sweetie – Sweetie 2.0 - is a fully automated chatbot, still could be a very useful, tool in criminal investigation. By far, Sweetie chatbot experiment[7] of Terre des Hommes Netherlands is a remarkable example of how this simple principle can be applied in the fight against specific forms of crime such as virtual child pornography.

The scholars have stated that chatbots could be used as undercover agents. While the initial version of human dependent chatbots is perfectly compatible with the undercover agent actor, the advanced independent versions are unfortunately non, since they are non-human actors. "(…) A human being seems a necessary element of undercover investigations at the moment. However, in the proposed approach, humans would only involve in the evaluation of stored communications between chatbots and potential offenders, not during undercover operations. The legal framework for online child sexual abuse investigations should be changed to conduct such humanless undercover operations".[8] The use of undercover agents is strictly provided by the law which states on the characteristics, conditions and situations when such an exceptional investigative method could be used. The advanced version of Sweetie is actually a hybrid model of chatbot, not entirely independent of human actor. In the future, there are projects to develop a fully automated chatbot that could eliminate the human factor, only raising serious questions on the legality of the use of such method in the criminal process.

2.2. Big Data Analysis by VoIP companies

Voice-over-IP (VoIP) is an efficient method to communicate. VoIP involves sending voice transmissions as data packets using the Internet Protocol (IP), whereby the user's voice is converted into a digital signal, compressed, and broken down into a series of packets. The packets are then transported over private or public IP networks and reassembled and decoded on the receiving side.[9]

VoIP companies run two types of Big data analysis: analysis of Metadata and analysis of Content data.

a) Metadata is in fact Data that provide information about other data, summarizing basic information about it, making finding and working with particular

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7 See short video on *Sweetie* at [https://youtu.be/aGmKmVvCzkw?t=10], accessed 13. April 2020

8 Açar, *op.cit.*, note 4, p.103

9 Varshney, U. *et al., Voice over IP*, Communications of the ACM, *vol.* 45, no. 1, 2002, p. 89, [https://dl.acm.org/doi/10.1145/502269.502271], accessed 15. April 2020

instances of data easier. In other words, Metadata is a shorthand representation of the data to which they refer.[10]

Metadata shows some attributes of communications such as date, creator and IP addresses without severely compromising the privacy of communications. Therefore, collecting metadata is easier both technically and legally since it takes up less space on disk and involves less intrusive personal information than the content data have. This method is used to detect possible online child pornography and other types of crimes/offenses which could be committed through internet by a pattern analysis of the metadata of VoIP communications (location, source, IP) that could lead investigators to potential victims or perpetrators. [11]

For example, a pour child from a minor victims "traditional provider" country contacts offenders from different countries during a limited period of time (one week). In this case VoIP company reads the "signals" - a resident of a very poor city chats with multiple foreigners from relatively wealthier countries - and after discloses the IP addresses and other helpful information like email addresses to the law enforcement authority for further investigations.[12]

b) Content data analysis exposes specific information of the VoIP communications between parties: texts, audio, video files and is highly intrusive. It requests legal authorizations and trained operators. An analysis of Skype which is used by millions of people worldwide to communicate shows that specific features of it – like real time translation[13]. In order to detect online child pornography for example, a content analysis could use code words like sexual meaning words in order to reveal suspect behaviors. When the results of such an analysis are corroborated with other data like type of money transfer (ex. PayPal, bitcoin) and location of IP, the final result might be extremely useful for the crime investigators.

2.3. Software expressly designed to be used in investigative phase of criminal process

There are many examples of software expressly designed to be used in investigative phase of criminal process. Analyst's Notebook by IBM[14] and HOLMES

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10 Hare, J., *What is metadata and why is it as important as data itself?* Opendatasoft, 25 August 2016, [https://www.opendatasoft.com/blog/2016/08/25/what-is-metadata-and-why-is-it-important-data], accessed 15. April 2020

11 Açar, *op.cit.*, note 4, p.103

12 *Ibid.*, p.104

13 *Ibid.*, p.105

14 [https://www.ibm.com/security/intelligence-analysis/i2/law-enforcement], accessed 15. April 2020

2[15] are both designed in 2006 and used in United Kingdom while Netherlands experimentally used BRAINS in crime investigation with some success in 2004. FLINTS[16] is another example which was first used by the British police in 1999 to manage forensic evidence.

Microsoft Company has created software that matches photos, even if they've been altered that is used in child pornography investigation, in order to help investigators to focus on new images surfacing online. Another software, Adobe Systems' Photoshop, is used to identify child pornography victims with tools that sharpen pictures to reveal clues.

Other initiatives using Artificial Intelligence are related to Google, which blocks search terms related to child pornography and to Thorn, a foundation supported by Hollywood actors which has created a database for tracking known child sex-abuse images and taking them offline.[17]

As stressed by the scholars, even if these software programs are extremely useful in the investigative phase, the results of the criminal investigation are "wholly dependent on human reasoning, and the structures resulting from such reasoning cannot be recorded and analyzed by the software"[18].

3. A CONTROVERSIAL INVESTIGATIVE TOOL: SWEETIE

As previously explained, Sweetie is a chatbot, an AI program, designed to combat online pedophilia (webcam sex with children) and to help identify suspects, perpetrators and victims. It was created by the organization Terre des Hommes[19] from Netherlands in 2013. Since its first use in 2013, Sweetie had led to the conviction of several English, Danish, Dutch and Belgian citizens for webcam sex with children.[20]

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15 HOLMES 2 (Home Office Large Major Enquiry System) is an information technology system used by United Kingdom Police in order to facilitate murder and high value fraud investigations. It was developed by Unisys under the Private Finance Initiative. The name of this tool refferes to the Arthur Conan Doyle's character Sherlock Holmes. Further information can be retrieved from [http://www.holmes2.com/holmes2/index.php] aaccessed 13. April 2020

16 Nissan, E., *Computer Applications for Handling Legal Evidence, Police Investigation and Case Argumentation*, *vol.* 1, Springer, 2012, p.767-836. As regards FLINTS (Forensic-Led Intelligence System) and its benefits, also see Jackson A.R.W.; Jackson J.M., *Forensic Science,* second edition, Pearson, 2008, p. 7

17 Schweizer, K., *Avatar Sweetie exposes sex predators*, The Age, April 26, 2014, [https://www.theage.com.au/world/avatar-sweetie-exposes-sex-predators-20140425-379kf.html], accessed 13. April 2020

18 Bex *et al., op.cit.,* note 1, p.146

19 Oficial site: [www.terredeshommes.nl], accessed 15. April 2020

20 Terre des Hommes, *First conviction for child abuse in Belgium thanks to Sweetie*, 9/04/2015, [https://www.terredeshommes.nl/en/news/first-conviction-child-abuse-belgium-thanks-sweetie], accessed 13. April 2020

In its first version - Sweetie 1.0 – the chatbot appeared as a virtual 10–year old girl from Philippine - was used to identify and expose pedophiles engaged in webcam sex tourism and was operated by a human agent. The conversations with the pedophiles were conducted by the human police agent, Sweetie being only its avatar. Despite its initial success, the use of Sweetie was limited by it being operated by a human actor who could conduct a limited number of online conversations at the same time. The number of suspects – sex solicitants - per hour was over 2000! In order to solve this problem, Sweetie 2.0 was created, a more advanced version of the chatbot. According to Schermer, Georgieva, Van der Hof and Koops, "the main difference with Sweetie 1.0 is that Sweetie 2.0 is no longer operated by a human, but is now a fully autonomous artificial intelligence that can engage in a meaningful conversation with a suspect"[21]. However, these authors are not entirely right, since Sweetie 2.0 is actually a hybrid model of chatbot, not entirely independent of human actor. In the future, there are projects to develop a fully automated chatbot that could eliminate the human factor, however, it would raise serious questions on the legality of the use of such method in the criminal process.

The main advantage in using Sweetie is that investigators can directly interact with pedophiles without putting anyone in danger, in other words, there are no potential victims, but only potential suspects. It is almost like discovering a crime before it was committed. As enthusiastic as could be, someone could not but observe that there are serious legal issues in relation with the "deeds" discovered by Sweetie: there is no crime/offense, no victim, and thus criminal law could not be imposed to anyone! In order to punish "sex predators" as a result of using Sweetie, further legislative interventions are necessary, for example, interacting with Sweetie must be qualified by law as criminal behavior.

"If this is not the case, then it will be much harder, if not impossible to prove that the suspect committed or attempted a criminal act. This in turn will make it more difficult to justify the use of Sweetie as an investigative method".[22]

Using Sweetie as an investigative method was praised by the civil society and questiond by the legal experts. Since Sweetie was designed and developed by a non-profit organization, despite its noble goal, European Policing Agency Europol has expressed reservations about its use: "We believe that criminal investigations using intrusive surveillance measures should be the exclusive responsibility of law enforcement agencies," spokesman Soren Pedersen told the Reuters news agency.[23]

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21 Schermer, B. W. *et al., Legal Aspects of Sweetie 2.0*. Leiden/Tilburg: TILT, 2016, p. 10

22 *Ibid.,* p. 12

23 Crawford, A., *Computer-generated ‚Sweetie' catches online predators*, BBC News, 5 November 2013, [https://www.bbc.com/news/uk-24818769], accessed 13. April 2020

4. ISSUES REFERRING TO THE USE OF SWEETIE IN THE CRIMINAL PROCESS

As Sweetie fame was raising, it became subject for a very detailed legal analysis that led to the conclusion it does not meet the law requirements for a recognized investigative tool[24]. The Report was published in 2016 and demoralized the enthusiastic supporters of Sweetie.

The main issues found by the researchers were:

a) Lack of human element

The advanced Sweetie 2.0 is no longer operated by a human, but an autonomous Artificial Intelligence algorithm that can engage in a conversation with a suspect. If we embrace the idea of Sweetie being an undercover agent, the lack of human operator is the element that eliminates the possibility of using Sweetie as such. Since domestic criminal procedure legislations regulate undercover agents as human beings, then nothing is to be said in this direction.

b) Ethical issues regarding the non-human nature of Sweetie. The concept of "virtual victim"

Because Sweetie is an avatar, a virtual character, programmed to appear and talk as a child but clearly no real child is ever involved in the process, and because no sexually explicit behavior on the part of the "victim" takes place[25], questions were raised if there is an actual victim in this case. The concept of victim is only understood in connection with a human being, since only human beings are subject for criminal protection, exercise rights and are holders of the social values protected by the criminal law.

This conclusion raises another question: could Sweetie be considered a virtual victim and if so, what is a *virtual victim*? If we are comfortable with this new category, we may proceed further.

Baarfield and Blitz propose to distinguish between virtual sexual assaults involving avatar interactions and those using immersive interactions and go even further using new terms such as *virtual victim* and *virtual perpetrator*[26] They even distinguish between fully virtual sexual interactions and combined sexual interactions between humans using avatars or between humans and virtual agents. Also they

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[24] Schermer, *et al., op.cit.,* note 21, pp. 82-86

[25] *Ibid.,* p. 29

[26] Baarfield W.; Blitz, M.J., *Research Handbook on the Law of Virtual and Augumented Reality*, Edward Elgar publishing, 2018, p. 368

distinguish between virtual reality and immersive reality[27]. Such an analysis is of great importance to understand the type of interaction in case of Sweetie and the human sexual predators.

A virtual perpetrator is, in fact, a virtual agent committing a crime. The virtual agent could be an avatar of a real person, a chatbot or a genuine virtual agent (a more advanced software than the one used to create a chatbot, which has abilities and skills exceeding those of chatbots, being improved with NLP – natural language processing[28]).

As shown in the table below, the first version of Sweetie - Sweetie 1.0 - could be qualified as a *human victim* - human user virtually sexually assaults an avatar controlled by another human being, using an avatar, while the interraction between the two is an avatar interaction with human perpetrator. In this case Sweetie is only an AI tool while the human operating it is an undercover agent. The situation could be legallyjustified by extensively interpreting existing criminal procedure regulation concerning undercover agents.

The second version of Sweetie - Sweetie 2.0 -, being an almost independent entity which was only designed and programmed by a human, while acting independently, could be a *virtual victim* - human user virtually sexually assaults a wholly virtual agent using an avatar. In this case Sweetie itself is an undercover agent acting as a victim in order to expose criminal conduct of the human perpetrator.

	Avatar - interaction	**Immersive - interaction**
Human Perpetrator	*Virtual victim:* human user virtually sexually assaults a wholly virtual agent using an avatar. *Human victim:* human user virtually sexually assaults an avatar controlled by another human being, using an avatar.	*Virtual victim:* Human user virtually sexually assaults a wholly virtual agent using immersive tech. *Human victim:* Human user virtually sexually assaults a virtual agent controlled by another human being using immersive tech.

[27] Immersive technology refers to technology that attempts to emulate a phisical world through the means of a digital or simulated world by creating a surrounding sensory feeling, thereby creating a sense of immersion, enabling mixed reality. Immersive reality is a combination of Virtual reality and Augmented reality or a combination of physical and digital. See short video Tiffany Lam, How immersive technologies (AR/VR) will reform the human experience, TEDxQueensU, on [https://www.youtube.com/watch?v=Fi97-DAcGMk], accessed 15. April 2020

[28] Kidd, C., *Chatbot vs Virtual Agent: What's The Difference?,* BMC Blogs, 27 November 2019, [https://www.bmc.com/blogs/chatbot-vs-virtual-agent/], accessed 05. June 2020

Virtual Perpetrator	*Virtual victim:* wholly virtual avatar is virtually sexually assaulted by a wholly virtual agent. *Human victim:* avatar controlled by a human being is virtually sexually assaulted by a wholly virtual agent.	*Virtual victim* – n/a this interaction is not distinct from an interaction between two wholly virtual avatars since the immersive tech only applies to fuse the real - world with the virtual world. *Human victim:* human user virtually sexually assaulted by a wholly virtual agent controlled by another human being while wearing immersive tech.

The perpetrator-victim interraction in the virtual space (Table 1.)

From an ethical perspective, Sweetie's most important feature is the fact that it does not put actual children at risk[29] – but this feature is in the same time its main flaw: in most criminal law systems, a real victim is mandatory in order to indict a suspect for committing a criminal deed. The law in force does not recognize virtual victims….yet! (?)

c) Issues regarding criminal nature of the acts committed by the perpetrator

Because Sweetie does not involve in sexually explicit behavior or nudity acts, the animations of Sweetie cannot be qualified as child pornography. As a result, the human actor interacting with Sweetie cannot complete the offence of accessing (and possibly storing) child pornography. From a law enforcement perspective this is an issue, given that in most countries accessing (virtual) child pornography would be the go-to offence in the case of Sweetie[30].

The imposition of criminal liability for an attempted sexual offense in the case of interacting with Sweetie is conditioned by the criminalization of those acts by the national legislator.

d) lack of procedural criminal provisions

Sweetie is an AI tool developed to facilitate the investigative actions of the judicial bodies, and would operate on public online platforms in an independent manner (Sweetie 2.0.). "The chatbot/avatar will be used as a lure for the alleged offender, but will also be capable of interacting with the suspect and recording and storing their interactions as well as available information on the offender, such as for

[29] Schermer *et al., op.cit.,* note 21, p. 29

[30] *Ibid.,* p.31

instance his IP address"[31]. There are few legal frameworks which could allow the use of Sweetie as an investigation method in the criminal investigation, as long as its application stays within the boundaries established by the law. As Sweetie is designed to identify and engage suspects in a manner comparable to undercover investigators, the rules regulating the latter will be decisive for its application. Further, the chatbot will collect certain information on the alleged offender and its devices, and store the content of the communications between that person and Sweetie for investigation purposes. Consequently, the rules authorising these different investigative powers would conjointly be applicable in the case of the chatbot[32].

4. EVALUATION OF SWEETIE ACCORDING TO DUTCH CRIMINAL LAW. NEW DUTCH LEGISLATIVE FRAMEWORK

Following the Report on Sweetie in 2016, Bart Schermer, associate professor at the Centre for Digital Technology and Law at Leiden University, explained the conclusions the team of researchers had reached: "According to Dutch criminal law the use of (virtual) children to lure is not yet explicitly allowed and it is unclear whether webcam sex with a virtual person is punishable anyway"[33] and that had to do with the type of legal system in the Netherlands. "We have a strong action-orientated criminal justice: you have to have committed all the elements that constitute an offense. Because in every sexual offense the victim has to be "a person who has not attained the age of eighteen years", otherwise the offense can never be committed. Sweetie is not a real person."[34]

It was nothing but an opportunity for adopting new legislation in Netherlands. On 21 September 2018, the Computer Crime Act III (*Wet Computercriminaliteit III*) was published in the Dutch Government Gazette and entered into force on 1st of March 2019. The Act managed to improve the Ducth criminal substantial and procedural legislation by amending Dutch Criminal Code (DCC) and the Dutch Code of Criminal Procedure (DCCP). The Act constituted a response to the rapid developments of technology, the internet and cybercrime, following the principles and directions set out in 1993 by the Computer Crime Act I and consolidated in 2006 by the Computer Crime Act II.

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31 *Ibid.,* p. 48

32 *Ibid.*

33 Terre des Hommes, *Dutch criminal law too limited to use Sweetie*, 20/10/2016, [https://www.terredes-hommes.nl/en/news/dutch-criminal-law-too-limited-use-sweetie], accessed 13. April 2020

34 *Ibid.*

The Computer Crime Act III enables courts and the police to access computers covertly and remotely to investigate serious crimes like child pornography, drug trafficking and targeted shootings. This power extends to personal computers, mobile phones and servers. In addition, the Act gives investigating officers the power to apply various investigative tactics, such as making certain data inaccessible, copying files and tapping communication channels. This will make it more difficult for criminals to use the internet to avoid detection.

Other provisions allow investigating officers to use "decoy teens" in order to facilitate the identification and prosecution of "groomers" who approach minors online for sexual purposes.[35]

One of the most controversial provisions refers to the so-called "hacking power" (provided by Sections 126nba, 126uba 126zpa DCCP). The law enforcement agents are empowered with a new competency: they have the power to access computer systems remotely by stealth under specific conditions. Thus designated investigative officials can access remotely and by stealth a computerized system (computer, smartphone or a server) in use by a suspect. They will hack the system by breaking or circumventing the system's security or by applying software and technical tools.

Since any implementation of the hacking instrument constitutes a severe violation of the privacy of the individual concerned, the Dutch legislator made it possible under restrictive conditions (urgent investigation interest, a warrant from an investigative judge, the suspected offence must constitute a serious breach of legal order and for which the law prescribes a sentence of imprisonment of eight years or more, etc.).

Any data that can be registered may be copied for evidence purposes in a criminal investigation and therefore, the Dutch legislator has established an additional safeguard: the requirement of "logging" (recording data) during the investigation (Section 126ee DCCrP). However, the logged information will not be added (automatically) in the case-file, the defense must expressly request for it.

Among other amendments stands the extended criminalization of the offence of "grooming"[36] (Sections 248a and 248e DCC). Until the new Act entered into force, the law enforcement authorities had to use decoy victims, essentially police

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35 [https://www.government.nl/latest/news/2019/02/28/new-law-to-help-fight-computer-crime], accessed 13. April 2020

36 The term "grooming" is used to denote the unwanted practice of soliciting minors over the internet with the objective of sexual abuse

officers impersonating minors under the age of 16 (because caselaw established that a suspect of grooming could not be punished if the victim, pursuant to the previous Section 248e DCC, was identified as a person not having reached the age of 16). Under the Computer Crime Act III, Sections 248a and 248e DCC were amended to ensure that the offence also related to soliciting, for sexual purposes, any person "impersonating an individual not having yet reached the age of 16 or 18".[37]

Some of the amendment brought by the Computer Crime Act III could make possible the use of Sweetie in the criminal investigation phase, allowing Dutch law enforcement agents to reach an effective result in their fight against online pedophilia.

5. EU COUNCIL TACKLES NATIONAL LEGISLATORS

EU Council has adopted recommendations pressuring the national legislators to think outside the box and[38] reiterated the importance of timely action to investigate and prosecute offenders and rescue child victims of sexual abuse and exploitation from situations of ongoing harm. The national competent authorities were invited to make the widest possible use of the existing tools and mechanisms available at national and EU level, in particular at Europol and Eurojust. The Council highlighted the necessity of having appropriate and specific tools in order to fight against online child abuse, including the possibility for the competent authorities to exploit the data collected during investigations. To this end, the Council recalled its conclusions of the JHA Council of 6 and 7 June 2019, underlining that data retention is essential for effective investigation and prosecution of serious crimes. Furthermore, legislative reforms should maintain the legal possibility for schemes for retention of data, in accordance with the principles laid down in the EU Charter of Fundamental Rights.

In this regard, the Council encouraged Member States to develop and apply innovative investigation methods as well as consider allocating specialized law enforcement resources to combat child abuse and sexual exploitation. The exchange of good practices among Member States adds value to these initiatives.

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37 Nosh van der Voort, David Schreuders, *Pioneering Dutch Computer Crime Act III entered into force*, 01 March 2019, [https://www.simmons-simmons.com/en/publications/ck0bi70lg7kew0b94qi4inld1/280219-pioneering-dutch-computer-crime-act-iii-entered-into-force], accessed 13. April 2020

38 Council of European Union, *Conclusions on combating the sexual abuse of children* – Council conclusions 12862/19, 8 October 2019, Paragraphs 10-15, [https://data.consilium.europa.eu/doc/document/ST-12862-2019-INIT/en/pdf], accessed 13. April 2020

The Council considers industry, and in particular online platforms, to be a key contributor to preventing and eradicating child sexual abuse and exploitation, including the swift removal of child sexual abuse material online. Notwithstanding current efforts, the Council notes that more must be done to counter technical, legal and human challenges that hamper the effective work of competent authorities.

Given the exponential increase in child sexual abuse material online, the Council urges the industry, including online service providers, to ensure lawful access to digital evidence for law enforcement and other competent authorities. The Council invites online service providers to remove or disable access to contents identified as child sexual abuse material online as soon as possible after becoming aware of such content. It calls on the Commission to propose measures to address this growing challenge.

A global, coordinated approach to fight this type of crime is important, including cooperation with third countries and other key stakeholders.

6. INTERESTING NATIONAL CASELAW OF EU COUNTRIES

At the end of December 2019, Eurojust had published another Issue of the Cybercrime Judicial Monitor, pointing out some of interesting national caselaw which raised the question of using Artificial Intelligence tools in the criminal process. [39]

On 14 December 2018, the Court of Appeal of Amsterdam convicted the defendant to the maximum penalty of 10 years and 243 days imprisonment for, among other offences, possession, production, distribution of child sexual abuse material, (attempt to) sexually abuse children, computer intrusion and possession of software for this purpose, extortion and swindling, following a previous conviction decided by the Court of First Instance in Amsterdam.

In 2013, following the receipt by the Dutch police of two reports from Facebook, a criminal investigation was started. According to Facebook, an unknown person with at least 86 interconnected Facebook accounts was collecting, producing and distributing images of child exploitation. This unknown person also blackmailed dozens of underage girls, using the images in question. He also blackmailed a number of adult men. He recorded images on which these men masturbated while they assumed that they were in contact via the webcam with underage boys. He

[39] Eurojust, Cybercrime Judicial Monitor, Issue 5 December 2019, p. 10-12, [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/cybercrimejudicialmonitor/CJM%20Issue%205%20-%20December%202019/2019-12_CJM-5_EN.pdf], accessed 13. April 2020

subsequently demanded money to be paid, threatening to distribute the images among the friends and family of the men. According to Facebook, false identity credentials, protected IP addresses, protected Internet connections and a Dutch IP address were used. During the investigation, the suspect's telephone number and house address were found. With the authorization of the judge, a keylogger[40] was placed on two computers in the suspect's house, and microphones were placed to record confidential communications. The suspect was arrested at home in 2014 and many of his goods were seized, including a laptop, a desktop and a large number of hard disks. Digital investigation has shown that a number of these data carriers contained many files that can be linked to the facts.

The defendant argued that the results of the keylogger installed on the laptop and desktop computer in the defendant's home, with which screenshots and keystrokes have been recorded, cannot be used for evidence purposes because (a) the keylogger was used unlawfully, and (b) the accuracy of the keylogger's results is in doubt.

The advocate-general opposed both points, stating that the inspection of the keylogger before its installation was both possible and sufficient. Furthermore, the irregularities with regard to the keylogger did not affect the reliability of the results. Secondly, with regard to the absence of the keylogger on the defendant's computer after his arrest, the Court reasoned that the user of the computer himself has likely disabled or deleted unwanted software from his computer, including the keylogger. With regard to the recording by the keylogger of other (non-confidential) communication, the Court stated that this additional recording could be regarded as an unavoidable side-effect of the recording of screenshots. However, this situation does not justify the conclusion that the keylogger has not been used in a normal way or that an irregularity has occurred.

The Court further examined whether the defendant actually used the accounts and the extent of the network of accounts. The offences of which the defendant was charged were committed on the Internet. Given the fact that the accounts refer to each other, it seemed that the accounts were used by one person and that they belong together.

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[40] A keylogger (short for keystroke logger) is software that tracks or logs the keys struck on the keyboard, typically in a covert manner so that the person using the computer doesn't know that his/her actions are being monitored. Keyloggers can be used to intercept passwords and other confidential information entered via the keyboard. As a result, the person who installed the keylogger can get PIN codes and account numbers for financial accounts, passwords to someone's email and social networking accounts and then use this information to various purposes, in trhis case to discover the perpetrator's identity and the criminal acts he/she committed. See McAfee, *What is a keylogger?*, 23 July 2013, [https://www.mcafee.com/blogs/consumer/family-safety/what-is-a-keylogger/] accessed 05. June 2020

In regard with one of the accusations, the defendant argued that, since the contact with the victim was via webcam, no physical contact took place and no form of force was placed on the victim. This force must be of such an extent that the victim had no other option than to cooperate, according with Dutch legislation. As the victim gave no sign of resistance, this force was not an issue, thus no attempt to sexual assault had taken place. The Court reasoned that the rationale behind Article 246 Criminal Code means that 'forcing a person to commit an act by means of threat of fact can only exist if the suspect, by means of the threat of that fact, has deliberately caused the victim to have committed those acts against her will'. The fact that the defendant deliberately put pressure on the victim, threatening to distribute nude pictures of her to friends and family, clearly showed that the victim felt forced to commit the sexual acts.

Another interesting case was that of Mathiew Brown King Bell, in 2019.[41] For the first time, a person was convicted of live-streaming the sexual abuse of children. The police relied almost entirely on the evidence of the offences that the accused had recorded. In addition, the identities of the victims are still unknown. Moreover, issues were encountered during the investigation, involving the transmission of intelligence from Terres des Hommes to the National Crime Agency in the UK and delay in them passing that intelligence on to Police Scotland. During this period, the accused continued to offend.

In this case, the accused was involved in the live-streaming of sexual abuse in the Philippines while residing in his home in Scotland. He was paying less than EUR 1 for each abuse to be committed. The offences of which he was convicted include conspiracy to rape and sexual offences against children.

The accused pled guilty, so no trial took place and no judicial consideration was made of the charges used to prosecute. The judge in sentencing did explicitly state that he was sentencing as though the accused had committed the offences in person. The UK domestic sexual offences law was tested to see if such behavior committed while live-streaming could be prosecuted. As with previous online sexual offences, this test has been successful without any extensive discussion by the Court.

7. CONCLUDING REMARKS

The criminal investigation faces new times that bring a lot of challenges: the professionalization of criminals, especially in the field of crimes committed online,

[41] *HMA v Matthew Brown King Bell* 2019, [http://www.scotland-judiciary.org.uk/8/2235/HMA-v-Matthew-Brown-King-Bell], accessed 13. April 2020

the proliferation of criminal phenomenon gathering new features such as technology and transnational component or the Internet offering environment. These challenges force investigators and other judicial bodies to adapt and be creative in their fight against crime. Artificial Intelligence and all its applications might be the key to successfully enforce the criminal law but using such novel tools could challenge the legislative framework of the states. Despite the opening and inventiveness of AI designers and programmers, their good intentions and noble goals, futuristic investigative tools cannot be used during the investigation faze in the absence of a very solid legal framework. The use of such tools may put human rights and due process standards at risk, so they require extreme caution.

The inventive tools, such as chatbots, allow investigators, as we have seen, to capture a criminal even before he/she commits the crime. However, from a legal point of view, this "efficiency" is actually the weak point of the use of such tools. In the contemporary law system, crimes can only be conceived by reference to a human perpetrator and a human victim, in compliance with the principle of legality: an act cannot be sanctioned by criminal law unless it is provided, as a consumed form or as an attempt by law. Or, as we have shown, in Sweetie's case, there is neither a human victim nor a crime (not even in the form of an attempt), essential conditions for a repressive criminal intervention.

The only solution for using a chatbot to catch criminals is a legislative intervention in the sense of introducing among the criminal procedural provisions new methods of supervision or criminal investigation on the one hand, and, on the other hand, the introduction of special norms in the criminal law providing that, in the situation of committing the deed against a virtual victim, this particular act would be assimilated to an attempt and sanctioned as such. Only in this way the standards of a fair trial could be met. The implementation of the EU Council's recommendations on the development and application of innovative investigative methods cannot lead to breaches of the principle of legality or the standard of a fair trial, no matter how effective the outcome of these efforts in the fight against crime is. One thing is certain: criminal and criminal procedural legislation must keep pace with the digitalization of crime and must adapt to new forms of crime, otherwise the legal instruments of reaction will be completely ineffective.

We place ourselves in favor of innovative approaches of the crime phenomenon but with respect of legal principles and fundamental human rights. The future will show us if the appeal to AI instruments was a good choice…

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UDK 334.126.15:342.722
343.13:342.722
Review article

IMPORTANCE OF THE PROTECTION OF PRIVACY OF JUVENILE SUSPECTS OR ACCUSED PERSONS IN CRIMINAL PROCEEDINGS IN THE CONTEXT OF THE EU LAW

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ABSTRACT

The protection of privacy of juvenile suspects or accused persons in criminal proceedings is one of the fundamental principles of juvenile criminal procedure. The aim of this right is to prevent any unnecessary stigmatisation and labelling of juveniles suspected/accused as perpetrators (of criminal act) by their peers or others in their community. The involvement in a formal criminal proceeding can be very stressful for a juvenile and affect their further development and mental health. The protection of privacy during criminal proceeding helps them in their rehabilitation and reintegration into society after conviction. Countries usually protect the juveniles` right to privacy by closing the criminal proceeding for general public and by restricting the disclosure of information about criminal proceedings involving juveniles as suspects or accused persons to the media. In practice, this means that a limited number of people in criminal justice system has the right to access information about suspected/accused juveniles. Unfortunately, the present-day media often neglect this right and use information about juveniles in criminal proceeding in their news reports in a sensationalist way in order to increase their circulation. That kind of practice shows that this right is considered irrelevant and that the media and general public do not have appropriate knowledge about the importance and reasons why this right has been incorporated into the juvenile criminal procedure. This paper analyses the importance of the protection of privacy of juveniles who are suspects or accused persons in criminal proceeding according to the international documents, ECHR, the relevant case law and the Directive EU 800/2016 with reference to the legislative solutions found in some EU Member States including Croatia.

***Keywords**: protection of privacy, juveniles, criminal proceeding, Directive 2016/800*

1. INTRODUCTION

Private life refers to different areas of human life that are intertwined, including privacy and secrecy. This aspect of life includes different life facts that should be inaccessible to other people (secret sphere) or available exclusively to certain people (private sphere). The private sphere implies the relationships with family and friends, and the secret sphere refers to a considerably smaller circle, usually only one person.[1] If that part of someone's life is violated, it can cause damage to their quality of life, affect their emotions, mental health and their social and family life. A juvenile's private life refers to his/her identity, mental integrity, public image, participation in creating an image of himself/herself, understanding the perception and interpretation of his/her life and himself/herself.[2]

Research shows that juveniles, due to their developmental stage, may not have obtained the cognitive abilities required to fully understand and effectively participate in juvenile justice proceedings yet. Their general intellectual ability, verbal ability, attention and executive functioning significantly improve with age but during developmental stage it is necessary to offer them help and guidance, especially during difficult times.[3] Juveniles should be considered particularly vulnerable because they are at a greater risk of being discriminated or deprived of their fundamental rights on account of their age, incomplete physical and psychological development, lack of knowledge or the ability to act by exercising free will.[4]

Cases when a juvenile is a suspect or accused in criminal proceeding represent significantly stressful situations that the juvenile should not have to experience alone and without help. One of the ways that can help him/her overcome that experience a little bit easier is to ensure that his/her privacy is respected and protected during that time. Therefore, the protection of privacy has become one of the fundamental principles of juvenile criminal procedure. The protection of privacy is important because it helps to prevent the unnecessary stigmatisation of juveniles, possible humiliations or embarrassments that they may experience after being suspected or accused in criminal proceeding. Once a juvenile has been labelled as a "criminal" within his social environment (neighbourhood, school, sports club),

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1 Gabelica Šupljika, M., *Psihološki aspekt prikaza djeteta u medijima* u Zaštita privatnosti djece u medijima, Zbornik priopćenja s tribine, Pravobranitelj za djecu, Zagreb, 2009, p. 20

2 *Ibid.*, p. 21

3 Liefaard, T.; van den Brink, Y., *Juveniles Right to Counsel during Police Interrogations: An Interdisciplinary Analysis of a Youth-Specific Approach, with a Particular Focus on the Netherlands,* Erasmus Law Review, December 2014, no. 4, p. 214-215

4 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*, in: Duić, D.; Petrašević, T. (eds.), EU and comparative law issues and challenges series-issue 2, 2019, p. 470

it is very difficult to discard the ensuing stigma and reintegrate into normal life. Hence, the right to the protection of privacy is substantially relevant for the effective participation of juveniles in justice proceedings. In order to protect the juvenile and help him/her in the process of resocialisation and reintegration into society, many countries have decided to close criminal proceedings involving juveniles to general public and the media, which means that only a limited number of people are entitled to attend the main hearing or trial.[5] However, in juvenile cases, the right to a public hearing, which is designated to benefit the defendant as one of the crucial elements of the right to a fair trial ensuring transparency of the criminal proceeding and full accountability of official actors, can harm the integrity of the juvenile and is, therefore, not perceived to be in the best interest of the juvenile. Hence, this requires special interpretations of Art. 6 ECHR[6] in terms of juvenile offenders, otherwise the principle of a fair trial could be reversed. [7]

Since the media have a major role in protecting this right, they have considerably benefited the interests of the juveniles by emphasising different problems regarding juveniles, the lack of political will and the social standard of protection related to this issue. Furthermore, they endorsed juveniles in different aspects of their lives by reporting, for instance, about their academic or sports achievements.[8] However, there have also been some less favourable examples of media's coverage of specific juvenile cases, especially in the last few years, where they severely disrupted the juveniles` privacy or exposed elaborate details of their personal or family life, which, in view of the above, is considered unacceptable.

2. THE RIGHT TO PROTECTION OF PRIVACY OF JUVENILE SUSPECTS IN INTERNATIONAL DOCUMENTS[9]

The Beijing Rules[10] emphasise the importance of protection of a juvenile's privacy during all stages of the criminal proceedings in order to avoid unnecessary public-

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5 Gensing, A., *Criminal procedure*; in Dünkel, F. *et al.* (eds.), Juvenile Justice Systems in Europe, Current Situation and Reform Developments, *vol.* 4, 2011, Forum Verlag Godesberg, p. 1638

6 European Convention on Human Rights, opened for signature in Rome on 4 November 1950 and came into force in 1953, [https://www.echr.coe.int/Documents/Convention_ENG.pdf], accessed 20. June 2020

7 Kovačević, M., *Maloletničko pravosuđe u Evropi i maloletnici kao aktivni učesnici krivičnog postupka*, Zbornik PF u Splitu, *vol.* 51, no. 4, 2014, p. 880

8 Gabelica Šupljika, *op. cit.*, note 1, p. 20

9 In this part of paper author uses the term child as a synonym for juvenile because most of the international documents uses the term child. The child is always defined as person under the age of 18 which includes juveniles.

10 United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Adopted by General Assembly resolution 40/33 of 29 November 1985

ity or the stigmatisation of the juvenile. Hence, no information that could lead to the identification of a juvenile should be published.[11]

The right to the protection of privacy is broadly stipulated to cover every child in every situation in the UN Convention on the rights of the child (UN CRC).[12] The provisions regulating the child's right during criminal proceeding state that the child's right to privacy should be respected during all stages of the proceedings.[13] According to the General Comment No. 10 on CRC,[14] the aim of the right to the protection of privacy of children is to avoid the harm caused by undue publicity or by the labelling process. In order to achieve this level of protection, the Member States should ensure that no information that may lead to the identification of the child offender be published, while the court hearings of an accused child should take place behind closed doors. The judgement/sentence should be pronounced publicly at the court session but without revealing the identity of the child. The media has a significant role in protecting this right, therefore the journalist who violate this right should be sanctioned with the appropriate disciplinary or even, in some cases, penal measures.[15] The CRC Committee states that the right to the protection of privacy may be related to the notion that juveniles should be able to express their views freely, which means that they can express their views without pressure, that would eventually help them decide whether they want to exercise their right to be heard in criminal proceedings. The protection of privacy prevents stigmatisation, social isolation and negative publicity of the child, all of which can hamper their reintegration into society.[16] The CRC Committee has also taken the stand that the trial *in camera* (i.e. behind closed doors) should be the rule, while the exceptions should be very limited and justified in writing by the court, taking into account the best interests of the juvenile.[17]

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11 The Beijing Rules, Rule 8.

12 Convention on the Rights of the Child (CRC,) General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990

13 UN CRC, art. 16. and art. 40 (2) vii

14 UN Committee on the Rights of the Child (CRC), General comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, available at: [https://www.refworld.org/docid/4670fca12.html], accessed 13. July 2020

15 CRC/C/GC/10, p. 18-19

16 See more: Derenčinović, D.; Getoš, A.: *Uvod u kriminologiju s osnovama kaznenog prava*, Zagreb, 2008, p. 147-150; Cvjetko, B.; Singer, M., *Kaznenopravna odgovornost mladeži u praksi i teoriji s prilozima i literaturom*, Zagreb, 2011, p. 147-151

17 See: General Comment No. 12, para. 61; see also General Comment No. 10, para. 65. Manual: Can anyone hear me?, *Participation of children in juvenile justice: A manual on how to make European juvenile justice systems child-friendly,* IJJO, Published by the International Juvenile Justice Observatory (IJJO), 2016, Belgium, p. 45

The protection of private and family life is stated as one of the general elements of child-friendly justice in the Guidelines on child-friendly justice (hereinafter: Guidelines).[18] The Guidelines state that the privacy and personal data of children who are or have been involved in judicial or non-judicial proceedings should be protected in accordance with the national law. The Member States should provide that no information or personal data potentially revealing the child's identity is made available or published, particularly by the media. The national law should have implemented rules that allow only a limited access to records or documents containing personal and sensitive data of children, especially when they are involved in judicial proceedings. In addition, whenever children are being heard or giving evidence in judicial proceedings, they should preferably be heard in camera, and only those directly involved should be present.[19] The protection of personal data of children should be ensured especially in relation to the mass media. The Member States should provide special legislative measures for the media and adopt positive obligations to monitor legally binding or professional codes of conduct for the press.[20]

The right to privacy is described as a vitally important right in the Guidelines on child-friendly legal aid.[21] The aim of this right is to protect the child from discrimination and stigmatisation that could occur if the information about the child's offence is widely publicised. The problem is that not many legal professionals recognise the risks implied for children in the situations when this right is not respected. Therefore, both the legislation and the practitioners should ensure that the court hearings involving children are held in private, the child's identity is not revealed in the judgments, the details of the case are exposed only to a limited number of people and that the media never discloses information that could lead to a breach of child's privacy. The legal professionals have a major role in the protection of the child`s privacy, hence they should ensure that the child's personal data are protected and kept confidential in accordance with the national law. The exception to this rule can be permitted in national legislation in exceptional circumstances.[22]

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18 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, Council of Europe Publishing, 2010, p. 22

19 Guidelines, part IV., 2. 6. – 2. 10., p. 22

20 If the identity of the child is revealed that could cause an irreparable damage to the child. Guidelines, IV. A., 2. 8., pp. 22., IV.A., 2.60., p. 64

21 Guidelines on child friendly legal aid, UNHCR, UNICEF's Europe and Central Asia Regional Office (ECARO), October 2018, [https://www.unicef.org/eca/sites/unicef.org.eca/files/2018-11/Guidelines%20on%20Child-Friendly%20Legal%20Aid%20UNICEF%20ECARO%202018.pdf], accessed 20. June 2020

22 Guidelines on child friendly legal aid, Guideline 9, Privacy and confidentiality, p. 30-31

Recommendation No. R(87)20[23] also states that in criminal proceedings against juveniles their right to a private life should be respected in order to reinforce their legal position throughout the proceedings, including the police investigation.[24] Recommendation CM/Rec (2017)3[25] indicated that any individual`s case records should be disclosed only to those that have the right to receive them and they should receive only limited information relevant to their legitimate purpose. In fact, the basic principle should be that the information in the individual's case records is confidential.[26]

Juvenile's right to privacy must be respected during all stages of the criminal proceeding according to Recommendation CM/Rec(2008)11.[27] The identity of juveniles and confidential information about them and their families can not be conveyed to anyone who is not authorised by law to receive it. [28] Protection of privacy of juveniles must also be respected when dealing with juveniles criminal case records, during deprivation of liberty of juveniles, his/her accomodation in institution during deprivation of liberty, during the search and transfers between institutions.[29]

2.1. Protection of juveniles' privacy in ECtHR case law

It is generally accepted that children enjoy all rights under ECHR, even though ECHR does not explicitly refer to children's rights.[30] In several cases, the European Court for Human Rights (ECtHR) has also recognised that the safeguards

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23 Recommendation No. R (87)20 of the Committee of Ministers to member states on social reactions to juvenile delinquency, Adopted by the Committee of Ministers on 17 September 1987at the 410th meeting of the Ministers' Deputies

24 Recommendation No. R (87)20, part III., point 8

25 Recommendation CM/Rec (2017) 3 on the European Rules on community sanctions and measures, Adopted by the Committee of Ministers on 22 March 2017 at the 1282nd meeting of the Ministers' Deputy

26 Recommendation CM/Rec (2017) 3, part II., point 47. Recommendation specially stipulates that agencies that work with juvenile during community sanctions and measures should draw up inter agency agreements to try to regulate information exchange between them about juveniles involve in the process

27 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 at the 1040th meeting of the Ministers' Deputies

28 Part A- Basic principles, art. 16, Recommendation CM/Rec (2008) 11

29 See: part D.1. 34.2.b); part E. 5. 63. 1; part E. 13. 2. 89. 1; part E. 14. 99. 3. Recommendation CM/Rec (2008) 11

30 T and V vs. U.K., ECHR 16.12.1999, 24724/94 and S.C. vs. U.K., ECHR15.06.2004, 60958/00. Carić, A.; Kustura, I., *Kamo ide hrvatsko maloljetničko kazneno zakonodavstvo*, Zbornik radova PF Split, *vol*. 47, no. 4, 2010, p. 806-808

provided for in Art. 6 also apply, *inter alia*, to administrative proceedings against juveniles.[31]

One of the elements of the right to a fair trial stated in Article 6 is the right to a public hearing, which is considered as one of the fundamental principles of any democratic society.[32] Despite the above mentioned, this right can also be subject to exceptions. ECHR states that "…press and public may be excluded from all or part of the trial … where the interests of juveniles or the protection of the private life of the parties so require…".[33] Conducting proceedings, whether entirely or partly, in camera must be strictly required by the circumstances of the case (*Welke and Białek v. Poland*, § 74; *Martinie v. France* [GC], § 40). If the authorities believe that there are grounds for applying one of the exceptions mentioned in Art. 6, they are entitled to order that the hearings be held in camera. The domestic courts are required to provide sufficient reasoning that their decision falls under the exceptions mentioned in Article 6 (1).[34] The right to a public hearing and the right to public pronouncement of a judgment are two separate rights under Article 6. The fact that one of these rights is not violated does not in itself mean that the other right cannot be breached.[35]

In the course of years, ECtHR has developed certain standards in the case law that relate to juvenile criminal law including the right to the protection of privacy and personal data of the accused child.[36] Article 6 provides for special safeguards regarding sensitive data, such as personal data related to criminal convictions. Other categories of data could be defined as sensitive by the domestic law or treated as such by public authorities allowing for a better protection of children's privacy.[37]

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31 See cases Adamkiewicz vs. Poland, 2 March 2010, appl. No. 54729/00, section 4; Blokhin v. Russia, 14 November 2013, app. No. 47152/06, section 1. In the case Blokhin vs. Russia ECtHR, the Court decided that the relevant administrative proceedings were criminal in nature and doing so the Court moved along the traditional lines of the Engel case-law. See: de Vocht D. *et al.*, *Procedural Safeguards for Juvenile Suspects in Interrogations: A Look at the Commission Proposal in Light of an EU Comparative Study*, New journal of European criminal law, *vol.* 5, no. 4, 2014, p. 485-486

32 Guide on Article 6 of the Convention – Right to a fair trial (criminal limb), European Court of Human Rights, Council of Europe, updated on 31 December 2019, p. 47

33 ECHR, art. 6 (1)

34 See: *Chaushev and Others v. Russia*, § 24., Guide on Article 6 of the Convention – Right to a fair trial (criminal limb), *op. cit.*, note 32, p. 51-52

35 *Ibid.*, p. 52

36 See more: Horvat, L., *Postupovna jamstva za djecu koja su osumnjičena ili optužena u kaznenim postupcima sukladno Direktivi 2016/800/EU*, HLJKPP; *vol.* 25, no. 2, 2018, p. 579-583

37 Some example of data that could be defined as sensitive: disciplinary proceedings, recording cases of violence, medical treatment in school, school orientation, special education for disabled people and social aid to pupils from poor families. From: Guidelines on child friendly justice, *op. cit.*, note 18, p. 65

In two important cases, ECtHR discussed the child`s right to privacy and protection of personal data in situations when the child is accused of committing a very serious offence that attracted a high level of media and public interest. In the cases *V. v. the United Kingdom and T. vs. UK,* the Court stated: "[…] it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings."[38] In addition, the Court stated: "...It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition."[39]

The Charter of Fundamental Rights of the EU[40] states that everyone has the right to the respect of his or her private and family life, home and communications and everyone has the right to the protection of personal data.[41] In a specific provision addressing children's rights, the Charter indicates that children have the right to such protection and care as is necessary for their well-being and that in all actions relating to children the child's best interests must be a primary consideration.[42]

Despite the fact that the previously mentioned international documents are considerably important, many of the contained norms are of general nature, and the majority of them are not binding for the Member States. One of the underlying issues is that only a few of them are concerned with the protection of the children's rights in the early stages of the criminal procedure, when the children are most vulnerable.[43]

3. PRIVACY PROTECTION OF JUVENILE PERPETRATORS IN THE JUVENILE JUSTICE SYSTEM OF EUROPEAN COUNTRIES

Criminal proceedings for adults are open to the public in all European countries because a public hearing is one of the crucial elements of the rule of law principle enshrined in Art. 6 ECHR. However, because of a widely accepted principle that juveniles involved in judicial proceeding need more protection, it has become a

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38 *V. v. UK*, No. 24888/94, paragraph 86, T v. UK, No. 24724/94, paragraph 84

39 *V. v. UK*, No. 24888/94, paragraph 87, *T v. UK, No. 24724/94*, paragraph 85. In both of these cases, the Court decided that there has been a breach of Article 6 (1) of the Convention

40 Charter of the Fundamental Rights of the EU, OJ C 326/395, 26. 12. 2012

41 Charter of the Fundamental Rights; Art. 7 and 8. The Charter also states that the compliance with the rules regarding protection of personal data shall be subject to control by an independent authority

42 Charter of the Fundamental Rights; Art. 24

43 de Vocht, *et al.*, *op. cit.*, note 31, p. 482

general rule that the public and the media are excluded from the criminal proceeding involving juveniles as accused/suspects or as victims or witnesses.[44]

The right to privacy of juvenile suspects or accused persons in criminal proceeding is protected in all EU Member States (MS). All MS try to find a balance between the right to privacy and the right to freedom of information and expression. In some MS (e.g. Austria, Portugal, Sweden), the legislation provides for a general rule that the information about the criminal proceeding involving a juvenile suspect or accused person can be disclosed, but in those countries the judges have a discretionary power to order the non-disclosure of any information about the juvenile if they consider it to be in the their best interest.[45] In contrast, in some other countries (e.g. Italy, Netherlands, UK) the legislation gives priority to the juvenile's right to privacy and the judges have a discretionary power to order a disclosure of information regarding the juvenile if they believe that it is necessary in order to achieve the legitimate aim such as freedom of information.[46] Interestingly, the existence of juvenile courts in a country is no clear guarantee of the non-publicity of proceedings. There are differences between the countries in terms of whether the exclusion of public also covers the rendition of the judgement and whether the criminal proceeding is public or non-public from the onset.[47]

In half of the EU countries, when a juvenile is a suspect/accused person in criminal proceeding, the proceedings are held in camera (in the absence of the general public) but with the possibility of public access under certain conditions. In the other half of the EU countries, the situation is reversed, which means that the proceedings are open to public with the possibility of exclusion due to the offender`s age or educational reasons.[48]

The majority of EU MS have adopted different forms of legislative solutions that regulate the media's coverage of the judicial proceedings involving juveniles, and in many states the bans on publicity are more strict in cases of suspect/accused juveniles

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44 Gensing, *op. cit.*, note 5, p. 1639

45 Summary of contextual overviews on children's involvement in criminal judicial proceedings in the 28 MS of the EU, European Commission – Directorate-General for Justice, Luxembourg, Publications Office of the European Union, 2014, p. 38

46 *Ibid.* In those countries the basic for an exclusion of publicity is not only the fact that juveniles need more protection but legislation often gives some other special grounds upon which the judge can decide to base the non-publicity so that more proceedings can in fact be held in camera. Gensing, *op. cit.*, Note 5, p. 1639

47 For example, in Croatia, Netherlands, Czech Republic and Austria the final judgment is always to be pronounced publicly. Art. 6. (2) al. 2 ECHR stipulates that renditions of judgment must be open to the public. Gensing, *op. cit.*, note 5, p. 1639

48 *Ibid,* p. 1640-1641

than in the cases of juveniles as victims or witnesses.[49] In all EU MS it is prohibited to broadcast the names or other information that could be used to identify the juvenile as a suspect/accused person. This approach, which has been accepted in order to avoid unnecessary humiliation, identification and exposure, is common to all countries.[50]

The juveniles value being heard in cases that affect them, and if they actively participate in the decision-making process, it helps them to understand and accept the final decision.[51] Research has shown that there is a connection between the right of the juvenile to express their views freely and the conducting of juvenile justice proceedings behind closed doors. The layout of and the atmosphere in the courtroom also influence the way that the suspect/accused juvenile feels and the way that he/she can effectively participate in the court hearing. Certain research has shown that in some countries (e.g. Switzerland, Belgium, France and the Netherlands) when the court hearing is held in chambers, the informal atmosphere, the limited number of participants in the court hearing and less social and physical distance between the participants contribute to the juvenile`s more effective participation in the criminal proceedings. It has also been concluded that in this type of hearings the judge examines not only the personal and family situation of the juvenile but he/she also discusses the criminal offence committed by the juvenile and provides the juvenile with more explanations of the court procedure.[52]

Another issue to be covered within the domain of protection of privacy is the adoption of special legislative provisions on the registration of offences. This particularly refers to the obligation to disclose past convictions, the accessibility of criminal records for future references in later proceedings, special provisions regarding exchange of information about children involved in criminal proceeding and data from the criminal record of a child. The exact form of such provisions varies significantly from country to country.[53]

4. PRIVACY PROTECTION OF JUVENILE PERPETRATORS IN CRIMINAL PROCEEDINGS BY THE DIRECTIVE 2016/800

Since recently, the children's rights have been addressed structurally and in a coordinated fashion across the EU legislation and policymaking, whereas in the past it

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49 Summary of contextual overviews on children s involvement in criminal judicial proceedings in the 28 MS of the EU, *op. cit.*, note 45, p. 38

50 Gensing, *op. cit.*, note 5, p. 1641

51 Rap, S., *A Children's Rights Perspective on the Participation of Juvenile Defendants in the Youth Court*, International Journal of Children's Rights, *vol.* 24, 2016, pp. 100

52 *Ibid.*, p. 104-105

53 Gensing, *op. cit.*, note 5, p. 1641

occurred in a piecemeal fashion.[54] Directive 2016/800[55] sets up a list of minimum rights that the juveniles who are suspects or accused persons in criminal proceedings in all EU MS should have during the criminal proceedings, including, *inter alia*, the right to the protection of privacy. In fact, one of the key features of the Directive as a whole is the emphasis on protecting the rights and providing safeguards at the earliest stages of proceedings when the suspected and accused juveniles are most vulnerable.[56] The Directive states that MS should ensure that the privacy of juveniles is protected during the criminal proceedings and that they should provide that the court hearings involving juveniles are held in the absence of the public, or allow the courts or judges to decide to hold such hearings in the absence of the public.[57]

In the adoption process of the Directive, there were different opinions on how to regulate this right so that it could be implemented in all MS because of the differences between the legal traditions and systems across the MS.[58] It was decided that the Directive should accept a solution that will be a balance between the best interest of the juvenile and the general principle of a public hearing as one of the elements of the rule of law in accordance with Article 6 ECHR. Therefore, it was decided that the MS should provide in their national legislation that the court hearings involving juveniles are usually held in the absence of the public or that the courts or judges have the right to decide if such hearings should be held in the absence of the public. It is up to the MS to decide what kind of legislative solution works in their national legislation and practice.[59] The implementation of this right is without prejudice to the judgments being pronounced publicly in accordance with Article 6 ECHR.[60]

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54 Rap, S., *et al.*, *White Paper on the EU Directive 2016/800, Key aspects, priorities and challenges for implementation in the EU MS*, IJJO, p. 8

55 Directive 2016/800/EU of the European Parliament and of the Council of the 11 May 2016 on the procedural safeguards for children who are suspects or accused persons in criminal proceedings (21.5.2016), OJ L 132/1. For more about the Directive see: 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, p. 110-118; Radić, *op. cit.*, note 4, p. 470-473

56 Directive includes principles enshrined in binding and non-binding standards, such as the CRC, the case law of the ECtHR and the Council of Europe Guidelines on Child-friendly Justice. Rap; Zlotnik, *op. cit.*, note 54, p. 117

57 Directive, Art. 14 (1 and 2)

58 Directive, para. 56

59 Cras, S., *The Directive on Procedural Safeguards for Children who Are Suspects or Accused Persons in Criminal Proceedings, Genesis and Descriptive Comments Relating to Selected Articles*, Eucrim, No. 2, 2016, p. 118

60 Directive, para. 56

The Directive also states that the MS should take appropriate measures to ensure that the audio-visual recording of questioning of the suspect/accused juvenile is not made public.[61] This means that the information, such as images of the suspect/accused juvenile, that could lead to the identification of the juvenile should not be made public. Certain proposals were made regarding the derogations to this obligation, for example in the situations when giving information about the juvenile's identity to the public could be in the interest of the criminal proceedings (cases of sexual assault), however they were not accepted.[62]

Since the media plays a significant role in the execution of the right to privacy in every MS, the Directive also states that the MS should encourage the media to take self-regulatory measures in order to achieve the protection of privacy for juveniles in practice, all taking into consideration and respecting the freedom of expression and information and freedom and pluralism of the media.[63]

5. PRIVACY PROTECTION OF JUVENILE PERPETRATORS IN THE CROATIANS LEGISLATION

The protection of privacy is stipulated in the Croatian Constitution[64] and it refers to the protection of privacy of family and personal life and the protection of personal data.[65] In addition, it indicates that the state and all societal stakeholders are obligated to protect the children and youth.[66] On the other hand, the Constitution also guarantees the freedom of the media to report the information to the public.[67]

In Croatia, the legal status of juveniles[68] who are suspects or accused of committing a criminal offence is regulated by special law, The Youth Courts Act (hereinafter: YCA).[69] Croatia has implemented Directive 2016/800 into the YCA at

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61 Directive, Art. 14 (3)

62 Cras, *op. cit.*, note 59, p. 118

63 Directive, Art. 14 (4)

64 Constitution of the Republic of Croatia, 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

65 Constitution, Art. 35 and 37

66 Constitution, Art. 63

67 Constitution, Art. 38

68 In Croatia the term "juvenile" is used for children that are criminally liable. A 'juvenile' is a person who, at the time of committing an offence, was at least 14 years but under 18 years of age. (YCA, Art. 2)

69 Youths Courts Act (*Zakon o sudovima za mladež*), Official Gazette No. 84/2011, 143/2012, 148/2013, 56/2015, 126/2019. Name of the act in Croatian language is Zakon o sudovima za mladež. There is no official translation of the Act in English and the author will use the term Youths Courts Act in this paper. YCA is *lex specialis* in regard to the Criminal Code, Criminal Procedure Act, Courts Act and

the end of 2019.[70] One of the basic elements of criminal proceeding against the juveniles in Croatia is that the court hearings are always held in camera, in the absence of the public. The public is excluded from the court hearing primarily to avoid the stigmatisation and labelling of the juvenile in his/her close environment and, secondly, to avoid gaining popularity among his/her peers due to the committed crime.[71] When implementing Directive 2016/800, the Croatian legislation decided that the implementation of the right to the protection of privacy in the YCA is not necessary because the YCA has already been harmonised with the requirements of the Directive.[72]

The right to the protection of privacy is prescribed in a number of legal provisions of the YCA. According to the YCA, the provisions of the Criminal Code[73] about the public pronouncement of a judgement do not apply to criminal proceedings against juveniles (Art. 34 YCA), the criminal investigation and proceeding against juveniles are secret, the content and the course of the criminal proceeding against juveniles or the decision made in that proceeding cannot be published without the approval of the competent authority (Art. 60 (1) and (2))[74], the participants in the criminal proceedings against juveniles are warned that the proceeding is secret and that the disclosure of a secret or confidential information that they hear during the criminal proceeding is considered a criminal offence (Art. 75 (3)). In addition to these basic provisions, the principle of protecting the privacy of juveniles during criminal proceeding can also be found in other articles: juveniles are brought to court without restraint by police officers in civilian clothes (Art. 55 (2)); any decisions made in relation to juveniles cannot be published on the bulletin board of the court house (Art. 55 (4)); only the persons listed in the legislation can be present during the judicial council session (Art. 84(1)) and during a court hearing (Art. 86 (2)). The persons engaged in the protection and upbringing of juveniles or the suppression of juvenile delinquency and the researchers may be allowed by the court to attend the hearing (Art. 86 (4)). If it seems necessary during the hearing, the court may order that all or some persons be removed from the hearing

other general regulations. These acts will be applied to juvenile only if the matter in question is not regulated otherwise by the YCA. YCA, Art. 3

70 YCA, Official Gazette No. 126/2019

71 Carić, A., *Kazneni postupak prema maloljetnicima*, Split, 2004, p. 13

72 Prijedlog Zakona o izmjenama i dopunama ZSM-a, Vlada RH, lipanj 2019, Zagreb, p. 26

73 Criminal Code (Kazneni zakon), Official Gazette No. 125/11., 144/12., 56/15., 61/15., 101/17., 118/18., 126/19.

74 Only those part of the criminal proceeding towards juveniles that the juvenile court or public prosecutor has approved can be published but, even then, the name of the juvenile or any information about the juvenile that could reveal the identity of the child cannot be published. YCA, Art. 60 (3)

(Art. 84 (4) and (5)). The data from the records on educational measures may be provided only to certain services for intended purposes (Art. 23).

The question of protection of privacy of juveniles during pre trial proceeding is also protected by YCA because it is stated that the criminal investigation against juveniles is secret (Art. 60 (1) YCA). This means that juvenile has the right to protection of privacy during the earliest possible stage of criminal proceeding when juveniles are most vulnerable.[75] Police officers who are trained to work with children are obligated to protect the privacy of children involved in criminal proceeding according to the Act on Police Affairs and Powers (Art. 18).[76]

In addition to the YCA, the protection of privacy of juveniles involved in criminal proceeding as suspects/accused persons or victims is regulated by different legislative enactments in Croatia. The right to the protection of privacy of children is also mentioned in the Social Welfare Act, Criminal Procedure Act, Criminal Code and Family Act.[77] In the Croatian Criminal Code, there is a special criminal offence titled the violation of the child's privacy that states "*Whoever brings or conveys something from the child's personal or family life, publishes a child's photograph or reveals the child's identity, which caused the child anxiety, ridicule from peers or other persons or otherwise endangers the child's well-being, shall be punished by imprisonment for a term not exceeding one year.*"[78] If said criminal offence has been committed by an official or through different media outlets (e.g. press, radio, television, internet), then it is considered as an aggravated form of the criminal offence.[79] The aim of this criminal offence is not only to protect the privacy of a child but also the child's well-being and development. In fact, frequent articles in the media where, without any protection of identity, the photos of children were published and their names and surnames mentioned, connecting them to the situations that can cause anxiety in children or generally endanger the child's well-being, are the main reason why this criminal offence was incorporated into the Criminal Code. [80]

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75 Directive 2016/800 applies in criminal proceedings even before the juvenile has been in any way, orally or in writing (by formal legal act) informed by the competent authorities that he/she is suspect or accused for committing a criminal offence. This means that all rights under the Directive 2016/800 apply to juvenile even before criminal proceedings have formally begun. See more Radić, *op. cit.*, note. 4, p. 472-473

76 Act on Police Affairs and Powers, Official Gazette No. 76/2009, 92/2014, 70/2019

77 See more: Petö Kujundžić, L., *Djeca u kaznenom pravu, počinitelji i žrtve*, Školska knjiga, Zagreb, 2019, p. 206-207

78 Criminal Code, Art. 178. (1)

79 See: Criminal Code, Art. 178. (2) and (3). Criminal Code also has a special criminal offence that protects the secrecy of the proceedings in which the public is excluded. See: Criminal Code, art. 307

80 Turković, K. (ed.) *et al.*, *Komentar Kaznenog zakona*, Narodne novine, Zagreb, 2013, p. 234-235

The Directive also mentions the obligation of the MS regarding the media, which is regulated by special legal acts in Croatia, e.g. the Media Act (hereinafter: MA).[81] One of the basic principles referring to the media mentioned in the MA is the protection of privacy: *"The media are obliged to respect the privacy, dignity, reputation and honour of citizens, especially children, youth and families, regardless of gender and sexual orientation. It is prohibited to publish information that reveals the identity of the child, if it endangers the welfare of the child."*[82] However, even after ten years of application of this legislation, there is still an impression that the media publishers and editors have a tendency to disregard this act and violate it being aware that they are unlikely to suffer any serious consequences.[83]

Article 12 of the Electronic Media Act also states that "*it is not allowed to publish information revealing the identity of a child under the age of 18 involved in cases of any form of violence, regardless of whether he is a witness, victim or perpetrator or the child has attempted or committed suicide, nor to give details of the child's family relationships and private life.*"[84] The Directive, like some other international documents such as the Guidelines, mentions that the MS should encourage the media to take self-regulatory measures, however some authors believe that in Croatia this cannot be achieved without the drastic court sentences.[85]

In the past few years, the Ombudsman for children has stated in her yearly reports that year after year there has been an increase in the inappropriate media coverage regarding the juvenile offenders that violates their right to privacy and dignity. The Ombudsman has repeatedly warned the editors and regulatory authorities of media outlets that, while reporting about the juveniles suspected or accused of a criminal offence, they must be aware of their particular responsibility because their negative attitude towards the juvenile can provoke inappropriate and even violent reactions of the public towards the child.[86]

Despite the fact that the reports from various state bodies have reported an increase in the violation of the juvenile's right to privacy, the data on the committed criminal offences stated in Art. 178 of the Criminal Code show otherwise. In the

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81 Media Act, OG 59/04, 84/11, 81/13

82 Media Act, Art. 16

83 See: Report on the work of the Ombudsman for Children, Zagreb, 2019, p. 163

84 Electronic Media Act, OG 153/09, 84/11, 94/13 and 136/13, Art. 12

85 See: Hrabar, D., *Zaštita djece u kaznenom postupku u promišljanjima o pravosuđu nakolonjenom djeci*, Godišnjak Akademije pravnih znanosti Hrvatske, *vol.* IX, no. 1, 2018, p. 10

86 See: Report on the work of the Ombudsman for Children, Zagreb, 2018, , p. 110; Report on the work of the Ombudsman for Children, Zagreb, 2018, Zagreb, p. 127-128

period from 2014 to 2019, only four judgements were passed for the criminal offence of violation of child's privacy.[87]

In the past years, there have been some unfavourable examples of media coverage of cases involving juveniles. In Croatia, a particular case of a group rape has aroused public interest because the victim and two suspects were under 18 years of age.[88] This case resulted in a number of newspaper articles that analysed every detail of the case. When the media reported that the judge had decided that the suspects from the case would not be held in pre-trail detention, a major protest was held with the aim to influence the judge and change that decision. The President of the Republic of Croatia[89] and the Ministry of Justice also commented on the case and the civil society organisations demanded that the Minister "intervene" in the case.[90] The case became a political issue that showed how little trust the public has in the justice system. The way in which the media reported about the case was particularly disturbing: new articles have been emerging on every internet portal for days, reporters were trying to find out the judge`s decision beforehand, locate the parents of the suspects, speak to the victim, they even visited the scene of the crime and interviewed some of the locals, discussed and revealed evidence of the case, and revealed the identity of the suspects on social media.[91] This happened in

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87 See: Croatian Bureau of Statistics, *Adult perpetrators of Criminal Offences, Reports, Accusations and Convictions 2014- 2019, Statistical Reports, Zagreb,2014-2020*

88 Five young men, all young adults and juveniles, were accused of committing a criminal offence of rape and for criminal offence of threat against a 16-year-old girl. This criminal offence happened in a small village near Zadar where everybody knows everybody. Days after the news broke, a reporter came to the village to talk to the locals and try to find more information about the criminal offence. Sviličić, B., *"Podignuta optužnica protiv petorice mladića zbog grupnog silovanja maloljetnice u okolici Zadra"*, Jutarnji list, 6. 5. 2020; [https://www.jutarnji.hr/vijesti/crna-kronika/podignuta-optuznica-protiv-petorice-mladica-zbog-grupnog-silovanja-maloljetnice-u-okolici-zadra-zlostavljanje-snimali-mobitelom-pa-ucjenjivali-zrtvu-10280362], accessed 20. June 2020

89 Ježovita, M., *"Zgrožena sam viješću o zlostavljanju i ucjeni maloljetnice"*, Večernji list, 19. 10. 2019., [https://www.vecernji.hr/vijesti/zgrozena-sam-vijescu-o-zlostavljanju-i-ucjeni-maloljetnice-1352119], accessed 20. June 2020

90 Večenji list, *"Ministre Bošnjakoviću, morat će te djelovati osobno i izravno na slučaj silovanja u Zadru"*, 14. 10. 2019., [https://www.vecernji.hr/vijesti/ministre-bosnjakovicu-morat-cete-djelovati-osobno-i-izravno-na-slucaj silovanja-u-zadru-1352052], accessed 20. June 2020. Večernji list, *"Udruge civilnog društva traže stegovni postupak protiv suca koji je pustio osumnjičene za silovanje"*, 14. 10. 2019., [https://www.vecernji.hr/vijesti/udruge-civilnog-drustva-traze-stegovni-postupak-protiv-suca-koji-je-pustio osumnjicene-za-silovanje-1352167], accessed 20. June 2020

91 Šarić, F.; Ježovita, M., *"Naslovi su bombastični, sudac je zaključio da nema opasnosti od ponavljanja djela"*, Večernji list, 14. 10. 2019; [https://www.vecernji.hr/vijesti/zadarski-sud-osumnjiceni-su-pusteni-jer-nema-opasnosti-od-ponavljanja-kaznenog-djela-1352101]; Nevešćanin, I., *"Strava kod Zadra: sedmorica mladića godinu dana silovala 15-godišnjakinju, tukli je, snimali mobitelom i ucjenjivali!; Sudac ih pustio da se brane sa slobode iako žrtva živi u istome mjestu!?"*, Slobodna Dalmacija, 14. 10. 2019, [https://slobodnadalmacija.hr/vijesti/crna-kronika/strava-kod-zadra-sedmorica-mladica-godinu-dana-silovala-15-godisnjakinju-tukli-je-snimali-mobitelom-i-ucjenjivali-sudac-ih-pustio-da-se-brane-sa-

a case where everybody involved should have respected the privacy of the victim and the suspects involved in the case. This case particularly shows how little importance the right to the protection of privacy has in practice, because the media and the general public tend to forget about the juveniles' rights and the consequences that the disclosure of too much information about their lives has on their future development, feelings and life in general.

6. CONCLUSION

Juveniles have been recognised as vulnerable persons who need help and protection in situations when they are considered suspects or accused of committing a criminal offence. When dealing with juveniles during criminal proceedings, all persons involved should take into account their young age, level of maturity and intellectual and emotional capacities, which means that the criminal proceeding must be coordinated in order to support the best interests of the juvenile. The right to the protection of privacy is one of the rights that has often been neglected or disregarded by the people involved in the criminal proceeding. This right is particularly important for the juvenile because if their right to privacy is violated, the consequences can rarely be rectified. Once they have been labelled as "problematic" or "criminal" within their social environment, it may be difficult to change that label and the ensuing stigmatisation, especially for the juveniles who are more susceptible to the opinions of others, especially their peers because they want to be accepted.

Therefore, it is important to ensure the protection of privacy and personal data of juveniles during all stages of criminal proceedings in accordance with the national law, especially at the beginning of the criminal proceeding when they are most vulnerable. The Member States must ensure that the court and other hearings involving a suspect/accused juvenile are conducted behind the closed doors (*in camera*), while the exceptions to this rule should be very limited and clearly specified by law. In addition, only a limited number of people listed in the national legislation should have access to a court hearing and they should be warned that it is prohibited to reveal any information that could disclose juvenile's identity to the public. Another important issue is to try to make the court hearing more informal because in an informal atmosphere, with a limited number of participants and less

slobode-iako-zrtva-zivi-u-istome-mjestu-627862]; Nevešćanin, I., *"Za monstruozan zločin u Zadru postoje čvrsti dokazi!; Naši izvori oštro demantiraju sud: Istražitelji posjeduju snimke svih grupnih silovanja. Sudac je momke morao zadržati iza rešetaka!"*, Slobodna Dalmacija", 16. 10. 2019. [https://slobodnadalmacija.hr/vijesti/crna-kronika/za-monstruozan-zlocin-u-zadru-postoje-cvrsti-dokazi-nasi-izvori-ostro-demantiraju-sud-istrazitelji-posjeduju-snimke-svih-grupnih-silovanja-sudac-je-momke-morao-zadrzati-iza-resetaka-628428], all websites accessed 20. June 2020

social and physical distance between the participants, there is a better chance that the juvenile will fully and effectively participate in the criminal proceeding.

Furthermore, special attention should be attributed to the media. The Member States should encourage the media to adopt self-regulatory measures and monitor their operation in practice or even prescribe legislative rules that the media must comply with when reporting about the cases involving a suspect/accused juvenile. In addition, the media employees should undergo trainings on juvenile offenders` rights for the purpose of relevant media reporting. The legislation should provide for a limited access to all records or documents containing personal and sensitive data of juveniles and ensure that all persons involved in the process must abide by the strict rules of confidentiality.

In most European countries, all these rules have already been incorporated in the legislation, however, this right is still frequently violated in practice. The Croatian legislation is fully in line with the requirements of the international documents and the Directive, and, in some respects, even better regulated with a higher standard for the protection of privacy. However, some legal professionals, journalists and other persons involved in the judicial process still do not understand the importance of this right and how their actions can influence the juveniles' future life and development. The consequences of violation of this right can be difficult for the juvenile and, most importantly, they cannot be remedied. Hence, education is a key step in ensuring the exercise of this right in practice. The Member States should ensure that the media workers, social workers, legal professionals, police officers and other participants in the judicial system who work with juveniles are systematically educated about the juveniles` right to privacy during criminal proceedings.

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UDK 336.76(497.11):343.359(4-67EU)
Original scientific paper

(IN)ADEQUATE CRIMINAL PROTECTION OF THE CAPITAL MARKET IN THE REPUBLIC OF SERBIA*

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ABSTRACT

Regulation 596/2014/EU and Directive 2014/57/EU were adopted in order to provide adequate protection of investors and the smooth functioning of the capital market in European Union (EU). They envisage the obligations of Member States to prescribe, under national law, misdemeanor and criminal sanctions for conduct that constitutes abuses in the capital market. Their aim was to provide the same level of criminal justice protection at the level of all EU countries. As EU candidate country, the Republic of Serbia has prescribed sanctions by the Law on the Capital Market, the Law on Takeovers of Joint Stock Companies and the Law on Open-Ended Investment Funds subject to Public Offering.

Although serious abuses in the capital market of the Republic of Serbia constitute criminal offenses, in practice it seems impossible for prosecutors and courts to prove their existence. Therefore, we cannot say that there is adequate protection of investors or unhindered functioning of the capital market. Given that national courts do not recognize as valid circumstantial evidence, it is impossible to prove some of these acts without the use of specific evidentiary actions such as, for example, eavesdropping on telecommunications. However, the Criminal Procedure Code of the Republic of Serbia only provides for a limited number of criminal offenses to which such evidentiary actions can be applied. This provision does not cover offenses under the sec-

* This paper was created within the two projects: "Serbian and European Law: Comparison and harmonization", Ministry of Education and Science of the Republic of Serbia, number 179031, which is implemented in the Institute of Comparative Law and "Serbia and challenges in international relations in 2020", financed by the Ministry of Education, Science, and Technological Development of the Republic of Serbia, and conducted by Institute of International Politics and Economics, Belgrade

ondary criminal legislation and, therefore, offenses representing abuses in the capital market. In the previous period, the Securities Commission has filed several criminal charges against the perpetrators of such criminal offenses, however, the Public Prosecutor's Office has not filed any lawsuit or notified the authorized applicant on the outcome of the proceedings. Such actions could further discourage institutions authorized to monitor legitimate capital market operations from filing criminal charges against capital market abusers in the future, some of which may be related to corporate business corruption. This could certainly have a negative impact on the decisions of both existing and potential investors in the capital market.

This paper starts with the analysis of compliance of the regulations of the Republic of Serbia with Regulation 596/2014/EU and Directive 2014/57/EU, then points to the lack of provisions of the Criminal Procedure Code which provides for the limited application of special evidence in criminal proceedings. Based on this analysis the authors strive to make recommendations in order to improve the implementation of provisions that enable the suppression of criminal offenses which threaten the capital market integrity. In this way, we would like to point out that alignment with the acquis communautaire also implies the possibility of applying its standards in the territory of both candidate and EU Member States. Therefore, in order to achieve this goal, it is necessary not only to adopt new regulations, but also to harmonize the existing provisions of some other regulations which enable their implementation in the practice.

Keywords: *capital market, abuses, criminal offenses, inability to prove, special evidentiary actions*

1. INTRODUCTION

An obstacle to entering a one market can be the possibility of creation a monopoly, which can also have a negative impact on the national economy. Therefore, state intervention is required, which is reflected in the establishment of bodies responsible for maintaining competitive relations in the market.[1] The same case is with the capital market. The absence of adequate norms regulating capital market enables the formation of monopolies, as well as the enrichment of individuals who possess insider information. Abovementioned, results in the creation of an unfavorable environment in the capital market.[2] The issue is important not only for the economy but also for the budget. Favorable conditions in the capital market can contribute to the reduction of the budget deficit, which is influenced by the purchase of government-issued bonds.[3]

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1 Brašić, J., *Institucionalne barijere za ulazak na tržište Republike Srbije i potencijalna konkurencija* [Institutional barriers to market entry of the Republic of Serbia and potential competition], Pravni zapisi, *vol.* 1, 2016, p. 118

2 *Ibid.,* p. 127

3 Nikolić, Lj.; Mojašević, A., *Organizacija finansijskih tržišta* [The organizanization of the Financial Market], in: P. Dimitrijević (ed.), *Zaštita ljudskih i manjinskih prava u evropskom pravnom prosoru,* tematski broj Zbornika radova Pravnog fakulteta Univerziteta u Nišu, Niš, 2012, pp. 122-123

The modern capital market is internationalized. Therefore, at the international level, there is a strong interest in combating behavior that has a negative impact on the smooth functioning of the capital market. Like any other market, the law of "supply and demand" should function smoothly. It could be disturbed by the indecent behavior of individuals, which would have a negative effect on further trade in that market. Major discrepancies may impair the functioning of the basic principles of a market economy, both nationally and internationally.[4]

At the European Union level, the idea of establishing a European capital market has gradually evolved, with the aim of improving capital mobility and investing in companies and infrastructure of EU member states. The aim of such action was to strengthen the financial system of the entire community. However, obstacles to the realization of this idea were the different rules and practices of national capital markets. Therefore, there was a need to harmonize practices in this area. One of the priorities was to protect investors in the capital market from the misconduct of other participants.[5]

Insider trading has been labeled as a criminal offense since the 1920s and in European countries only in the last few years.[6] Therefore, the legal description of the offense of insider trading in European countries appears to be very similar to the solution existing in the United States. However, such a solution may present a problem in terms of proving criminal offenses. The offense of insider trading may require special evidence to be taken into consideration because of the large number of persons who hold such information. Therefore, in addition to prescribing sanctions for certain behaviors that constitute criminal offenses, it is necessary for criminal law to provide for an adequate way of proving them. In doing so, it is necessary to have evidentiary standards established by the legislation of a particular country.

In this paper we will first start with the European Union standards in the field of criminal justice protection of the integrity of the capital market. We will then analyze the compliance of the substantive criminal law provisions with them. In addition, we will highlight the problems that exist regarding the implementation of full criminal justice protection and make recommendations for its improvement.

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4 Kostić, J., *Izazovi harmonizacije krivičnopravne zaštite tržišta kapitala sa pravom Evropske unije – primer italijanskog zakonodavstva*,[Challenges of harmonization with EU standards in capital market protection by criminal law-example of Italian legislation], Strani pravni život, *vol.* 2, 2018, p. 120

5 *Ibid.*, p. 121

6 Stojanović, Z. *et al, Priručnik za suzbijanje privrednog kriminaliteta i* korupcije [Manual on suppression of economic crimes and corruption], Ministarstvo pravde SAD, Kancelarija za međunarodnu pomoć, usavršavanje i profesionalnu obuku u pravosuđu i Misija OEBS-a u Srbiji, Beograd, 2018, p. 187

2. EUROPEAN STANDARDS IN THE FIELD OF CRIMINAL PROTECTION OF THE CAPITAL MARKET

Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing did not impose an obligation on Member States to prescribe the offense of insider trading.[7] Such an intention was first expressed in Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).[8] However, the conditions for criminal sanctioning of insider trading were created only by the adoption of Regulation No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).[9]

2.1. Significance of the Regulation No 596/2014 on market abuse

The Regulation No 596/2014 on market abuse defines unlawful disclosure of privileged information and manipulation of the capital market.[10] In order to prevent these phenomena, and in order to protect the integrity of the capital market and its participants, certain measures have been envisaged.

This Regulation defines privileged information acquired as information of certain content that has not been published and which directly or indirectly relates to one

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7 The Directive provides for mutual assistance through the exchange of information between national authorities responsible for overseeing transactions in the capital market, with a view to preventing and detecting irregularities in insider trading. Pursuant to the provisions of the Directive, interested parties were able, by prior agreement, to enhance cooperation with a view to establishing liability for illicit activities that threaten equal access to information for all participants in the capital market and which may constitute the commission of other offenses. The text of the Direction in English is available at: [https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007b0d5], accessed on 05. April 2020

8 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), Official Journal L096 12/4/2003, [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003L0006], accessed on 05. April 2020. Although the Directive did not provide an obligation for Member States to prescribe criminal sanctions for abuses in the capital market at national level, its adoption represented a significant step towards this. In accordance with its provisions, Member States are obliged to provide in their national regulations for the powers of national institutions to detect abuses in the capital market

9 Stojanović *et al., op. cit.* note 6, p. 187,188

10 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 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, Official Journal of the European Union L 173/1, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0596&from=EN], accessed on 05. April 2020

or more issuers or one or more financial instruments, which if published would significantly affect the price of those financial instruments or on the price of related financial instruments. Privileged information may also apply to commodity derivatives, provided that it is unpublished information that, if released directly or indirectly, would relate to one or more of those derivatives and which would then likely have a significant effect on their price. This information must be published in accordance with Union or national regulations, market rules, contracts, practices or traditions in the relevant commodity markets. According to Article 7 of the Regulation, privileged information means information relating to broadcast units or products on the market that are based on them and which have not been published. In addition, it is necessary that this information is directly or indirectly related to one or more financial instruments and which, if disclosed, would have a significant impact on the prices of those or related financial instruments. The regulation is relevant for defining the elements of the insider trading offense. Therefore, at national level, it was necessary for the definition of privileged information to be aligned with the aforementioned provision of the Regulation defining the elements of the substance of the insider trading crime.

The Regulation also stipulates when it is allowed and when not to use privileged information in the capital market. Trading on the basis of privileged information within the meaning of the Regulation means the trading of privileged information held by a particular person for the purpose of acquiring or selling on his own behalf or for the benefit of some third party of a particular financial instrument to which that information relates. In addition, it involves the use of privileged information to modify or cancel an order in respect of financial instruments to which the information relates, when the order was submitted before a person possessed the information. In accordance with Article 8 of Regulation No 596/2014, the use of privileged information involves the submission, modification or withdrawal of a purchase offer undertaken by a particular person for his own account or for the account of a third party.[11] The above definition is important for determining the limits of criminal repression, because in certain situations the use of privileged information in the capital market will not be considered illegal, and therefore undertaking such activities will not be considered an element of the crime. It was therefore necessary at national level to harmonize the rules governing capital market relations with the provision of Regulation No 596/2014, which defines when the use of privileged information is permitted.

Important for defining the elements of the offense of insider trading is the understanding of the concept of unlawful disclosure of privileged information, which

[11] Article 9 of the Regulation defines permitted activities

means the communication to any other person of privileged information that one possesses, except when they are published in the ordinary course of business, profession or duty. Illegal disclosure can be perpetrated by both natural and legal persons. Illegal activity is not only the publication of privileged information contrary to the mentioned rule, but also the encouragement of other persons to publish it, if it is done by a person who knows or should know that it is privileged information.[12] The Regulation does not provide for an obligation for Member States to impose criminal sanctions at national level prohibiting certain illicit activities in the capital market. However, its provisions are important for defining the elements of the substance of crimes related to abuses in the capital market. It explicitly stipulates that trading in the capital market should not be based on privileged information. In addition, it is prohibited to recommend to another person to trade on the basis of privileged information, as well as to encourage another person to trade privileged information and unlawfully publish privileged information.

Securities are valued on the capital market based on the available information. A certain number of persons have certain information, not only the managers of certain companies but also some other persons such as accountants and others. Insider information is not publicly available, and it is very difficult to determine how many people are involved because of the type of work they do. For this reason, there are authors who consider it unnecessary to impose an insider trading ban even though it is established in most developed countries.[13] The same authors argue that insider information is working towards the establishment of real prices irrespective of whether it is adjusted up or down.[14] However, in any case, it is essential to have adequate and timely financial information to make financial decisions.[15] We therefore believe that it is nevertheless necessary to prohibit insider trading and to put in place adequate mechanisms to prevent it. However, this mechanism is not only made up of misdemeanors and criminal sanctions. Given that insider information is often available to a large number of individuals, a great deal of effort is needed to determine who made it possible for them to trade based on insider information. In fact, this is a prerequisite for the imposition of a misdemeanor or criminal sentence.

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12 Article 10 of the Regulation

13 Prokopijević, M. *Tržište kapitala u Srbiji* [Capital market in the Republic of Serbia] (this article has been published in december 2006 in the Collection of papers of the Institute of Euroepan studies), Available at: [https://pescanik.net/wp-content/PDF/trziste_kapitala_u_srbiji.pdf], accessed on 05. April 2020

14 *Ibid.*

15 Bakić, S., *Tržište kapitala u Srbiji* [Capital market in Serbia], Oditor, časopis za menadžment, finansije i pravo, *vol*. 5, no. 3, 2019, p. 56

The Regulation prohibits manipulation and attempted manipulation, as another type of abuse in the capital market. Manipulation means entering into a transaction, issuing a trading order or any other procedure by which a person gives or is likely to give inaccurate or misleading information regarding the supply, demand or price of a financial instrument or maintain the price of one or more financial instruments at an unusual or lower level. The regulation is important for defining the elements of the crime of capital market manipulation. According to its provisions, manipulation of the capital market will not exist if a person entering into a transaction gives a trading order or takes any other action that has been taken for legitimate reasons and is in accordance with accepted market practice established in accordance with Article 13 of the Regulation. Manipulation also means the transmission of false or misleading information or the provision of false or misleading basic information in relation to reference values, when the person who transmitted the information or provided the basic information knew or should have known that they were false or misleading. Manipulation is also considered to be any other procedures that manipulate the amount of the reference values. The regulation does not mandate Member States to impose criminal sanctions on national legislation for conduct that may be considered missuses in the capital market, but it has a significant criminal legal scope. In addition to its provisions, being of great importance for determining the elements of the offenses of insider trading and capital market manipulation, it also provides for an obligation for Member States to provide for sanctions for offenses for acting contrary to the regulations governing capital markets, as national regulations, and the powers of the competent authorities to impose such sanctions. In addition to its provisions being of great importance for determining the elements of the insider trading offenses and capital market manipulation, it also envision an obligation for Member States to provide sanctions for acting contrary to the regulations governing capital markets, as national regulations, and the powers of the competent authorities to impose such sanctions.

2.2. Goals and recommendations of the Directive 2014/57/EU

Recommendation for Member States of the European Union to prescribe by national legislation criminal sanctions for behaviors that violate the integrity of the capital market is laid down in the European Parliament and the Council Directive 2014/57/EU. The Directive recommended that Member States establish as criminal offenses trade based on privileged information, also for recommending or encouraging another to trade based on privileged information, where such activities were intentionally undertaken and also in more serious situations. Accordingly, Member States were required to treat as criminal offences in the national

legislation the publication of privileged information and disclosure of privileged information to other persons. However, this does not apply to the disclosure of information as a normal part of the job and in situations where such activity may qualify as market research.[16]

The Directive recommended that Member States in their respective national legislations prescribe market manipulation as a criminal offense. Market manipulation activities include the execution of transactions, the issuing of a trading order, and any other procedure that gives false or misleading information regarding the supply, demand or price of financial instruments or related spot commodity contracts. Market manipulation is also considered to be any activity whereby the price of one or more financial instruments or related commodity contracts is maintained at an unusual or artificial level. However, there will be no basis for liability if the reasons why the person who made the transaction or gave a reason for trade is justified, or if the transaction or trading order is in accordance with accepted market practice in the specific trading place. Manipulation, within the provisions of the Directive, also implies the execution of a transaction, the placing of a trading orders, or any other activity or procedure affecting the price of one or more financial instruments, or a related spot contracts for goods, using fictitious contracts or any other form of fraud or scams. In addition, Member States should prescribe as an act of commission of a crime, the dissemination of information through the media, including the Internet and any other means of giving false or misleading signs in terms of supply, demand or price of a financial instrument, or related spot contract for goods at an unusual or artificial level, where the disseminators gain for themselves or for another person the benefits of disseminating specific information, as well as forwarding false or misleading information, or providing false, or misleading basic information or any other method of manipulating the calculation reference values.[17]

In addition to recommending Member States to prescribe those activities as criminal offenses under their national legislation, one of the recommendations is to prescribe criminal sanctions for persons assisting or inciting a person to commit a crime that violates the integrity of the capital market, as well as for a person attempting the execution.[18]

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16 Article 4 of the Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), OJ L 173, 12.6.2014, p. 179–189

17 Article 5 of the Directive

18 Article 6 of the Directive

To trade based on privileged information, the recommendation to trade based on privileged information, as well as the market manipulation, recommendation is that national law prescribe a minimum of four years imprisonment.[19] Whereas for the illegal publication of privileged information, it is recommended to be prescribed, a national sentence of at least two years imprisonment.[20]

The provisions of the Directive do not call into question the independence of the judiciary and differences in the organization of the judiciary at European Union level, but one of the recommendations is the training of judges, prosecutors, police, judicial staff, as well as employees in relevant institutions involved in criminal proceedings and conducting investigative actions to ensure at national level the achievement of the objectives defined by its provisions.[21]

The criminal legislation of the Republic of Serbia prescribes both misdemeanors and criminal offenses that distort the capital market. However, it does not appear that the necessary conditions have been created for the realization of the objectives defined by the provisions of the Directive.

3. CRIMINAL LAW PROTECTION OF THE CAPITAL MARKET IN THE REPUBLIC OF SERBIA

The Republic of Serbia, as a candidate country for EU membership, has harmonized its national regulations with European standards in the field of criminal protection of the integrity of the capital market. The offenses which distorts the capital market in the Republic of Serbia are prescribed by secondary criminal legislation: the Law on the Capital Market (Official Gazette of RS, No 31/2011, 112/2015, 108/2016 and 9/2020), the Law on Takeovers of Joint Stock Companies (Official Gazette of RS, No 46/2006, 107/2009, 99/2011 and 108/2016) and the Law on Open-Ended Investment Funds subject to Public Offering (Official Gazette of RS, No 73/2019).

The Law on the Capital Market specifies three offenses that violate the integrity of the capital market. These are: prohibition of market manipulation (Article 281), use and disclosure of insider information (Article 282) and unauthorized provision of investment services (Article 283). Market manipulation is defined as the act whereby an executor obtains material gain for himself or another person or harms others by completing a transaction or issuing trading orders that are given or likely to provide false or misleading information about the supply, demand or

[19] Article 7, Paragraph 2 of the Directive

[20] Article 6 of the Directive

[21] Article 11 of the Directive

price of financial instruments, or by which the entity or entities jointly maintain the price of one or more financial instruments at an unrealistic level. The act will also exist when a person concludes transactions or issues trading orders that use fraudulent practices or any other form of deception or fraud, as well as when a person disseminates information through the media, including the Internet, or by any other means transmission of untrue news or news that may be misleading about financial instruments if they knew or had to know that this information was false or misleading. The offender will get between six months and five years' imprisonment and a fine. The same article envisages a more serious form of the act that exists if the commission of the offense resulted in a significant disturbance on the regulated market or the international trading platform. The offender is sentenced to between three and eight years in prison. In addition, the possibility of punishment for attempting a crime also has been prescribed. The legal description of the offense is in line with the provisions of Directive 57/2014. The level of the sentence has also been harmonized, as well as the provision stipulating that the person attempting to commit the crime will also be punished.

The same Law prescribes the crime of using, disclosing and recommending insider information. This act exists if a person intends to gain for himself or for another person material gain or cause harm to other persons, use insider information directly or indirectly in acquiring, alienating and attempting to acquire or alienate for his own account or for the account of another person financial instruments to which that information relates, for disclosing and making available insider information to any other person, for recommending or forcing another person to acquire or dispose of the financial instruments to which that information relates based on insider information, for disclosing and making available insider information to any other person, to recommend or induce another person to acquire or dispose of the financial instruments to which that information relates based on insider information. A fine or imprisonment up to one year is prescribed for the offender. In addition to the basic one, a more serious form is also prescribed if in the committing of a criminal offense property was gained or other persons suffered property damage in the amount exceeding one million five hundred thousand dinars. The offender is punished by imprisonment for a term not exceeding three years and a fine. In addition to the basic and severe, a special form of the act is prescribed, which exists if the act was performed by a person who possesses insider information through membership in the management and supervisory bodies of the issuer or public company, participation in the capital of the issuer or public company, by accessing information obtained by performing duties on workplace, performing a professional or other duties, or through the offenses committed by that person. The offender is fined or sentenced up to three years in prison. If the

execution of the act resulted in the material gain or damage to other persons in the amount exceeding one million five hundred thousand dinars, there will be considered as a more severe act. The offender may be punished by imprisonment for a term between six months and five years and a fine. The law also stipulates that the person who attempts to commit the offence will be punished. It seems that the basic form of the offense could have been prescribed as a misdemeanor, while it is justified that, in accordance with the provisions of Directive 57/2014, the more serious form of the offense was prescribed as a criminal act. The amount of the sentence in this case is in line with the provisions of the mentioned Directive, as well as the provision prescribing the obligation to punish the person attempting to commit the act. A special form of criminal offense is abuse of position of a responsible person, which is prescribed by Article 227 of the Criminal Code of the Republic of Serbia.[22]

In addition to the above crimes, the Law on the Capital Market also prescribes the criminal offense of unauthorized provision of investment services. A criminal offense exists if an individual illegally provides investment services with the intention of making a gain for himself or another person. Unauthorized provision is considered to be the provision of such services without the permission of the competent authority, and therefore it seems quite justified that in such cases the imposition of a sanction for the offense was adequate. The criminal offense of unauthorized provision of investment services is punishable by a fine or imprisonment for a term not exceeding one year. In addition to the basic one, the same provision prescribes a more serious form of act. It exists if, by undertaking an act of execution, a person obtains for himself or other persons property gain or inflicts property damage in the amount of over one million and five hundred thousand dinars. The offender was given a sentence of imprisonment of more than three years and a fine.

[22] The Criminal Code of the Republic of Serbia, Official Gazette of the Republic of Serbia No 85/2005, 88/2005-ispr., 107/2005-ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019. The criminal offense of abuse of the responsible person position is prescribed in the group of criminal offenses against the economy and exists if the responsible person, by exercising his position or authority, exceeding the limits of his authority or by failing to perform his duty, obtains unlawful material gain for himself or another natural or legal person, unless the characteristics of another crime have been accomplished. The offender will get between three months and three years of imprisonment. In addition to the basic one, the same provision prescribes a two more serious forms of the act. The first one exist if in the committing of a criminal offense property was gained in the amount exceeding four hundred and fifty thousand dinars. The offender may be punished by imprisonment for a term between six months and five years. The second more serious form of abuse of the responsible person position exists if in the committing of crime offense property was gained in the amount exceeding million and five hundred thousand dinars. The offender may be punished by imprisonment for a term between two and ten years

Taking into account the offenses prescribed by the Law on the Capital Market, it can be concluded that it was sufficient for the legislator to decide that only serious forms of criminal offenses should be sanctioned as criminal offenses, and that the prescribed sanctions are in line with the provisions of Directive 57/2014.

In addition to the Law on the Capital Market, the integrity of the financial market in the Republic of Serbia is also protected by the criminal law provisions prescribed by the Law on Takeover of Joint Stock Companies (Official Gazette of RS, No. 46/2006, 107/2009, 99/2011 and 108/2016). The Law prescribes three criminal offenses: offering or promising gifts, services or other benefits (Article 44), misuse of privileged information (Article 45), and publication of false information (Article 46).

The criminal offense of offering or promising gifts, services or other benefits is a special form of the criminal offense of bribery in the conduct of an economic activity. It exists if a person offers or promises a gift, services or other benefits to the shareholder after the offeror has announced the takeover bid, either directly or by advertising through the media, or if a person offers or promises gifts, services, property or other benefits for the person to accept or rejected a takeover bid. [23] The offender is to be sentenced between six months and five years in prison. In addition, the same provision prescribes a criminal sanction from six months to five years of imprisonment for the person who intermediate in bribing. Therefore, if the bribery is performed in connection with the trading of shares, there will be a criminal offense of offering or promising gifts, services or other benefits.

It seems that the action of abuse of privileged information could be subsumed under the legal description of criminal offence usage, disclosing and recommending insider information, which is prescribed by the Article 282 of the Law on the Capital Market. The act of committing the crime of misuse of privileged information exists if a person commits a takeover of a Joint Stock Company by using privileged information. The same act exists if a person, in order to obtain for himself or for another person unlawful property gain, communicates to the other person privileged information or on the basis of privileged information recommends to another to acquire, buy or sell shares of the targeted company, which are traded or will be traded on organized securities market. Therefore, it appears that the regu-

[23] Bribing in the conduct of an economic activity is prescribed by Article 231 and exists if a person makes, offers or promises a gift or other benefit to the person in the performance of an economic activity, concludes a contract or reaches a business agreement or provides a service or abstains from such activity or violates other duties in the exercise of economic activity to the detriment or for the benefit of the business entity for which or in which he or she works to the detriment or for the benefit of another legal or natural person, and who mediates such giving of gifts or other benefits

lation of the mentioned act was unnecessary. Also, the existence of minor form of this act if it is committed by negligence is also unnecessary.

A special form of prohibition of manipulation in the capital market is the crime of publishing false information. Elements of this act will be materialized if a person on the regulated market or international trading platform of securities in the takeover bid publishes false information about the legal and financial position of the target company or its business opportunities, as well as other false facts that are relevant to the decision to accept the takeover bid or not to publish complete information on those facts. The offender of abovementioned will get between three months and three years of imprisonment. In addition to the basic one, a more serious form of the offense is prescribed if there is a disturbance in the regulated market, or the international trading platform of securities, due to the commission of the crime. The offender may be punished by imprisonment for a term between one and five years.

In addition to the offenses prescribed by the Law on the Capital Market and the Law on Takeover of Joint Stock Companies, the Law on Open-Ended Investment Funds subject to Public Offering also prescribes the publishing false information about open-ended investment fund with public offering. This crime will exist if someone by intention to deceive investors in rules of open-ended investment fund subject to public offering, prospectus, key information, annual or semi-annual report published false information about financial position of open-ended investment fund subject to public offering or published other false facts which are relevant to make an investment decision. The same crime will exist if someone by the intention publishing incomplete data about that facts. The offender may be punished by fine or imprisonment up to one year. The more serious form of mentioned crime will exist if in the committing of a criminal offense property was gained or other persons suffered property damage in the amount exceeding one million five hundred thousand dinars. The sanction up to three years and fine is prescribed for the offender.[24] The offense of publishing false information about open-ended investment fund subject to public offering also fits within the legal description of the crime of prohibiting market manipulation. Therefore, it seems to be a redundant provision by which that act is prescribed by the Law on Open-Ended Investment Funds subject to Public Offering. In addition, above mentioned Law prescribes offense unauthorized performance of the activities of the management company and the depository. The basic form of this crime exists if someone by intention of gaining benefit for himself or another person performs the activities or a management company or the activities of a depositary without

[24] Article 121 of the Law on Open-Ended Investment Funds subject to Public Offering

authorization. The offender may be punished by a fine or imprisonment for a term not exceeding one year. More serious form of offense unauthorized performance of the activities of the management company and the depository will exist if in the committing of a criminal offense property was gained or other persons suffered property damage in the amount exceeding one million five hundred thousand dinars. The offender is to be sentenced up to three years and fine.[25] We consider that the regulation of the mentioned crime was unnecessary, because it could be qualified as a criminal offense fraud prescribed by Criminal Code and which will exist if someone intends to gain for himself or for another person material gain misleads or misleads him by falsely presenting or concealing the facts and thus leads him to do or not to do something to the detriment of his own or someone else's property. The offender may be punished by imprisonment for a term between six months and five years and fine. As can be noticed, the Criminal Code even prescribes a stricter punishment for the perpetrator of criminal offense of fraud. In addition, mentioned legal act prescribes one minor and two more serious forms of that crime. The minor form will exist if someone did this crime only intends to provoke the damage for some person. As can be noticed no harmful consequences are necessary for the existence of this form. The offender of this crime may be punished by imprisonment up to six months and crime. The first more serious form exists if in the committing of a criminal offense was gained or other persons suffered property damage in the amount exceeding four hundred and fifty thousand dinars. The offender is to be sentenced by imprisonment in term between one and eight years and fine. Another one more serious form will exist if in the committing of a criminal offense was gained or other persons suffered property damage in the amount exceeding million and five hundred thousand dinars. The offender may be punished by imprisonment in term between two and ten years and fine.[26]

Given the above, it seems that the secondary criminal legislation of the Republic of Serbia prescribes too many offenses to protect the integrity of the capital market. Prescribing a large number of crimes is neither necessary nor justified. This is often a problem when it comes to secondary criminal legislation.[27] Although legal

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25 Article 122

26 Article 208 of the Criminal Code

27 Similarly, the Law on Tax Procedure and Tax Administration of the Republic of Serbia, Official Gazette of RS, No 80/2002, 84/2002-corrigendum, 13/2003-corrigendum, 70/2003, 55/2004, 61/2005, 85/2006-other law, 62&2006.other law, 63/2006-corrigendum of other law, 61/2007, 20/2009, 72/2009-other law, 53/2010, 101/2011, 2/2012.corrigendum, 93/2012, 47/2013, 108/2013, 68/2014, 105/2014, 91/2015-autentic interpretation, 112/2015, 15/2016, 108/2016, 30/2018, 95/2018 and 86/2019prescribes four criminal offenses, while two tax criminal offenses are prescribed by the Criminal Code. However, it seems more expedient that in the above case it was also more appropriate to prescribe certain behaviors as misdemeanors or to have their act of execution brought under

theory often neglects the existence of secondary criminal legislation, the authors who find that moderately, rationally and realistically placed criminal legislation performs its function more successfully than too broadly set, are right on point. [28] Considering that the legal description of certain offenses could be summed up under the legal description of some other, it seems quite sufficient to have two offenses: prohibition of market manipulation and using, disclosing and recommending insiders information. Therefore, it seems more appropriate that national criminal law only prescribes more serious forms of crime that violate the integrity of the capital market, which is in line with the recommendations contained in Directive 57/2014. Instead, it should focus on the possibility of proving the existence of offenses threatening the capital market, since it seems that a particular problem in practice is the proving of such offenses.

4. PROBLEM WITH PROVING CRIMINAL OFFENSES WHICH ENDANGER CAPITAL MARKET

According to the available data of the Securities Commission, until 2017 no final verdict was reached against the perpetrators of criminal offenses that distort the capital market.[29] The prohibition of abuses in the capital market is primarily

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the legal description of some other criminal offenses prescribed by the Criminal Procedure Code of the Republic of Serbia

[28] Stojanović, Z., *Da li je Srbiji potrebna reforma krivičnog zakonodavstva?,* [Does Serbia need a criminal legislation reform], *Crimen*, 2/3013, p. 140. Despite the intention to reduce the number of criminal offenses provided by secondary criminal legislation, it still appears to contain a large number of crimination. However, the largest number of economic crimes is provided by secondary criminal legislation and for many of them there are almost no criminal proceedings. About that see in: Turanjanin, V. *"Privredna krivična dela iz sporednog krivičnog zakonodavstva"* [Economic Crimes in secondary criminal legilastion], in: Stevanović. I.; Čolović, V. (eds.), *Privredna krivična dela,* Institut za uporedno pravo, Institut za kriminološka i sociološka istraživanja, Beograd, 2017. p. 203 and Turanjanin V. *"Krivičnopravna zaštita tržišta kapitala"* [Criminal protection of the capital market], in: Godišnjak fakulteta Bezbednosti, Univerzitet u Beogradu, Fakultet bezbednosti, 2017. p. 390

[29] The information was obtained from interviews with employees and members of the Securities Commission of the Republic of Serbia in April 2020. The aforementioned Institution does not have information on whether a verdict has been issued after 2017 and what are the measures taken by the public prosecutor's office against persons suspected of criminal offenses affecting the capital market in the Republic of Serbia. The Securities Commission is an independent state organization and regulator of the capital market of the Republic of Serbia. Its activities are aimed at ensuring the legal, fair and transparent functioning of the capital market, as well as protecting investors. In addition to the regulatory function, the Commission supervises participants in the capital market, stock exchanges, investment companies, broker-dealer companies, authorized banks, custodian banks, investment fund management companies, as well as the investment funds themselves. If there are facts that indicate the existence of a criminal offense, economic offense and misdemeanor, the Securities Commission shall inform the competent authority or file a criminal complaint with the competent public prosecutor's office. Information on this is available at: [http://www.sec.gov.rs/index.php/sr/], accessed on 08. April 2020

designed to prevent certain irregularities without the use of criminal law mechanisms. Therefore, it is impossible to apply the standard of proof inherent in criminal proceedings in relation to the proof of offenses protecting the integrity of the capital market. Some authors consider overcoming of this problem by establishment a special level of evidence standards.[30]

Pursuant to the provisions of the Criminal Procedure Code of the Republic of Serbia, a reasonable suspicion is required in order to bring an indictment. It means the totality of facts that directly substantiate a reasonable suspicion.[31] Reasonable suspicion means a set of facts that directly indicate that a person has committed a criminal offense.[32] In view of the above, the existence of circumstantial evidence is not sufficient to bring an indictment in criminal law. Nevertheless, some authors consider that the definitions of the grounds of suspicion, reasonable suspicion are not quite precise and that in all cases it depends on the subjective belief of the authority conducting the proceedings and on its evaluation of evidence and indications, so it generally does not depend on the quality of the evidence.[33] According to some authors, there is no reason to classify circumstantial evidence as less valuable and is thought to lead to less accurate results than direct evidence. In contrast, some studies have shown that certain types of circumstantial evidence are more accurate, and that in some situations direct evidence may lead to less accurate conclusions than circumstantial evidence. Even some research has shown that circumstantial evidence can contribute to reducing wrongful convictions to a greater extent than direct evidence.[34] However, given the national legislation of the Republic of Serbia, circumstantial evidence in criminal proceedings has no significant proof value. Therefore, it seems that only the use of specific evidentiary actions is available. An obstacle to this is the provisions of the Criminal Procedure Code, which stipulates under what conditions such actions can be applied. The aforementioned regulation foresees the application of special evidentiary actions only when it comes to criminal offenses referred to in the Code. These measures may be applied to a person who is suspected of having committed any of the of-

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30 Haynes, A., *The burden of proof in market abuse cases*, Journal of Financial Crime, *vol.* 20, no. 4, 2013, p. 386

31 Article 331, paragraph 1, Article 341, paragraph 1a, in conjunction with Article 338, paragraph 1, item 3 of the Criminal Procedure Code. *Ibid.*

32 Article 2. Points 1 and 2 of the Criminal Procedure Code

33 Grubač M.; Vasiljević T., *Komentar Zakonika o krivičnom postupku*, [Comment on criminal procedure code], PROJURIS, Beograd, 2014, see in: Mrčela, M.; Delost, D., *Dokazni standardi u kaznenom postupku*, [Evidentiary standards in criminal procedure], Policija i sigurnost, Zagreb, *vol.* 4, 2019, p. 423

34 Bedan, H. A.; Radebet, M., *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rewiew, *vol.* 21, no. 56/58, 1987; Blum, B., *Evidence Law Convictions Based on Circumstantial Evidence*, The Judges Book, *vol.* 3, 2019, p. 64

fenses provided for in Article 162 of the Criminal Procedure Code, provided that no other evidence of relevance to the prosecution can be collected, or when their collecting was significantly impeded.[35] In addition, the mentioned evidentiary actions may also be applied to a person suspected of preparing one of the offenses, and the circumstances of the case indicate that the offense could not otherwise be detected, prevented or proved or would cause disproportionate difficulties and great danger.[36] When it comes to criminal offenses that threaten the integrity of the capital market, it is clear that in most cases evidence cannot be gathered in any other way except by the use of specific evidentiary actions. Some authors point out that the system of statutory assessment of evidence has been abandoned today, according to which laws prescribe the probative value of evidence by rules that determine how much and what kind of evidence must be collected in order for a legally decisive fact to be considered established and well founded in order to reach a decision. Therefore, the free evaluation of the evidence is left largely to the courts.[37] Nevertheless, the courts adhere to the evidentiary standards defined by national law primarily to respect the presumption of innocence. Therefore, in our view, the only solution is to supplement Article 162 of the Code of Criminal Procedure by providing for the possibility of applying special evidentiary actions for crimes that threaten the integrity of the capital market. The Criminal Procedure Code provides for a limited ability to apply evidentiary actions in relation to certain criminal offenses. Thus, e.g. according to the provisions of the mentioned regulation in relation to criminal offenses: unauthorized use of a copyright and related rights, damage to computer data and programs, computer sabotage, computer fraud and unauthorized access to a protected computer, computer network and electronic data processing, only a measure of eavesdropping on telecommunications can be determined, but other evidentiary actions cannot be conducted.[38] Given the inability to prove certain activities that constitute an act of committing offenses that threaten the integrity of the capital market, the application of the mentioned measure could also be prescribed in relation to those offenses. Its application is particularly justified given the large number of persons who hold insider information, since insider trading is considered a criminal offense. In this case, it is justified to monitor both communication by telephone or other techni-

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35 With regard to criminal offenses of an economic nature, Article 162 of the Criminal Procedure Code prescribes the following acts: abuse in connection with public procurement, counterfeiting of money, money laundering, as well as for offenses for which it is determined that the public prosecutor's office of special jurisdiction. However, that Article does not provide for the application of special evidentiary actions not only in the case of offenses threatening the capital market, but also for other offenses prescribed by other laws, which are also part of the secondary criminal legislation

36 Article 161 of the Criminal Procedure Code

37 Mrčela;Delost, *op. cit.* note 33, p. 419

38 Article 162, Paragraph 3 of the Criminal Procedure Code

cal means, as well as surveillance of the suspect's e-mail and seizure of letters and other shipments.[39]

According to the Criminal Procedure Code, special evidentiary actions can also be applied to perpetrators of criminal offenses prescribed by the Law on the Organization and Jurisdiction of Government Authorities on the Suppression of Organized Crime, Terrorism and Corruption.[40] However, that regulation does not apply to crimes that protect the integrity of the capital market.

Secondary criminal legislation seems to be neglected by national law when it comes to justifying the application of procedural law provisions. Therefore, consideration should be given not only to the imposition of an adequate sanction on natural and legal persons when it comes to the criminal offenses, but also for the possibility of applying that sanction. Although, in our view, it is justified that offenses containing blanket disposition should be prescribed by secondary criminal law, we believe that some legal systems are not mature enough for such an approach. The experience of the Republic of Serbia indicates that the offenses prescribed by the secondary criminal legislation are perceived as acts that are less threatening to certain social values.[41] When it comes to crimes prescribed by another law, it is impossible to keep track of the number of charges and convictions for such crimes in the reports of the Statistical Office of the Republic of Serbia. They are summarized as "offenses prescribed by other laws". Our conclusion is that hyper-criminalization contributed to this, i.e. too many crimes to protect certain social values. When it comes to the integrity of the capital market, we believe that the existence of two offenses is sufficient: the prohibition of manipulation of the capital market

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39 The manner of carrying out the measure of eavesdropping on telecommunications is defined in Article 166 of the Criminal Procedure Code of the Republic of Serbia

40 Article 2. of the Law on the Organization and Jurisdiction of Government Authorities on the Suppression of Organized Crime, Terrorism and Corruption (Official Gazette of RS, No. 94/2016 and 87/2018 - other law) prescribes to which offenses its provisions apply. In addition, in practice exist numerous difficulties in proving of economic crimes. That requires the existence of special knowledge and skills, which requires the existence of special competencies of subjects authorized for seizure that type of crimes. More about that in: Banović, B., *"Kompetentnost subjekata otkrivanja i gonjenja u funkciji efikasnog suzbijanja privrednih krivičnih dela"* [Competency of entities of detection and protection in the function of efficient suppression of economic crime], in: Stevanović, I.; Čolović, V. (eds.), *Privredna krivična dela*, Institut za uporedno pravo, Institut za kriminološka i sociološka istraživanja, Beograd, 2017. p. 168

41 Haynes, A., in his paper *Market abuse, fraud and misleading communications*, Journal of Financial Crime, *vol*. 19, no. 3, 2012, p. 247 points out that the sanctions applied to legal entities should be such that the penalty also has some effect on the responsible persons employed by large financial investment firms. Not only does it consider that the application of sanctions would be facilitated if adequate software systems were in place to detect irregularities, the extensive use of evidentiary actions would also be of particular importance

and the use, disclosure and recommendation of insider information. Others can either be brought under the legal description of some other crimes, or it is sufficient to prescribe such conduct as misdemeanors. The view expressed in Directive 57/2014 also appears to be that adequate protection of the integrity of the capital market is provided only in situations where its functioning is seriously impaired.

5. CONCLUSION

Criminal offenses protecting the integrity of the capital market in the Republic of Serbia are prescribed by the secondary criminal legislation, that is, by three laws governing capital market operations. Considering that these are crimes with blanket disposition, this can be a quality solution. However, in the case of the Republic of Serbia, these laws prescribe a large number of criminal offenses. Some of them may have been prescribed as misdemeanors and others may have been subject to a legal description of pre-existing offenses. Thus, e.g. the criminal act of unauthorized provision of investment services could be prescribed as a violation of the Law on the Capital Market. The criminal offense of offering or promising gifts, services or other benefits prescribed by Article 45 of the Law on Takeovers of Joint Stock Companies could be subject to the statutory description of the criminal offense of bribery in commercial activities prescribed by the Criminal Procedure Code of the Republic of Serbia. In addition, the crime of misuse of privileged information prescribed by Article 45 of the mentioned Law could also be subject to the legal description of the offense of using, disclosing and recommending insider information, which is prescribed by Article 282 of the Law on the Capital Market. The criminal offense of publishing false information prescribed by Article 46 of the Law on Takeovers of Joint Stock Companies could be subject to the legal description of the criminal offense of prohibition of market manipulation, which is prescribed by Article 281 of the Law on the Capital Market. The same could apply to the criminal offense of advertising prospectuses with false information, which is regulated by the Law on Open-Ended Investment Funds subject to Public Offering.

Concerning the level of compliance of national regulations prescribing criminal offenses protecting the integrity of the capital market in the Republic of Serbia with Directive 57 of 2014, it can be concluded that they are largely in compliance with the mentioned Directive with regard to penalties prescribed for more serious conduct which impair the integrity of the capital market. In addition, the obligation to punish persons who attempt to commit a crime as well as persons who incite and assist in their commission is prescribed. Punishment of legal entities is possible on the basis of the Law on the Liability of Legal Entities for Criminal

Offences, the application of which is of particular importance in relation to the protection of the integrity of the capital market.

However, it seems necessary to amend the criminal law provisions governing business in the capital market in order to narrow the criminal zone and, therefore, to make it more effective. However, a much bigger problem in practice is the inability to prove offenses that threaten the integrity of the capital market. According to the Securities Commission of the Republic of Serbia, no convictions have certainly been issued against persons who have been prosecuted on suspicion of having committed crimes that violate the integrity of the capital market, by 2017. In addition, they have not been notified, by the competent public prosecutor's offices, of the proceedings against persons for whom criminal charges were filed in a later period. One of the reasons for this may be the lack of evidence when it comes to particular offenses, such as the criminal offense of using, disclosing and recommending insider information provided for in Article 282 of the Law on the Capital Market. Although some authors believe that criminal sanctioning of insider trading is not justified, we believe that it is still necessary. Breaking the confidence in the capital market can cause major problems in the financial market. However, because of the large number of insiders who use insider information, it is often not possible to determine which person made such information available to others. Our legislation does not recognize the possibility of using circumstantial evidence, but because of the evidentiary standards laid down in the Criminal Procedure Code of the Republic of Serbia, requires solely the use of direct evidence, which is judged on the basis of the freedom of judicial belief. In relation to the offenses prescribed by the laws governing the business in the capital market, it is not possible to apply special evidentiary actions, which include the eavesdropping on telecommunications. Therefore, it seems that the most acceptable solution, when it comes to proving crimes that threaten the integrity of the capital market, would be justify to extend the application of special evidentiary acts to the offenses prescribed by the laws governing the capital market through the Criminal Procedure Code. Bearing in mind that we believe that the existence of criminal offenses is a prohibition of manipulation on the capital market and the use, disclosure and recommendation of insider information, Article 162 of the Criminal Code could cover these offenses as well. However, both in legal theory and in practice, they appear to be unjustifiably neglected in relation to the acts prescribed by the Criminal Code as well as other acts prescribed by the secondary criminal legislation. In addition, in practice is present a rare application of crimes prescribed by secondary criminal legislation in general. Bearing in mind that most of them are economic crimes, the reason for that could be a lack of public prosecutors and judges knowledge in economy field and company law. Considering the complex-

ity of the phenomenology of economic crime their knowledge in this area should be continuously improved.

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UDK 343.85: 343.359](4-67EU)
Review article

NEW EU APPROACH IN COMBATING CRIMINAL OFFENCES AFFECTING FINANCIAL INTERESTS

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ABSTRACT

Financial crimes represent a significant problem at the EU level since they are damaging the integrity of the financial sector. In that context, it should be noted that there is a range of offences concerning financial crimes, so it became undisputed that such criminal activities should be prescribed in a comprehensive manner at the EU level. In that regard, it is worthwhile noting that Directive (EU) 2017/1371 on the fight against fraud to the EU's financial interests by means of criminal law establishes the definition of criminal offences concerning combating fraud and other illegal activities affecting the EU's financial interests. This is the reason why the first part of the paper is dedicated to the analysis of the criminal offences affecting the EU's financial interests. However, the prescribed list of financial crime in Directive (EU) 2017/1371 represented only required but not the sufficient step for combating this type of criminal activities since there was a lack of legal possibilities for national and European authorities to access to relevant financial information as well as the lack of cooperation between them. On these grounds, the Directive (EU) 2019/1153 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences was adopted on 20 June 2019. For that reason, the second part of the article deals with the legal measures referred to in Directive (EU) 2019/1153 concerning the possibilities for the access by competent authorities to financial information as well as the conditions for the exchange of information between competent authorities and financial intelligence units as well as between financial intelligence units and Europol. Furthermore, since the protection of the financial interests by means of criminal law, cannot be sufficiently achieved only with individual measures adopted by Member States, it seems compulsory to take into consideration significant improvements achieved in this area at international level in order to examine whether the new EU framework is in compliance with existing international standards. Finally, since the Republic of Serbia has, in the context of accession and negotiations process to EU, recently amended the framework concerning criminal offences with regard to combatting fraud and other illegal activities affecting the financial interests, the third part of the paper is dedicated to the analysis of the national framework 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 the protection of the EU financial interests against financial crimes there is still a lack of effective implementation of adopted standards. Bearing in mind the above, some recommendations for accelerating the implementation of adopted measures are listed.

Keywords: *financial interests, criminal offences, criminal law, Directive (EU) 2017/1371, Directive (EU) 2019/1153*

1. INTRODUCTION

In recent years, emerging new phenomenological forms have brought to light in the respect of criminal offenses affecting the EU's financial interests, in particular regarding the way how criminals conduct their operations. Methods and techniques for acquiring funds from the EU budget and then using them for committing fraud and other criminal offenses affecting the EU's financial interests have become very sophisticated, often unnoticeable and difficult to detect, making hardly possible the tracking of money flows. As their fund-raising activities were substantially increased, in order to enlarge their profits, criminals were encouraged to evolve new ways of conducting their activities by creating organized criminal networks, which enabled them to engage in large criminal operations. Consequently, due to the fact that detection, prevention and investigation of criminal offenses affecting the EU's financial interests was faced with an increase of number of difficulties regarding gathering of evidence as well as because the proving of this type of crime was significantly hampered at the EU level, it was required to create, develop and adopt new legal measures regarding the fight against fraud and other offenses causing negative effects for the EU's financial activities. In this regard, it was obvious that the protection of EU's financial interest against illegal activities should be improved by means of criminal law. For that reason, at the EU level, already in 2012, the proposal of the new Directive on the fight against fraud and other crimes affecting the EU's financial interests by means of criminal law was submitted. After the completion of internal procedure, in 2017, Directive (EU) 2017/1371 on the fight against fraud to the EU's financial interests by means of criminal law was finally adopted (hereinafter: Directive (EU) 2017/1371).[1] By adopting the Directive (EU) 2017/1371, the EU legal framework was covered by the substantive issues in the respect of the definitions of criminal offences concerning combating fraud and other illegal activities affecting the EU's financial

[1] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, Official Journal of the European Union, L 198/29 of 28 July 2017. Juszczak, A., Sason, E., *The Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law (PFI Directive)*, [https://eucrim.eu/articles/the-pfi-directive-fight-against-fraud/] Accessed on 15. April 2020

interests.[2] However, adopting of this Directive was only the required step, but not sufficient, in the respect of the protection of EU's financial interests against illegal criminal activities, since the procedural matters, including the modality of the exchange of required financial information relevant for detection, prevention and investigation of fraud and other financial crimes, had not been agreed. In this sense, a significant step forward has represented the adoption of new Directive (EU) 2019/1153 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences (hereinafter: Directive (EU) 2019/1153) adopted in 2019.[3] From this perspective, in this paper firstly, it will be analyzed and discussed new EU framework concerning the nexus between the fight against fraud to the EU's financial interests by means of criminal law and the facilitating the access, use and dissemination of financial and other information for the prevention, detection, investigation or prosecution of fraud and other financial crimes. Furthermore, the focus will be on 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.

2. THE EU APPROACH CONCERNING COMBATING FRAUD AND OTHER ILLEGAL ACTIVITIES AFFECTING THE FINANCIAL INTERESTS BY MEANS OF CRIMINAL LAW

In the line with Article 2 of Directive (EU) 2017/1371 the term of EU's financial interests is related to all revenues, expenditure and assets covered by as well as acquired through the EU budget or the budgets of the EU institutions, bodies and offices. For that reason, this Directive was adopted with the purpose to provide minimum rules regarding recognition of and fight against criminal offences affecting the EU's financial interest. In this sense, it should be noted that the Directive (EU) 2017/1371 makes the difference between two types of conduct which can negatively affect and threaten to EU's financial interests. On the one side, this Directive deals with the fraud, while on the other side, it approaches to

[2] Kostić, J., *Krivičnopravna zaštita finansijskih interesa Evropske unije*, Institut za uporedno pravo, Beograd, 2018, pp. 44-48

[3] Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, Official Journal of the European Union, L 186/122 of 11 July 2019. 2.Wahl, T., *New Directive on Law Enforcement Access to Financial Information*, [https://eucrim.eu/news/new-directive-law-enforcement-access-financial-information/], accessed on 15. April 2020

the consideration of other criminal offences affecting the EU's financial interests.[4] To start with the fraud as the special type of conduct which adversely affect the EU's financial interests.

2.1. FRAUD AFFECTING THE EU'S FINANCIAL INTERESTS

Since the fraud affecting the EU's financial interests is usually perpetuated by organized criminal networks, causing that this crime is not limited to a single country, Directive (EU) 2017/1371 pursuant to Article 3 obliges all Member States to ensure that this crime constitutes a criminal offence at the EU level when it is committed intentionally.[5] By contributing to the suppression of the fraud affecting the EU's financial interests, Directive (EU) 2017/1371 has recognized four types of this crime, in the area of: 1) non-procurement-related expenditure; 2) procurement-related expenditure; 3) revenue arising from VAT own resources and 4) revenue other than revenue arising from VAT own resources.[6] In order to be consider as illegal last two types of this crime should be committed as the part of the cross-border fraudulent schemes.

First of all, when it comes to non-procurement-related expenditure, Directive (EU) 2017/1371 makes the difference between three possible modality of committing the fraud in the area, by prescribing: a) the use or presentation of false, incorrect or incomplete statements or documents; b) non-disclosure of information in violation of a specific obligation and c) the misapplication of such funds or assets. However, it should be noticed that the mere fact of executing the abovementioned acts of execution is not sufficient for the existence of this crime. In other words, another element is required to become such conduct illegal. Thus, in the respect of the use or presentation of false, incorrect or incomplete statements or documents as well as non-disclosure of information in violation of a specific obligation, the required element is the consequence of the exercised act. Namely, the committing of these two acts should have as its effect the misappropriation or wrongful retention of funds or assets from the EU budget or budgets managed by the EU, or on its behalf. On the other side, in the regard of the third act of execution, the required element is the specific purpose of committing the fraud.

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4 Picard, M, *Financial Crimes: The constant challenge of seeking effective prevention solutions*, Journal of Financial Crime, *vol.*15, no.4, 2008, p. 386

5 Mathis, A., *Combating Fraud and Protecting the EU's Financial Interests*, European Parliament, Brussels, 2020, p. 5

6 Šuput, J., *Harmonizacija nacionalnog zakonodavstva Republike Srbije sa Konvencijom o zaštiti finansijskih interesa Evropske unije*, Evropsko zakonodavstvo, *vol.*13 no. 47/48, 2014, p. 192

Precisely, the misapplication of the EU's funds or assets should be undertaken for purposes other than those for which they were originally granted.[7]

Moreover, in the context of the second type of this crime concerning procurement-related expenditure, it should be pointed out that Directive (EU) 2017/1371 is recognized the same phenomenological forms of execution with the same special elements required for the existence of the fraud in the given case, as it the situation with the non-procurement-related expenditure. Therefore, it is about the following acts or omissions relating to: a) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the EU budget or budgets managed by the EU, or on its behalf; b) non-disclosure of information in violation of a specific obligation, with the same effect; or c) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the EU's financial interests. However, it is noteworthy that in respect of procurement-related expenditure it is prescribed one more element required in order to such conduct be considered as the fraud. What is meant here is the element of the intention specified in Directive (EU) 2017/1371 for the procurement-related expenditure, but not also for non-procurement-related expenditure. Thus, the procurement-related expenditure as the special form of the fraud should be considered as such only if it is committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the EU's financial interests.

Furthermore, the next phenomenological form of execution of the fraud is related to the area of revenue arising from value added taxes (hereinafter: VAT) own resources.[8] In this regard, three types of illegal acts are prescribed in relation to: a) the use or presentation of false, incorrect or incomplete VAT-related statements or documents; b) non-disclosure of VAT-related information in violation of a specific obligation; c) the presentation of correct VAT-related statements.[9] However, it should be noticed that the mere fact of executing the abovementioned acts of execution is not sufficient for this existence of this crime, since the existence of others elements is required in order to be treated such conduct as the fraud. Therefore, in the respect of the use or presentation of false, incorrect or incomplete VAT-related statements or documents and non-disclosure of VAT-related information in vio-

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7 Sánchez D., *(a) The Directive on the Fight against Fraud to the Union's Financial Interests and its Transposition into the Spanish Law*, Perspectives on Federalism, *vol.* 11, no. 3, 2019, p. 128

8 OECD, *Improving Co-operation between Tax Authorities and Anti-Corruption Authorities in Combating Tax Crime and* Corruption, OECD, Paris, 2018, pp. 21-33

9 Maesa, C., *Directive (EU) 2017/1371 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law: A Missed Goal?*, European papers: a journal on law and integration, *vol.* 3, no. 3, 2018, p. 1461-1462

lation of a specific obligation as well, the additional elements is the consequence. Precisely, the committing of these two acts should have as an effect the diminution of the resources of the EU budget. Diversely, for the third phenomenological form of execution of the fraud the required element is the specific purpose of committing this crime meaning that the presentation of correct VAT-related statements should be undertaken for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.[10]

Finally, regarding the fourth phenomenological form of execution of the fraud, it should be recalled that is related to revenue other than revenue arising from VAT own resources. In this sense, three ways of execution are prescribed in relation to: a) the use or presentation of false, incorrect or incomplete statements or documents; b) non-disclosure of information in violation of a specific obligation and c) misapplication of a legally obtained benefit. As it was the case with the previous illegal forms, also in this regard the mere fact of executing the abovementioned acts of execution is not sufficient for this existence of this crime, since the existence of others elements is required in order to be treated such conduct as the fraud. Nevertheless, in this case for all three ways of execution are prescribed the same special element which is referred to the special consequence, required for the existence of the crime. So, the committing of these acts should have as its effect the illegal diminution of the resources of the EU budget or budgets managed by the EU, or on its behalf.

2.2. OTHER CRIMINAL OFFENCES AFFECTING THE EU'S FINANCIAL INTERESTS

By protecting EU's financial interests from other criminal offences, Directive (EU) 2017/1371 in consonance with Article 4 deals with three types of criminal behavior including: 1) money laundering; 2) passive and active corruption and 3) misappropriation. The essential element of money laundering is prescribed by Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing[11], while the elements of other two abovementioned criminal offenses are contained in Directive (EU) 2017/1371. According to Article 1 of Directive (EU) 2015/849, terrorist

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[10] Tudor, G., *Criminalizing fraud affecting the European Union's financial interests by diminution of VAT resources*, Juridical Tribune, *vol*. 9, no. 1, 2019, p.142

[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 05 June 2015, (hereinafter: Directive (EU) 2015/849)

financing means the provision or collection of funds, by any means, directly or indirectly, with the intention that they be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of terrorist offences.[12] On the other hand, it is worthwhile mentioning that in the context of money laundering there are four types of conduct, which when committed intentionally, shall be regarded as this crime.[13] The first type of conduct covered by this Directive includes the acts of the conversion or transfer of property. In order to be considered illegal such conduct must include the elements of specific knowledge and specific purpose of committing this crime. Namely, this act of execution should be conducted with the knowledge that such property is derived from criminal activity or from an act of participation in such activity and for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action. Furthermore, the second type of conduct covers situations of concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property. Also, in this case the additional element is required regarding the specific knowledge. In this sense, the perpetuator should act knowing that such property is derived from criminal activity or from an act of participation in such an activity. Finally, the next type of conduct is related to acts of the acquisition, possession or use of property.[14] The additional element in respect of knowledge is applicable also to this situation, but with the difference that such knowledge of perpetuator should exist at the time of receipt of property deriving from criminal activity or from an act of participation in such an activity. Finally, last type of conduct covers different situations such as participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the abovementioned actions.[15] The analyzed essential elements required for the consideration of an act of money laundering as such, in accordance with Directive (EU) 2015/849, however, are not sufficient for the purpose of Directive (EU) 2017/1371. In other words, in order to be regarded one conduct as money laundering, except this elements prescribed by Directive (EU) 2015/849, in the respect of Directive (EU) 2017/1371, it is required that

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12 Finn, H., *The fifth anti-money laundering and terrorist financing directive (AML 5)-Key aspects and changes,* Arendt & Medernach, Luxembourg, 2018, p. 1

13 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, pp. 108-113

14 Paunović, N., *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*, Duić, D.; Petrašević, T.; Novokmet, A. (eds.), EU and Member States – Legal and Economic Issues, Faculty of Law, Josip Juraj Strossmayer University of Osijek, Osijek, 2019, p. 662

15 Fletzberger, B., *5th Anti-Money Laundering Directive – a summary of the main points*, PayTechLaw, 2018, p. 1

property derived from money laundering is acquired by some of offenses covered by this Directive.[16]

On the other side, in accordance with Article 4 paragraph 2, regarding corruption as the form of other criminal offences affecting EU's financial interests, it is noteworthy that Directive (EU) 2017/1371 makes the difference between passive and active form of this crime.[17] In that sense passive corruption means the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the EU's financial interests. On the other hand, active corruption means the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the EU's financial interests. Ultimately, as reported by Article 4 paragraph 3, Directive (EU) 2017/1371 deals with the misappropriation as the form of other criminal offences affecting EU's financial interests. According to this Directive, misappropriation means the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the EU's financial interests.[18]

As we can notice, the common element in the respect of all three crimes abovementioned is that the perpetuator or passive subject can be public official. For that reason, it was required to define who should be considered as public official. In this regard, in Article 4 paragraph 4 Directive (EU) 2017/1371 defines two categories of person which shall be regarded as public official. Thus, the public officer is not only EU official or a national official, including any national official of another Member State and any national official of a third country, but also any other person assigned and exercising a public service function involving the management of or decisions concerning the EU's financial interests in Member States or third countries. Bearing in mind that the terms of EU official and a national official, include a lot of different types of official, it was supposed to precise the

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16 Savona, E.; Riccardi, M., *Assessing the risk of money laundering: research challenges and implications for practitioners*, European Journal on Criminal Policy and Research, 2019, *vol*. 25, no. 1, pp. 1-4

17 Fight Against Corruption, [https://ec.europa.eu/info/sites/info/files/file_import/european-semester_thematic-factsheet_fight-against-corruption_en_0.pdf], p. 2, accessed on 15. April 2020

18 Sánchez, D., *(b), The European Union Criminal Policy against Corruption: Two Decades of Efforts*, Politica Criminal, *vol* 14, no. 27, 2019, p. 531

meaning of these notions. Thus, it is specified that under the term of EU official it is meant not only a person who is: an official or other servant engaged under contract by the EU within the meaning of so called Staff Regulations, but also a person who is seconded to the EU by a Member State or by any public or private body, who carries out functions equivalent to those performed by EU officials or other servants. On the other side, it is determined that the term of national official shall be understood by reference to the definition of official or public official in the national law of the Member State or third country in which the person in question carries out his or her functions. Although, at the first glance, it appears that the notion of national official is prescribed in a general manner and without any specific details and criteria regarding how Member States should define this notion, it is not the case, since Directive (EU) 2017/1371 provides additional elements specifying who should be understood as the national official. Thus, the term national official shall include any person holding a legislative, an executive, administrative or judicial office at national, regional or local level. However, this is only a tentative, non-binding definition, since in the case of proceedings involving a national official of a Member State, or a national official of a third country, initiated by another Member State, the latter shall not be bound to apply the definition of national official, except insofar as that definition is compatible with its national law.

3. NEW EU LEGAL MEASURES CONCERNING THE POSSIBILITIES FOR THE ACCESS TO FINANCIAL INFORMATION OR TO OTHER INFORMATION AND THE EXCHANGE OF INFORMATION

Since the prevention, detection, investigation or prosecution of abovementioned serious criminal offences affecting EU's financial interest is not enough effective without special legal measures for the access to and the use of financial information and bank account information by competent authorities, and consequently for the exchange of such information, it the following lines it will be analyzed the new EU legal approach in this area. In the context of the special rule concerning the access to relevant information, it should be cleared that Directive (EU) 2019/1153 pursuant to Article 2 makes a difference between three types of information including: 1) financial information; 2) law enforcement information and 3) bank account information. In the respect of the financial information it is important to note that it means any type of information or data, such as data on financial assets, movements of funds or financial business relationships, which is already held by Financial Intelligence Unit (hereinafter:FIUs) to prevent, detect and effectively combat serious crimes such as money laundering and terrorist fi-

nancing. On the other side, law enforcement information such as criminal records or information on investigations, means both any type of information or data which is already held by competent authorities in the context of preventing, detecting, investigating or prosecuting criminal offences and that information which is held by public authorities or by private entities but which is available to competent authorities without taking of coercive measures under national law. Finally, bank account information means information on bank and payment accounts and safe-deposit boxes contained in the centralized bank account registries.

3.1. ACCESS BY COMPETENT AUTHORITIES TO BANK ACCOUNT INFORMATION

By dealing with the issue of access by competent authorities to bank account information, Directive (EU) 2019/1153 covers three topics such as: 1) the access to and searches of bank account information by competent authorities (Article 4); 2) conditions for access and for searches by competent authorities (Article 5) and 3) monitoring access and searches by competent authorities (Article 6).[19]

Generally speaking, the power of competent national authorities to access to and search of, directly and immediately, bank account information is limited to the case when it is necessary for the performance of their tasks for the purposes of preventing, detecting, investigating or prosecuting a serious criminal offence or supporting a criminal investigation concerning a serious criminal offence, including the identification, tracing and freezing of the assets related to such investigation. Access and searches shall be considered to be direct and immediate, inter alia, including the situation where the national authorities operating the central bank account registries transmit the bank account information expeditiously by an automated mechanism to competent authorities, providing that no intermediary institution is able to interfere with the requested data or the information to be provided. However, Directive (EU) 2019/1153 specifies the additional elements required for the legal access. In this sense, access to and searches of bank account information shall be performed only on a case-by-case basis by the staff of each competent authority that have been specifically designated and authorized to perform those tasks. The staff of the designated competent authorities should maintain high professional standards of confidentiality and data protection, while at the same time should be appropriately skilled with technical and organizational measures for the security of the data. Finally, in the context of the protection of bank account information it is worthwhile mentioning that Directive (EU) 2019/1153

[19] EU directive gives greater access to financial information, [https://www.taxjournal.com/articles/eu-directive-gives-greater-access-to-financial-information], accessed 15. April 2020

deals with the issue of monitoring access and searches by competent authorities, prescribing that the authorities operating the centralized bank account registries should ensure that logs are kept each time designated competent authorities access and search bank account information. Furthermore, for the safety reasons, the data protection officers for the centralized bank account registries shall check the logs regularly, and make them available, on request, to the competent supervisory authority. In order to be protected against illegal uses and unauthorized access the logs shall be used only for data protection monitoring, including checking the admissibility of a request and the lawfulness of data processing, and for ensuring data security. Therefore, they shall be erased five years after their creation, unless they are required for monitoring procedures that are ongoing.

3.2. EXCHANGE OF INFORMATION BETWEEN COMPETENT AUTHORITIES AND FIUS, AND BETWEEN FIUS

Approaching to the consideration of exchange of information, Directive (EU) 2019/1153 recognizes four types of requests including the following: 1) requests for information by competent authorities to an FIU (Article 7); 2) requests of information by an FIU to competent authorities (Article 8); 3) requests for the exchange of information between FIUs of different Member States (Article 9) and 4) requests for the exchange of information between competent authorities of different Member States (Article 10).[20]

In the respect of the requests for information by competent authorities to an FIU, it is important to stress that each FIU at the EU level is required to cooperate with its designated competent authorities in order to be able to reply, in a timely manner, to reasoned requests for financial information or financial analysis under the following two conditions.[21] One the one side, it is necessary that financial information or financial analysis is requested on a case-by-case basis, while, on the other side the request should be motivated by concerns relating to the prevention, detection, investigation or prosecution of serious criminal offences. This is important to stress out because any use for purposes beyond those originally approved shall be made subject to the prior consent of that FIU, which shall appropriately explain why refused to reply to a request. Therefore, in the following situations, if these conditions are not fulfilled the FIU shall be under no obligation to comply with the request for information: 1) if there are objective grounds for assuming

[20] Wahl, T., *Commission: Need for Reinforced FIU Cooperation*, [https://eucrim.eu/news/commission-need-reinforced-fiu-cooperation/], accessed 15. April 2020

[21] Nunzi, A., *Exchange of Information and Intelligence among Law Enforcement Authorities a European Union Perspective,* Revue internationale de droit penal*, vol.* 78, no. 1-2, 2007, pp. 143-151

that the request for such information would have a negative impact on ongoing investigations or analyses, or 2) in exceptional circumstances, if disclosure of the information would be clearly disproportionate to the legitimate interests of a natural or legal person or 3) if disclosure of the information would be irrelevant with regard to the purposes for which it has been requested. Finally, in this regards, it should be noted that the designated competent authorities may process the financial information and financial analysis received from the FIU for the specific purposes of preventing, detecting, investigating or prosecuting serious criminal offences other than the purposes for which personal data are collected. This option is in accordance with Article 4 paragraph 2 of Directive (EU) 2016/680 and because of that, it should be permitted in so far as: 1) the controller is authorized to process such personal data for such a purpose and 2) processing is necessary and proportionate to the purpose of preventing, detecting, investigating or prosecuting serious criminal offences.[22] Reversely, Directive (EU) 2019/1153 includes the situations where requests of information is made by an FIU to competent authorities, obliging its designated competent authorities to reply in a timely manner to requests for law enforcement information made by the national FIU on a case-by- case basis, where the information is necessary for the prevention, detection and combating of money laundering, associate predicate offences and terrorist financing.

Furthermore, Directive (EU) 2019/1153 covers situations which include the exchange of information between FIUs of different Member States. The exchange of information in this sense it possible under three conditions: 1) the exchange of financial information or financial analysis should be relevant for the processing or analysis of information related to serious criminal offenses; 2) in the given case it should be about exceptional and urgent circumstances which requires the exchanges of information among FIU's, and 3) FIUs should exchange such information promptly. Finally, Directive (EU) 2019/1153 regulates the situation including exchange of information between competent authorities of different Member States. The exchange of information obtained from the FIU of their Member State between competent authorities is applicable under the following conditions: 1) upon request and on a case-by-case basis and 2) if the financial information or financial analysis is necessary for the prevention, detection and combating of serious criminal offenses. In this regard, it should be emphasized that designated

[22] Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, Official Journal of the European Union, L 119/89 of 04 May 2016

competent authorities may use the obtained financial information or financial analysis only for the purpose for which it was sought or provided, since any other use of that information for purposes other than those originally approved is made subject to the prior consent of the FIU providing the information.[23]

3.3. EXCHANGE OF INFORMATION WITH EUROPOL

By regulating the issue considering the exchange of information with Europol, Directive (EU) 2019/1153 in accordance with Article 11 and 12 makes a difference between two situations including: 1) the exchange of bank account information to Europol and 2) the exchange of information between Europol and FIUs. In the respect of first situation it may be noted that competent authorities are entitled to reply, through the Europol national unit or by direct contacts with Europol, to duly justified requests made by Europol related to bank account information on a case-by-case basis. Ultimately, under the same conditions each FIU, in the context of the exchange of information between Europol and FIUs, is entitled to reply to duly justified requests made by Europol.

4. INTERNATIONAL STANDARDS FOR THE PROTECTION OF FINANCIAL SYSTEM BY MEANS OF CRIMINAL LAW

Bearing in mind the fact that the protection of the financial system by means of criminal law through the prevention, detection and investigation of fraud and other criminal offences targeting financial interests, cannot be sufficiently achieved only by the Member States with individual measures adopted by them, it will be also taken into consideration significant improvements achieved in this area at international level, especially those made by Financial Action Task Force (hereinafter: FATF). [24] When it comes to the issue of the exchange of information relevant for the protection of the financial system against fraud and other criminal offences targeting financial interests it should be noted that FATF recognizes four types of exchange applicable to specific forms of international cooperation including the following: 1) the exchange of information between FIUs; 2) the exchange of information between competent authorities; 3) the exchange of information between law enforcement authorities and 4) the exchange of information

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[23] Quintel, T., *Follow the Money, if you can Possible solutions for enhanced FIU cooperation under improved data protection rules*, Law Working Paper Series Paper, *vol.* 1, 2019, pp. 6-8

[24] 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

between non-counterparts.[25] Generally speaking, this four types of exchange it should be divided into two broader groups, covering on the one side exchange of information between counterparts, and on the other side exchange of information between non-counterparts.

However, before further analyze of this issue, it seem compulsory to make a short consideration of principles applicable to all forms of international cooperation. First of all, it should be mentioned that when making requests for cooperation, authorities which take part in the exchange of information should make their best efforts to enable a timely and efficient execution of the request, as well as the foreseen use of the information requested. Upon request, requesting authorities should provide feedback to the requested competent authority on the use and usefulness of the information obtained. Furthermore, authorities should not place unreasonable or unduly restrictive conditions in the context of the exchange of information, by refusing a request for assistance for example on the grounds that laws require financial institutions to maintain secrecy or confidentiality. Moreover, it should be underlined that exchanged information should be used only for the purpose for which the information was sought or provided. Otherwise, any dissemination of the information to other authorities or third parties, or any use of this information for administrative, investigative, prosecutorial or judicial purposes, beyond those originally approved, should be subject to prior authorization by the requested authority. At a minimum, authorities should maintain appropriate confidentiality for any request for cooperation and the information exchanged, protecting the integrity of the exchanged information in the same manner as they would protect similar information received from domestic sources. In order to fulfill this duty, it should be established controls and safeguards to ensure that information exchanged by authorities is used only in the manner authorized. For that reason, requested authorities may, as appropriate, refuse to provide information if the requesting competent cannot protect the information effectively. These general principles should be applicable to all forms of exchange of information between counterparts or non-counterparts. [26] To start with the exchange of information between FIUs.

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[25] FATF Recommendation Interpretive Note to Recommendation 40 (Other Forms Of International Cooperation) See in FATF (2012-2019), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, FATF, Paris, 2019, pp. 108-110

[26] FATF (a), *ibid.*, pp. 107-108

4.1. THE EXCHANGE OF INFORMATION BETWEEN FIUS

In the respect with the exchange of information between FIUs, it should be emphasized that when requesting cooperation, FIUs should make their best efforts to provide complete factual, and, as appropriate, legal information, including the description of the case being analyzed and the potential link to the requested country. Upon request and whenever possible, FIUs should provide feedback to their foreign counterparts on the use of the information provided, as well as on the outcome of the analysis conducted, based on the information provided. In this regard, it is important to note that FIUs should have the power to exchange two types of information: a) all information required to be accessible or obtainable directly or indirectly by the FIU and b) any other information which they have the power to obtain or access, directly or indirectly, at the domestic level, subject to the principle of reciprocity.[27] The FATF fulfills its tasks through three roles including: 1) receipt of the information; 2) analysis of the information and 3) dissemination of the information.

In the context of the first mentioned role of FATF, it should be noted that the FIU serves as the central agency for the receipt of information by reporting entities, which at a minimum should contain suspicious transaction reports as well as other information as required by national legislation such as cash transaction reports, wire transfers reports and other threshold-based declarations/disclosures.[28] By the receipt of information, obtained through the receipt function, the FIU can begin the use of such information in the context of the fulfilling its central role – making the analysis of received information. [29] While all information should be considered, the analysis may focus either on each single disclosure received or on appropriate selected information, depending on the type and volume of the disclosures received, and on the expected use after dissemination. During the stage consisting on making an analysis, the FIU can use analytical software to process information more efficiently and assist in establishing relevant links. However, such tools cannot fully replace the human judgement element of analysis. In this regard, it is worth mentioning that FIUs conducts usually the following two types of analysis: 1) operational analysis and 2) strategic analysis. One the one side, operational analysis means the use of available and obtainable information for the subsequent purposes: a) to identify specific targets (e.g. persons, assets, criminal networks and associations), b) to follow the trail of particular activities or transactions, and c)

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27 *Ibid.*, p. 108

28 Financial Intelligence Units, *An Overview, International Monetary Fund*, Washington, D.C, 2004, pp. 42-46

29 Scherrer, A., *Fighting tax crimes – Cooperation between Financial Intelligence Units*, European Union, Brussels, 2017, pp. 19-20

to determine links between those targets and possible proceeds of crime. One the other side, strategic analysis covers the use of available and obtainable information, including data that may be provided by other competent authorities for the succeeding purposes: a) to identify trends and patterns related with the crime; b) to determine threats and vulnerabilities related with the crime and c) to establish policies and goals for the FIU. Therefore, in order to conduct proper analysis, the FIU should have access to the widest possible range of financial, administrative and law enforcement information, including information from open or public sources, as well as relevant information collected and/or maintained by, or on behalf of, other authorities and, where appropriate, commercially held data.[30] The last role of FIU is related to the dissemination of the information meaning that this body should be able to disseminate spontaneously or upon request information and the results of its analysis to relevant competent authorities. In connection with this, it is also noteworthy that there are two modality for the dissemination of information: 1) spontaneous dissemination and 2) dissemination upon request. The spontaneous dissemination means that the FIU should be able to disseminate information and the results of its analysis to competent authorities when there are grounds to suspect the existence of a crime, allowing the recipient authorities to focus on relevant information. On the contrary, dissemination of required information upon request means that FIU should respond to the demand of requesting authority, however, the final decision in this case whether the required information will be exchanged or not depends fully on the decision made by the FIU.[31]

4.2. EXCHANGE OF INFORMATION BETWEEN COMPETENT AUTHORITIES

Efficient cooperation between competent authorities aims at facilitating effective supervision of financial institutions. For that reason, competent authorities should exchange the financial information related to or relevant for purposes of prevention, detection and investigation of fraud and other crimes affecting financial interests. In that context, competent authorities should be able to exchange with foreign counterparts' information domestically available to them, including information held by financial institutions.[32] The information relevant for purposes of prevention, detection and investigation of fraud and other crimes affecting

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30 Stroligo, K.; Hsu, C.; Kouts, T., *Financial Intelligence Units Working With Law Enforcement Authorities and Prosecutors*, International Bank for Reconstruction and Development / The World Bank, Washington, DC, 2018, p. 12

31 FATF Recommendation Interpretive Note to Recommendation 29 (Financial Intelligence Units), See in FATF (a), note 25, pp. 97-98

32 FATF (b), Consolidated FATF Standards on Information Sharing, FATF 2016, pp. 28-29

financial interests includes the following: a) regulatory information, such as information on the domestic regulatory system, and general information on the financial sectors; b) prudential information, such as information on the financial institution's business activities, beneficial ownership, management, and fit and properness, and c) other relevant information, such as information on internal procedures and policies of financial institutions, customer due diligence information, customer files, samples of accounts and transaction information. In order to facilitate effective group supervision competent authorities should be able to conduct inquiries on behalf of foreign counterparts, and, as appropriate, to authorize or facilitate the ability of foreign counterparts to conduct inquiries themselves in the country. However, any dissemination of exchanged information or use of that information beyond purposes originally approved, should be subject to prior authorization by the requested competent authorities, unless the requesting competent authorities is under a legal obligation to disclose or report the information. In such cases, at a minimum, the requesting financial supervisor should promptly inform the requested authority of this obligation.[33]

4.3. EXCHANGE OF INFORMATION BETWEEN LAW ENFORCEMENT AUTHORITIES

In the respect of the exchange of relevant information for purposes of prevention, detection and investigation of fraud and other crimes affecting financial interests, it should be also noted that law enforcement authorities should exchange domestically available information with foreign counterparts for intelligence or investigative purposes, including the identification and tracking of the proceeds and instrumentalities of crime.[34] In order to be able to fulfill their tasks law enforcement authorities are authorized: 1) to use any investigative techniques available in accordance with their domestic law, to conduct inquiries and obtain information on behalf of foreign counterparts; 2) to govern any restrictions on use imposed by the requested law enforcement authority during law enforcement cooperation, such as the agreements between Europol and individual countries; 3) to form joint investigative teams to conduct cooperative investigations; 4) when necessary, to establish bilateral or multilateral arrangements to enable such joint investigations and 5) to join and support existing law enforcement networks, and develop bilateral contacts with foreign law enforcement agencies, including placing liaison officers abroad, in order to facilitate timely and effective cooperation.[35]

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33 FATF (a), note 25, pp. 108-109

34 Hollywood, J.; Winkelman, Z., *Improving Information-Sharing Across Law Enforcement: Why Can't We Know?*, Random corporation, California, 2015, pp. 4-5

35 FATF (a), note 25, pp. 109-110

4.4. EXCHANGE OF INFORMATION BETWEEN NON-COUNTERPARTS

The exchange of information does not only include the cooperation with counterparts, but also with non-counterparts. In this regard, competent authorities should be able to permit a prompt and constructive exchange of information directly or indirectly with non-counterparts, applying the general principles of cooperation abovementioned. By acting under these principles, indirect exchange of information refers to the requested information passing from the requested authority through one or more domestic or foreign authorities before being received by the requesting authority. Since this type of the exchange of information includes the existence of intermediaries, such an exchange of information and its use may be subject to the authorization of one or more competent authorities of the requested country. In addition, the competent authority that requests the information should always make it clear for what purpose and on whose behalf the request is made.[36]

5. THE NEW NATIONAL FRAMEWORK IN AREA OF THE PROTECTION OF FINANCIAL SYSTEM FROM ILLEGAL ACTIVITIES AFFECTING THE FINANCIAL INTERESTS

In the Republic of Serbia in 2017 is adopted new Law on the Prevention of Money Laundering and the Financing of Terrorism[37] (hereinafter: the Law), amended in 2019.[38] Bearing in mind that, this part of the paper is dedicated to the analysis of the national framework in the area of the exchange of information relevant for prevention, detection and investigation of these crimes affecting financial interests. Immediate and direct access to the relevant information for the detection of financial crimes is an indispensable source of data for successful criminal investigation as well as for the timely identification, tracing and freezing of related assets in view of their confiscation. In that sense, the new adopted EU framework represented in Directive (EU) 2019/1153 is of special importance for the strengthening of the framework of the Republic of Serbia in the context of accession and negotiations process to EU.

However, before the analysis of the special provision dedicated to different types of the exchange of information relevant for the protection of the financial system, it is worthwhile noting to analyze the definition of money laundering as well as

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36 *Ibid.*, p. 110

37 Law on the Prevention of Money Laundering and the Financing of Terrorism, Official Gazette of Republic of Serbia, Official Gazette of Republic of Serbia, No. 113/2017 and 91/2019

38 See more Milošević, M., *Novi Zakon o sprečavanju pranja novca i finansiranja terorizma*, *Časopis* Izbor sudske prakse, no. 3, 2018, pp. 9-13

terrorist financing.[39] According to Article 2 of the Law, money laundering means the following: 1) conversion or transfer of property acquired through the commission of a criminal offence; 2) concealment or misrepresentation of the true nature, source, location, movement, disposition, ownership of or rights with respect to the property acquired through the commission of a criminal offence; 3) acquisition, possession, or use of property acquired through the commission of a criminal offence.[40] On the other side, terrorism financing means the providing or collecting of property, or an attempt to do so, with the intention of using it, or in the knowledge that it may be used, in full or in part: 1) in order to carry out a terrorist act; 2) by terrorists; 3) by terrorist organizations.[41] In this regard, it should be noted that this definition is not fully in line with the definition of money laundering adopted in the Criminal Code of the Republic of Serbia. According to this Code, money laundering means the following acts: a) converting or transfering property originating from a criminal activity, with intent to conceal or misrepresent the unlawful origin of the property; b) concealing and misrepresenting facts on the property originating from a criminal offence; c) obtaining, keeping or using property with the knowledge, at the moment of receiving, that such property originates from a criminal offence. In other words, the Criminal Code stipulates that the property that is the subject of money laundering does not have to originate from a predicate criminal offense, but prescribes that property that is the subject of money laundering should originate from a criminal activity. By adopting this solution the scope of its application has been extended meaning that a previous (predicate) offense does not have to be individually determined in the given case, enabling criminal prosecution for this crime without a prior conviction for a predicate criminal offense. Therefore, it is sufficient for criminal prosecution for this crime to establish that the money or property was acquired through criminal activity.[42]

Moreover, it should be noted that the framework of the Republic of Serbia regarding the rules referred to in the Criminal Code is harmonized with the relevant EU framework. Precisely, the meaning of money laundering prescribed in Criminal Law is in compliance with the solutions referred to in 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 as well as Directive (EU) 2018/843 of the European Parliament and of

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39 Sinanović, B., *Pranje novca*, Bilten sudske prakse Vrhovnog suda Srbije, no. 2, 2011, pp. 61-68

40 See more in Važić, N. *Pranje Novca- Materijalni I Procesni Aspektu Međunarodnom I Domaćem Zakonodavstvu*, Bilten sudske prakse Vrhovnog suda Srbije, no. 2, 2008, pp. 114-141

41 Lukić T., *Borba Protiv Pranja Novca I Finansiranja Terorizma U Republici Srbiji*, Zbornik radova Pravnog fakulteta u Novom Sadu, no. 2, 2010, p. 203

42 Criminal Code of Republic of Serbia, Official Gazette of Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019

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.[43]

In the context of harmonization with the abovementioned solutions Law on seizure and confiscation of the proceeds from crime was adopted in 2013. By adopting this Law the possibility for international cooperation and the exchange of information was extended including the group of criminal offenses against financial interests. In this sense, of special importance are those rules related to the organisation and jurisdiction of the Financial Intelligence Unit. This unit processes received and sent requests obtained through channels of international exchange of information, in order to detect property arising from a criminal offense and to confiscate it temporary or permanent. Furthermore, regarding the issue of competent authorities authorised for the confiscation or seizure of assets of money laundering it should be mentioned that in the Republic of Serbia these tasks perform The Directorate for Management of Seized and Confiscated Assets under Ministry of Justice. The Directorate manages the seized or confiscated proceeds from crime, objects resulting from the commission of a criminal offence and material gain obtained by a criminal offence. Also, this authority conducts professional assessment of the seized proceeds from crime, sells provisionally the seized proceeds from crime, administers funds thus obtained, and performs other tasks in accordance with this Law.[44]

When it comes to the regulation of corruption it should be mentioned that in the Republic of Serbia Law on the Organisation and Jurisdiction of Government Authorities on the Suppression of Organised Crime, Terrorism and Corruption was adopted in 2016 prescribing the list of criminal offenses against official duty under the regime of this Law. In the context of the exchange of the information applied to these offences, it is worthwhile noting that this Law has introduced several new bodies in the struggle against corruption such as: 1) Task Forces; 2) Financial Forensic Divisions; 3) Connecting Officials. Task Forces are special organisational structures within each Public Prosecutor's office with the aim to deal with the process of prosecuting complex cases within its jurisdiction. Furthermore, Financial Forensic Divisions are composed of state officers who shall be re-

[43] 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; 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

[44] Law on seizure and confiscation of the proceeds from crime Official Gazette of Republic of Serbia, No. 32/2013, 94/2016 and 35/2019

sponsible to analyse financial data and assist public prosecutors to decide whether there are sufficient grounds to launch criminal proceedings. The term connecting officials means government officials employed in some governmental bodies such as e.g. Customs Office, National Bank of Serbia etc. who shall be responsible to keep communication with public prosecutors and to provide them with necessary information.[45]

As the recognition of these achievements, Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (hereinafter: Moneyval) in its last report in 2019 regarding the position of Republic of Serbia has noticed significant progress in strengthening the framework for combating money laundering and terrorist financing, meaning that there are no areas in which Serbia would be assessed as non-compliant. In the forthcoming period, according to Moneyval Serbia should report on further progress in strengthening the implementation of adopted measures against money laundering and terrorist financing.[46]

Finally, it should be added that although in the framework of the Republic of Serbia there is still no regulation concerning criminal law protection against criminal offences affecting EU financial interest, there is the national anti-fraud strategy to protect the EU's financial interests for the period from 2017 to 2020.[47] In the context of the exchange of relevant information it is worthwhile mentioning that the special anti-fraud coordination service (known as: AFCOS) under the Ministry of Finance was established with the aim to cooperate with the European Commission during investigations and to report to the Commission on irregularities and suspected fraud cases.[48]

5.1. TYPES OF THE EXCHANGE OF INFORMATION RELEVANT FOR THE PROTECTION OF THE FINANCIAL SYSTEM

When it comes to the issue of the exchange of information relevant for the protection of the financial system against criminal offences targeting financial interests,

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45 Law on the Organisation and Jurisdiction of Government Authorities on the Suppression of Organised Crime, Terrorism and Corruption Official Gazette of Republic of Serbia, No. 94/2016 and 87/2018

46 Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism Anti-money laundering and counter-terrorist financing measures, Serbia, 3rdEnhanced Follow-up Report December 2019

47 National anti-fraud strategy to protect the EU's financial interests from the period 2017-2020, Official Gazette of Republic of Serbia, No. 98/2017

48 European Commission, Commission Staff Working Document Serbia 2019 Report, European Commission, Brussels, 2019 p. 95

it should be noted that the Law recognizes six types of the exchange applicable to specific forms of internal as well as international cooperation including the following: 1) requesting data from the obliged entities (Article 73); 2) requesting data from the competent state authorities and holders of public authority (Article 74); 3) requesting data from the law enforcement authority (Article 77); 4) dissemination of data to competent authorities (Article 78); 5) requesting data from foreign countries (Article 80); 6) dissemination of data to competent state authorities of foreign countries (Article 81). Moreover, it should be pointed out that in accordance with Article 72 of the Law like the law enforcement authority the Administration for the Prevention of Money Laundering (hereinafter: the Administration) is established, as an administrative authority under the Ministry competent for finance. Among other duties, the Administration has authorized to collect, process, analyze and disseminate to the competent authorities obtained information, data and documentation.

In the context of requesting data from the obliged entities, such as banks and other financial institutions, it is noteworthy that the Administration may submit the request if only there are reasons to reasonable grounds for the suspect a crime affecting financial interests. If the Administration finds that there are reasons to suspect criminal offences targeting financial interests in respect to certain transactions or persons, it may pursuant to Article 76 of the Law issue a written order to the obliged entity to monitor all transactions or business operations of such persons that are conducted in the obliged entity. The obliged entity is required to inform the Administration of each transaction or business operation within the deadlines specified in the order. Unless otherwise provided in the order, the obliged entity is required to report each transaction or business operation to the APML before a transaction or a business activity is conducted, as well as to indicate in the notification the deadline for the transaction or business operation to be completed. If due to the nature of a transaction or a business operation or for other justified reasons the obliged entity cannot act within the deadlines specified in the order it is required to inform the Administration of the transaction or operation right after they are conducted, and the following working day at the latest, providing reasons in the notification as to why it did not act in line with the order. The measure of monitoring of customer's financial activities shall last for three months from the day when the order was issued, and may be extended by one month at a time, but for no more than six months following the day the order was issued.

Anyway, under these conditions, as reported by Article 73 of the Law, the Administration may request from the obliged entity the following type of information:1) data from the customer and transaction records kept by the obliged entity; 2) information about the customer's money and assets held with the obliged entity;

3) data on turnover of customer's money or assets by the obliged entity; 4) data on other business relations of a customer established by the obliged entity; 5) other data and information necessary for detecting or proving the crime concerning a persons to whom there are reasons to suspect committing a crime affecting financial interests. In respect of this type of the exchange of information, the special significance has the provision on the deadline for the respond of obliged entities to the request of the Administration. In that context, it should be noted that in accordance with the Law it is prescribed both options, including setting shorter and longer deadlines, different from the deadline which was initially determined. Therefore, the general rules is that the obliged entity is required to provide the Administration with required data, information and documentation without delay but no later than eight days following the reception of the request. However, if it is necessary for deciding in urgent cases the Administration may set in its request a shorter deadline for providing data, information and documentation. Reversely, only due to the size of documentation or for other justified reasons, the Administration may set a longer deadline for providing documentation, or inspect the documentation on the obliged entity's premises.

Furthermore, in order to assess whether there are reasons to suspect criminal offences targeting financial interests in relation to certain transactions or persons, in line with Article 74 of the Law the Administration may request data, information and documentation necessary for detecting and proving these crimes, from the state authorities, organizations and legal persons entrusted with public authorities. These authorities and organizations are required to provide the Administration in writing form with requested data, within eight days following the receipt of the request. In the case of this type of the exchange of information is not stipulated the possibility for the extension of deadline, but only the shortening of deadline. In this sense, the Administration may request, in urgent cases, the receipt of required data within the deadline shorter than eight days.

In the respect of the exchange of information from the law enforcement authority, it is important to stress that, in consonance with Article 77 of the Law, if there are reasons for suspicion in respect of certain transactions concerning criminal offences targeting financial interests the state authority such as court, public prosecutor and police may, in a written and justified form, request from the Administration data and information necessary for proving these criminal offences. Therefore, it should be underlined that the Administration shall refuse the request if they do not justify the reasons of suspicion of criminal offences targeting financial interests, as well as in cases when it is obvious that such reasons do not exist, by informing the initiator in writing of the reasons why it refused the request. Moreover, as stated in Article 78, in order to be able competent state authorities to undertake

measures within their competence it is prescribed the possibility which covers situation of dissemination of data to competent authorities, which is applicable in cases where the Administration finds, based on the obtained data, information and documentation, that there are reasons to suspect criminal offences targeting financial interests in relation to a transaction or person.

Ultimately, the last two types of the exchange of relevant information are related to the international cooperation. One the one hand, the Law deals with the request of data from foreign countries. Thus, in the sense of Article 80, it should be noticed that the Administration is authorized to request data, information and documentation necessary for the prevention and detection of criminal offences targeting financial interests from the competent authorities of foreign countries. However, it is determined that the Administration may use obtained data, information and documentation only for the purposes for which they are sought. If there is a need to send requested and obtained data to another state authority, the Administration shall demand prior consent of the state authority of the foreign country which provided that data. This provision is justified since it should be cleared that the Administration may not use obtained data, information and documentation contrary to the conditions and restrictions determined by the state authority of the foreign country that provided that data. Reversely, in line with Article 81 it is determined situation of the dissemination of data to the competent state authorities of foreign countries. In that context, it is worthwhile noting that the Administration may disseminate data, information and documentation in respect to transactions or persons for whom there are reasons to suspect criminal offences targeting financial interests to the state authorities of foreign countries competent for the prevention and detection of these crime either at their written and justified request, or at its own initiative. However, it should be cleared that the Administration may reject the request if the dissemination of such data would compromise or could compromise the course of a criminal procedure in the Republic of Serbia, by informing in writing the state authority of the foreign country about the reasons for rejection. Finally, in the case of approval of dissemination of information, the Administration may set conditions and restrictions under which an authority of a foreign country is allowed to use requested data, information and documentation and further dissemination of information to any other authority of a foreign country may not be made without a prior consent of the Administration.

6. CONCLUSION

There has been a significant legislative action at the recent times at the EU level in the area of the protection of financial interests. By adopting Directive (EU)

2017/1371, the EU framework was enriched with the list of criminal offenses targeting and affecting EU financial interests. In this way, at EU level not only was prescribed various number of fraud scheme, but also other financial crimes, including money laundering, passive as well as active corruption, and misappropriation. However, regulation of substantive matters of significance for the prevention, detection and investigation of financial crimes was represented only required but not the sufficient step for combating this type of criminal activities. In other words, in the respect of proper and efficient fight against financial crimes there was a lack of legal possibilities for national and European authorities to access to relevant financial information as well as the lack of cooperation between them. What is meant here is that the adequate procedural rules for effective combating of this types of crime had not yet been adopted. On these grounds, by adopting of the Directive (EU) 2019/1153 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences in 2019, has approved a strong and coordinated response in the area of the protection of EU financial interests. Namely, this legal act has created new possibilities for the access by competent authorities to financial and other information and has established the special rules in the respect of the conditions for the exchange of information between competent authorities and financial intelligence units as well as between financial intelligence units and Europol. However, although in the recent period there have been significant improvements in the EU framework on the protection of the financial interests against financial crimes there is still a lack of effective implementation of adopted standards, in particular in the area of the exchange of relevant information in timely manner. Therefore, in order to be prepared for all applicable and new methods and techniques used by criminals and organized crime groups, it is extremely important that authorities constantly collect and exchange requested data regarding financial crimes. Precisely, the risk of the new threats in the area of the abuse of the financial system through fraud and other financial crimes requires application of the multinational approach in order to combat this phenomenon effectively, since it is unrealistic to expect that one or several countries, without others, will achieve any significant results in the respect of prevention, detection and investigation at the international level. Therefore, owing to the fact that the abuse of the financial system through financial crimes as a phenomenon cannot be fully eradicated, it seems compulsory to take into consideration significant improvements achieved in this area at international level. Hence, it should be aware that by working together the whole international community can achieve much more in the context of controlling this phenomenon.

To conclude, concerning the protection of financial interests, the EU framework is in compliance with existing international standards, introducing several remarkable provisions. 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 financial crimes. In the area of early detection of these crimes, the investigative focus should be on the recognition and analysis of indicators for identifying suspected transactions. The next recommendation for the adequate implementation of adopted measures on preventing financial crimes implies timely reporting and exchanging information of suspected transactions. Finally, the comprehensive response to the prevention of financial crimes includes as broad as possible cooperation between authorities including mutual support among national financial units, between the competent authorities and legal enforcement authorities or other authorities as well. Ultimately, following accomplished achievements at the EU level, the Republic of Serbia has undertaken appropriate legislative steps by adopting new framework, including the provisions on the exchange of information between relevant authorities for the purposes of prevention, detection and investigation of the crimes affecting financial interests. Therefore, when it comes to the Serbian Law, it can be noticed that national legislation is in compliance with the adopted EU framework and international standards in this area. In addition, in the respect of the exchange of relevant financial and other information, it seems that it provides broader possibilities for the effective internal and international cooperation.

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UDK 343.137.3(498)
Review article

REMEDIES FOR THE TRIAL *IN ABSENTIA*. THE RECENT ROMANIAN EXPERIENCES

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ABSTRACT

Accepting the fact that a person can be tried without being personally notified is one of the great concessions that the right to a fair proceeding makes to the public interest and the efectiveness of criminal trial. However, the remedy for such a possibility must be itself effective and it is one of the real challenges of the EU states. This is because sometimes it is very difficult to determine, objectively, whether a person has really been out of criminal proceedings or he is just letting it to be believed.

So, we are talking about a series of rights and interests in conflict. As we stated, the celerity of the proceedings, finding the truth, the security of the final decisions, the defense and the fair trial. All these problems are encountered when the issue of the judgment in absentia and its remedies are raised. So, the central goal of our paper is outlining the concept of contumacy and observing the Romanian legal order specificities.

In Romanian procedural system, the trial can be held in absentia, if the accused is not found at the legal or known residence. The prosecutor or the judge must perform reasonable efforts to find the offender, by carrying out investigations in the labor registers, or at the detention places. However, the person still can not be located by the authorities. The summons are communicated, and the procedure is legal even they are not personally received.

As a rule, in Romania, the importance of personal participation in criminal trials is very high. If the defendant is absent and found guilty, the judge has very less posibilities of sentencing without deprivation. The person identified by the police in any state is arrested and the question of his extradition is raised. In which cases Romanian system enables the reopening of the proceedings?

We will try to identify the effectiveness of this remedy in the pre-trial stage, in accordance with those retained by the ECHR (well-known Sejdovic. v. Italy, Colozza v. Italy) but also by the recently CJUE case-law (e.g. Pawel Dworzecki). We will identify the conditions provided by the Romanian law regarding, in particular, the personal summoning.

We also intend to analyze, briefly, the conclusions of a recent decision of the Romanian Constitutional Court, which requires that, after admitting the request to retrial, the file should resume from the moment of challenging the lawfulness of the investigation, which, in the Romanian system, is prior to the trial of the case.

***Keywords**: trial in absentia, personal summons, EAW, resumption of trial, preliminary chamber*

1. AVOIDANCE, INDIFFERENCE OR IGNORANCE?

The old scholars said that *"contumax pro convicto et confesso habetur"*. That means that the contumacy itself was a severe presumption of guilt, because it was accepted that only a culpable defendant avoids presence at his own criminal trial[1]. The fight of modern criminal law with this old *dictum* is far to be finished. The contemporary legislations try to face with this serious problem: the judgement *in absentia* and the rights of the person convicted in this special situation.

Whether it was absent from his own trial by avoidance, indifference or ignorance, the status of the convicted *in absentia* is seriously and certainly unfavorable. He will be faced, most of the times, if he is found and arrested, with a warrant for the execution of the custodial decision issued after a trial where he did not participate.

On one hand, deciding the destiny of a person without his presence seems to cast a shadow on the principle of fair trial and sometimes on the concept of justice itself. On the other hand, the requirement of personal presence of the accused poses a variety of practical problems, mainly concerning executability and inevitability of the punishment. Nevertheless, the absence of the main actor in a court drama always entails a challenge to the due process of law, and a need for proper remedies to address such a challenge[2].

The difficulty of the solution in these cases is precisely due to the origin of the contumacy. It is very difficult to assimilate the situation of the one who did not actually know that the authorities initiated a criminal investigation against him with the person who knew it, but avoided the investigation and the procedures. But we can go even further. Can we make reference to his subjective position with the offence that he is supposed to have committed? The answer is difficult.

First, we start from the assumption that a criminal offence was committed, and second that the authorities impute it to a person. It is possible that the subject has

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1 Dezza, E., *„Il granduca, i filosofi e il codice degli irochesi. Il principio contumax pro confesso habetur e la riforma leopoldina",* [https://riviste.unimi.it/index.php/irlh/article/view/12875], accessed on 14. April 2020

2 Augustyniak, B. *et al.*, *The concept of "a trial in absentia resulting in a decision" within the European Arrest Warrant framework*, [http://www.ejtn.eu/PageFiles/17290/WR%20TH-2018-01%20PL.pdf], accessed on 14. April 2020

the awareness of committing an unlawful act, assuming a possible investigation regarding it. However, he leaves the country or changes his residence, the consequences being unimportant to him.

On the other hand, the person may not have the consciousness of the illicit behaviour, being confident that he did not violate the criminal law, following his day-to-day activities naturally, although the authority initiates a criminal investigation against him. Finally, there is also the possibility that the person can find out about the initiation of criminal proceedings against him and yet he will not attend the hearings or the trial, avoiding them. This last case is usually the one where the right to reopen the procedures is hardly accepted.

Absence from the trial is seen in many situations as a liability sign. In some cases, this statement is real, but it cannot be converted into a presumption. Returning to the previous observations, the missing person is somehow automatically accused of a malicious attitude, of avoiding presence. For this reason, his guilt seems easier to argue for the judge. He does not show up for trial because he is guilty and he assumes a conviction. However, this reasoning is clearly in contradiction with the presumption of innocence that any accused in a criminal trial must benefit.

Even the word *contumacy* comes from the Latin *contumace* which has the meaning of "bold, disobedient, unsupported, which does not conform"[3]. Considering this status as a manifestation of contempt for justice or rebellion against authority is one of the old traditions of criminal trial, which only with serious difficulty the contemporary systems are trying to get rid of.[4] The state had to react more quickly, with a restrictive, severe procedure, with an energic judgment. Some more radical views considered the contumacy itself as a distinct crime.[5]

However, even in the modern period, some very interesting opinions were exposed. In a report of the Italian Parliamentary Commission for the revision of the Criminal Procedure Code of 1930, it was held in a radical opinion that "the re-judging of the convicted person is an exorbitant protection of the rights of the defendant, thereby favouring his hiding, setting barriers to criminal justice and infinite extensions in the procedure. Often re-judging is a real scandal, a mockery of justice, causing a new trial with diminished or deleted evidence, with excessive

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3 According to Cambridge dictionary, contumacy means „refusing to obey or respect the law in a way that shows contempt, [https://dictionary.cambridge.org/dictionary/english/contumacious], accessed on 14. April 2020

4 Pop, T.,*Drept procesual penal*, *vol*. IV, Tipografia Națională Cluj, 1948, pp. 320-321

5 Karas, E. I., *Reopening of proceedings in cases of trial in absentia: European legal Standards and Croatian law*, in: Duić, D.; Petrašević, T. (eds.), EU and comparative law issues and challenges series, vol. II, 2018, [https://hrcak.srce.hr/ojs/index.php/eclic/article/view/7113/4604], accessed on 14. April 2020

indulgence of judges, because too much time has elapsed since the crime was committed and repression is no longer necessary".[6]

It is a requirement of any legal system to decide its cases quickly. Very important issues are involved in this necessity. First, punishments must be applied close to the time of the commission of the crime for which the punishment is administered. If the punishment serves any purpose (deterrence, rehabilitation or retribution), it makes no sense to postpone its application without a reason. The sooner it is applied, the more efficient it becomes. Second, the trial, which is the only legal way to apply a punishment, would not function properly if the cases are decided long after the criminal conduct. Witnesses tend to forget about past actions, some of them move out of the city, and records get lost. In sum, it becomes more difficult for both the government and the defendant to collect evidence. Finally, if society has a legitimate interest in the resolution of criminal cases, it is obvious that a delay in trial and punishment does not help to fortify the confidence of the people in the judicial system. One way to avoid these negative consequences is a trial *in absentia* because it helps to prevent the defendants from manipulating the judicial system by deciding with their presence whether or not a case can by tried.[7]

2. A BRIEF OF THE ECTHR LEADING CASE-LAW

There are many international Courts that accept procedures *in absentia*. Maybe the most disputed are the international criminal Tribunals, but it is not our goal to analyse them.[8] The Court of Strasbourg, applying the Convention, ruled a series of cases in the field starting with the 80's of the last century.[9] Even if the member states have successfully succeeded in aligning a great part of their law to extend and clarify this procedure, the decisions, even if rarer, are not totally extinct.[10] The so-called "leading case" is *Colozza vs Italy.*[11]

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6 Manzini, V., *Tratatto di diritto procesuale penale italiano*, Torino, 1931-1932, *vol*. IV, p. 400

7 Tassara, L., *Trial in absentia: rescuing the "public necessity" requirement to proceed with a trial in the defendant's absence*, Barry Law review, *vol*. 12, Issue 1 Spring 2009, [https://lawpublications.barry.edu/cgi/viewcontent.cgi?article=1073&context=barrylrev], accessed on 14. April 2020

8 Zakerhossein, M.H.; De Brouwer A-M., *Diverse approaches to total and partial in absentia trials by international criminal tribunals*, Criminal Law Forum, 2015, [https://link.springer.com/content/pdf/10.1007/s10609-015-9257-0.pdf], accessed on 14. April 2020

9 Bârsan, C., *The European Convention of Human Rights, Commens by articles*, 2nd Ed., CH Beck, Bucharest, 2010, p. 499; Chiriță, R., *The European Convention of Human Rights, Comments and explanations*, CH Beck, Bucharest, 2008, p. 337

10 The case was summarized from the official page of the Strassbourg Court, [https://hudoc.echr.coe.int/eng#{"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]}], accessed on 14. April 2020

11 ECHR, Colozza v. Italy, App. 9024/80, judgment of 12 February 1985

Mr. Giacinto Colozza was born in 1924 and died in 1983 in prison, during the proceedings. We can say he did not survive to see his success in the Court. He was an Italian citizen and lived in Rome.

On 4 October 1973, the investigating judge issued a "judicial notification" intended to inform him of the opening of criminal proceedings against him. A bailiff attempted to serve it on Mr. Colozza at the address shown in the official records, but without success: he had moved and had omitted to inform the City Hall of his change of residence as required by law.

On 14 November 1973, after unsuccessful searches at the address, the investigating judge declared the accused untraceable (*irreperribile*), appointed an official defence lawyer for him and continued the investigations. Thereafter, in pursuance the Code of Criminal Procedure, all the documents which had to be served on the applicant were lodged in the registry of the investigating judge, the defence counsel being informed in each case.

On 20 May 1977, the public prosecutor's office issued an arrest warrant. Colozza was arrested at his home in Rome (at other adress than the official one). On the next day, he raised a "procedural objection" as regards this warrant and at the same time filed a "late appeal"

On 29 April 1978, the Rome Regional Court dismissed the "procedural objection" and ordered that the papers be sent to the Rome Court of Appeal for a ruling on the "late appeal".

Mr. Colozza maintained that he had been wrongly declared "latitante" and that the notifications of the summons to appear and of the extract from the judgment rendered by default were therefore null and void.

He explained that, as he had received notice to quit from his landlord at the end of 1971, he had left his flat in Via Fonteiana and, before finding a new one, had lived in a hotel. He pointed out that his new address (via Pian Due Torri) was known to the police since, on 12 March 1977, they had summoned him to the local police station for questioning; the same applied both to the Rome public prosecutor's office, which, on 7 October 1976 (that is to say, almost two months before adoption of the judgment), had sent him a "judicial notification" concerning other criminal proceedings, and to various public authorities, which had served documents on him, using the notification service of the Rome City Hall.

Court of Cassation finally dismissed his demands, it considered that Mr. Colozza had rightly been declared first to be "irreperibile" and then to be a "latitante".

The European Court recalled that the guarantees contained in paragraph 3 of Article 6 are constituent elements, amongst others, of the general notion of a "fair trial". In the circumstances of the case, the Court, whilst also having regard to those guarantees, considers that it should examine the complaint under paragraph 1, which provides: "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ... ."

The basic question is whether the combined recourse to the procedure for notifying persons who are untraceable (irreperibile) and to the procedure for holding a trial by default - in the form applicable to "latitanti", deprived Mr. Colozza of the right at a fair trial.

The Court said that although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the 6 Article taken as a whole show *that a person* "*charged with a criminal offence" is entitled to take part in the hearing.* Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", *and it is difficult to see how he could exercise these rights without being present.*

In this case, the Court does not have to determine whether and under what conditions an accused can waive exercise of his right to appear at the hearing since in any event, according to the Court's established case-law, waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal way.

In fact, the Court is not here concerned with an accused who had been notified in person and who, having thus been made aware of the reasons for the charge, had expressly waived exercise of his right to appear and to defend himself. The Italian authorities, relying on no more than a presumption inferred from the status of "*latitante"* which they attributed to Mr. Colozza that there had been such a waiver.

In the Court's view, *this presumption did not provide a sufficient basis*. Examination of the facts does not disclose that the applicant had any inkling of the opening of criminal proceedings against him. It is difficult to reconcile the situation found by the Court with the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner.

In conclusion, the material before the Court *did not disclose that Mr. Colozza waived exercise of his right to appear and to defend himself or that he was seeking to evade justice*. It is therefore not necessary to decide whether a person accused of

a criminal offence who does actually abscond thereby forfeits the benefit of the rights in question.

It is not the Court's function to elaborate a general theory in this area. *The impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice*. However, in the circumstances of the case, this fact does not appear to the Court to be of such a nature as to justify a complete and irreparable loss of the entitlement to take part in the hearing. When domestic law permits a trial to be held notwithstanding the absence of a person "charged with a criminal offence" who is in Mr. Colozza's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge. Obviuosly, the Court concluded that there was a violation of Article 6 para.1.

3. CJEU AND THE EUROPEAN ARREST WARRANT

Court of Justice of the European Union held many recent decisions that regard the execution of European Arrest Warrant (EAW) involving a previous *in absentia* trial. It is not our goal to analyse this problem, but the specialists observed it in many scientific works.[12]

The most discussed is the Melloni case[13]. In judgment Melloni[14], using literal interpretation, the CJEU specified that Article 4a(1) of Framework Decision 2002/584/JHA 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."

In this specific case, difficulties in the implementation of succesive EU Framework decisions became visible. Practice on EAW made clear that for a better international cooperation, more harmonization and equivalent minimum standards

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12 For details, Karas, E. I., *Decisions rendered in absentia as a ground to refuse the execution of a european arrest warrant: European legal standards and implementation in Croatian law*, [https://www.pravo.unizg.hr/_download/repository/1._Ivicevic_Karas-Decisions_rendered_in_absentia.pdf], accessed on 14. April 2020

13 Schneider, A., *In absentia trials and transborder criminal procedures. The perspective of EU Law*, in Quattrocolo, S.; Ruggeri, S. (eds.), *A Comparative Study of Participatory Safeguards and in absentia Trials in Europe*, Springer, 2019, p. 605 *et seq*.

14 CJEU, (Grand Chamber) C-399/11 Stefano Melloni v. Ministerio Fiscal, 26 February 2013, par. 41

should be fostered.[15] Mr Melloni was informed of the trial and he was represented and effectively defended by two counsels that he appointed. 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 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. 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.[16]

Returning to the Romanian procedure, the CCP (Code of Criminal Procedure) speaks only of "legal summoning", and not about "personal summoning". Although, the Courts accept, applying the CJEU cases, that when the notification is not personal, the defendant has the right to have the case re-openned. One of the most recent recalled cases is judgement C108/16 PPU (Paweł Dworzecki)[17], where the Luxembourg Court stated that:

"Article 4a(1)(a)(i) of Council Framework Directive 2002/584/JHA of 13 February 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that the expressions 'summoned in person' and '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' in that provision constitute autonomous concepts of EU law and must be interpreted uniformly throughout the European Union."

„Article 4a(1)(a)(i) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that a summons, such as that at issue in the main proceedings, which was not served directly on the person concerned but was handed over, at the latter's address, to an adult belonging to

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15 Bachmayer Winter, L., *New Developments in EU Law in the field of In Absentia national proceedings. The Directive 2016/343/EU in the light of the EctHR Case Law*, in Quattrocolo, S.; Ruggeri, S. (eds.), *A Comparative Study of Participatory Safeguards and in absentia Trials in Europe*, Springer, 2019, p. 641 *et seq.*

16 Karas, *op.cit.* note 12, p. 464

17 CJEU, C-108/16 PPU Pawel Dworzecki, 24 May 2016

that household who undertook to pass it on to him, when it cannot be ascertained from the European arrest warrant whether and, if so, when that adult actually passed that summons on to the person concerned, does not in itself satisfy the conditions set out in that provision."

4. REOPENING A CRIMINAL CASE ACCORDING TO THE NEW ROMANIAN CRIMINAL CODE OF PROCEDURE. SOME CONTROVERSIES

The dispositions of the former Romanian CCP (1969) provided for the possibility to reopen criminal cases only related to persons extradited in Romania[18]. Noting the limited access to this procedure related to the non-extradited persons or to other incarcerated individuals, but also the ECtHR decisions, which set that the presence of the person to the trial relates to the essence of its fair character, the new CCP effective in 2014 reset and extended the procedure.

Romanian Constitution does not contain express provisions in the matter[19]. The fundamental law states that "the jurisdiction of courts and the rules of proceedings are regulated only by the law". This statement should not imply that the Romanian legal system completely disregards the presence of the parties at the trial, since the same fundamental act states the pre-eminence of international documents and treaties on fundamental human rights. These are directly applicable in Romanian legislation.

Therefore, any person judged *in absentia* shall be entitled to the reanalyzing of the cause in case of cumulative fulfilment of several conditions provided for by the procedural code (art. 466 CCP):

4.1. The request has to be lodged in the one month term starting from the day the convicted was informed, by any official notification, that a criminal trial was held against him.

The individual convicted *in absentia* is usually informed about the criminal trial against him in the moment of the incarceration. But this happenes only if the person is located. Sometimes, assuming that the defendant was not located during the criminal investigations or trial, it is difficult to believe that he will be later, in the execution proceedings.

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18 Ciopec, F, *Retrial in case of extradition*, Ann Fac Law Timişoara, no. 1/2006, pp. 162-168

19 Ciopec, F.; Roibu, M., *Report on Romania*, in: Quattrocolo, S.; Ruggeri, S. (eds.), *A Comparative Study of Participatory Safeguards and in absentia Trials in Europe*, Springer, 2019, p. 361 *et seq*.

But does the one-month term begin when the person is not found yet? There are convicts that do not live anymore in the state that held the trial against them. Furthermore, the official communication of the documents or the warrant were not fulfilled by the Romanian authorities. Is this an impediment regarding the admissibility of their request? The dominant opinion is negative. Thus, art. 466 paragraph. 3 CCP refers to the communication after bringing the person into the country. Certainly, its interpretation in the sense that the persons who are not in the country could not draft the claim for retrial would restrict their free access to justice.

Therefore, the request made just before the start of the one-month term provided by law is admissible and not premature. The one-month term is only a maximum, established in benefit of the convicted, precisely because the situation of those for whom extradition is requested is one of increased vulnerability[20].

4.2. The person has not been legally summoned and has not been informed officially about the criminal proceedings against him

Related to the negative condition for the person to have not been legally summoned, the simple existence of a summoning or the notice of the decision is pure judicial fiction, created by the legislator aiming not to block the activity of courts. As we observed, even ECtHR and CJEU accept the trial *in absentia*. Therefore, it is allowed to trial the accused, even if they are absent from the proceedings and their address is unknown.

Some interpretation dilemmas appeared in Romanian practice. The dominant solution is that the summoning of the defendant in accordance with the legal provisions in force at the time the trial was held should not lead to the conclusion that the accused avoided the proceedings or, even worse, that he knew about the trial.[21] The same author observes that the Romanian standard is somehow superior than the European Convention, because the international document does not exclude the possibility that, in the absence of an official notification, "certain established facts might provide an unequivocal indication that the accused is aware of the existing criminal proceedings against him and he does not intend to take part in the trial".

In most of the criminal cases requested for reopening, the summoning procedure was legal, summons being communicated to an old residence of the individual,

[20] Udroiu, M., *Criminal procedure. General part*, 6 th edn. CH Beck Publishing House, Bucharest, 2019, p. 736

[21] Ciopec; Roibu, *op. cit.* note 19, p. 397

or displayed at the prosecutor's office or local council. Despite all this, personal notice is missing, because it can only be signed by the accused itself.[22]

Romanian Courts decided in a specific case that[23] "the decision was communicated to the defendant at the same address and also returned with the mention that „she moved to UK" It should be noted that the defendant was not heard during the criminal investigation, the search documents proving that she moved to Italy and UK (…), respectively, there being practically no official notification to the defendant from which she would be informed that a criminal trial exists against her.

The defendant was never informed of the existence of a criminal charge against her, and the summons to the address with which it appears in the DEPABD (the official Police database), given that he had lived in UK for several years, is not equivalent to the summons "to the address where he lives", according to art. 259 paragraph 1 CCP.

For this reason, the Court cannot agree with the argument put forward by the first instance tribunal, which considered that the defendant knew about the trial because she was summoned to her home on (…) on 28.02.2013, the summons being received by D., relative to the defendant, and on 22.01.2014 the summons was received by M, the addressee's brother-in-law, as this "procedure" cannot constitute an official notification, within the meaning of art. 466 al. 2 CCP, which refers to the summonning procedure before the court and not to the criminal investigation phase.

The Court finds that in this way the convicted person was not legally summoned for the trial and did not become aware of it in any other official way, so that the conditions provided by law to be considered an *in absentia* convicted person are met."

4.3. The defendant has not appointed a lawyer and has not asked for the judgment *in absentia*

It is obvious that the person appointing a lawyer/counsel is aware that certain criminal procedures are held against him. In specific cases where a lawyer was appointed, the convicted *in absentia* tries to prove that the lawyer was appointed by the family, without his knowledge. These arguments are usually analyzed *in concreto* from one case to another, but almost all of them are rejected by the courts, as it is real difficult to assume reasonably that a family member appoints a lawyer

[22] Iugan, A.V., *Retrial of the the criminal case*, Universul Juridic Publishing House, Bucharest, 2016

[23] Bacău Court of Appeal, Decision no. 1357 of 21.11.2018, [www.rolii.ro], accessed on 14 April 2020

without informing the person concerned regarding the criminal investigation or trial.

In Sulejmani v. Albania[24] the Court stated that when an accused appointed lawyers to represent him in court, "the fact that lawyers were later replaced by lawyers appointed by members of his family does not alter the clear finding that he knew about the criminal proceedings against him."

Sometimes, during the investigation stage or the trial, the assistance being compulsory, the prosecutor or the court appoints a lawyer *ex officio*, but his presence do not replace the right of the accused person to defend himself, the legal negative condition only relating to the lawyer appointed by the suspect.

4.4. The request for reopening cannot be lodged by the person who has not filed an appeal after the legal receiving of the conviction decision

This condition needs to be analysed in mirror with that of the personal summoning, meaning that the decision, in order to be legally remedied by an appeal, needs to be personally received.

The meaning of the phrase "after notice, according to law" (art. 466 para. 2 CCP) is not that of a notice legally performed based on the presumptions provided for by the law (as leaving the decision in the postal box). Furthermore, the decision is legally received if the papers were signed by persons living with the defendant, but they are not personal received.

The ECtHR judgment in Somogyi v. Italy[25] is particularly relevant in this respect. In this case, the Court rejected the Italian State's argument that the applicant could have appealed over time, considering that the domestic provisions did not contain sufficient guarantees. The Court also stated that it was not clear whether the petitioner could have actually benefited from a late (over time) appeal and that he had not been obliged to prove that he had not deliberately refused to acknowledge the existence of the process. It was also considered that he could not have effectively exercised this ordinary remedy which could be formulated within 10 days from the date on which the person learned of the trial and that this short period, also related to the fact that he was in a foreign country, it is not likely to satisfy the requirements of the Convention in the light of art. 6.

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[24] ECtHR, Sulejmani v. Albania, decision of 19 june 2012, App. No. 16114/10, para. 22

[25] ECtHR, Somogyi v. Italy, decision of 18 may 2004, App. No. 67972/01

The convicted person who did not give any statement in the case and was not aware of it seeks the retrial of the whole trial, and not only of the appeal, with the risk of rejecting it as late or as unfounded. Only retrial starting with the first instance (or, as recent in Romanian procedure, from the moment of preliminary chamber) is the concrete and effective remedy of *in absentia* trial.

The request to reopen the criminal proceedings is not a subsidiary one to the appeal, as could be assessed, because, if this opinion were accepted, in all cases where an appeal is filed, a subsequent request for reopening would be *ab initio* stopped, because an appellant obviously knows of the criminal proceedings against him.

Thus, if we admit that the person tried *in absentia*, completely being out of criminal proceedings, who although legally summoned to a place where he no longer lived and also where his decision was communicated, should file an appeal, practically the institution of reopening the trial would be completely annihilated. A possible appeal over time would not be a sufficient remedy for that judgment.

5. THE NEW POSSIBILITY TO CHALLENGE THE EVIDENCE IN THE RETRIAL PROCEDURE

Once the request for reopening the case has been admitted, after the judge analyses the conditions abovementioned, the criminal trial will resume its course, with the observance of the right to a fair trial, by the possibility of insuring the presence of the defendant. The presumption of innocence gets it strength again and the execution warrant is cancelled.

The trial, regarding the law dispositions, has to be reopened from the first moment of first degree trial, which involves the brief presentation of the facts he is accused of. But after 2014, the criminal procedure involves a new stage, situated after the prosecutor finishes the investigation but before the judge opens the first degree trial[26]. The so-called "preliminary chamber", has the aim of a filter the judge applies on the legality of the evidences and documents of the prosecutor from the investigation.[27]

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[26] Kuglay, I, *Preliminary chamber*, in Udroiu, M. (ed.), *Criminal procedure code. Comments by articles*, CH Beck Publishing House, Bucharest, 2017, p. 1413 *et seq*.

[27] According to the CCP (art. 54) the preliminary chamber procedure has the aim to verify if the indictment was legally drawn up by the prosecutor and to verify if the evidence in the file and the investigation activities were lawfully supplied. This special procedure exists in German criminal system and also in Italian legislation (*udienza preliminare*), see also Cassiba. F., *L'udienza preliminare. Struttura e funzioni*, Giuffré editore, 2007

International doctrine pointed that according to Art. 2 of the Directive 2016/343[28], the provision applies only to trials which "can result in a decision of guilt or innocence of a suspect or accused person". It is unclear if the right to be present is focused at the court main hearing or it extends to other stages of the proceedings., due to different concepts used in languages of the Directive (*e.g. Hauptverhandlung, processo, juicio*).[29]

The "preliminary chamber" has been envisaged in Romanian system as an intermediate procedure, situated between the investigation and the judgement stage. First, the procedure was held *in camera*, but, after several decisions of the Constitutional Court from 2015, the absence of the parties was sanctioned as unconstitutional.[30] The preliminary chamber does not finish with a guilt or innocence decision (even this possibility exists in other legislations, in Romanian procedure if the judge observes some evidence being unlawfully supplied, he will remove them from the file, or send back the file to the prosecutor). So, this stage will finish only with a decision that certifies the evidence and the investigation were lawfully ordered, or contrary.

So, the preliminary chamber is not a "trial" in its common sense, but a specific "pre-trial", with clear procedure rules and special solutions.

Being asked regarding the moment the trial has to reopen, after the request for retrial is accepted, the Romanian Supreme Court decided in 2017[31] that *„in the unitary interpretation and application of the provisions of art. 469 para. (3) of the Code of Criminal Procedure, following the admission of the request for reopening the criminal proceedings for convicted persons tried in absentia, the case is resumed from the trial phase in the first instance."*

But after this decision, the norm in the Romanian Constitution related to the equality before law (art. 16 para. 1) is infringed, as the re-judgment without analyzing the legality of the investigation (specific in the preliminary chamber stage) leads to unfairness, differentiating the citizens depending on their presence in court.

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28 "This Directive applies to natural persons who are suspects or accused persons in criminal proceedings. It applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive."

29 Bachmayer Winter, *op..cit.* note 15, p. 652

30 Ciopec; Roibu, *op. cit.* note 19, p. 381

31 High Court of Justice, Decision 13 of 3 july 2017, Official Journal no. 735 of 13 september 2017

The situation related to the inequality appears when, by hypothesis, regarding the person judged *in absentia* who obtains the right to re-trial, the stage of analyzing the lawfulness of the evidence, or of the prosecuting documents is considered definitively stated, despite the fact that the person has not been present in this stage and did not personally receive the summons, in order to express his position.

The situation of the person related to whom the reopening of a trial was admitted should be the same with that of any person brought in court, which is the attendance to the procedural stage – the "preliminary chamber" filter. The equality in front of the law is infringed by the failure to reinstate the person in the situation following procedurally to the notification of the court with the indictment.

In its case law, the Constitutional Court of Romania reiterated the principle that the equality of citizens does not mean uniformity. The infringement of the principle of equality and non-discrimination only exists when a differentiated treatment is applied to equal cases, without an objective and reasonable motivation or if there is a disproportion between the purpose pursued by the unequal treatment and used means. In the criticized case, the latter conditions are totally fulfilled, there being no elements to justify a differentiated treatment.

Therefore, as related to the possibility that unlawfully obtained evidence can be used against a defendant after the retrial is accepted, or void documents may remain effective, the judge of the merits of the case is not able to censor them. So, the different legal treatment is obvious.

Accepting this brief arguments, in a very recent decision, Romanian Constitutional Court stated[32] contrary to the *dictum* of the Supreme Court, reversing its effects. The Court stated that: *"the provisions of art. 469 para. (3) of the Code of Criminal Procedure, in the interpretation given by Decision no. 13 of July 3, 2017, pronounced by the High Court of Cassation and Justice - regarding the procedural phase from which the criminal process is resumed, are unconstitutional."*

Court noted that "Regarding the importance of ensuring the right to challenge evidence in criminal proceedings, the Court held that obtaining evidence legally is a guarantee of the right to a fair trial, and the remedy against non-compliance with this guarantee is to prohibit the use of evidence thus obtained. Moreover, art. 102 para. (2) of the CCP provides that evidence obtained illegally may not be used in criminal proceedings. It was also found that legally obtaining evidence, a guarantee of the right to a fair trial, is a more favorable standard for the citizen

[32] Decision no. 590/2019, Official Journal no. 1019 of 18 december 2019

than the one set by the jurisprudence of the European Court of Human Rights regarding illegally obtained evidence.

According to this jurisprudence, it is noted that the analysis of the European Court of Human Rights aims at the fairness of the procedure as a whole, which also includes the analysis of the way in which the evidence was obtained, since art. Article 6 of the Convention does not lay down rules on the admissibility of evidence, which is primarily a matter of national law, so that the Court's task is not to determine whether certain evidence has been obtained unlawfully, but to determine whether such evidence has been obtained. Curt refered to Judgment of 11 July 2006 in Jalloh v. Germany, para. 94 *et seq*., Judgment of 5 February 2008 in Ramanauskas v. Lithuania, para. 52 and the following, or the Judgment of 17 December 2013 in Szilagyi v. Romania, paragraph 26 *et seq*.

In view of these arguments, the Court notes that the retrial of the case from the stage in the first instance, after accepting the reopening of criminal proceedings, according to art. 469 of the CCP, as stated by Decision no. 13 of July 3, 2017 pronounced by the High Court of Cassation and Justice, and not from the preliminary chamber stage, in the event that the defendant was not legally summoned in the aforementioned procedural stage or, although he had knowledge of the trial, was justifiably absent from the trial of the case, violates the right to a fair trial and the right to defense of the person in the analyzed hypothesis, who was convicted *in absentia.*

Furthermore, for the reasons set out above, the Court notes that the provisions of art. 469 para. (3) of the CCP, in the interpretation given by Decision no. 13 of July 3, 2017 pronounced by the High Court of Cassation and Justice, creates discrimination between persons tried in absentia, in respect of which it is ordered the reopening of the criminal process, according to art. 469 of the Code of Criminal Procedure, but which were not legally summoned and, therefore, did not have the opportunity to participate in the preliminary chamber procedure, and those who participate in all stages of criminal proceedings.

In this regard, the Court notes that the two categories of persons abovementioned are in similar situations, but only persons in the second category have the real possibility to challenge the lawfulness of the evidence drawn by the prosecutor.

In terms of ensuring equality in rights, the Constitutional Court held, by Decision no. 512 of November 18, 2004[33] that discrimination is the result of a different legal treatment applicable to the same category of subjects of law or to situations

[33] Published in the Official Journal, Part I, no. 1246 of December 23, 2004

that do not differ objectively and reasonably. Also, by a constant jurisprudence[34], the Constitutional Court ruled that the principle of equality implies the establishment of equal treatment for situations that, depending on the purpose pursued, are not different. That is why it does not exclude, but, on the contrary, presupposes different solutions for different situations. Consequently, a different treatment cannot only be the expression of the exclusive appreciation of the legislator, but must be rationally justified, respecting the principle of equality of citizens before the law and public authorities. At the same time, by Decision no. 270 of April 23, 2015[35], the Court found that a difference in legal treatment is discriminatory when it is not objectively and reasonably justified, meaning that it does not pursue a legitimate aim or does not maintain a reasonable relationship of proportionality between the means used and the intended purpose.

However, in the light of the case-law previously relied on, there are no objective and rational criteria justifying the difference in legal treatment between the categories of defendants analyzed, as regards ensuring the right to be present at the preliminary chamber procedure and to submit procedural objections, according to art. 342 of CCP.

So, after the moment this abovementioned decision was published in Official Journal, the procedure of retrial the convicted *in absentia* radically changes. After the judge accepts the request, he has to offer the right to challenge the evidence obtained by the prosecutor *in absentia*, in the preliminary chamber, and only after this filter is finished the *stricto sensu* retrial can begin.

6. CONCLUDING REMARKS

Since the landmark decision in *Colozza*, hardly accepted by the member states, the participatory rights for the persons convicted *in absentia* are nowadays recognized in most of the criminal systems, if different certain filter-criteria are fulfilled. Instead of being a reducing phenomenon, *in absentia* trials are more and more frequent all over Europe.

But the difficulty of the solution in these cases is precisely due to the origin of the contumacy and the sensible line between the duty to take part at the trial or the

[34] Decision of the Plenum of the Constitutional Court no. 1 of February 8, 1994, published in the Official Journal, Part I, no. 69 of March 16, 1994, Decision no. 540 of July 12, 2016, published in the Official Journal, Part I, no. 841 of October 24, 2016, paragraph 21, Decision no. 2 of January 17, 2017, published in the Official Journal, Part I, no. 324 of May 5, 2017, paragraph 22, and Decision no. 18 of January 17, 2017, published in the Official Journal, Part I, no. 312 of May 2, 2017, paragraph 22

[35] published in the Official Journal, Part I, no. 420 of 12 June 2015, paragraph 25

option to act so. It is obvious that it is difficult to assimilate the situation of the one who did not actually know that the authorities initiated a criminal investigation against him with the one who knew it, but avoided the investigation and the procedures. This is why the states provide some filter criteria for the retrial procedure, which, in some cases, are very difficult to fulfil.

Romania adopted this procedure only in 2014, when the new Criminal Code of Procedure was enforced. The "reopening of the criminal trial" is an extraordinary remedy that has the aim not to challenge the unlawful decision ruled *in absentia*, but to give effectiveness to the right to participate in the proceedings and the right to personal defence. After some practical controversies, and observing the *sui-generis* stage of the preliminary chamber, the Constitutional Court accepted recently that the convicted *in absentia* has not only the right to retrial, but also to challenge the lawfulness of the evidence the prosecutor performed against him.

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UDK 343.211.2: 342.7(4)
Original scientific paper

FEW QUESTIONS YET TO BE ANSWERED IN REGARD TO THE ARTICLE 7 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

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ABSTRACT

The aim of this paper is not only to analyze the case-law of ECtHR and its development of the principle nullum crimen, nulla poena sine lege, but also to determine and draw attention to some unresolved issues, ambiguities, and inconsistencies regarding the Article 7. Special attention will be paid to the distinction that ECtHR draws between the imposition of a penalty and its enforcement, where the latter is not considered as part of the "punishment" within the meaning of Article 7, leading to the conclusion that the prohibition of retroactivity has no effect on it. The paper will analyze ECtHR's reasoning related to this matter and test the opposite thesis that the ex post facto prohibition should be applied on the enforcement of the penalty in the same manner as it is applied on its imposition. The influence of the EU Charter of Fundamental Rights on the development of the prohibition of retroactivity will also be emphasized. Furthermore, in the case of Scoppola v. Italy (No. 2), ECtHR has specified that the rules on retroactivity do not apply to procedural laws, which immediate application is in conformity with the tempus regit actum principle. However, as it will be argued, there are some examples that may show how their retroactive application increases the likelihood of the conviction and therefore puts the defendant in a detrimental position, breaching the principle of legal certainty. In the light of that, it will be discussed whether the rules of criminal procedure should be given retroactive effect, particularly when they benefit the accused.

***Keywords**: Non-retroactivity of Criminal law, Nullum crimen, nulla poena sine lege, European Convention on Human Rights, European Court of Human Rights, Foreseeability*

* This paper is a contribution to the project 'Identity Transformation of Serbia' supported by the Faculty of Law University of Belgrade

1. SOME GENERAL REMARKS ON ARTICLE 'NO PUNISHMENT WITHOUT LAW'

It could be considered common legal knowledge that the prohibition of retroactive application of criminal law is a derivative of a *nullum crimen, nulla poena sine lege* principle, a general principle of criminal law which prohibits criminalizing acts committed prior to the entry into force of a rule banning such conduct as a crime. The evolution of this principle was furthered by the development of international law and eventually it became an internationally recognized human right – the right not to be prosecuted or punished without legal basis, guaranteed by many universal and regional human rights instruments.[1]

Article 7 of the European Convention of Human Rights (hereinafter: ECHR) is titled 'No punishment without law' and while embodying the principle of legality, it stipulates that 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.[2] That is to say, it stands for the legal definitiveness of an offence, but also constitutes a ban on an overly broad construction of criminal provisions, in particular by analogy.[3] The underlying idea of the rule is that justice requires someone to be held only criminally responsible on the basis of law which was in force at the time of the commission. Furthermore, law should be sufficiently precise (*lex certa*), must be strictly construed - implying the ban on analogous application (*lex stricta*) and should not be applied retroactively - prohibition of *ex post facto* law (*lex praevia*).[4] Article 7 seeks to provide certainty by requiring governance in accordance with prior rules. Primarily, it should serve as a limitation on the power of the legislature, which is under obligation to enact laws prospectively.[5] In addition, the rule imposes restrictions on the courts, since they should only apply the law which was already enacted and entered into force at the time the offence was committed, not the law in effect when the offender is indicted, pending trial

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1 Article 15 of the International Covenant on Civil and Political Rights, *UN Treaty Series*, vol. 999, p. 171; Article 9 of the American Convention on Human Rights, *Organisation of American States (OAS)*; Article 7 of the African Charter on Human and Peoples' Rights, *Organisation of African Unity (OAU)*; Article 49 of the Charter of Fundamental Rights of the European Union, 2012/C 326/02

2 Article 7 of the European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

3 *Kokkinakis v. Greece* (1993) 17 EHRR 397, para. 52

4 van der Wilt, H., *Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test*, Nordic Journal of International Law, *vol.* 84, 2015, p. 516

5 Mokhtar, A., *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, Statute Law Review, *vol.* 26, no. 1, 2005, p. 48

or on trial.[6] Similarly, the rule applies to the laws that aggravate the penalties of an offence.[7]

Most importantly, Article 7 represents *conditio sine qua non* of a democratic society. According to Article 15 (2) of the ECHR no derogation from it is allowed in time of war or public emergency.[8] European Court of Human Rights (hereinafter: ECtHR) explained that 'the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment'.[9] Therefore, by reason of being non-derogable and absolute right, hence part of the *noyau dur* of human rights,[10] Article 7 should not be subject to any limitation, except for something that seems to be the sole explicit exception provided in the text of the Convention itself.

Namely, the second paragraph of Article 7 reads that this Article 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.[11] Arguably, it mirrors the weak status of the legality principle immediately after the end of WWII, when it has not yet been recognized as an international human right.[12] In fact, the time of Nuremberg trials was more than somewhat marked by the retroactive application of criminal law with regard to acts considered immoral by the community of nations.[13] Even the Nuremberg Tribunal itself readily submitted that it inevitably had to apply

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6 *Ibid*.

7 *Ibid*.

8 Article 15 (2) of ECHR; Virjan, B., *Principle of Non-Retroactivity of Criminal Law According to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Law Annals of Titu Maiorescu University, 2012, p. 96

9 *S.W. v. United Kingdom* (1995) 21 EHRR 363, para. 35

10 Shabas, W., *Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals*, European Journal of International Law, *vol.* 11, no. 3, 2000, p. 522

11 For more about the question whether the principle *nullum crimen sine lege* always prohibits an international criminal court from regarding an act as a crime where, at the time it was done, it did not correspond in its totality with the legal provision proscribing it, see Shahabudeen, M., *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, Journal of International Criminal Justice, *vol.* 2, no. 4, 2004, pp. 1007-1017

12 Rychlewska, A., *The Nullum Crimen Sine Lege Principle in the European Convention of Human Rights: The Actual Scope of Guarantees*, Polish Yearbook of International Law, *vol.* 36, 2016, p. 164

13 Cassese, A., *International Criminal* Law, Oxford University Press, 2003, p. 72

the law retroactively, when observed that: 'The maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. The Nazi leaders must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression'[14]. Hence, with an eye to avoid affording Nazi criminals a claim of a violation of the *nullum crimen sine lege* principle before ECtHR, the so-called 'Nuremberg clause' was inserted in Article 7.[15] When it comes to the legal nature of the clause, one should be careful when qualifying it as a derogation from the principle of non-retroactivity of criminal law.[16] Although ECtHR described it as 'an exceptional derogation from the general principle laid down in the first paragraph', it went further to recall the *travaux préparatoires* which show that the purpose of the second paragraph is to specify that Article 7 does not affect laws that, in the wholly exceptional circumstances at the end of WWII, were passed in order to punish war crimes, treason, collaboration with the enemy, etc.[17] Considering that Article 7 is a non-derogable right, it must be concluded that the second paragraph is completely unrelated to the derogation, but rather represents 'a contextual clarification of the liability limb of the general rule of non-retroactivity laid down in the first paragraph, which was included to ensure that there was no doubt about the validity of prosecutions after the WWII in respect to the crimes committed during the war'[18]. It is thus clear that the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity.[19] In other words, the second paragraph of Article 7 should be considered as an interpretation clause, with the aim of clarifying that the Convention system of protection allows domestic authorities to punish retrospectively individuals who have committed acts which, although not criminalised by any law at the time of commission, were unacceptable under the general principles of law recognized by civilized nations.[20]

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14 *France et al.* v. *Goering et al.* (1946) 22 IMT pp. 411, 466

15 Mariniello, T., *The 'Nuremberg Clause' and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence*, Nordic Journal of International Law, *vol.* 82, 2013, p. 226

16 For such a qualification see Virjan, *op. cit.*, note 8, p. 102

17 *Kononov v. Latvia* (2010) ECHR 667, para. 115

18 *Vasiliauskas v. Lithuania* (2015) ECHR 332, para. 189

19 *Ibid*.

20 See also Francioni, F., *Crimini internazionali*, Digesto delle Discipline Pubblicistiche, Vol. IV, 1989

Moreover, ECtHR has held in a number of cases that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner.[21] Should that be the case, it remains unclear why general principles of law recognized by civilized nations do not fall within the meaning of the general term 'international law' from the first paragraph of Article 7. As a matter of fact, pursuant to Article 38(1)(c) of the Statute of the International Court of Justice the general principles of law recognized by civilized nations are a (subsidiary) source of international law.[22] They refer to norms common to national legal systems of majority of states or at least states involved in a dispute.[23] Thus, they are originally source of national laws and only give rise to the international law once the International Court of Justice (or any other international court or tribunal) recognize and apply them in a particular case.[24] It is not apparent why other sources of international law, *i.e.* customary or treaty law were considered less relevant in criminalizing acts or omissions than general principles of law recognized by civilized nations. This ambiguity together with the fact that the second paragraph is not limited to war crimes have led some authors to indicate that it may potentially allow state authorities to prosecute an individual for a wide range of acts prohibited in other states.[25] Obviously, it would have been far more appropriate if the drafters were consistent with the use of a broad term 'international law' rather than segregating one particular source in the second paragraph of Article 7. Regardless, this incongruity could be overcome by ECtHR if it continues to interpret paragraph 2 of Article 7 as referring to international crimes, irrespective of their source.[26]

Some authors have accurately described Article 7 as a poorer relative of the matured Article 6 of the ECHR.[27] There is really no denying that it represents an under-theorized as well as under-developed aspect of the ECHR, probably due to multiple of causes. One of them may be confounding case-law regarding this Article, that is to say different approaches to the same issues concerning imple-

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21 *Vasiliauskas v. Lithuania*, *op. cit*, note 16, para. 189

22 Statute of the International Court of Justice, *United Nations*, 18 April 1946

23 Kreća, M., *Međunarodno javno pravo*, Pravni fakultet Univerziteta u Beogradu, 2014, p. 95

24 *Ibid*.

25 Murphy, C. C., *The Principle of Legality in Criminal Law under the ECtHR*, European Human Rights Law Review, *vol*. 2, 2010, p. 207

26 Rauter has taken the view that ECtHR indicated such a distinction between the applicability of the *nullum crimen sine lege* principle in relation to 'ordinary' domestic crimes and 'international crimes', where the latter are covered by paragraph 2 of Article 7 in the case of *Naletilić v. Croatia*, Rauter, T., *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, Springer, 2017, p. 36

27 Murphy, *op. cit*., note 25, pp. 192-193. See also Greer, S., *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge University Press, 2006

mentation, which may have led to misunderstandings and discouragement of individuals to claim breaches of this particular right before ECtHR.[28]

Therefore, the aim of this paper is to shed light on some of the unresolved issues, ambiguities and inconsistencies detected in the case-law of ECtHR, hence to contribute that not only every individual understands what Article 7 guarantees them and how it protects them, but also to open eyes of ECtHR to some deficiencies in its case-law along with aspects to which the scope of Article 7 may be expanded.

2. HOW FAR-SIGHTED ONE SHOULD BE IN ORDER TO FORESEE THE CHANGES IN CRIMINAL LAW?

As previously mentioned, while Article 7 particularly prohibits extending the scope of existing offences to acts which were previously not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.[29] It follows that offences and the relevant penalties must be clearly defined by law.[30] This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.'[31] ECtHR also explained that 'when speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises both statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability'.[32]

Hence, the first finding to be clarified is regarding the term 'law', which has an autonomous meaning and includes judge-made law along with legislation, whether primary or delegated.[33] In *SW & CR v UK*, cases concerning two men who were prosecuted for forcing their wives to have sexual intercourse with them, the status of the common law as 'law' was upheld.[34] While the common law had previously considered husbands immune from charges of rape against their wives, this posi-

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28 Murphy had a point when noticed that (only, *A. Z.*) in an ideal world, a low violation count would be evidence of high compliance. However, in the context of (ever, *A.Z.*) increasing pleas to ECtHR, the under-use of Article 7 is unusual, Murphy, *op. cit.*, note 25, p. 193

29 *Coëme and Others v. Belgium* (2000) ECHR 2000-VII, para. 145

30 *Ibid*.

31 *Ibid*.

32 *Ibid*.

33 Harris, D.J., *et al.*, *Law of the European Convention on Human Rights*, Oxford University Press, 2018, pp. 492-493

34 *S.W. v. United Kingdom*, note 9, para. 39; *C.R. v. United Kingdom* (1995) 21 EHRR 363, paras. 47-50

tion was eventually changed by the House of Lords and the two applicants were prosecuted and convicted.[35] ECtHR noted that 'in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen'.[36] What is more, it emphasized that 'the essentially debasing character of rape is so manifest so the result of the decisions … that the applicant could be convicted … irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7', and that 'the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilized concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom'.[37]

It must be underlined that in these cases relevant acts, which the applicants had been convicted of, constituted an outstanding example of the crime *mala in se*, where a common sense of justice implies punishability, thence the foreseeability test of criminal responsibility would be more easily satisfied.[38] Moreover, the Court reiterated that the conclusion of the national authorities that 'a rapist remains a rapist subject to the criminal law, irrespective of his relationship with the victim' was in accordance with a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife.[39] Notwithstanding, some authors are doubtful whether a 'perceptible line of case-law devel-

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35 *Ibid*.

36 *Ibid*, *S.W. v. United Kingdom*, note 9, para. 36

37 *Ibid*., para. 44

38 Similar observation is made by Rychlewska, however she concluded that 'a common sense of justice requires a perpetrator to be punished regardless of the principle of *nullum crimen sine lege* and, in these special cases, regardless of the degree of foreseeability of criminal responsibility', Rychlewska, *op. cit.,* note 12, p. 182

39 *S.W. v. United Kingdom*, note 9, paras. 11, 23-27, 43. Greer found that one of the peculiarities of these cases is that the central issue was not settled by 'balancing' the wife's implicit right not to have sex with her husband against her consent (as implicitly guaranteed by Articles 3 and 8) with the husband's putative right not to be punished without law provided by Article 7, nor was the right provided by Article 7 'balanced' against the public interest represented by the modern conception of marriage. Instead the Court itself defined the scope of each right by identifying, through reference to contemporary standards, the underlying interests and values most at stake, Greer, *op. cit.*, note 27, p. 240. However, this way of Court's reasoning seems to be in accordance with the absolute nature of Article 7, which excludes every application of the proportionality test, *i.e.* balancing with other rights or interests

opment' is a sufficient source of foreseeability.[40] That could be particularly true in reference to *mala prohibita*, since in those circumstances an individual must be pretty well-informed about which commissions or omissions are prohibited.[41] European Commission of Human Rights also elucidated that existing offences should not be extended so as to cover facts which previously did not entail criminal responsibility. Specifically, 'this implies that constituent elements of an offence such as the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the case-law of the courts'.[42]

All things considered, 'law' is a concept comprising both statute law and case-law.[43] Put differently, as long as ECtHR is concerned, *lex scripta* does not represent a part of the principle of the legality, as usually understood in civil law traditions. Be that as it may, what seems most importantly is that when criminal law changes via case-law and judicial activism, new standards cannot be abruptly implemented, but gradually developed for a longer period of time, while making sure that the majority of citizens are familiar with new rules and amendments. Finally, ECtHR has always understood the term 'law' in its substantive and not formal sense, meaning that it includes both enactments of lower rank than statues as well as unwritten law.[44] In sum, the 'law' is the provision in force as the competent court have interpreted it.[45]

In cases dealing with the *nullum crimen* principle, ECtHR has continually applied the test of accessibility and foreseeability when determining whether the conduct in question falls within the scope of a criminal statute. The stated twin qualitative requirements have consistently featured in its jurisprudence, even outside the context of Article 7,[46] where the former supposes that the law is publicly available,[47] while the latter requires that an individual must be able – if need be, with the assistance of the courts' interpretation of relevant provision and appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances,

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40 Rychlewska, *op. cit.,* note 12, p. 182; Ashworth, A., *Principles of Criminal Law*, Oxford University Press, 2003, pp. 72-73

41 One of the examples could be hitchhiking, which is illegal at certain locations (for instance on motorways in Italy) or even in some countries

42 *X Ltd. and Y v. United Kingdom* (1982) 28 DR 77, para. 9

43 *Sunday Times v. United Kingdom* (1979) 2 EHRR 245, para. 47; *Kruslin v. France* (1990) 12 EHRR 547, para. 29

44 *De Wilde, Ooms and Versyp v. Belgium* (1971) 1 EHRR 435, para. 93

45 *Leyla Sahin v. Turkey* (2005) 44 EHRR 5, para. 88

46 For instance, in regard to Article 5(1) see *Amuur v. France* (1996) 22 EHRR 533, para. 50

47 *Kasymakhunov and Saybatalov v. Russia* (2013) ECHR 217, paras. 79, 91, 98

the consequences which a given action may entail, *i. e.* whether it will make him/her criminally liable[48]. One could also read that accessibility implies law to be sufficiently clear for individuals to conduct themselves in accordance with its commands, whereas in regard to judicial development of the law, foreseeability means that any changes must be predictable.[49] These qualitative requirements must be satisfied with respect to both the definition of an offence and the penalty being carried by the offence in question.[50] Clearly, the bottom line is that human beings can only adapt their behaviour in order to prevent criminal responsibility, if they are aware of the consequences. The paramount importance of the foreseeability is apparent from the description of Article 7 as an internationally recognized human right to foreseeable criminalization.[51] However, foreseeability becomes especially puzzling in the perspective of international crimes. It is imaginable that a concrete behaviour is not forbidden under national law, but punishable according to the international rules. It follows that a perpetrator may be prosecuted by a foreign or international court, or even national court after a regime or legislation change, although at the time of the commission not aware that the act was proscribed by international law.[52] Of course, whether that particular act qualifies as a crime is completely up to an international or national court to decide. As application of the law inevitably involves an element of judicial interpretation, different courts may come to different conclusions. That is probably the very reason why ECtHR refrains from deciding on an individual applicant's criminal responsibility.[53]

So, the foreseeability test requires that an accused has a general sense of the laws and customs in order to recognize when his behaviour may possibly constitute a violation of those standards, amounting to even international crimes. The starting point in analysing the foreseeability is an objective assessment, akin to the reason-

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48 *Korbely v. Hungary* (2008) ECHR 847, para. 70; *Del Rio Prada v. Spain* (2013) 58 EHRR 37, para. 125

49 Murphy, *op. cit.*, note 25, pp. 201

50 *Achour v. France* (2006) 45 EHRR 2, para. 41

51 Rychlewska, *op. cit.,* note 12, p. 168; Peristeridou, C., *The Principle of Legality in European Criminal Law*, Intersentia, 2015

52 Cassese, A., *Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law*, Journal of International Criminal Justice, *vol.* 4, 2006, p. 417. This led some authors to criticize ECtHR for occasionally refraining from applying the accessibility and foreseeability test in the regard to international crimes, van der Wilt, H., *op. cit.*, note 4, p. 526. One of the fundamental judgments concerning the general question as to how new regimes should deal with grave human rights violations which occurred under the former regime is *Vasiliauskas v. Lithuania*, *op. cit*, note 16. See also *Streletz, Kessler and Krenz v. Germany* (2001) ECHR 2001-II, the case about high ranking officials and law-makers of the German Democratic Republic that were convicted of incitement to murder many young people trying to escape to the West, which was in accordance with the legal practice of that time and that particular regime.

53 van der Wilt, H., *op. cit.*, note 4, p. 527

able person standard, but ECtHR held that the personal circumstances and abilities are relevant, too.[54] There is no denying that the assessment of foreseeability is by no means an easy affair, which is probably why ECtHR took a flexible case-by-case approach and sometimes even failed to apply them in an uniform manner.

3. KAFKAESQUE DISTINCTION BETWEEN THE 'PENALTY' AND THE 'ENFORCEMENT OF THE PENALTY' – IS IT REALLY NECESSARY?

The third and final prohibition in Article 7(1) prevents a harsher penalty from being imposed than that prescribed by law at the time the offence was committed. For example, in the *Welch* case, the Court found that the imposition of a confiscation order on conviction for drug offences was a retrospective heavier penalty as the legislation governing the orders was introduced after the offence was committed.[55] The Government did not dispute the retrospectivity of the order, but claimed that it was not a criminal penalty as it was concerned with the prevention of future drugs trafficking.[56] ECtHR elucidated that 'the concept of a penalty (in Article 7) is, like the notion of 'civil rights and obligations' and 'criminal charge' in Article 6 (1), an autonomous Convention concept. To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a penalty'.[57] The starting-point in any assessment is whether the measure follows conviction for a 'criminal offence', while other factors to be taken into account are 'the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity'.[58] This combination of punitive elements led to the conclusion that the confiscation order was a criminal penalty and since it was applied retrospectively, there was a breach of Article 7.[59]

The imposition of a penalty by analogy can also violate the principle embodied in Article 7, as in *Başkaya and Okçuoğlu v. Turkey*, the case concerning a sentence to a term of imprisonment imposed on a publisher, under a provision applicable to editors.[60] On the other hand, it is not the role of ECtHR to decide on the appro-

54 *Soros v. France* (2011) ECHR 172, para. 53

55 *Welch v. United Kingdom* (1995) 20 EHRR 247, para. 35

56 *Ibid.*, paras. 22-25

57 *Ibid.*, para. 27

58 *Ibid.*, para. 28

59 *Ibid.*, para. 35

60 *Başkaya and Okçuoğlu v. Turkey* (1999) ECHR 42, paras. 42-43

priate length of the prison sentence or the type of penalty in general which should be served for particular crime.[61]

In the year of 1986, the European Commission of Human Rights developed what could be considered the first Strasbourg doctrine concerning retrospective punishment - a distinction between a 'penalty' and the 'enforcement of a penalty'.[62] The case affected a killer sentenced to life imprisonment. After 13 years in closed prison, the applicant was transferred to an open prison, which was usually considered as a step towards release. However, after one year, the applicant was suddenly returned to a closed prison, and, on that same day, the competent secretary of state announced a new and harsher parole policy towards offenders of serious crimes, according to which, all offenders should expect to serve a minimum of 20 years in prison. His appeal for an early release had been rejected, so he introduced an application before the Commission stating that, *inter alia*, the new governmental policy had had the effect of imposing a harsher penalty than originally imposed by the judge at the time of the crime and at the time of his sentencing. When it comes to the impacts of the new policy, the Commission took the stance that even if it had had the effect of increasing the length of the imprisonment, this question related to the enforcement of the sentence as opposed to the imposition of a penalty.[63] The penalty was that of life imprisonment and that had never been changed, so it could not be said that the penalty imposed was heavier than what had been imposed by the domestic court.[64] There was no detailed explanation, nor presentation of any guidelines for distinguishing the penalty from its enforcement. The decision ignored the fact that, by spoiling the legitimate expectations that the applicant could have nourished in view of the legal framework at the time the crime took place, a new and tougher sentence had somehow been added to the original one.[65]

3.1. *Kafkaris v. Cyprus*

On the face of it, similar to *Hogben* is the *Kafkaris* case.[66] Kafkaris was convicted for premeditated murder committed in 1987 and sentenced to life imprisonment.[67]

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61 *Vinter and Others v. United Kingdom* (2013) ECHR 645, para. 105. Issues relating to the 'gross disproportionality' of a penalty are to be assessed under Article 3 of the Convention, para. 102

62 *Hogben v. United Kingdom* (1986) 46 DR 231

63 *Ibid*.

64 *Ibid*.

65 Sanz-Caballero, S., *The Principle of Nulla Poena Sine Lege Revisited: The Retrospective Application of Criminal Law in the Eyes of the European Court of Human Rights*, European Journal of International Law, *vol*. 28, no. 3, 2017, p. 792

66 *Kafkaris v. Cyprus* (2008) 49 EHRR 877

67 *Ibid*., para. 12

During the hearing, the prosecution invited the court to examine the meaning of the term 'life imprisonment' in the Criminal Code and to clarify whether it entailed imprisonment of the convicted person to the rest of his life or just for a period of 20 years, as provided by the Prison Regulations in force at the time.[68] Besides, pursuant to the Prison Regulations, life prisoners were eligible for remission of up to a quarter of their sentence.[69] The court held that the term meant imprisonment for the remainder of the life of the convicted person.[70] Regardless, after incarceration the applicant was given a written notice specifying the duration of his sentence to 20 years and stating that an early release depended on his good conduct and industry during detention, hence setting the date for his release in 2002.[71] However, in litigation not involving the applicant, the Prison Regulations were declared unconstitutional.[72] As the new regulation prevented prisoners from applying for remission, the applicant was not released at the previously promised date.[73] He argued before the ECtHR that the unforeseeable prolongation of his term of imprisonment together with the retroactive application of the new legislation violated Article 7.[74]

ECtHR accepted the Government's argument that the purpose of the Regulations concerned the execution of the penalty, but admitted that in reality the distinction between the scope of a life sentence and the manner of its execution was not immediately apparent.[75] At the same time, it did not accept the applicant's argument that a heavier penalty was retroactively imposed on him since in view of the substantive provisions of the Criminal Code it could not be said that at the material time the penalty of a life sentence could clearly be taken to have amounted to twenty years' imprisonment.[76] Therefore, ECtHR considered that there was no element of retrospective imposition of a heavier penalty involved in the present case, but rather a question of 'quality of law'.[77] In particular, it found that at the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances,

68 *Ibid*., para. 13
69 *Ibid*., para. 16
70 *Ibid*., para. 14
71 *Ibid*., para. 16
72 *Ibid*., para. 19
73 *Ibid*., para. 23
74 *Ibid*., para. 125
75 *Ibid*., para. 148
76 *Ibid*., para. 149
77 *Ibid*., para. 150

the scope of the penalty of life imprisonment and the manner of its execution.[78] Based on that fact , a violation of Article 7 was founded.[79]

It must be admitted that this reasoning is quite contradictory. ECtHR found a violation of the principle *nulla poena sine lege*, which prohibits the retrospective effect of criminal legislation, but, at the same time, stated that no heavier penalty was retrospectively imposed. As some authors described it, the Grand Chamber gave a Solomonic solution by saying 'yes, but no'.[80] As if this was not enough, the ECtHR introduced the criterion of the 'quality of law' for the first time in the context of Article 7. Since it did not bother to explain the meaning of this concept, we can accept the view that it is nothing more than a muddled mix of the existing requirements of accessibility and foreseeability.[81] And when it comes down to it, the whole point really seems to be that the applicant had been led to believe, by a form specifying release date, that he would serve a twenty-year term and that it would be reduced for one quarter had he well behaved. So, taking into account that statutory law together with the courts' stands and case-law concerning 'life imprisonment' was completely different to the actual implementation of that sentence, where the prison authorities continually applied the Prison Regulations, *i. e.* the imprisonment of 20 years with the possibility of remission, it can be argued that the applicant could not foresee the duration of his sentence. What is more, according to judge Borrego 'no judicial precedent existed in Cyprus in 1987 (the time of the commission) for interpreting life imprisonment as entailing the deprivation of liberty for the remainder of the convicted person's life'.[82] But for some reason, ECtHR did not say that. Instead, it noted that the fact that applicant, as a life prisoner, no longer had a right to have his sentence remitted is a matter of the execution of the sentence, not the penalty imposed on him, which remained that of life imprisonment.[83] It acknowledged that the changes in the prison legislation and in the conditions of release may have rendered the applicant's imprisonment effectively harsher, but made it clear that these changes cannot be construed as imposing a heavier penalty than the one imposed by the trial court.[84] After all, the issues relating to release policies, the manner of their implementation and the reasoning behind them fall within the power of the Member States in determin-

78 *Ibid*.

79 *Ibid*.

80 Sanz-Caballero, *op. cit.*, note 65, p. 794-795

81 Murphy, *op. cit.*, note 25, p. 207

82 *Kafkaris v. Cyprus*, Partly Dissenting Opinion of Judge Borrego, para. 5

83 *Kafkaris v. Cyprus*, *op. cit.*, note 66, para. 151

84 *Ibid*.

ing their own criminal policy.[85] However, it is quite interesting that 'for more than thirty years the Committee of Ministers and the Parliamentary Assembly have repeatedly concerned themselves with matters relating to long-term sentences and have expressly called on Member States to introduce conditional release in their legislation for those with longer sentences'.[86] Moreover, in 2007 the Council of Europe's Commissioner for Human Rights firmly asserted that 'the use of life sentences should be questioned'.[87] The same trend could have been observed at the European Union level in regard to the Framework Decision on the European arrest warrant and the surrender procedures between Member States.[88] Furthermore, long ago has the European Commission of Human Rights expressed the view that a life sentence without a possibility of release might raise issues of inhuman treatment.[89] So, suddenly it becomes apparent that the question of execution of the penalty is far from being an exclusive matter of national criminal policy, quite the contrary. It rather seems that ECtHR tried to remain within the frame of its own standing, namely that it is not its role to decide what is the appropriate term of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served[90]. But in doing so, it compromised one of its other rules, in particular that 'the Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective'[91]. It is indeed unfortunate that ECtHR did not realized that Kafkaris's human right guaranteed by Article 7 remained dead letter. Although the violation was found, ECtHR offered no real remedy to the applicant, which can be understood as directly undermining the absolute nature of the right in question.[92] It seems that Judge Borrego really made a point when wrote that 'the reasoning of the judgment is far removed from reality, as though it had been pronounced from an ivory tower'.[93]

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85 *Ibid*.

86 *Ibid*., Joint Partly Dissenting Opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spelmann and Jebens, para. 4

87 *Ibid*.

88 It states that 'if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after twenty years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure ...', *ibid*.

89 *Weeks v. United Kingdom*, 9787/82, Commission Report, 7 December 1984, para. 72

90 *T. and V. v. United Kingdom* (1999) 30 EHRR 121, para. 118

91 *Airey v. Ireland* (1979) 2 EHRR 305, para. 24

92 Murphy, *op. cit.*, note 25, p. 207.

93 *Kafkaris v. Cyprus*, Partly Dissenting Opinion of Judge Borrego, para. 1

3.2. *Del Rio Prada v. Spain*

At last, we come to the famous case of *Del Rio Prada v. Spain*.[94] The applicant had been convicted of terrorism offences and sentenced to a total of over 3,000 years of imprisonment.[95] Pursuant to the criminal provisions in force at the time when the offences were committed, the national court (*Audiencia Nacional*) fixed the maximum term to be served by the applicant in respect of all her prison sentences combined at thirty years.[96] The same court set the date on which the applicant would have fully discharged her sentence at 27 June 2017.[97] In 2008 the prison authorities proposed to the court that the applicant was released on 2 July 2008, because she was entitled to remission due to the work she has done, such as cleaning the prison, her cell and communal areas and undertaking university studies.[98] However, that proposal was rejected on the basis of the new precedent known as the 'Parot doctrine' set by the Supreme Court in 2006.[99] Conforming to that approach, sentence adjustments and remissions were no longer to be applied to the maximum term of imprisonment of thirty years, but successively to each of the sentences imposed.[100] The national court explained that it should be applied to people convicted under Criminal Code of 1973, which was the applicant's case, so the date of her release was to be changed accordingly.[101] The applicant alleged that the retroactive application of a new doctrine had extended her detention by almost nine years, in violation of Article 7.[102]

The Grand Chamber started its analysis by reminding that both Commission and ECtHR have drawn a distinction between a measure that constitutes in substance a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of the penalty, meaning that where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form a part of the 'penalty' within the meaning of Article 7.[103] It also admitted that in practice the distinction between a measure that is 'penalty' and a measure that is 'execution' or 'enforcement' of the penalty may not always be clear cut.[104] What is

94 *Del Rio Prada v. Spain*, *op. cit.*, note 48
95 *Ibid.*, para. 12
96 *Ibid.*, para. 14
97 *Ibid.*, para. 15
98 *Ibid.*, para. 16
99 *Ibid.*, para. 17
100 *Ibid.*
101 *Ibid.*, para. 18
102 *Ibid.*, para. 56
103 *Ibid.*, para. 83
104 *Ibid.*, para. 85

quite interesting is that Grand Chamber invoked *Kafkaris* case, unriddling it in a way that 'the manner in which the Prison Regulations concerning the execution of sentences had been understood and applied in respect of the life sentence the applicant was serving went beyond the mere execution of the sentence'.[105] Unfortunately, that was never mentioned in the original *Kafkaris* judgment, but on the contrary that 'the change in the prison law relates to the execution of the sentence as opposed to the 'penalty' imposed on the applicant, which remains that of life imprisonment … accordingly, there has not been a violation of Article 7 in this regard'.[106]

Back to case at hand, the Grand Chamber considered that it was clearly the practice of the Spanish prison and judicial authorities to treat the term of imprisonment to be served, that is to say thirty years, as a new, independent sentence to which certain adjustments, such as remissions of sentence for work done in detention, should be applied.[107] It also noted that such remissions of sentence gave rise to substantial reductions of the term to be served – up to a third of the total sentence – unlike release on licence, which simply provided for improved or more lenient conditions of execution of the sentence, as for example in *Hogben* case.[108] Also, different from other measures that affected the execution of the sentence, the right to remissions for work done in detention was not subject to the discretion of the judge responsible for the execution of the sentences, whose task was simply to apply the law on the basis of proposals made by prison authorities, without considering such criteria as how dangerous the prisoner was considered to be or his prospects of reintegration.[109] However, it admitted that the Criminal Code provided for the exceptions of automatic reduction of the term of imprisonment for work done in detention, namely when the prisoner escaped or attempted to escape or when the prisoner misbehaved.[110] But, since in those cases remissions already allowed by the judge represented acquired rights that could not be taken away retroactively, that was enough for the Grand Chamber to distinguish it from *Kafkaris*, where the five years' remission of sentence granted to life prisoners was conditional on their good conduct.[111] Although far from apparent, this difference

105 *Ibid*.

106 *Kafkaris v. Cyprus*, *op. cit.*, note 66, para. 151.

107 *Del Rio Prada v. Spain*, *op. cit.*, note 48, para. 99

108 *Ibid*., para. 101

109 *Ibid*., para. 101

110 *Ibid*.

111 *Ibid*.

was enough for the Grand Chamber to conclude that the issue of remission in this particular case falls within the scope of Article 7.[112]

Further, the Grand Chamber considered that, at the time when the applicant was convicted and when she was notified of the decision to combine her sentences and to set a maximum term of imprisonment, there was no indication of any line of case-law development in keeping with the Supreme Court's judgment of 2006.[113] Therefore, she could not have foreseen the change in the Supreme Court's case-law which will have the effect of modifying the scope of the penalty imposed to her detriment.[114] ECtHR concluded that there had been a violation of Article 7.[115]

What is clear from the ECtHR reasoning is that both the objective change of the norm that was applied in its original form for decades and the inability of the applicant to anticipate an unexpected judicial ruling led to the violation of Article 7. However, in the instant case the distinction between 'the scope of the penalty' and 'the manner of its execution', which was previously drawn in the *Kafkaris* judgment, became completely blurred.[116] Apparently, ECtHR was of the opinion that the new approach concerning remissions of sentences had to be regarded as provision affecting the actual fixing of the sentence and not just its execution. On the other hand, one could wonder whether her position was really different from Kafkaris's. They were both well aware of the sentences they were convicted to. They were both hoping for the remission as a commonly known part of the criminal sentence. And neither of them could have foreseen the changes in the law that made their sentences considerably harsher. What was different though was that in *Kafkaris*, ECtHR held unanimously that the finding of a violation constituted in itself sufficient just satisfaction for the victim and never suggested the release of the applicant.[117] On the other hand, in *del Rio Prada*, the Grand Chamber considered it incumbent on the respondent state to ensure that the applicant was released at the earliest possible date.[118] The fact is that two applicants in very similar situations did not receive the same treatment from ECtHR.[119]

To conclude, in both *Kafkaris* and *del Rio Prada*, ECtHR seems to have had many troubles in coping with its own doctrine on the differentiation between a measure

112 *Ibid*., para. 110
113 *Ibid*., para. 117
114 *Ibid*.
115 *Ibid*., para. 118
116 *Ibid*., Joint Partly Dissenting Opinion of Judges Mahoney and Vehabović, p. 61
117 *Kafkaris v. Cyprus*, *op. cit.*, note 66, para. 170
118 *Del Rio Prada v. Spain*, *op. cit.*, note 48, para. 139
119 Sanz-Caballero, *op. cit.*, note 65, p. 816

that constitutes in substance a 'penalty', for which an absolute ban on retrospective application exists, and a measure that concerns the 'execution of the penalty' which remains outside of the scope of Article 7. What the two cases have in common is that the state authorities were wrong to apply national precedents, even if they amounted only to the remission of sentences, retrospectively to crimes committed prior to the change of jurisprudence. It follows that retroactive application of any change in the remission or parole system, whether accomplished by a statutory law, executive practice, or judicial case-law, must contravene the spirit of Article 7, which requires that the guiding principle should always be the ability of individuals to plan their affairs in accordance with the law[120], even if that is concerning good behaviour and voluntary work during imprisonment.

Legal certainty would be completely satisfied if ECtHR extended the meaning of the penalty to encompass not only the penalty imposed, but also the measures that amount to the enforcement of that penalty. If so, there would still not be any impediments for the state to change the regulations, administrative acts and practice governing the execution. However, as Article 7 would cover the question of execution as well, it would simply mean that on convicts should be applied only regulations and rules concerning the execution that were in force at the time the criminal offence was committed. When they change over time, the new penal policy must be applied prospectively.

From the hard line decision in *Hogben*, continuing with the perplexing *Kafkaris* to finally surprising *del Río Prada*, ECtHR has steadily departed from its previous reasoning and developed a more open-minded approach to the concepts of penalty and the enforcement of penalty to the individual's benefit.[121] It seems only rational to propose that ECtHR should consider abjuring this unnecessary and completely theoretical differentiation. Should that be deemed as unacceptable, ECtHR ought to be once and for all called upon to specify where is the dividing line between the penalty and its enforcement to be drawn and explain how this doctrine contributes to the protection of human rights.

4. MORE FAVOURABLE LAW, BUT FOR WHOM?

Another question that ECtHR necessarily had to address at one point is whether the right to a more favourable penalty provided for in a law subsequent to the offence was included in Article 7. Back in the 1978, the European Commission

[120] Murphy, *op. cit.*, note 25, p. 206

[121] Sanz-Caballero, *op. cit.*, note 65, p. 817

of Human Rights had answered it in the negative[122] and that ruling has been repeated by ECtHR[123]. However, ECtHR departed from it in *Scoppola v. Italy* (No. 2), when affirmed that Article 7 not only affords protection from the non-retrospectiveness of more stringent criminal law, but also implicitly guarantees the retrospectiveness of more lenient criminal law.[124]

The case involved a man who was found guilty for several offences including murder, attempted murder and ill-treatment of his family, hence convicted to life imprisonment.[125] Having elected to stand trial under the summary procedure, which, according to the Code of Criminal Procedure, allowed for a reduction of the penalty, a more lenient sentence was applied on him – imprisonment for a term of 30 years.[126] On the very day that he was convicted, the Code of Criminal Procedure was modified in a way of hardening the regime of imprisonment for any convicted person liable of serious cumulative offences.[127] Conform to the new norm, in the event of trial under the summary procedure, life imprisonment was to be replaced with life imprisonment with daytime isolation.[128] Consequently, the higher instance national court considered that the applicant should have not been subject to 30 years imprisonment but rather, to life imprisonment with daytime isolation.[129] It took the view that new changes had to be applied to any pending procedure, since their nature was procedural and not substantial, as it had only modified the Code of Criminal Procedure, not the Criminal Code.[130] It also took into account that the applicant made his choice by opting to be judged under the summary procedure and although he could have withdrawn that request, he had not.[131]

Firstly, ECtHR considered that 'a long time has elapsed since the Commission gave the *X v. Germany* decision and that during that time there have been important developments internationally'.[132] Apart from the entry into force of the American Convention on Human Rights, that guarantees the retrospective effect of a law providing for a more lenient penalty enacted after the commission of the relevant offence, ECtHR emphasized the wording of Article 49 of the European

122 *X v. Germany* (1978) 12 Decisions 6-Reports
123 *Le Petit v. United Kingdom* (2000) ECHR 714; *Zaprianov v. Bulgaria* (2003) ECHR 730
124 *Scoppola v. Italy (No. 2)* (2009) 51 EHRR 12
125 *Ibid*., para. 13
126 *Ibid*.
127 *Ibid*., para. 15
128 *Ibid*.
129 *Ibid*., para. 21
130 *Ibid*.
131 *Ibid*.
132 *Ibid.,* para. 105

Union's Charter of Fundamental Rights that states: 'If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable'.[133] It went further to cite the Court of Justice of the European Union (hereinafter: CJEU) in the case of *Berlusconi and Others*: 'The principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States. It follows that this principle must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law'.[134] CJEU did confirm this interpretation[135] and ECtHR reminded that the ruling was also endorsed by the French Court of Cassation.[136] Unusually, ECtHR allowed and acknowledged the remarkable impact of the EU's Charter of Fundamental Rights and decisions of the CJEU on its reasoning. Truth be told, CJEU had developed significant jurisprudence concerning the right to have the more lenient penalty applied.[137] In this regard, ECtHR also cited the statute of the ICC and the judgment of the ICTY.[138] Concludingly, since the *X v. Germany* decision 'a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law'.[139] ECtHR admitted that Article 7 does not expressly mention an obligation for Contracting States to grant an accused the benefit of a change in the law subsequent to the commission of the offence and explained that it was precisely on the basis of that argument that the Commission rejected the applicant's complaint in the case of *X v. Germany*.[140] However, after considering all the circumstances mentioned above, ECtHR rejected that argument and contrarily stressed that in prohibiting the imposition of 'a heavier penalty ... than the one that was applicable at the time the criminal

133 *Ibid*.

134 *Ibid*., paras. 105, 38. See Joined Cases C-387/02, C-391/02, and C-403/02 *Berlusconi, Adelchi, Dell'Utri and others* [2005] ECR, I-3624, paras. 68–69

135 Joined Cases C-23/03, C-52/03, C-133/03, C-337/03 and C-473/03 *Mulliez and Others* [2006] ECR I-3925

136 *Scoppola v. Italy (No. 2)*, *op. cit.*, note 60, para. 38

137 Lock, T., *Articles 48-50*, in: Kellerbauer M. *et. al.* (eds.), Commentary on the EU Treaties and the Charter of Fundamental Rights, Oxford University Press, 2019, pp. 2233-2234. The more lenient penalty can result from either a change in the classification of the act concerned or the penalty applied to the offence, Case C-218/15, *Paoletti*, EU:C:2016:748, para. 27. However, where an individual had been convicted when the more lenient penalty was introduced, that individual does not benefit from the right to have the more lenient penalty applied, unless specific provision has been made for such an entitlement, Case C-650/13, *Delvigne*, EU:C:2015:648, para. 56

138 *Scoppola v. Italy (No. 2)*, *op. cit.*, note 60, paras. 40-1, 105

139 *Ibid*., para. 106

140 *Ibid*., para. 107

offence was committed', paragraph 1 *in fine* of Article 7 does not exclude granting the accused the benefit of a more lenient sentence, prescribed by legislation subsequent to the offence.[141] Furthermore, inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time.[142] In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State – and the community it represents – now consider excessive.[143] ECtHR finally ascertained that the obligation to apply, from among several criminal laws, the one whose provisions are the most favourable to the accused is a clarification of the rules on the succession of criminal laws, which is in accordance with another essential element of Article 7, namely the foreseeability of penalties.[144]

Unsurprisingly, this radical change in the ECtHR's approach to Article 7 was not accepted without criticism. For example, some judges invoked the *travaux préparatoires* of the Convention and previous case-law in arguing that the majority went beyond its powers to widen the interpretation of Article 7 and have actually rewritten it to comply with what they thought was respecting the limits set by the Convention provisions.[145] In other words, the majority have overstepped the limits of judicial interpretation.[146]

Furthermore, it is quite questionable whether 'law more favourable to the accused' is subjective or objective category. The weight of the penalty should not generate serious concern as long as one is dealing with the same type of the penalty.[147] On

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141 *Ibid*.

142 *Ibid*., para. 108

143 *Ibid*.

144 *Ibid*.

145 "The conflict of opinion in the present case should not be attributed to a difference in our interpretative approach to Article 7. We all profess adherence to the relevant international rules embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 and the view that we, as minority, take of Article 7(1) does not call in question the Court's case-law, to which the majority briefly refer, either on reversing previous decisions, where necessary, or of adapting to changing conditions and responding to some emerging consensus on new standards since, as is often emphasized, the Convention is a living instrument requiring a dynamic and evolutive approach that renders rights practical and effective, not theoretical and illusory. But no judicial interpretation, however creative, can be entirely free of constraints. Most importantly it is necessary to keep within the limits set by Convention provisions", Partly Dissenting Opinion of Judge Nicolaou, joined by Judge Bratza, Lorenzen, Jociene, Villiger and Sajo, pp. 46-47

146 *Ibid*.

147 See also Nowak, M., *UN Covenant on Civil and Political Rights – CCPR Commentary*, Engel, 1993, pp. 365-367

the other hand, if a law is amended so that a penalty of imprisonment becomes a fine, it can be reasonably expected that for some the short term of imprisonment is less severe sentence than a considerable fine, while for others just the opposite.[148] So the question is – who is the one to decide what is more favourable to the particular person and what are the criteria that have to be taken into account while rendering such a decision?

Finally, some authors raised concern that literal reading of Article 15 of the International Covenant on Civil and Political Rights as well as Article 9 of American Convention on Human Rights, which provide for the retroactivity of the lighter penalty, does not allow the offender to benefit from the decriminalization of his or her act.[149] Simply put, what would happen in a situation where the offender is already serving the sentence at the moment of the decriminalization of his act?[150] Since the Article 7 does not explicitly guarantee neither 'the retroactivity of the lighter penalty' nor 'application of the more favourable law' it is entirely up to ECtHR to illuminate all of these issues.

5. MIRROR, MIRROR ON THE WALL – WHAT AMOUNTS TO PROCEDURE LAW OF THEM ALL?

It is no secret that the prohibition of retroactive application of criminal law pertains only to substantive law, while in procedural law it is the *tempus regit actum* principle that rules.

In view of that fact, *Scoppola v. Italy (No. 2)* is once again a remarkable judgment.

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148 Mokhtar, *op. cit.*, note 5, p. 50

149 *Ibid*., p. 49

150 Thought-provokingly, Mokhtar expressed an opinion that the human rights perspective on such a case would be that this person should discontinue serving the sentence and should be freed, since decriminalizing an act actually implies that the legislature was wrong to criminalize it in a previous law, *ibid*. That is at least highly debatable, since the reasons for decriminalization can be diverse. A society may come to the view that an act is not harmful enough, should no longer be criminalized due to the change of social and moral standards or for another reason is no longer a matter to be addressed by the criminal law. However, that does not necessarily mean that at the time of the commission, the particular act did not deserve to be punished (according to the social apprehensions at the relevant time). And even so, it remains unclear which legal institutes should be used in order to revoke an irrevocable judgment.

For instance, from the standpoint of the Supreme Court of Cassation of the Republic of Serbia, the prohibition of retrospective application of criminal law, including the principle of 'law more favourable to the accused', can only be applied until the judgment becomes final. After that moment, it held that there is no violation of right if the national authorities apply the statutory law concerning the conditional release, which is less favourable to the convict and that was adopted after the commission of the offence, Supreme Court of Cassation of the Republic of Serbia, Judgment of 13 June 2019, Kzz 587/2019

To begin with, ECtHR reiterated that the rules on retrospectiveness set out in Article 7 apply only to provisions defining offences and the penalties for them, while held that it is reasonable for domestic courts to apply the *tempus regit actum* principle with regard to procedural laws.[151] Nevertheless, the Grand Chamber clarified that criminal norms are not only criminal norms because they are set down in a Criminal Code and likewise, procedure norms are not only procedure norms because they are established in a Code of Criminal Procedure.[152] The classification in domestic law of the legislation concerned cannot be decisive.[153] As a result, in the case discussed, ECtHR considered that the relevant norms governing summary procedure, although part of the Code of Criminal Procedure, actually concerned the length of the sentence to be imposed, hence fall within the scope of Article 7.[154]

This ruling has twofold consequences. On the one hand, it puts national courts in a rather difficult position, since ECtHR did not provide with detailed instructions concerning qualification of a norm as substantive or procedural, but on the other, it leaves an open window for a more flexible approach to the prohibition of retroactive application of criminal law.

At this point, it is worth recalling that very long ago, in 1798, it was the United States Supreme Court who identified four categories of *ex post facto* laws: any law that criminalizes an act after the time it was committed and which punishes such action; any law that aggravates a crime, or makes it greater than it was at the time it was committed; any law that changes the punishment, thus inflicting a greater punishment than that which existed at the time the crime was committed; *any law that alters the legal rules of evidence, thus accepting less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender*.[155] Far from accepting the retroactive application of the procedural rules, this court just recognised that 'any alternation of the legal rules of evidence which would authorize conviction upon less proof, in amount of degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws'[156].

Back to the presence, let us imagine that there was a murder. The corpse was found, but the investigation was unsuccessful for years – no trace of the perpetra-

151 *Scoppola v. Italy (No. 2)*, *op. cit.*, note 60, para. 110

152 *Ibid*., para. 111

153 *Ibid*.

154 *Ibid*., paras. 111, 113

155 *Calder v. Bull* (1798) 3 US (3 Dall.) 386, 390

156 *Hopt v. Utah* (1884) 110 US 574, 590

tor. However, one sunny day a new legal institute was introduced in the national criminal legal system, in particular the 'co-operative witness'. And all of the sudden, due to the co-operator's testimony, our perpetrator was identified, found and convicted at short notice. So, due to the retroactive application of the new legal institute, which commonly amounts to the procedure law, as being a part of the rules of evidence, a person was arrested and sentenced. The same person that would probably have never been even identified let alone prosecuted had the new institute not been introduced and retroactively applied.

This being said, it can be argued that an evidentiary change may also run afoul of the *ex post facto* prohibition if it increases the likelihood of the conviction to such an extent as virtually to guarantee it.[157]

Of course, it must be admitted that ECtHR was pretty clear when stipulated that, for instance, change in a statute of limitations rule to the detriment of an accused in pending proceedings is not a breach of Article 7, because changes in procedural rules generally have immediate application in national law[158] or that the rules concerning the use of witness statements constitute procedural rules, since they do not indicate either the constituent element of the offence or the penalty to be imposed in the event of the conviction[159]. But, it was also very explicit when asserted that Article 7 does not prevent any retroactive alteration in the law or practice concerning remission or any other aspect of the execution of the penalty to the detriment of the defendant[160] and yet we are all aware of the change of course in *del Rio Prada*.

After all, taking into account that ECtHR accepted the approach of 'law more favourable to the accused', it may be reasonable to reconsider why would this perspective be limited only to the penalty and not extended to all of the aspects of the position of the defendant, primarily to the rules regarding the evidence. The fact is that the defendant always has a weaker position in the criminal proceedings, so it does not seem too unfair to allow him/her to at least know the rules that will be applied, either substantial or procedural. Even more so, if we consider the abovementioned hypothetical example that shows how some changes in the evidentiary

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157 Adler J. T., D., *Ex Post Facto Limitations of Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, Fordham Law Review, *vol.* 55, no. 6, 1987, p. 1211

158 *Coëme and Others v. Belgium*, *op. cit.*, note 27, para. 149. However, the legal nature of statute of limitations can be at least described as hybrid or mixed, having both substantial and procedural aspects. For more see *Research Note – Limitation rules in criminal matters,* Directorate-General for Library, Research and Documentation, European Court of Justice, 2017, pp. 1-22

159 *Bosti v. Italy* (2014) Dec. 43952/09, para. 55

160 *Kafkaris v. Cyprus*, *op. cit.*, note 66, para. 142

norms may be significantly detrimental for the defendant, maybe more detrimental than some changes in the substantial law. Given that Article 7 was conceived as a protection from arbitrary prosecution and a limitation of tremendous powers of the state, why would it allow the state to change the rules of the criminal procedure during the procedure? With all due respect, it is rather difficult to understand how such an approach contributes to the respect and observance of human rights.

Therefore, hope remains that ECtHR will not wait for a consensus to gradually emerge in Europe and internationally around the view that the prohibition of retroactive application of criminal law should be interpreted extensively so that it encompasses other legal institutes and rules, such as the norms governing the evidentiary procedure, but that it will take the lead as many times before and extend the scope of Article 7 once again, beyond its outdated limits.

6. CONCLUSION

The principle of legality embodied in Article 7 constitutes a foundation of any criminal justice system that strives to be in accordance with the rule of law. Indisputably, it is aimed at shielding individuals from arbitrary prosecution, conviction and punishment. However, Article 7 has still not reached its full potential. One of the reasons may be a surprisingly conservative approach that has ECtHR adopted regarding this matter, even to the point of handing down judgments that lack any real effect. An obvious example is *Kafkaris* case, which was so criticized that some even argued, and not unfoundedly, that it undermined both the absolute nature of the Article 7 and the value of the Convention system in general.[161]

Greater attention has to be paid to the foreseeability, a pretty clear requirement, that has unfortunately not been consistently applied in regard to Article 7. On the other hand, ECtHR was persistent in insisting on the distinction between the 'penalty' and the 'enforcement of a penalty', a completely blurred construction, whose neither theoretical nor practical value was so far discovered.

On the bright side, inclusion of the *lex mitior* rule within the scope of Article 7 is a promising example of evaluative interpretation used by ECtHR. Over time, with *Scoppola* ruling, it has departed from its previously established case-law and came to realise that a defendant should be able to benefit from a subsequent criminal law providing for a more lenient penalty. However, an issue urging further clarification is concerning the actual scope of the principle 'law most favourable to the accused' and the identification of the criteria by which it is to be determined.

[161] Murphy, *op. cit.*, note 25, p. 208

This new anti-formalistic point of view was also reflected in *del Rio Prada*, a valuable judgment indicating that even ECtHR is not fully convinced in its own doctrine concerning the distinction between the 'penalty' and the 'enforcement of a penalty'. Given that this differentiation in no way contributes to the protection of human rights, ECtHR should seriously consider rejecting it and extending the scope of Article 7 on all forms of the enforcement of the penalty. There is really nothing unreasonable in demanding that only rules that were in force at the time of the offence are to be applied on the convicts, even during the execution of their sentence, since legal certainty is the very essence of Article 7.

Finally, quite flexible reasoning in *Scoppola* and *del Rio Prada* retained faith that ECtHR, an organ otherwise known for its leadership role and innovative insights, will gain strength to realize that the only way for Article 7 to start to truly fulfill its mission is to widen its scope to other legal institutes and norms that are not tightly connected to the offence or the penalty, but are still of immense importance for the position of the defendant, such are the rules concerning evidence. ECtHR should encourage national authorities to analyze 'intrinsic nature' of the particular norm, even if it appears to be of the procedural character, before they decide to retroactively apply it to the defendant's detriment.

Ultimately, despite the broad freedom that states obviously enjoy in determining their own criminal policies, both legislative and judicial changes have to respect the principle of non-retroactivity, unless they benefit to the accused.

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Topic 4

EU civil law and procedure

UDK 331.5(4-67EU:497.5)
Original scientific paper

ATYPICAL FORMS OF EMPLOYMENT – A HINT OF PRECARIOUSNESS? STRUGGLING WITH THE SEGMENTATION AND PRECARISATION OF THE LABOUR MARKET*

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ABSTRACT

Creation of more and better jobs is a central issue of the ILO's Decent Work Agenda, OECD's jobs strategy and the European Union's quality of work policies. While recent reports show an increase of new jobs in the European Union, the number of quality jobs is diminishing. On the other hand, there is a problematic mismatch between the education system and labour market needs. According to statistical data, Croatia is among the EU Member States with the highest rate of precarious work and the highest share of fixed-term employment in total employment. Almost a quarter of the Croatian population is at risk of poverty or social exclusion. Precarious work is closely related to non-standard or atypical forms of employment (e.g. part-time work, fixed-term employment, temporary agency work and (bogus or dependent) self-employment). These forms of employment have negative consequences for the functioning of the labour market, individual workers and the society as a whole. The authors underline shortcomings of the Croatian legislation regarding atypical forms of employment and give possible solutions that could improve the employment status and social security entitlements of those categories of workers.

Keywords: *atypical forms of employment, precarious employment, EU, Croatia*

* This paper is written under support of the University of Rijeka Research Project "Legal Aspects of Companies Restructuring and Transition Towards New Corporate Governance Culture" (uni-ri-drustv-18-43)

1. INTRODUCTION

The new world of work is strongly marked by precariousness. This phenomenon appears in different forms in the labour market. Employers use different forms of work that enable them to be very creative and circumvent rules, while exploiting legal lacunas and uncertainties to increase profit and stay competitive often at the expense of their employees. Precarious employment has become the key occupation of the contemporary labour legislation that notes a rise of precariousness in employment. [1] Precarious work is closely related to non-standard or atypical forms of employment (e.g. part-time work, fixed-term employment, temporary agency work and (bogus or dependent) self-employment). The latter have negative consequences for the functioning of the labour market, individual workers and the society as a whole. The authors question whether precariousness is inherent to the non-standard forms of employment and its temporary nature, and whether it is releated exclussively to the specific form of employment and its legal shortcomings or the phenomenon lies in a combination of work arrangement and organizational anomalies and personal perception of the work process.This represents the basis for analysing the capability of the Croatian market to respond to demands for functional flexibility in the form of non-standard employment. According to statistical data, Croatia is among EU Member States with the highest rate of precarious work and the highest share of fixed-term employment in total employment. Almost a quarter of the Croatian population is at risk of poverty or social exclusion. The authors underline the shortcomings of the Croatian legislation regarding atypical forms of employment and provide possible solutions that could improve the employment status and social security entitlements of these categories of workers. Within this article the terms non-standard work and atypical work will be used as synonymus.

2. ATYPICAL FORMS OF EMPLOYMENT AND THE LABOUR MARKET

Precarious work continuously attracts attention at the EU level. One of the crucial questions in the context of EU social policy concerns the efficiency of positive law and the protection of precarious workers. This question hence centres on the extent of the scope of basic rights to all persons that perform some form of personal work in order to deter or at least control the labour market transition into more precarious spheres. The insecurity in the world of labour challenges the funda-

[1] Ross, S., *The Rise of Precarity*, Ontario Secondary School Teachers Federation magazine, Education Matters, Understanding and navigating the emerging economic and social (dis)order, 2017, [https://labourstudies.mcmaster.ca/news/the-rise-of-precarity], Accessed on 12. April 2020

mental principles of the European Social Model (ESM) concerning the security of employment relationship and decent social protection as a result of labour market fragmentation and social polarization. [2] One of the ambitious aims of the European Pillar of Social Rights (EPSR), as an official document of the EU, is to create the conditions for better and more quality life and working environment in the EU. For the first time it emphasizes *expressis verbis* the notion of precariat as a challenge facing modern European legislation.[3] Therefore, it's unsurprising that precarious work and the impact of precarisation on employment law of the EU and EU Member States is a trending topic among the academic society.[4]

2.1. Atypical equals precarious?

Since 1970es the labour market has been upgraded by atypical employment relations, thus adapting to (overlapping) megatrends, such as globalisation, digitalisation, demographic changes, industrial restructuring, remodelling of labour force and erosion of social standards due to weakening of the trade unions' bargaining power and the growing trend of declining membership.[5] The growing number of available forms of employment enables the labour market participants to adapt to the growing economic competition, with the goal of creating an added value, that often causes a reduction of the workers' protection.[6]

The introduction of non-standard employment in the EU was the reflection of the labour market structural changes and the individual interests of its participants, that dictate the increase of part-time work, temporary work and self-employment, as well as 'compound' non-standard employment, i.e. very marginal part-time work, very short temporary contract, working without a contract and casual work. [7] Their number and variety is increasing, especially in the Central, Eastern and Southern Europe, where trade unions as social partners are being marginalized

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2 European Commission (et al) Launching a Consultation on a Euopean Pillar of Social Rights, 127 Final, Strasbourg, 2016

3 Europan Pillar of Social Rights in 20 Principles, [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en], Accessed on 01. March 2020

4 Fudge, J.; Owens, R., *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, in: Fudge, J.; Owens, R. (eds.), Precarious Work, Women, and the New Economy: The Challenge to Legal Norms, Hart Publishing, 2006

5 Stone, K. V. W., *From Widgets to Digits, Employment Regulation for the Changing Workplace*, Cambridge University Press, USA, 2004, p. 69

6 Matković, T., *Nestajanje rada? Opseg i oblici zaposlenosti na početku informacijskoga doba*, Društvena istraživanja, *vol*. 13, no. 1-2, 2004, pp. 69-70

7 Eurofound (2020), *Labour market change: Trends and policy approaches towards flexibilisation*, Challenges and prospects in the EU series, Publications Office of the European Union, 2020, p. 2

due to often unilateral governmental decisions.[8] These employment forms represent a deviation from the standard of core employment that presupposes stable and secure employment with clearly defined rights and responsibilities and visible carrier perspective, why we call them atypical or non-standard. [9] The employers need operative flexibility in order to adapt quickly to the market changes caused by technological innovations. [10] That becomes possible by means of a combination of core labour, multi-skilled non-replaceble workers, on the one hand, and marginal, periphery, single-skilled workers who perform temporary or casual job, employed (directly or indirectly) through atypical forms of employment, on the other.[11] Recent research "had often lead to the conclusion that the one of the largest and fastest growing problems in Europe is labour market dualization, that is, an increasing divide between insiders in permanent employment and outsiders in precarious work or unemployment."[12]

Strict employment protection legislation (EPL) is often considered as the main cause for the labour market segmentation, due to which standard workers can easily be replaced with flexible, adaptable, cheap, precarious labour force, precariat,[13] and which should be deregulated.[14] Traditionally, precarity is connected with time-limited forms of employment, but as will be shown, precarity and atypical employment cannot be equalized.[15] Moreover, the erosion of labour standards and

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8 Butković, H. *et al.*, *Nestandardni rad u Hrvatskoj: Izazovi i perspektive u odabranim sektorima*, IRMO, Zagreb, 2018, p. 19

9 At which point has the standard become an exception? Some research attributes the dominance of the SER to increased self-employment. See: Eurofound (2017b), *Non-standard forms of employment: Recent trends and future prospects*, Eurofound, Dublin, 2017, p. 5

10 Flexibilisation in employment can refer to numerical, spatial or functional flexibility. See: Labour market change, note 7, p. 9

11 For core/periphery model see: Huws, U. *et al.*, *What price flexibility? The casualisation of women's employment*, 1989, [https://openaccess.leidenuniv.nl/bitstream/handle/1887/35203/What%20price%20flexibility.pdf?sequence=1], Accessed on 01. March 2020, p. 10

12 Florczak, I.; Otto, M., *Precarious work and labour regulation in the EU: current reality and perspectives*, in: Kenner, J. *et al.* (eds.), Precarious work: towards a new theoretical foundation, The challenge for Labour Law in Europe, Edward Elgar, Cheltenham, Northampton, 2019, p. 2

13 Standings defines precariat as group of workers in labour market who lack several forms of social and legal security. See: Standing, G., *Precariat: New Dangerous Class*, Bloomsbury Academic, London, 2011

14 Employment in Europe Report noted that stict EPL sustaining SER contributes to labour market segementation, high use of temporary contracts with low protection and limited prospects for permanent employment. Employment in Europe Report, 2007, p. 51

15 Besides the so-called classic atypical forms of employment, Quinlan mentions five categories of precarious, insecure work: casual work; work in which the workers are exposed to organizational changes (including restructuring, reduction of the employees, privatization); outsourcing (inclucing homework), part-time work, and small business work (including self-employment). Quinlan, M. *et al.*, *The Global Expansion of Precarious Employment, Work Disorganization, and Consequences for Occupational Health:*

increased insecurity did not outmanoeuvre the permanent form of employment. [16] It should be stressed that Eurofound has mapped nine relatively new working arrangements in EU28 and Norway,[17] which, although useful both for employers and workers, provoke justified concern because of their impact on working conditions and the labour market in general.

2.2. Flexicurity – an effective means for combating precariousness or a "shiny" political instrument

As mentioned above rigid labour legislation (on high employment protection) was seen as harmful for the labour market. This has been addresses in the form of the policy of deregulation both at the EU and Member States level over the past three decades, including also the concept of flexicurity.[18]

Constituting the official EU employment policy ever since 2007, the concept of flexicurity was meant to provide the necessary flexibility of employment for employers, on the one hand, and adequate protection (security) of employees, on the other hand. However, there are not only doubts regarding its effectiveness, [19] but also widespread concerns that "the persistent lack of a right balance between flexibility and security has resulted in the precarization of atypical employment's working relations."[20] Consequently, the old questions arise of whether the fascination with the concept of flexicurity is justified, [21] or has it achieved its purpose or just brought popularity to its creators without real effect and sustainability. [22]

A Review of Recent Research, International Journal of Health Services, *vol.* 31, no. 2, 2001, pp. 335-414

16 Marshall, A., *The Sequel of Unemployment, The Changing Role of Part-time and Temporary Work in Western Europe*, in: Rodgers, G.; Rodgers, J. (eds), Precarious Job in Labour Market Regulation, Geneva: Institutional Institute for Labour Review, 129, 1989, p. 17-30

17 Eurofound (2015), New Forms of Employment, [https://www.eurofound.europa.eu/hr/new-forms-of-employment#case%20studies], accessed on 03. March 2020

18 Florczak; Otto, *op. cit*, note 12, p. 8

19 It did not bring any novelty in the EU Employment Policy regulation of the precarious employment. Report by the „Flexicurity" Mission (2008) in: Kountouris, N., *The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective*, Comparative Labour Law & Policy Journal, *vol.* 34, no. 1, 2012, pp. 39-40

20 Florczak; Otto, *op. cit*, note 12, p 7

21 Bodiroga - Vukobrat, N. *et al.*, *Precarious Times, Precarious Work: Lesson from Flexicurity*, in: Wolfrum, R. *et al.* (eds.), Contemporary Developments in International Law. Essays in Honour of Budislav Vukas, Brill Nijhoff, Leiden, Boston, 2016, p. 408

22 Henning, J. *et al.*, *Flexicurity and Beyond. Finding a new agenda for the European Social Model*, DJØF Publishing, Kopenhagen, 2007

The concept of flexicurity suggests different roads Member State can take to improve their labour markets. This variety and diversity of welfare states across Europe is documented by many studies.[23] However, flexibilisation in the labour market could be seen as a neutral concept, beneficial to both employers and workers, only im implemented properly, depending on specific individual situations and regulatory frameworks, so as to ensure a win–win situation for both sides.[24] Nevertheless, the traditional conflict of interests in the world of labour full of emerging needs and novelties, in which workers more often accept insecure and changeable working conditions that create a feeling of individual uncertainity, deserves the intervention of labour law in offering an optimal solution.[25]

2.3. The notion of precarious work

Pecarious work is not a matter of a single state, but a hallmark of the contemporary world of work in general. If we want to develop (more) effective means (or regulation) to combat this negative phenomenon universally, we need an appropriate regulatory response, comprehensive policy and workers empowered by promoting collective bargaining and right to associate, as well as minimum wages (globally) and basic income security.[26] In achieving this, contemporary labour law legislation and situation at the labour market call for a universal (comprehensive) definition of precarious work, that includes clear indicators and dimensions of precariousness. Despite the proliferation of scientific publications and studies about precarious work, the concept still remains unclear.[27] One of the reasons is the economic, social, political, and labour market diversity in different states.[28] However, the majority of academics agree that precarious employment is a multidimensional and heterogeneous phenomenon that contains a combination of insecurity, instability, socio-economic vulnerability and the lack of protection.[29]

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23 Wilthagen, T. *et al.*, *Flexicurity Pathways: Turning Hurdles into Stepping-Stones*, Brussels, 2007

24 Eurofound (2020), note 7, p. 3

25 Godlewska-Bujok, B.; Patulski, A., *Precariat: next stage of development or economic predominance in a new scene?*, in: Kenner, J. *et al.* (eds.), Precarious work: towards a new theoretical foundation, The challenge for Labour Law in Europe, Edward Elgar, Cheltenham, Northampton, 2019, pp. 25-26

26 ILO (2012), From precarious work to decent work, Bureau for Workers' Activities, International Labour Office, Geneva, 2012, p. 22

27 It seems that the insecurity that is a characteristic of the atypical employment arrangements has been transmitted to the research. Starčević, M., *Prekarni rad i nemogućnost prekarne klase*, Diskrepancija, *vol.* 13, no. 19, 2014, p. 38. The same is true of science when using "precarious employment" as a notion that is not a statistical category

28 ILO (2011), *Policies and Regulations to Combat Precarious Employment*, Bureau for Workers Activities, International Labour Office, Geneva, 2011, p. 5

29 About reflexive question: How the precariousness has become a multi-dimensional phenomenon? In: Badoi, D., *Normalizing precariousness through the flexible work -A conceptual model proposal for the*

Even though these characteristics are associated to atypical employment, as (highly) precarious, non-standard or atypical categories of work, they cannot be equated with precarious employment,[30] but may, nevertheless, be used as a starting point for our analysis.

The European Commision has addressed the challenges of precarious work. One study concluded that the precarious work includes different forms of employment "established below the socially accepted normative standards (typically expressed in terms of rights, of employment protection legislation, and of collective protection) in one or more respects (the four dimensions) which results from an unbalanced distribution towards and amongst workers …. of the insecurity and risks typically attached to economic life in general and to the labour market in particular..."[31] Different research shows that in general, all employment relationships are at some risk of precarization, [32] depending on the individual context and the type of risk connected to a specific employment relationship. EU Member States that have the highest share of SER have, contrary to logic, the highest risk of precarization.[33] Precariousness is indeed closely connected with digitalization and "gig economy".[34] The stable resp. permanent employment relationships are also exposed to precariousness in a situation where employer does not pay wage due to insolvency[35] and, on the other hand, because of low salaries, unpaid obligatory

precarization of early-stage workers in science and research, [http://www.inclusivegrowth.eu/files/Call-12/15-DBadoi-_paper.pdf], accessed on 01. March 2020, in connection with: Bodiroga-Vukobrat *et al.*, *op. cit.*, note 21, p. 406

30 Non-standard work include various types of employment status as found in labour law and reflected in conventional labour market statistical categories. Eurofound (2018a), *Non-standard forms of employment: Recent trends and future prospects*, Eurofound, Dublin, 2018

31 Hromadžić, H.; Zgaljardić, A., *Prekarnost, Ekonomsko-politički i društveni fenomen suvremenog svijeta*, Etnološka tribina 42, *vol*. 49, 2019, p. 123

32 Share of the open-ended employment contracts in total employment is almost 60% and shows continuous growth. *Precarious Employment in Europe: Patterns, Trends and Policy Strategies*, 2016, p. 10-11, [http://www.europarl.europa.eu/studies, 10.2.2020], accessed on 03. March 2020

33 *Ibid*.

34 Eurofound (2017), *Aspects of nonstandard employment in Europe*, Dublin, Eurofound, 2017

35 It is estimated that in Croatia around 40.000 workers from the private sector, sector of services, craft and retail work, but do not receive salary. Most of them are not organized in trade unions and not covered by a collective agreement in force in their company. There are no official data about the number of workers that perform work but do not receive salary, because the employer in Croatia has to pay taxes and obligatory contributions first, and afterward salary. Also, the employer is not obliged to notify the authorities about the number of the workers he did not remunerate for their work. [https://www.moj-posao.net/Press-centar/Details/68737/Izmedju-40-i-60-tisuca-ljudi-radi-a-ne-prima-placu/2/], accessed on 10. March 2020

social security contributions, and/or access to the mechanisms of protection.[36] It is possible to conclude hence that precariousness is inherent to every working process, and not only to atypical forms of employment.[37] Despite the high EPL and social security, a worker employed based on an open-ended contract is equaly "vulnerable" in terms of indicators that make work insecure or less secure. As Grimshaw emphasizes, if SER is taken as a referent value of "quality work", it should also be aware of the diversity of national standards that guarantee the protection of this type of model and the fact that many national legislations have relaxed the SER protection.[38] The main risks related to SER are: low rewards (income precariousness), exposure to stress (psychological precariousness), questionable career perspective and limited acces to professional trainings (organizational precariousness).[39] From the perspective of temporal precariousness, part-time worker's sense of (financial) instability and (social) insecurity may continue transforming into a standard employment relation which, although representing "job-for-life" *per se* does not create a lasting and unbreakable bond between employer and employee that could not be terminated.[40]

2.4. Non-standard employment – personal choice rather than involuntary work

Besides the legislative approach,[41] the criterion of personal choice of a flexible working arrangement can be used to determine whether a certain flexible employment is precarious or not. One of the best examples is part-time work as the most important instrument of flexibilization over the last decade, with a share of over 20 % in total employment in 2018.[42] According to some authors, a worker who

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36 Ori, M.; Sargeant, M., *Introduction*, in: Precarious Work and Vulnerable Workers, Vulnerable Workers and Precarious Working, International School of Higher Education in Labour and Industrial Relations, Cambridge Scholars Publishing, Newcastle upon Tyne, 2013

37 Kountouris, *op. cit.,* note 19, p. 22

38 Still, standard employment – permanent, full-time employment subject to labour regulation – is still dominant employment form in Europe. Grimshaw, D. *et al.*, *Reducing Precarious Work Protective gaps and the role of social dialogue in Europe*, 2017, p. 6, [https://www.epsu.org/sites/default/files/article/files/Precarious%20work%20and%20social%20dialogue.pdf], accessed on 07. March 2020

39 *Ibid*.

40 Florczak; Otto, *op. cit.*, note 12, p. 8

41 Directive 97/81/EC defines part-time worker as "*an employee whose normal hours off work (...) are less than the normal hours of work of a comparable full-time worker*." Minority of interviewed Member States overall perceived part-time work as precarious. However, study respondents described part-time work as the main issue for the social partners with employers arguing for the liberalisation of restrictions on part-time working and trade unions supporting the existing limits on part-time work. See: Countouris, N., *Strengthening the protection of precarious workers: the concept of precarious work*, ITC, London, <s.a.>, p. 4

42 Managers, for instance are much less likely to be working part-time and, if working part-time, to be doing so involuntary. Eurofound (2018), Non-standard forms of employment: Recent trends and

choses part-time work in order to achieve work-life balance should not be deemed to be precariously employed. Conversely, if a part-time worker has no possibility to increase working hours, he or she is confined by a lower-paid employment with limited career perspectives; consequently, the lower-quality employment prompts precariousness.[43]

Taking into account the regulatory inefficiency of the Part-time work Directive 97/81/EC, [44] there are significant differences in national legislations of the Member States concerning the regulation of the part-time worker's right to request the move to more secure type of employment, resp. move from part-time work to full-time work.[45]

In Croatia, under the Art. 62 par. 7 of the Labour Act (LA), the employer is obligated to consider the request of the worker for change in the duration of working hours agreed by the employment contract, from part-time to full-time and vice versa. As this is a way for workers wishing to incease the working hours and earnings, and/or secure permanent position in undertaking or establishment,[46] it seems to be an instrument against precariousness. However, the employer has this obligation only if a possibility for that type of work in his enterprise actually exists. It is important to note that the wording of the provision is not precise, and consequently the employer's obligation remains unclear and vague. Croatian workers choose to work part-time mostly involuntarily in the absence of full-time employment opportunities.[47] For some authors, involuntary acceptance of atypical form of employment in the absence of alternative solutions represents hence precarious employment in which the elements of the security of a full-time job is missing. [48] While in the EU the percentage of part-time workers is growing, in

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future prospects, Dublin, p. 9 See also: Countouris, Strengthening, *op. cit.*, note 41

43 Eurofound, 2020, Labour market change, note 7, p. 21

44 Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work) [1997] OJ L 14/9 (Part-Time Work Directive)

45 Westregård, A., *Is Permanent Employment the Solution? Precarity on new forms of employment under Swedish labour law*, in: Kenner, J. *et al.* (eds.), Precarious work: towards a new theoretical foundation, The challenge for Labour Law in Europe, Edward Elgar, Cheltenham, Northampton, 2019, p. 108

46 European Commission, Commission Staff Working Document: Analytical document accompanying the Consultation Document Second phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive (Directive 91/533/EEC) in the framework of the European Pillar of Social Rights, SWD(2017)301 final, Brussels, 2017

47 Who are involuntary part-time workers? See in: Eurofound (2017a), Estimating labour market slack in the European Union, Publications Office of the European Union, Luxembourg; Eurofound „Aspects of nonstandard employment in Europe" Dublin, 2017

48 Report VI: Employment Policies for Social Justice and Fair Globalization, ILO, 2010, p. 35, in connection with: Employment in Europe, 2007, p. 47 (Directorate-General for Employment, Social Af-

Croatia it is falling (in 2017 it amounted to 4,8%) with women working mostly as part-time employees.[49] Research has shown that the precarious position of female part-time workers is manifested in non-equal access to professional training and possibility of promotion (organizational precariousness) and significantly lower average wage (income precariousness) in relation to male workers, that causes a more visible unequal access to pension schemes and consequenty, growing risk of social exclusion.

2.5. *De lege lata* solution at the EU level – still searching for a comprehensive definition of precariousness

It seems that the "atypical" Directives are a good example of an intersection of precarious labour elements and secondary EU law. Part-Time Work Directive (like the Fixed-Term Work Directive and Temporary Agency Work Directive)[50] uses the principle of **equal treatmen**t to equalize the status of atypical and comparable permanent worker.[51] Earlier research shows that the latter directives were not efficient enough in decreasing the existing differences regarding access to professional education, safety and health at work protection, and social protection of atypical workers in relation to permanent workers.[52] Still, I. Florczak emphasizes that the violation of the principle of equal treatment is not sufficient for the development of precarious employment, just as precarious employment is not always a consequence of unequal treatment.[53]

In 2016 the European Commission emphasized that flexible labour market policy should enable the transition to more secure and more permanent forms of em-

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fairs and Equal Opportunities Unit, 2007)

49 Also see: The Gender Pay Gap in Belgium, Report, 2014, [https://igvmiefh.belgium.be/sites/default/files/78_-_gender_pay_gap_report_2014_eng_0.pdf], accessed on 12. April 2020

50 Part-Time Work Directive, note 44; Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999], OJ L175/43 (Fixed-Term Work Directive); Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work [2008] OJ L327/9 (Temporary Agency Work Directive)

51 Whether the temporary and permanent workers of the same enterprise are comparable should be assesed taking into account different factors, e.g. nature of work, conditions for professional training, and working conditions. See the Judgments of the CJEU: Case C-177/10 *Francisco Javier Rosado Santana v Consejería de Justicia y Administración Pública de la Junta de Andalucía* (EU:C:2011:557, 66., 8.9.2011) and Case C-38/13 *Małgorzata Nierodzik v Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. dr. Stanisława Deresza w Choroszczy* (EU: C:2014:152, 13.3.2014)

52 Eurofound (2018), *Does employment status matter for job quality?*, Publications Office of the European Union, Luxembourg, 2018, p. 4-7

53 Florczak; Otto, *op. cit.*, note 12, p. 13

ployment.[54] Social partners in Europe have an important role in limiting precarious work through national legislation and collective bargaining at lower levels. For example, the Slovenian trade unions strive for the convertion of temporary resp. casual working arrangements into permanent employment, nevertheless, there are quite different examples as well.[55]

The Report of the European Parliament contains guidelines that represent a contribution to the indeed necessary basic consensus about the notion of precariousness. Precarious employment is therein defined as "employment which does not comply with EU, international and national standards and laws and/or does not provide sufficient resources for a decent life or adequate social protection"; precariousness depends on the type of contract that has been concluded, but also on one of following factors: "little or no job security owing to the non-permanent nature of the work, as in involuntary and often marginal part-time contracts, and, in some Member States, unclear working hours and duties that change owing to on-demand work; rudimentary protection from dismissal and lack of sufficient social protection in case of dismissal; insufficient remuneration for a decent living; no or limited social protection rights or benefits; no or limited protection against any form of discrimination; no or limited prospects for advancement in the labour market or career development and training; low level of collective rights and limited right to collective representation; a working environment that fails to meet minimum health and safety standards." [56] Such a multidimensional approach to precarious employment that uses different indicators is not new. Rodgers and Rodgers differentiate the temporal, organizational, economic and social precariousness.[57]

Nevertheless, while analysing precariousness we should bear in mind that legal norms do not include personal, psychological and/or existential indicators of precariousness that could create different perceptions of insecurity of a concrete form of employ-

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54 *Annual Growth Survey*, 2016, COM/2015/0690 final. Unlike Germany and UK where standard open-ended contracts represent the most prevalent employment relationship, France and Spain are characterised by a high incidence of non-standard employment and quite low transition rates into standard forms of employment. Eurofound (2019), *Labour market segmentation: Piloting new empirical and policy analyses*, Publications Office of the European Union, Luxembourg, 2019, p. 22

55 In Latvia they support labour market flexibility. Bejaković, P., *Prekarni rad u Hrvatskoj i Europi*, Radno pravo, no. 7-8, 2019, p. 36

56 European Parliament, *Report on working conditions and precarious employment* (2016/2221(INI)), [https://www.europarl.europa.eu/doceo/document/A-8-2017-0224_EN.html], accessed on 10. March 2020

57 Rodgers, G., *Precarious Work in Western Europe*: The State of the Debate, in: Rodgers, G.; Rodgers, J. (eds.), Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe, ILO, Geneva, 1989

ment, in relation to age, sex, psychological status of worker, his/her family and social conditions.[58] Therefore, individual, subjective experiences of a concrete job can create a positive perception of an otherwise objectively "low-quality" (bad) job.[59]

Another challenge in the battle against precarious work is related with the application of the social policy directives *rationae personae*, i.e. in regard to the effectiveness of the guaranteed rights. Some categories of precarious workers (self-employed, on-call workers) [60] fall within the concept of "worker" in EU law according to the established case law of the CJEU. On the other hand, the application of Part-time and Fixed-term Directives to other categories of workers "may be dependent upon the relevant national legal definitions and practices".[61] Such interpretation of the concept of worker creates a gap in the protection of workers employed in the atypical forms of work, that do not fullfil the criteria for a contract of employment or employment relationship.[62] This triggered the drafting of "Protection Against Precarious Work Directive" based on the principle of equal treatment, protection against abuses and facilitation of access to typical forms of employment. [63]

Another issue closely related with the precariousness of work that draws attention is the creation of "quality jobs", regardless of the contractual form. The latter issue is also manifested in the revision of the Written Statement Directive[64] and the

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58 Kountouris, *op. cit.*, note 19, p. 22

59 Subjective experience is the basic way to find out „to what extent is precariousness transmitted to worker." See: Campbell, I.; Price, R., *Precarious work and precarious workers: Towards an improved conceptualisation*, The Economic and Labour Relations Review, *vol.* 27, no. 3, 2016, pp. 316-318

60 Case C-143/16 *Abercrombie & Fitch Italia Srl v Antonino Bordonaro,* EU:C:2017:566 (19 July 2017) with legal updates on this case: link: Use of zero hours contracts for young workers, with automatic dismissal at age 25, not unlawful age discrimination (ECJ); Case C-66/85 Deborah Lawrie-Blum v Land Baden-Württemberg, [1986] ECR 02121

61 Florczak; Otto, *op. cit.*, note 12, p. 18 ff

62 The application of the concept of worker is problematic in frame of potentially most relevant Part-Time and Fixed-Term Directives. Florczak; Otto, *ibid.*, p. 19; in connection with: Kountouris, N., *The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope*, 2018, p. 197, [https://discovery.ucl.ac.uk/id/eprint/1571889/1/Countouris_Concept_Worker_European_AAM.pdf], accessed on 02. February 2020

63 Garben, S. *et al.*, *Towards a European Pillar of Social Rights: Upgrading the EU social* aquis*,* Theorising the ENP –Conference Report, 2015, p. 5. Kountouris emphasized that Directives depart from the aproach that „atypical equals precarious" (and *vice versa*), and consequently the best way to deprecarize the atypical work is „to make its regulation conform to that of the standard employment relationship". Kountouris, *op. cit.*, note 19, p. 37-38

64 Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L288/32 - Writtent Statement Directive is the first instrument of secundary law with which the EU began to regulate „atypical" work. European Commission, *Staff Working Document REFIT Evaluation of the "Written Statement Directive"* (Directive 91/533/EEC) SWD (2017) 205 final

extension of the minimum rights, resp. social dialogue, collective bargaining and freedom of association, to all workers, including precarious workers, with the view of promoting security and information about all aspects of employment relationship. The idea of a comprehensive policy that guarantees an efficient protection at the workplace in order to eliminate the trend of precariousness was realized in June 2019, when the Directive on Transparent and Predictable Working Conditions in the Union, with a special emphasis on atypical forms of employment, was adopted.[65]

3. THE QUALITY-DECENCY WORK PERSPECTIVE TO INVESTIGATE PRECARIOUS EMPLOYMENT

Notions of "precarious employment" and "quality of employment" share the same difficulty of finding or developing appropriate indicators that could be used to classify (in a metodologically satisfactory way) certain work as precarious, i.e. to classify an employment relationship as (non)-quality employment. As this is a topic warranting a detailed investigation, several issues need to be addressed. Competitive economy should not be based on a permanent decrease of the quality of jobs, especially when the statistics and trends show that the high employment rate goes hand in hand with the quality of jobs. Moreover, earlier research demonstrates that a job is of lower quality if work is performed based on temporary working arrangements, in contrast to permanent employment relationships, which is most notable in the difference in the amount of salary of the permanent and temporary worker, the access to specific rights like professional training or trade union membership.[66]

In spite of the so far (pre-Covid) positive economic indicators for Croatia,[67] a stable trend of a decrease of quality jobs has continued, which seems to be true of the economic growth based on the reduction of workers' rights too. A recent study found that the working conditions of a great number of workers are similarly bad or worse than before the recession of 2008. Consequently, one quarter of the population is on the brink of poverty or social inclusion risks.[68] This data shows that

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65 Directive 2019/1152 of the European Parliament and of the Council on transparent and predictable working conditions in the European Union [2019] OJ L186/105

66 More at: Union of Autonomous Trade Unions of Croatia (Savez samostalnih sindikata Hrvatske); its Project: Work at the measure of workers; available at: [http://www.sssh.hr/hr/vise/nacionalne-aktivnosti-72/rad-po-mjeri-covjeka-3446], accessed on 24. April 2020

67 In 2018 the real growth of the GDP amounted to 2,6%, thereby the trend of the economic activity's recovery commenced in 2015 after 6 years of reccession. Convergence Program 2019-2022, Ministry of Finance, Croatia, 2019 [https://ec.europa.eu/info/sites/info/files/business_economy_euro/economic_and_fiscal_policy_coordination/documents/2019-european-semester-convergence-programme-croatia-hr.pdf], accessed on 04. March 2020

68 Tomić, I. *et. al.*, *The employment and social situation in Croatia*, Policy Department for Economic, Scientific and Quality of Life Policies, EU, 2019, p. 8, [http://www.europarl.europa.eu/supporting-anal-

the social benefits are not an efficient tool for the reduction of poverty as, comparing to the period 2013 – 2018, a decline in benefits has been marked.[69] According to the Commission, one of the positive indicators of the efforts undertaken by the Croatian legislation to reduce poverty and social exclusion is the above mentioned duty of the employer to consider the worker's request to transfer from part-time to full-time and *vice versa*. However, the efficiency of such regulation (*infra* 4) could be achieved by additional measures, e.g. the employer's duty to answer in a written form or to guarantee a priority to part-time worker, which have been introduced in several Member States.[70]

Responses of the national economies to the global labour market competition, in line with the European legislation, disturbe the social structure and push non-standard workers into poverty.[71] The research of the European Commission illustrates that more than 40% of all employment contracts are related to non-standard forms of work ranging from regular part-time work to on-demand work without guaranteed working hours.[72] Therefore, it is important to ensure decent work, including decent wage to avoid in-work poverty.[73]

Adressing precariousnes in work, the EPSR emphasizes the right to fair wages that provide for a decent standard of living. It underlines that precariousness should be analysed independently from the form of employment, and based on the decent standard of living that could be disrupted by bad working conditions.[74] Regardless of the generally accepted understanding of decent living conditions, if their realization is ensured by the financial indicator - adequate remuneration - we could indeed label a particular job secure and in turn non-precarious. Consequently, an adequate wage should be ensured and regulated in line with the national social and economic conditions of the Member State in order to prevent in-work poverty.

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yses], accessed on 12. April 2020

69 *Ibid*.

70 European Commision, Right to request a different form of employment and receive a reply in writing, 2017, p. 118-119. About the inefficiency of Part-Time Directive, see: Eurofound, 2020, Labour market change, note 7, p. 1

71 Izvješće o uvjetima rada i nesigurnosti radnih mjesta, Europski Parlament, 2017, [http://www.europarl.europa.eu/doceo/document/A-8-2017-0224_HR.html], accessed on 01. April 2020

72 Extent of NSE in the EU, European Commission, Non-standard employment and access to social security benefits, Research note 8/2015 (SMM_2015_RN8_non-standard employment_final (2).pdf)

73 Peña-Casas, R. *et al.*, *In-work poverty in Europe, A study of national policies*, European Social Policy Network (ESPN), Brussels, European Commission, 2019, p. 7. See also ILO definition of decent work in: ILO (2016), Non-standard employment around the world, Understanding challenges, shaping prospects, International Labour Office, Geneva, 2016, p. 3

74 *Cf*. Florczak; Otto, *op. cit.*, note 12, p. 13-14. Some authors observe: "A guaranteed minimum income may have an important role in reducing IWP —when it can be (temporarily) combined with work income" as a strengthen income replacement policy. Peña-Casas, *et al.*, *ibid.*, p. 16

In 2020 the minimum net wage in Croatia amounts to 3.250,01 Kuna (cca 440 EUR). Working for a minimum wage does not necessarily mean living in poverty, while the poverty depends on the economic status of a household, resp. the duty of the wage earner to support other persons or not.[75]

Concerning the social security aspects, Grgurev and Vukorepa warn that in Croatia fixed-term employment (and temporary agency work) is potentially problematic in the case of low wages and longer career breaks between two employment contracts. In order to avoid marginalisation of workers engaged in flexible forms of employment, it is important to reflect more on state measures which could be introduced.[76]

To conclude, the above mentioned relations are connected in straightforward ways. Although still subject to debate, they seem to offer useful guidance in empirical research of precarious employment.

4. LEGISLATIVE DEVELOPMENTS IN FIXED-TERM CONTRACTS – WHERE DO WE STAND?

The standard employment relationship is still prevalent in most EU Member States. But employers often engage workers based on employment contract (or relationship) of limited duration, determined by objective conditions.[77] In those countries, fixed-term employment is percieved as precarious for workers who, after the end of one or more successive fixed-term contracts, can find themselves in the labour market in a precarious position, both from the legal and financial standpoint. The risk of unemployment is very high.[78]

Directive 99/70/EC in clause 4 prescribes the protection of fixed-term workers from discrimination in relation to the comparable permanent workers. This principle was also used as a tool against the income precariousness, i.e. to equalize fixed-term

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75 Nestić, D; Blažević Burić, S., *Radnici na minimalnoj plaći i siromaštvo u Hrvatskoj*, Revija za socijalnu politiku, *vol.* 25, no. 3, 2018, p. 260. **Cf.** Grgurev, I.; Vukorepa, I., *Minimum wage as a tool in the fight against poverty: Croatian labour law perspective,* in: Löschnigg, G. (ed.), Staatliche Eingriffeindeas System der Mindestentgelte im internationalen Vergleich, Verlag des ÖGB, Wien, 2013, pp. 280-308

76 Grgurev, I.; Vukorepa, I., *Flexible and New Forms of Employment in Croatia and their Pension Entitlement Aspects*, in: Sander, G.G. *et al.* (eds.), Transnational, European, and National Labour Relations, Springer Verlag, Heidelberg, Berlin, 2018, pp. 255, 259

77 Directive 99/70/EC defines fixed-term worker as a person having an employment contract (...) is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event

78 Lokiec, P., *Fixed-Terms Contracts in France*, Regulation of Fixed-term Employment Contracts, Comparative Labour Law Seminar, JILPT Report No. 9, 2010, pp. 43-53

workers in the right to wage allowance based on seniority.[79] Moreover, the Directive requires from Member States to take all necessary steps to prevent the misuse of the fix-term contracts[80] and introduce, taking into account the needs of specific sectors and/or categories of workers, one or more of the following measures: objective reasons justifying the renewal of such contracts or relationships; the maximum total duration of successive fixed-term employment contracts or relationships;[81] the number of renewals of such contracts or relationships.[82] This led to variations between Member States contributing to a greater level of segmentation in the labour market.[83] Precariousness inherent to fixed-term employment contracts arises from a lack of adequate protection against the *employers first use* of fixed-term contract, in relation to which the Framework agreement does not request from Member States to prescribe restrictions. The Member States were thus forced to individualy restrict the initial use of first fixed-term contract given the non-regression clasue that allows them to upgrade protection *in favorem laboratoris.*[84]

An approach to discourage the use of temporary contracts included restriction of their use, but also a deregulation of the SER, of redundancies etc.[85] Some reforms have effected labour institutions in a positive way increasing the quality of work in standard and in promoted atypical employment, while others acted in the opposite direction towards precarization. For example, the reform in Spain (in the period 2000 - 2015) led to a decreasing of labour standards and employment protection and an increasing of precariousness.[86]

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79 Joined Cases C-444/09 and C-456/09 Rosa María Gavieiro Gavieiro (C-444/09), Ana María Iglesias Torres (C-456/09) v Consellería de Educación e Ordenación Universitaria de la Xunta de Galicia [2010] OJ C 55/14

80 Joined Cases C-103/18 *Sánchez Ruiz and* C-429/18 *Fernández Álvarez and Others v Comunidad de Madrid (Servicio Madrileño de Salud)*, Luxembourg, 19.3.2020. Member states should not from the notion „successive employment relationships on fixed-term" exclude a situation of a worker who was employed long-term, based on several engagements, as the substitution for the job without a public tender, whereby his employment relationship was tacitly prolonged from one year to another

81 Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* [2006], ECR I-06057. Successive fix-term contracts where there is a gap of more then 20 days between them as instrument for employers to re-employ after a short break

82 Clause 5.1 of the Framework Agreement on fixed-term contract. Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* [2006], ECR I-06057

83 Kahn, L. M., *Employment protection reforms, employment and the incidence of temporary jobs in Europe: 1996–2001*, Labour Economics, *vol.* 17, no. 1, 2010, pp. 1–15

84 Davies, A.C.L., *EU Labour Law*, Edward Elgar Publishing, Oxford, 2011, p. 191

85 More: Eurofound,2020, Labour market change, note 7, p. 43

86 Davies, *op. cit.*, note 85, p. 191

The Croatian Labour Act,[87] as *lex generalis* for individual and collective employment relations,[88] explicitly prescribes that the fixed-term employment contract can be concluded exceptionally,[89] what „implies that such contracts are seen as an atypical form of employment and that priority should be given to standard forms of employment."[90]

As fixed-term contracts can be concluded as a very short term to long term temporary contract, workers are faced with temporal precariousness. The employer may enter into a successive fixed-term employment contract with the same worker solely on objective grounds ("opravdani razlozi"), that must be specified in the contract, Art. 12 (2). It is important to emphasize that for the conclusion of the first fixed-term contract the objective ground is not needed (Art. 12 (4), in con. with (2).

The cumulative (maximum) duration of all successive fixed-term employment contracts, *including the first employment contract*, may not exceed three consecutive years, unless where it is necessary for the purpose of replacing a temporarily absent worker or where it is based on objective grounds allowed by law or a collective agreement (Art. 12 (3). The maximum duration of three consecutive years do not apply to the first fixed-term employment contract (Art. 12 (4). This means, for example, that the first fixed-employment contract could be concluded for five or seven years. But if the first contract is concluded for the period shorter than three years, and subsequently new contract(s) are concluded, a limitation of three consecutive years applies to all the concluded contracts. Also, another issue here is whether the employer and worker after the first fixed-term contract concluded for a period longer than three years, can conclude successive fixed-term contract(s) (i.e. with the duration of up to three years) or not? Opinions on the matter differ,[91] leaving the final say to the judicature. According to the Supreme Court case law, the uninterrupted 3-year period should also include the period of work the same worker performed for the same employer,

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87 Zakon o radu, Official Gazzete 93/2014, 127/2017, 98/2019

88 Employment relationships in Croatia are regulated by more than 20 other laws, besides Labour Act, that makes labour law legislation complex and increasingly fragmented. Grgurev; Vukorepa, *op. cit.*, note 76, p. 245

89 For the purpose of taking up an employment where the end of the employment is determined by a specific date, the completion of a specific task, or the occurrence of the specific event (Art. 12 (1))

90 Grgurev, I., *Atypical Employment Relationships: The Position in Croatia*, in: Waas, B.; van Voss, G. H. (eds.), Restatement of Labour Law in Europe, *vol.* II, Atypical Employment Relationships, Hart, Oxford, 2019, p. 84

91 Rožman, K., in: *Detaljni komentar Zakona o radu*, Rožman K. (ed.), Radno pravo, Zagreb, 2017, p 112; Kasunić Peris, M., in: *Zakon o radu s komentarima i tumačenjima*, Bejaković, P. *et al*. (eds.), TIM press, Zagreb, 2014, p. 120; Milković, D., *Sporna pitanja novog Zakona o radu*, in: Aktualnosti hrvatskog zakonodavstva i pravne prakse, *vol*. 22, Organizator, Zagreb, 2015, p. 142-143

but as an assigned temporary agency worker. Otherwise, a circumvention of the strict rule at the detriment of worker would occur.[92]

Temporal precariousness is additionaly increased by allowing exceptions to the rule on the three-year maximum duration of successive fixed-term contracts, when it is „based on objective grounds allowed by law[93] or by a collective agreement."

On the other hand, several legal presumptions improve the position of fixed-term workers,[94] and represent an element of security. However, Croatian workers are often reluctant to claim their rights from the employer or before the court, afraid of losing their job. The Ombudswoman of the Republic of Croatia reports that "many workers have fixed-term work contracts, often concluded against the law, while employers patently exploit this institute", and aware of this and dissatisfied with their insecure employment status, "workers put up with it, hoping to be offered permanent work contracts if they prove they deserve it through their work and efforts."[95] Labour inspectors note the violations related to the illegal conclusion of the fixed-term contracts (Art. 228 (1/1).[96] In 2017, they amounted to 6% of the total number of violations, and included 215 workers (110 women), compared to 2016 and a share of 7% (228 workers, 121 women).[97]

The *temporal precariousness* of fixed-term work[98] reflects in the level of workers' rights, although they should be guaranteed in line with the principle of equal treatment. Croatian LA safeguards in line with EU employment law, the same rights to fixed-term workers as to the "comparable workers"[99] on an open-ended

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92 Supreme Court (Vrhovni sud RH, Revr 649/2018-2, 9.4.2019). The justification the employer used for the conclusion of successive fixed-term contracts was the "temporary" increase of work, that lasted almost six years, and the Court concluded that he had a permanent need for the worker

93 See: Grgurev, *op. cit.*, note 90, p 87 ff

94 Provisions regulating legal presumptions in case of fixed-term contracts: Art. 12 (5), (6) and (7); Art. 11 (3) LA

95 Annual Ombudsman Report for 2018, p 85-89, [https://www.ombudsman.hr/en/reports/], Accessed 25 April 2020 The situation with fixed-term contract is depicted in a complaint from "… a former employee, who had concluded 54 fixed-term work contracts with this employer during a 15-year period. Inspection found that concluding these contracts was not in contravention of the LA, and the employer received approval from the workers' council in this specific case, too." The Report emphasized that such excessive number of fixed-term work contracts „…creates a feeling of insecurity contributing to decisions made by both the employed and unemployed to look for work outside the RC."

96 Serious offences by employers, Article 228 (1), accompanyed with a fine in an amount ranging from HRK 31,000.00 to 60,000.00 (cca 4.100 – 8.000 EUR)

97 Izvješće o radu Inspektorata rada (2016; 2017), [http://haw.nsk.hr/arhiva/vol2018/4734/76272/www.mrms.hr/ministarstvo-rada-i-mirovinskoga-sustava/inspektorat-rada/index.html], accessed on 26. April 2020

98 See Kountouris, *op. cit.*, note 19, p. 30

99 See Art. 13(1-3). More: Grgurev, *op. cit.*, note 90, p. 89-90

contract, but in practice there are numerous challenges. Without a doubt, fixed-term workers have smaller chances because the employer usually has no or little interest to invest in the education of temporary staff. Consequently, they are in an awkward position in achieving the opportunities for education, and also for life-long learning, and therefore more vulnerable in terms of their position in the labour marked in order to improve their employability by acquiring the right skills for the labour market. Also, the employer is, according to the Art. 13 (4) of LA, obligated to inform the fixed-term workers about assignments for which these workers could enter into an employment contract of indefinite duration (Art. 13 par. 4, LA). Due to a rather imprecise provision that does not regulate how and when the worker should be informed, the realization of workers's right is doubtful. More precise regulation is hence needed *de lege ferenda*.[100]

The analysis of the fixed-term work regulation and judicature leads us to a conclusion that there are significant gaps in the regulation of this non-standard form of employment enabling abuse of this type of employment on behalf of the employer, and rendering it therefore even more precarious than intrinsically. Some of the solutions *de lege ferenda* against precariousness could be: to limit the number of successive fixed-term contracts (as in some other national legislations of Member States, e.g. France) and to strengthen the role of labour inspection in controlling the abuses of this form of employment, possibly by introducing more effective measures, i.e. authorizing the labour inspector to order the employer who committed a violation to conclude the open-ended contract with the same worker. Under the current LA, the worker is entitled to severance payment only after two years of continuous employment with the same employer, whereas one of the options could be the introduction of the Austrian institution of *Vorsorgekasse*.[101]

A concerning factor is that Croatia is among countries with the highest overall proportion of precarious employment mostly present in agriculture, retail trades and catering activities, most notably because of the importance of tourism for the Croatian economy and because of its seasonality.[102] However, other factors, institutional (labour legislation), technological (digitalisation) and economic (employers' caution, decrease of the total labour cost) play an important role as well.[103]

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100 Similar problem is visible when the same right of TAW is concerned

101 More: [https://www.oenb.at/Publikationen/Statistik/Finanzstatistik/Betriebliche-Vorsorgekassen.html], accessed on 28. April 2020

102 In 2016 it amounted to 8.4%, while the EU average was 2.3% of the employees who had a precarious job. In 2018 the average decreased to 6.8%. [https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/DDN-20180209-1], accessed on 16. April 2020

103 Tomić *et al.*, *op. cit.*, note 68, p 11.

A significant reconfiguration of the employment status in Croatia is the result of a shift from self-employment to temporary employment, which places Croatia, together with Spain, in the group of Member States with the highest share in growth of temporary work.[104] Statistics provided by the Croatian Pension Insurance Fund (HZMO) show that a quarter of Croatian employees have fixed-term contracts, while the lion's share of the newly employed, that is 90% of them, are temporary workers, which is why unionists warn that the government-sponsored measures to boost employment are inefficient.[105] Slovenia, for example, found itself in the group of Member States with the highest proportion of fixed-term employment contracts in the past 15 years, rendering this practice, as Senčur Peček and Franca rightly note, the rule, rather than an exception.[106]

A further problematic trend is the shortening of the duration of temporary contracts, observed in most EU Member States. As a matter of fact, the incidence of precarious casual work resp. short-term temporary contracts with a maximum duration of three months (precarious temporary employment) amounts to over 30% in Croatia in contrast to the stable EU average of 19%. It should be emphasized that Croatia is in the group of countries in which in 2018 over one-third of younger workers were on short-duration contracts (the Baltic states, Belgium, Finland, Hungary and Sweden).[107]

5. GIG-ECONOMY - HOW TO COMBAT *VIRTUAL* PRECARIOUS WORK?

The economy of atypical, i.e. casual work as the product of the so-called gig economy is constantly growing[108] and represents the beginning of the end of permanent employment, and a temporary solution of existential problems.[109] The core of gig economy, more often called sharing economy, is a phenomenon of the labour market, i.e. a bussines-strategy oriented to use technological revolution to achieve the main goal of the entrepreneur, namely, the optimization of cost.

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104 Temporary employees as percentage of the total number of employees. Source of data: Eurostat. 26.4.2020

105 HZMO: [http://www.mirovinsko.hr/default.aspx?id=4298], accessed on 14. April 2020

106 Senčur Peček, D.; Franca, V., *From student work to false self-employment: how to combat precarious work in Slovenia?*, in: Kenner, J. *et al.* (eds.), Precarious work: towards a new theoretical foundation, The challenge for Labour Law in Europe, Edward Elgar, Cheltenham, Northampton, 2019, p. 120

107 Eurofound (2020), note 7, p 39

108 Eurofound (2018a), note 30; *cf.* Bjelinski, I., *Izazovi radnog i socijalnog prava u svjetlu digitalizacije rada*, Zagrebačka pravna revija, *vol.* 8, no. 3, 2018, p. 315

109 For an opposing opinion see: The Future Organisation, [https://thefutureorganization.com/wp-content/uploads/2018/04/Paul-Oyer-Transcript.pdf], accessed on 03. March 2020

The impact of the technological revolution on the transformation of the Croatian labour market is visible in the increase of employment and atypical forms of employment to perform digital services. It is a big challenge for employers, workers, and especially the legislator that should respond by creating a new regulatory framework, with the guarantee of decent working conditions and employment in new jobs, with precisely defined rights and duties of the contractual parties.[110]

In the context of organizational precariousness, ICT workers can face the *flip side* of long working hours, especially for self-employed whose work is mostly based on the use of digital technology, e.g. platform-work (ICT-mobile work and telework).[111] In practice, employers often use the lack of precise (legal) indicators of the employment relationship circumventing the law to disguise such work as bogus self-employment, or the worker is in fact economically dependant of one employer (dependent self-employment). Due to this, virtually organized work reminds of a manipulation of the labour status in which the workers carry all risks that are not shared with the employer.[112]

In Croatia, a prominent example of such practice in the IT sector seems to be using the possibility to pay lower taxes by allowing workers to register as independent craftpersons paying lump-sum taxes through the so-called flate-rate craft sheme.[113] There is further research however showcasing that standard employment remains significant in this field.[114] The institution of telework represents a flexible solution that enables a work-life balance, but its indicator of insecurity is reflected in the shaping of working time individually, rendering the organization of private duties the more difficult.[115] Workers should permanently partake in professional training, and pay the costs therefor mostly themselves, without a real possibility for promotion. Precarisation of ICT work is visible from its temporary nature, especially in the case of short-term projects.

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110 [http://www.europarl.europa.eu/doceo/document/A-8-2017-0224_HR.html], accessed on 03. March 2020

111 Eurofound (2020a), *Telework and ICT-based mobile work: Flexible working in the digital age*, Publications Office of the European Union, Luxembourg, 2020

112 Therefore, we rightly wonder are freelancer genuinely "free"? ILO (2018), Work On Digital Labour Platforms In Ukraine: Issues And Policy Perspectives, International Labour Office, Geneva, 2018, p. 32

113 Tomić *et. al.*, note 68, p. 12

114 Laleta, S., *Innovation and growth of skills: Challenges to the Croatian legislature*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, *vol.* 39, no. 4, 2018, pp. 1865, 1870

115 Directive 2019/1158 of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L 188/79 (Work-Life Balance Directive)

In Croatian legislation, ICT mobile work is regulated inside the broader concept of the *employment at an alternative workplace* (Art. 17, LA). It includes "works to be performed at the worker's home or outside the employer's premises", under conditions regulated by the Protection at Work Act.[116] Such regulation guarantees the same employment rights as of a standard worker, and safe working conditons.[117] Provisions of the LA that regulate this institute are in line with the European standards,[118] enabling full antidiscrimination and safety at work protection, remuneration for work (salary) and obligatory social insurance.[119] However, in practice workers often cannot control the organization of work (*organizational precariousness*) due to the overload and expectations of the employer, which can cause health problems (*burnout*). The situation with COVID-19 pandemic and the transfer of work to home as an alternative workplace coupled with the abundant use of ICT technology (working online) has clearly demonstrated that this type of work deserves to be regulated as an autonomous institute as soon as possible.

6. CASUALISATION OF EMPLOYMENT

Casual work is described as work which is irregular or intermittent, without prospects of continuous employment. Depending on the type of contract, the employer arbitrarily determines maximum or minimum working hours, but can also refrain from the latter (zero-hour).[120] In other words, precariousness manifests itself in the absence of guaranteed hours of work and the employer's duty to provide worker with work or a task.[121] Typicial characteristics are: very insecure demand (casual), or even no demand for certain services/work that should be performed in certain time limits with no guarantee that the employment relationship will be prolonged; unpredictable and irregular working time; low wages and limited access to benefits. The satisfaction of worker is lower due to a disorderly work re-

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116 Zakon o zaštiti na radu, Official Gazette, 71/14, 118/14, 154/14 , 94/18, 96/18. The employer no longer has a duty to write a risk evaluation for work performed on alternative workplace *temporarily*

117 According to old Labour Act, Official Gazette, 149/09, 61/11, 82/12 i 73/13, the employer had to inform the labour inspection about every contract that stipulates flexible organization of working time or work outside the employer's premissses. The cancellation of this duty has relaxed the conclusion of such contracts. We are of the opinion that such legislative intervention represented a means to prevent manipulations with insecure forms of employment

118 The biggest step in the modernizaton of the work organization, including flexible forms of employment, in order to achieve the purpose of the concept of flexicurity, has been made with the European (autonomous) Framework Agreement of Telework, 2002

119 Bilić, A., *Rad na daljinu prema međunarodnom, europskom i hrvatskom radnom pravu*, Zbornik radova Pravnog fakulteta u Splitu, *vol*. 48, no. 3, 2011, p. 636

120 Eurofound (2019), note 54, pp. 3-4

121 Adams, A. *et al.*, *The 'zero-hours contract': Regulating casual work, or legitimating precarity?*, Oxford Legal Studies Research Paper No. 11, University of Oxford, Oxford, 2015, pp. 1-21

lationship, while the strong flexibilization makes *off-work time* organization more difficult.[122]

It is evident that casual workers do use the given chances to work, afraid of what might happen if they rejected them.[123] In addition, they fear because of the *exclusivity clauses* included in a particular type of casual contracts that demand workers to be available everyday, at any time, making it impossible to take another job.[124]

In Croatia casual work is performed outside the employment relationship, based on civil-law contracts (contract for services and works, student contracts, occupational training contracts) or by self-employed persons.[125] Those alternative forms of employment are not regulated by the Labour Act and therefore higly precarious in particular in regard to income, social security, access to education and other working conditions.[126] For example, student work as rather frequent and cheap work often assumes all the elements of an employment relationship in practice; nevertheless, due to the old-new regulation, it is still regulated as a contract for services.

It is worth mentioning that self-employed journalists or similar professions in the media often work based on a civil-law contract, but perform work that has all the characteristics of an employment relationship (bogus self-employment).[127] In many court cases self-employed persons have hence claimed that the work they performed was in fact tantamount to an employment relationship. Surprisingly, the Supreme Court of Croatia has expressed an doubtful opinion in several cases asserting that the elements proved in trial (e.g. subordination, working hours, work performed at the employer's premises) which are indicators of an employ-

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122 According to research conducted in the UK, more than 60% of the interviewed work in precarious working conditions. This creates a lower standard of skills in the workforce and permanent insecurity. See: [https://theconversation.com/zero-hours-contracts-have-a-devastating-impact-on-career-progression-labour-is-right-to-ban-them-123066], 19 January 2020. Also: ILO (2004), On-call work and 'zero hours' contracts, International Labour Office, Geneva, 2004, p. 3

123 For EU intervention see: The Directive on Transparent and Predictable Working Conditions

124 In the UK, exclusivity clauses in zero-hours contracts are prohibited by a law dating back to May 2015. See: Commission Staff Working Document Executive Summary Of The Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union{COM(2017)797final} -{SWD(2017)478final, Brussels, 2017

125 As I. Vukorepa *et al.* stated there is no official definition or meaningful statistics concerning the number of bogus and dependent self-employment. Vukorepa, I. *et al.*, *ESPN Thematic Report on Access to social protection of people working as self-employed or on non-standard contracts*, *Croatia*, ESPN, EC, 2017, p. 6

126 Butković; Samaržija, *op. cit.*, note 8, p. 26

127 Vukorepa *et al.*, *op. cit.*, note 125, p. 6

ment relationship according to the ILO Recommendation,[128] were not relevant because they could also be conceived of as elements of a civil-law relationship, and that priority should be given to the intention of the contractual parties.[129]

The Croatian Ministry of Culture has recently adopted a special regulation for specific groups of self-employed persons, like freelance artists who lost all income due to the theater, museums and music halls shutdown in the midst of the COVID-19 pandemic.[130]

7. INSTEAD OF A CONCLUSION

By uncritically accepting the global market trends, economies expose the labour market to new rules of the game that limit government intervention, thereby relaxing legal frameworks and protective collective mechanisms. Such exposure to modernization has indeed influenced the transformation of the labour organization enabling employers an autonomous determination of employment and working conditions.

Globalization has not eluded a *microeconomy* as Croatia, whose labour market, due to ambitious aspirations and imperatives of reducing labour costs and competitiveness leads to a permanently uncertain and despondent business policy.[131] The decline of work quality made insecurity in the form of precariousness present not only in all segments of the employment relationship, but also in all aspects of the human life. Many recognize their own experience, which is why the need to articulate the issue of precariousness within scientific and academic circles is gaining prominence. Nevertheless, the conflict of interests in the world of labour full of emerging novelties and expectations requires an adequate labour law intervention and optimal solution for the traditional employer-employee conflict, bearing in

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128 Employment Relationship Recommendation, 2006 (No. 198) - Recommendation concerning the employment relationship, Geneva, 95th ILC session (15 Jun 2006)

129 Supreme Court of RC, judgments: VSRH, Revr 409/13-2, 17.12.2013; VSRH, Revr 657/14-2, 2.12.2014; VSRH, Revr 648/13-3, 9.9.2014; VSRH, Revr 177/15-2, 15.9.2015; VSRH, Revr 1536/13-3, 9.6.2015. For the employment relationship's indicators in case law see: Grgurev, I., *The Concept of 'Employee': The Position in Croatia*, in: Waas, B.; van Voss, G. H. (eds.), Restatement of Labour Law in Europe, Vol I: The Concept of Employee, Hart Publishing, Oxford and Portland, Oregon, 2017, p. 76 *ff*

130 Government measures for culture, [https://www.koronavirus.hr/vladine-mjere/mjere-za-kulturu/133], accessed on 25. April 2020

131 For the decline of job quality in Croatian tourism sector see: "*Turizam i ljetne migracije*" i „*Turizam i rad*" in journal Rad, br. 3, rujan, 2015

mind the legislator´s role in creating precariousness through unclear provisions and courts´ discretion to interpret. [132]

In consideration of the above, this paper has attempted to point out the conceptual issue of the phenomenon in all its socio-economic dimensions in order to highlight the continuous practice of labour exploitation and overproduction of today´s precarious labour army.[133]

The pandemic caused by the corona virus (COVID-19) in March 2020 has flabbergasted the world. A new wave of economic crisis has once again displayed a lack of empathy in the political reality and the business sector, which, as Athrey vividly states, have no room for financial losses and continue to "celebrate" the gig economy from the security of their homes considering the best ways to exploit precarious workers.[134]

ILO has reported that approximately 25 million workers will lose their jobs, which has more far-reaching consequences than those caused by the 2008 recession. An initial assessment of the impact of COVID-19 on the global work world, in addition to millions unemployed and in-work poverty, admonishes that the labour market crisis will disproportionately affect vulnerable workers engaged in low-paid jobs consequently leading to social exclusion and rise of inequality.[135] This "economic fall" and erosion of work standards requires rapid and coordinated intervention on national and supranational level, primarily to protect the status of already disadvantaged workers.[136]

The aforementioned proponents of an affirmed neoliberal stance, whose basic premise implies an unrestricted labour market with an epidemiologically adjusted business policy continually provide services unaware of the health and safety risks their employees are exposed to, and unable to refuse to work under hazardous

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132 Godlewska-Bujok; Patulski, *op. cit*., note 25, p. 25-26

133 Standing, G., *Precariat: New Dangerous Class*, London, Bloomsbury Academic, 2011, p. 16

134 Labour market participants at the top end are celebrating the rise of an economy reliant on precarious work that serves their interests, both as investors and consumers. Recent example of such exploitation is Amazon worker (not the only case) in a New York warehouse tested positive for coronavirus. Yet Amazon refused to provide sick leave to employees. Amazon denies this. See: *The Gig Economy to the Rescue, The flexibility of app services is helping millions in the panic*, The Wall Street Journal, 2020, [https://www.wsj.com/articles/the-gig-economy-to-the-rescue-11584573142] including: [https://www.theatlantic.com/health/archive/2020/03/amazon-warehouse-employee-has-coronavirus/608341/], accessed on 03. May 2020

135 *COVID-19 and the world of work: Impact and policy responses*, ILO Monitor 1st Edition, 2020, p. 2-3

136 *Ibid*.

conditions. [137] The question thus arises as to how the labour market will challenge laid-offs in a situation of much-needed "cost-cutting", given that most gig-works do not include social benefits which are pivotal at a time of a global pandemic. Within such *precarious economy*, terminating employment contracts of marginal employees accounts for a textbook economic activity typical of the world labour market.[138]

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[137] Need to go out and don't want to face public transportation? Just order car service from Uber or Lyft. Want to avoid crowded grocery stores? Instacart has you covered! Can't go to your favorite restaurant? There's an app for that, too. See also: *Fair working conditions in Germany*, [https://www.fair-arbeiten.eu/hr/article/460.faq-corona-virus.html], accessed on 30. May 2020

[138] For effects of interrupted business operations on employment and respond of the Croatian goverment through financial support for employers see: Grgurev, I., COVID-19 and Labour Law: Croatia, 2020, [https://illej.unibo.it/article/view/10773/10682], accessed on 19. April 2020

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UDK 341.174(4-67EU):339.137
Original scientific paper

RECENT (AND FUTURE) DEVELOPMENTS OF EU COMPETITION LAW: MATTERS OF POLICY AND OF MEMBER STATES COOPERATION

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ABSTRACT

EU Competition law has recently incurred main procedural reforms. Their basis must be found in Regulation 1/2003, decentralizing the control on the application of Articles 101 and 102 TFEU, thus emphasising the role of National Competition Authorities and Courts. This system has proved to be far from complete and perfect, as the first part of this article aims at demonstrating. A new political wave has enabled to strengthen the enforcement of EU Competition Law under two strands: the private and the public enforcement.

Directive 2014/104 harmonises parts of the national (civil) procedural law regarding damages actions. Powers and duties of National Courts are its focus. Its main features are recalled within this contribution. The long-awaited Directive 2019/1 aims at further reinforcing the role of NCAs, establishing a very detailed piece of legislation, whose main elements are briefly examined here. Since the two acts have been adopted in a quite short period of time, their coordination is analysed too.

This exam can lead us to offer some remarks on the perspective role of EU Competition Law, both from the Member States perspective and the needs for reform, and the new Commission's approach to the consistent application of the new legislation.

Keywords*: EU Competition Law, Private Enforcement, Public Enforcement, Decentralisation, National Competition Authorities, Member States implementation*

1. INTRODUCTION: THE DECENTRALISATION OF THE ENFORCEMENT OF EU COMPETITION LAW

The enforcement of EU Competition Law has incurred deep reforms in recent decades. The (r)evolution started with the adoption of Regulation 1/2003[1] on the implementation of Articles 81 and 82 TEC (Nice) (hereafter: Regulation) and the straightforward case law of the Court of Justice of the European Union (hereafter: CJEU) on damages actions for infringement of the same Treaty's rules. This development seems to have reached a completion with the enactment of Directive 2014/104 on damages actions[2] (hereafter: Directive 104) and of Directive 2019/1 (hereafter: Directive 1) on the empowerment of National Competition Authorities[3] (hereafter: NCA(s)).

Both Directives were much awaited in order to secure legal certainty to private parties, from both the victims' and the infringers' perspective, and a level playing field where EU Competition Law is uniformly applied within all Member States.

Indeed, Directive 1 constitutes a sort of follow-up to the Regulation. This transformed the previous system of enforcement and the control of the respect of EU Competition Law, from both the political and technical perspectives, decentralising the public enforcement of EU Competition Law through the institution of NCAs.

This notwithstanding, the Regulation devoted only a few provisions to NCAs. Among these, Article 35 laid down a duty to Member States to establish a NCA, with administrative or jurisdictional nature, responsible for the application of Competition Law. The Regulation determined the NCAs main competences: Article 3 conferred the power to apply current Article 101 and 102 TFEU, along with national legislation on cartels and abuses of dominant position, while Article 5 granted the competence to apply EU Competition Law autonomously. For this purpose, the provision listed a set of powers for NCAs acting on their own initiative or on a complaint. In particular, they could issue five kind of decisions: the cessation of the infringement; interim measures; the acceptance of commitments; the imposition of fines or other penalties; the closing up of the investigation due

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1 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1

2 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1

3 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3

to lack of interest; no grounds for action on their part, including orders requiring that an infringement be brought to an end, and imposing fines[4]. NCAs margin of appreciation and powers were limited only by Article 16(2), since they could not adopt decisions which would run counter a Commission's decision issued on the same case.

Article 15, although positioned within the Chapter on Cooperation, conferred the NCAs the competence to act as *amicus curiae* within national proceedings, where issues on the application of EU Competition Law were dealt with[5]. Article 11, 12 and 13 established some main rules on the functioning of the European Competition Network (hereafter: ECN), with regard to cooperation and information exchange between the Commission and NCAs. Article 22 finally laid a duty of cooperation among Authorities[6], in that each NCA had to perform the investigations provided for by its national legislation when requested to do so by the Commission or another NCA.

Some regulatory lacks emerged immediately after the first practice of the Regulation. These depended on its general approach, which was evident for example from the black letter of Article 22, in that it implicitly referred back to national law for the constitution and the correct functioning of NCAs. The efficiency of the NCAs was entrusted with Member States procedural autonomy, to be balanced with the principle of effectiveness of the application of EU Competition Law recalled in Article 35[7]. Furthermore, the mere listing of the decisions to be taken by the NCAs left Member States free to rule their internal procedures, the sanctions and their calculation. Except from the quite general Article 5, whose content differs from the powers vested with the Commission, the Regulation did

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4 Pace, L.F., *La politica di decentramento del diritto antitrust CE come principio organizzatore del regolamento 1/2003: luci e ombre del nuovo regolamento di applicazione degli artt. 81 e 81 CE*, Rivista Italiana di Diritto Pubblico Comunitario, *vol.* 14, no. 1, 2004, pp. 147-197, at 157

5 As the CJEU, Case C-429/07, Inspecteur van de Belastingdienst v X BV [2009] ECR I-04833 made it clear, this means that the main object of the proceedings might be different from the application of EU Competition Law. It is enough that the nature of the sanctions applied by the Commission (and by the NCA) were under discussion, in the proceedings filed after the ascertainment of the violation of Article 101 TFEU

6 The term "Authorities" designates jointly the Commission and the NCAs

7 Therefore, a system that does not grant standing to the NCA in judicial proceedings brought against its decisions is not effective, because only the claimant would be enabled to submit evidence and remarks suitable to contribute to the final judgment (Case C-439/08, VEBIC, [2010] ECR I-12471: Frese, M.J., *Case C-439/08, Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC), Judgment of the European Court of Justice (Grand Chamber) of 7 December 2010*, Common Market Law Review, *vol.* 48, no. 3, 2011, pp. 893-906; Petit, N., *The Judgment of the European Court of Justice in VEBIC: Filling a Gap in Regulation 1/2003*, Journal of European Competition Law & Practice, *vol.* 2, no. 4, 2011, pp. 340-344

not provide for either common neither harmonised investigative, inspection and sanctioning powers in favour of the NCAs.

EU Commission noted that this autonomy has been exercised differently by Member States[8], so that there were different models in the NCAs structures and consequently functions and powers[9]. These divergences risked undermining the correct application of EU Competition Law, since decentralisation could be effective insofar as NCAs exercise the same powers with the same specialised competences.

Commission Junker had put *Competition* as main priority with its activity and the prevailing political view has thus been in the sense that a reform of public enforcement was needed. Therefore, it has been possible to approve Directive 1 shortly after the submission of the Commission's proposal in March 2017[10], without profound amendments. It consists in 77 recitals, 37 Articles and one Commission's declaration. Member States must implement it before 4th February 2021, and notify the transpositions measures to the Commission (Article 34(1)).

2. THE STRENGTHENING OF PUBLIC ENFORCEMENT: THE DIRECTIVE ON THE EMPOWERMENT OF THE COMPETITION AUTHORITIES

Directive 1 focuses on public enforcement through the empowerment of NCAs for the better application of EU Competition Law. From its adoption, it is also

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8 Commission Staff Working Document. *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, SWD(2014) 231/2. Accompanying the document Communication from the Commission to the European Parliament and the Council. *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* {COM(2014) 453} {SWD(2014) 230}

9 For a comparative perspective: Pera, A.; Falce, V., *The Modernisation of EC Competition Law and the Role of National Competition Authorities – Revolution or Evolution?*, Diritto dell'Unione europea, *vol*. 8, no. 2-3, 2003, pp. 433-454; Reichelt, D., *To what extent does the co-operation within the European Competition Network protect the right of undertakings?*, Common Market Law Review, *vol*. 42, no. 3, 2005, pp. 745-782; Tesauro, G., *The evolution of European competition law and the Italian Autorità Garante della Concorrenza e del Mercato*, in: H. Ullrich (ed.), The Evolution of European Competition Law: Whose Regulation, Which Competition?, Cheltenham, 2006, pp. 71-83; Rusu, C.S., *The Commission Communication on Ten Years of Antitrust Enforcement Under Regulation 1/003 – Prospective Priorities and Challenges*, in: Almăşan A.; Whelan P. (eds.), The Consistent Application of EU Competition Law. Substantive and Procedural Challenges, Cham, 2017, p. 32; Melloni, M.; *The European Competition Network (ECN) and its First 11 Years of Life: Balances and Challenges*, in: Benacchio G.A.; Carpagnano M. (eds.) *L'applicazione delle regole di concorrenza in Italia e nell'Unione europea*, Napoli, 2015, p. 47; Malinauskaite J., *Harmonisation of EU Competition law Enforcement*, Springer, Cham, 2020

10 Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM/2017/0142 final - 2017/063 (COD), 22 March 2017

known as Directive ECN+[11]. Due to its novelty, we provide a short glance at its most meaningful provisions.

2.1. Independence and resources

Chapter III is devoted to independence and resources. It is applicable to NCAs with administrative nature, because independence should be a connatural requisite to jurisdictional bodies[12], and the EU cannot influence financial and economic resources of the Courts, which is a matter of Member States' exclusive competence. Granting full independence to administrative bodies is not an easy task and the CJEU has already intervened in cases related to bodies whose institution is requested by EU Law. In *si.mobil*[13] the Tribunal verified only the functional independence of the Slovenian NCA, that must be established by the law and granted with the powers conferred to the body. The analysis is therefore quite brief. The two cases related to the Austrian and the Hungarian supervisory authorises for the protection of personal data, to be established pursuant to Article 28 of Directive 95/46[14], rise more sensitive issues. Functional autonomy is deemed not to be satisfactory, in that the independence of their key staffs shall be assured, too. Consequently, the appointment and the suspension of the Authorities boards shall be consistent with exigence of independence[15].

Due to the difficulties to balance the duty to establish these bodies under EU Law, on one side, and to regulate their institution and functioning according to the principle of Member States procedural autonomy, on the other side, the length of Article 4 is not surprising. This provision affects various aspects related to the creation and the functioning of NCAs, such as the selection and the appointment of the members of the board; independence's duties from political interferences laid down on persons responsible to issue some decisions within their powers; a cooling off period.

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11 See on EU Commission website: [https://ec.europa.eu/competition/antitrust/nca.html], Accessed 15 April 2020

12 Case C-286/12, Commission v. Hungary [2012] ECLI:EU:C:2012:687; Case C-64/16, Associação Sindical dos Juízes Portugueses [2018] ECLI:EU:C:2018:117; Case C-619/18, Commission v. Poland [2019] ECLI:EU:C:2019:531

13 Case T-201/11, si.mobil [2014] ECLI:EU:T:2014:1096

14 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 such data [1995] OJ L 281/31

15 Case C-614/10, Commission v. Austria [2012] ECLI:EU:C:2012:631; Case C-288/12, Commission v. Hungary [2014] ECLI:EU:C:2014:237

Furthermore, para. 5 establishes the power for NCAs to determine priorities in the implementation of their competences, that might lead to the dismissal of cases that do not appear particularly relevant or of manifestly unfounded complaints[16].

The condition of adequate resources is functional to the independence (Article 5). Indeed, NCAs must not depend economically or financially on any other national body of any kind, that would at the very end be tantamount to a controller of the NCA. In *Commission v. Austria*, above, the Court criticizes the fact that the staff of the supervisory authority is composed by officials of the Federal Chancellery, that makes available the necessary equipment. This organisation risks creating a State influence on the body's work. That does not mean that the NCA must have an autonomous budget, but the availability of resources must not affect the organic independence. Accordingly, Article 5 of Directive 1 establishes that NCAs must be autonomous in the spending of the allocated budget.

2.2. NCAs powers

Once an independent NCA is established, Directive 1 confers it powers and competences. Article 5(2) recalls the minimum powers, whose conferral should be already clear from the Regulation, such as: to conduct investigations with a view to applying Articles 101 and 102 TFEU; to issue decisions based on Article 5 of Regulation; to cooperate in the ECN. NCAs shall also have consultative powers in favour of public institutions and bodies, but the provision leaves the advisory competence under national legislation.

The new powers are listed in Articles 6-9, and are both investigative and decisional. Their formulation recalls Articles 17-21 of the Regulation, that grant similar powers to the Commission. It emerges immediately that one of the targets of Directive 1 is the uniformity of powers within Authorities, so that NCAs with administrative nature shall benefit from the same competences and powers of the Commission. The positive practice of the Institution in the detection and the sanction of antitrust infringements leads to an extension of this model to other Authorities responsible for the application of the same Treaty rules[17].

Directive 1 impacts on the decisional powers of NCAs. Articles 10-12 are applicable to bodies with jurisdictional nature, too, since the specification of the

[16] In Case T-24/90, Automec [1992] ECR II-2223, para. 77 the Tribunal has expressed favour towards the Commission's power to set priorities, it being functional to the rational use of its resources

[17] Rusu, C.S., *Case Comment: Workload Division after the Si.mobil and easyJet Rulings of the General Court*, The Competition Law Review, *vol.* 11, no. 1, 2015, pp. 163-172 notes that NCAs are the bodies with the best capacity to apply Competition Law and shall not be a mere extension of the Commission

powers already granted by the Regulation do not jeopardise the judiciary, rather it reinforces it.

For these powers, too, the model is represented by Commission, in that Articles 10-12 retrace Articles 7-9 of the Regulation. Yet, there are some main differences between the two sets of provisions.

Directive 1 does not specify that structural remedies shall be considered more burdensome with respect to behavioural remedies (Article 7(1) of the Regulations). However, Article 10(1) of the Directive recalls the principle of proportionality, whom Article 7(1) can be a specification, and thus the same balance shall be applicable to NCAs, too.

Article 11 of Directive 1, devoted to interim measures, is much more precise than parallel Article 8 of the Regulation and to Article 10 of the Directive's Commission Proposal. The main divergence depends on the mention of the principle of proportionality as a limit both to the content and to the duration of the measure. This difference in the formulation of Article 8 of the Regulation and Article 11 of Directive 1 does not seem particularly relevant for the practice. Indeed, Commission's power to issue interim measures was recognized and limited by the CJEU in the sense of balancing the interests at stake[18]. Therefore, the Commission's powers are not so broad as might seem from the formulation of Article 8 of the Regulation.

The last meaningful difference regards findings on inapplicability, that remain a Commission's exclusive competence. Nevertheless, Article 10(2) strengthens the cooperation, establishing that NCAs must communicate the Commission the closing of enforcement proceedings because there are no grounds to proceed. By that, the Commission is better informed of the proceeding undertaken by NCAs, in order to verify NCAs activities both for statistical purposes and for the new opening of enforcement proceedings in doubtful cases.

An accordance with the Commission's decisions appears suitable for the uniform application of EU Competition Law. This shall not depend on the authority investigating the case and issuing a decision. Therefore, if slight differences stem from the European or national, administrative or judicial nature of the authority, or from peculiarity of national jurisdiction, the output of the control procedure must not be divergent. The consequences risk being unforeseeable for undertakings and

[18] Case 792/79, Camera Care [1980] ECR 119; Cases 228 e 229/82, Ford [1982] ECR 2849; Case T-184/01R, IMS Health Inc [2001] ECR II-3193

associations of undertakings when operating in the market or even calculating the costs/benefits of the infringement(s).

The harmonisation of the sanctioning powers is based on the same uniformity purposes.

2.3. Leniency programmes

A lengthy part of Directive 1 is devoted to leniency programmes (Chapter VI). According to the Commission, these are the most efficient tools in order to have knowledge and to put an end to secret cartels[19]. Therefore, these means must be available to all NCAs. Since the 2006 Commission's Model Leniency Program, many Member States have introduced these programmes[20], whose contents and procedures have been partly harmonising thanks to the cooperation within the ECN[21]. Thus, Directive 1 fills the remaining gaps and inconsistencies related to some specific aspects that emerged in the application of the leniency programmes. Chapter VI deals with the quality of the contribution offered by the whistle-blower, the favourable treatment to be granted, its relationship with the Authorities with which it has not filed a request of application, the possible benefits for the other involved undertakings' cooperation with the authority. These provisions are inspired by the 2012 ECN Model Leniency Programme, which has played a role as a guideline for NCAs, although it not being binding.

The setting of uniform conditions for the benefiting from the immunity or the reduction of the sanctions avoids the distortion of the potential "forum selection" of the whistle-blower, that might prefer to lodge an application to a NCA whose requisites are not rigorous. In this new uniform legal framework, rules on NCAs competence seem less needed, since the final decision should be the same, notwithstanding the seized NCA. The sole difference remains if the Commission is also seized with an application covering more than three Member States, because Article 22(3) of Directive 1 accords it a preference with an estoppel effect.

Directive 1 provides for a procedural harmonisation, too, having regard to the start of the proceedings and the coordination with Commission's activity. Nevertheless, pursuant to the principles of proportionality and of Member States procedural

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19 The major part of Commission's decisions find their origins in a request for application of a leniency programme (Commission Staff Working Document. *Ten Years of Antitrust Enforcement under Regulation 1/2003*, *cit.*, note 8, par. 217)

20 Melloni, *op. cit.,* note 9, p. 48

21 Chiriţoiu, GB.M., *Convergence Within the European Competition Network: Legislative Harmonization and Enforcement Priorities*, in The Consistent Application, *cit.* note 9, p. 3

autonomy[22], Directive 1 accepts only some of the elements already stated in the Leniency Model Program, while Member States continue to be free to introduce a legislation perfectly corresponding to the Model.

2.4. Directive 1 and national reforms

The impact of Directive 1 on Member States depends strictly on the structure and the powers already conferred to each NCAs after the Regulation in every jurisdiction. A strong difference can be already established in States where NCA has a judicial nature, or where it is an administrative body. In the former, the most important part is that referring to sanctions, that is able to strengthen the available enforcement tools, thus modifying the current sanctioning powers of the judiciary within this specific competence. In the latter, Directive 1 can have a strong impact, so that Member States might need to reform radically the organisation, the functioning and the powers of their NCAs. Some studies have already been published[23], showing the different impact of the Directive in various Member States.

The second meaningful remark relates to the precise formulation of most of the Directive's provisions. Therefore, a direct effect can be quite easily determined, especially with regard to the investigative and sanctioning powers and to the cooperation within the ECN. Hopefully, the detailed character of Directive 1 incentivises Member States to implement it correctly and on time, so as not to incur in infringement proceedings and especially into a legislation derived from the direct effect and not from although limited national regulatory choices.

3. THE GROWTH OF PRIVATE ENFORCEMENT

3.1. The CJEU's case law

In the same years of the decentralisation, private enforcement of EU Competition Law has started being a core issue in EU Competition Law. It finds out its roots with CJEU's case law. The judgments are well known and we only need to recall here their impact in the development of the application of EU Competition Law.

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22 This is particularly relevant if the NCA has jurisdictional nature

23 Malinauskaite, *op. cit.,* note 9, on Central and Eastern European Member States; Marino, S., *Il rafforzamento dell'azione delle autorità nazionali garanti per la concorrenza: un nuovo impulso dall'Unione europea*, Rivista italiana di diritto pubblico comunitario, *vol*. 29, no. 3-4, 2019, pp. 537-557 on Italian NCA

Since the *Courage* case[24] it is established case law that the victims of an anti-competitive behaviour can claim damages against the infringer(s), since current Article 101(1) TFEU has direct effect[25]. Further, the effective protection of competition in the internal market required the compensation of any damage incurred because of the infringement. Subsequent case law has clarified this principle. The CJEU had the opportunity to stress that anyone is entitled to a damages action, even if the claimant is a consumer (*Manfredi* case[26]), or the Commission itself (*Otis* case[27]), or a person suffering damages because of the "umbrella-pricing" effect (*Kone* case[28]). Recently this case law was further enriched in the sense that even public "persons who are not active as suppliers or customers on the market affected by a cartel, but who provide subsidies, in the form of promotional loans, to buyers of the products offered on that market" might have legal standing to sue the infringers[29]. Actually, there does not seem to be limitations on standing, provided that the other conditions for liability are met, i.e. the illegal conduct, the damage and the causality. Furthermore, the CJEU has set out some principles on the limitation periods, and on the quantification of the damages (*Manfredi* case). More recently, a meaningful case law is being formed as for the application of the rules on international jurisdiction and applicable law to cross borders claims on damages for infringement of EU Competition Law[30]. This is due to the strong success of private enforcement[31] together with the lack of any specification on civil judicial rules within Directive 104.

The first case law referred to represents a set of basic general principles for damages claims, but did not affect directly national legislations. Indeed, failing any EU harmonisation, damages actions were subject to (procedural and substantive) national law(s), balanced with the principles of effectiveness and equivalence, and by the rules stated by the CJEU case law. Here again, the fragmentation of laws applicable to the same infringement or type of infringements risked undermining the uniform application of EU Competition Law and the rights of the victims.

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24 Case C-453/99, Courage and Crehan [2001] ECR I-6297

25 Case 127/73 BRT [1974] ECR 313

26 Case C-295/04, Manfredi [2006] ECR I-6619

27 Case C-199/11, Otis [2012] ECLI:EU:C:2012:684

28 Case C-557/12, Kone AG and Others v ÖBB-Infrastruktur AG [2014] ECLI:EU:C:2014:1327

29 Case C-435/18, Otis [2019], ECLI:EU:C:2019:1069, para. 34

30 Case C-353/13, CDC [2015] ECLI:EU:C:2015:335; Case C-27/17, flyLAL [2018] ECLI:EU:C:2018:533; Case C-595/17, Apple [2018] ECLI:EU:C:2018:854; Case C-451/18, Tibor-Trans [2019] ECLI:EU:C:2019:635

31 Calvo Caravaca, A.L.; Carrascosa González J., *El Derecho internacional privado de la Unión Europea frente a las acciones por daños anticompetitivos*, Cuadernos de derecho transnacional, *vol*. 10, no. 2, 2018, pp. 7-178

Thus, again the setting of *Competition* as a Commission's priority has led to a prevailing political approach[32] in the sense of overcoming this situation through the adoption of a harmonising EU measure aimed at granting the same level playing field among Member States. The result of a long period of debates is Directive 104. The deadline for transposition was established on 27th December 2016.

3.2. An overview on the novelties of Directive 104 and on its impact within Member States

Directive 104 harmonises only certain aspects of damages actions. Therefore, the principles of national procedural autonomy, of effectiveness and of equivalence are still good law for all the aspects not regulated, as recalled by Article 4.

The regulation aims at simplifying access to justice for the victims, in order to strengthen the role of private enforcement as an effective remedy against antitrust infringement. Thus, Directive 104 impacts on substantial parts of the proceedings on damages, contemplating rules on the right to full compensation; on the notion of victim and the legal standing; including the passing-on defence; the notion of defendant; the disclosure of evidence, with special rules if it is contained in the file of a NCA; the effects of NCAs decisions; and the causal link between the harmful event and the damage; consensual settlements and limitation periods.

In the perspective of the simplification, we only need to recall the (rebuttable) presumption that a cartel causes harm (Article 17(2)). Moreover, Article 14(2) eases the burden of proof of the passing-on, for the benefit of the indirect purchaser, with regard to the consumer, and proves its usefulness in follow-on actions[33].

In the perspective of harmonisation, thus the creation of a level playing field, the most meaningful rules are those on limitations and on the cross-borders effects of NCAs decisions. Indeed, as for the former, the admissibility of an action does not depend on national statutes of limitations, so that a forum shopping based on limitations periods is practically impossible.

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[32] For an analysis of the backgrounds of the Directive see: Lianos, I.; David, P.; Nebbia, P., *Damages Claims for the Infringment of EU Competition Law*, Oxford University Press, Oxford, 2015, p. 33; Jones, A.; Sufrin, B., *EU Competition Law. Text, Cases and Materials*, Oxford University Press, Oxford, 2016, p. 1070; Wils, W.P.J., *Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present, Future*, World Competition, *vol*. 40, no. 3, 2017, pp. 3-45

[33] In these cases the claimant needs to prove a causal link leading from the infringer to the direct purchase and the purchase itself (which can be a bill or an invoice, for example). Indirect purchasers do not need to give evidence of the total or partial pass-on through the commercial chain that lead to them

As for the latter, consideration at least as a *prima facie* evidence must be given to foreign NCAs decisions (Article 9(2)). Although this rule leaves a national margin of appreciation on the effect to be attributed to these decisions[34], parties can be sure that they acquire some legal value in all Member States. For example, the defendant cannot completely rely on the absence of NCA's decisions in the judicial proceedings for damages, insofar as another NCA has established an infringement of EU Competition Law.

Due to Directive 104 impact on national procedure, national implementations have casted some difficulties, which varied depending on the sensitiveness of the Member State concerned[35]. Nevertheless, the short margin of appreciation left to Member States did not give the opportunity to express strongly diverging approaches in the implementation of the Directive, notwithstanding internal uncertainties. Most Member States implemented it on time, or with a short delay (as the case of Italy), with only few exceptions (as the case of Greece, transposing it in March 2018).

4. THE INTERACTIONS BETWEEN PUBLIC AND PRIVATE ENFORCEMENT

4.1. The private enforcement perspective

Both Directive 1 and Directive 104 accord short attention to the coordination between private and public enforcement.

Directive 104 states a few rules that might be considered as stating an implicit coordination. The former is Article 6, insofar as it establishes the conditions for NCAs documents disclosure. In that, it balances the needs of public enforcement, which may require confidentiality, with the purposes of private enforcement, which instead requires the availability of all the existing documents.

Article 6(6) provides for a "black list" of non-accessible documents, i.e. leniency statements and settlement submissions. In the balance between public and private enforcement, the former prevails, because leniency programmes have an extremely practical impact on the discovery of antitrust behaviours; at the same time, the

[34] For example, the UK and Germany already granted legal binding effects to foreign NCAs' decisions, based on a high level of mutual trust between Member States. Italy has opted for a minimum implementation, so that the foreign decision may be presented as evidence, among other things, of the infringement against the infringer

[35] For a comparative approach: Marino, S.; Biel, Ł.; Bajčić, M.; Sosoni V. (eds.), *Language and Law*, Springer, Cham, 2018, first part; Malinauskaite, *op. cit.*, note 9

whistle-blower is not in a worse position compared to the other cartelists/infringers in the private enforcement perspective.

In addition, Article 6(5) of Directive 104 provides for a "grey list", i.e. documents that can be disclosed after the termination of the NCA's proceedings. This rule aims at granting the effectiveness of the on-going public enforcement in relation with documents prepared specifically for the public enforcement proceedings, or drafted by the NCA, or finally settlement submissions that have been withdrawn. Again, the efficiency of private enforcement risks being set aside because of the impossibility to introduce good evidence of the infringement.

Article 6(4) lists a set of grounds to be taken in consideration to evaluate the proportionality of the disclosure order, which are strictly linked to public enforcement efficiency. The balance with private needs is to be found in the national Court's power to order the disclosure of the evidence to verify if it corresponds to the documents in the black or in the grey list.

Therefore, Directive 104 privileges the public enforcement, that shall continue without external interferences, even though these are constituted by damages actions arising from the same facts. Apparently, EU legislator seems to prefer follow-on claims, where the infringement can be considered as ascertained and documents are made more accessible.

Article 9, on the effects of national decisions, establishes the latter implicit means of coordination between public and private enforcement. The rule fills a gap left by Article 16 of the Regulation, and approximates national laws in a field where different solutions were adopted[36]. The decision of the NCA (of the State of the judge seized) and/or the judgment deciding on an appeal against it shall have a legal binding effect as regards the ascertainment of the infringement. No evidence to the contrary is admitted. Such solution calls upon legal certainty, so that a final administrative decision or judgment cannot be reopened again, at any time.

As mentioned the same legal effects cannot be granted to foreign NCAs' decisions. Automatic recognition of administrative decisions is not a goal already reached within Member States cooperation, and approximation of national legislations is not conceived. Nevertheless, EU Competition Law benefits from the cooperation system between the Commission and the NCAs, and among NCAs (Articles 11 ff. of the Regulation), which is reinforced under Directive 1. It cannot be argued that

[36] Cortese, B., *Defining the Role of Courts and Administrative Bodies in Private Enforcement in Europe: United in Diversity?*. in: Cortese, B. (ed.), EU Competition Law. Between Public and Private Enforcement, Alphen aan den Rijn, p. 145

the foreign public enforcement systems are completely unknown and obscure. Therefore, the efficiency of public enforcement and the correct functioning of private enforcement require that public acts issued abroad were considered at least as *prima facie* evidence of the infringement.

These rules go in the same direction, in that the outputs of the public enforcement system must have an impact in the private enforcement, too.

4.2. The public enforcement perspective

Directive 1 devotes a few mentions to the coordination between the two enforcement systems.

Article 31 strengthens the protection of the whistle-blower already established by Directive 104. Indeed, it prescribes limits to the use of information disclosed during NCAs proceedings. Only the parties to the administrative procedure can accede to the declarations released within a leniency programme, or a request for immunity or reduction of fine proceedings, and to the limited scope to exercise their rights of defence. This information can be used only within jurisdictional proceedings, insofar as they concern the allocation between cartel participants of a fine imposed jointly and severally on them by a NCA; or the review of a decision by which a NCA found an infringement of EU or national competition law. This rule appears consonant with Article 6(6) of Directive 104, in that the two rules offer a complete protection to the undertaking requesting the access to any of these favourable programmes: the information disclosed cannot be used in proceedings different from those concerning the infringements displayed, and the enterprise is not subject to sanctions for related facts and acts. Furthermore, the success of damages actions is scarce without this information.

Article 31(5) of Directive 1 is a parallel provision to Article 6(5) of Directive 1, so that the listed documents can be disclosed only after the conclusion of the NCA's ascertainment.

Notwithstanding the need for coordination, Directive 1 refers explicitly back to Directive 104 only twice. Article 14(2) repeats Article 18(3) of Directive 104, so that the NCA can take into consideration damages paid by the infringers for the calculation of the sanction within public enforcement. These rules risk having a limited scope, since they implicitly refer to stand-alone actions, more difficult to succeed for evidence reasons notwithstanding the simplification provided for by Directive 104. Their rationality is debatable, too, since private enforcement shall be a tool to strengthen EU Competition Law enforcement (recital 4 of Directive 104), to be added to and not to substitute public enforcement through sanctions' reductions.

The second reference is contained in Article 23(5), on the interplay between applications for immunity from fines and sanctions on natural persons. It merely states that the protection of natural persons, as current and former directors, managers and other members of staff of applicants for immunity, shall not prejudice the right to compensation in favour of the victims. The rule appears misleading in such a context: damages actions shall be lodged against the infringer and not against natural persons representing it.

4.3. A general perspective

In the enforcement of EU Competition Law, two sets of remedies are established. Public enforcement shall aim at restoring competition in the internal market; private enforcement shall protect private interests through the availability of damages actions. Due to the different aims, these systems may coexist in perfect independence: on one side, private enforcement includes stand-alone actions not needing a previous Authority decision; on the other side, the ascertainment of an infringement by any Authority does not have as a consequence the lodging of follow-on damages actions. Nevertheless, the two prongs of the enforcement cannot be considered as perfectly separated. The outputs of public enforcement cannot but affect private enforcement; the grant of damages cannot but impact on private enforcement; the simultaneous pending of public and private antitrust enforcement proceedings shall be coordinated in order not to jeopardise the protection of the two protected interests – the market, the victims' rights. Separate legislations are therefore admissible stressing on the full independence of these remedies, but at the same time, they must be coherent and complete. The perceived lack of coordination risks undermining the full potential of the enforcement system, disregarding victims'/consumers' rights.

5. SOME CONCLUDING REMARKS: PAST AND FUTURE OF THE ENFORCEMENT OF EU COMPETITION LAW

The new enforcement system seems finally completed with the adoption of Directive 1. It is grounded on the foundations established with the Regulation: an allocation of competences among the Commission, NCAs and national Courts. In that, the two recent Directives adopt an approach that can be considered classical within EU Competition Law enforcement. Their novelties depend on the roles reserved to these controllers, the Commission assuming a central position, but not anymore the first; the NCAs and the national Courts strengthening their powers and consequently becoming important actors in the enforcement systems.

After Member States implementations of Directive 1, time will be ripe to assess its efficacy and its good functioning. This is the current and fundamental challenge: on the one side, Member States need to cooperate sincerely in order to correctly implement and apply the Directives. Strong reforms might be needed, to the extent that the institution and the structure of NCAs are not anymore left to the full national competences. The current implementation period shall be useful for the discussions among Member States and within the ECN in order to grant the best national reforms to take place. Good practices detected in a comparative perspective might offer an example for those Member States whose current framework appears to depart from the principles established by Directive 1 with the goal of an efficient reform.

On the other side, the new EU Commission is empowered to check the application and the implementation of these rules. Although this Commission has not indicated Competition as its priority[37], the continuity within the DG Competition leads us to suppose an unchanging state in the development of EU Competition Law. Since Directive 1 has been approved under the wishes of the same current Commissioner, controls on its correct implementation are easy to foresee.

Next years could be a test period: the legal framework is new and the practice must prove its effectiveness. The formally correct implementation of the Directives and the future establishment of a well-functioning system of public enforcement are only the grounds on which the enforcement of EU Competition Law can continue growing. The two systems, private and public, are not perfect and not well coordinated: still, the level playing field thus created shall be suitable to reduce the Commissions' workload without losing the quality of the enforcement itself and the protection of the victims. In that perspective, the combination of the two reforms might constitute a final point in legislative reforms and at the same time a good starting point for the best application of EU Competition Law.

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UDK 349.22-055(497.7)
Original scientific paper

WORK-LIFE BALANCE: CHALLENGES OF GENDER EQUALITY IN THE LABOR MARKET IN THE REPUBLIC OF NORTH MACEDONIA VS EUROPEAN UNION

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ABSTRACT

Work-life balance is the term used to describe practices in achieving a balance between the demands of employees' family (life) and work lifes. Employers today strive to augment job satisfaction in the workforce for it is conducive to lower employee turnover, higher engagement, and greater productivity. Besides the feminists, who discuss women's inequality with men in the family and the separation of the family responsibilities, the term "work-life balance", addressing the aspects of achieving this balance, starts to be more commonly used in employment policies. The dramatic increase in female labor force participation in the labor market, as a result of the collapse of the so-called "male breadwinner" model, often results in a "double burden" for paid women. On the other hand, there is a tendency among employers to increase workforce satisfaction because it has been shown to reduce employee turnover and produce higher engagement and increased productivity.

Policies for the harmonization of work and private life are covered by social legislation and labor legislation. The International Labor Organization defines the work-life balance as one of the greatest challenges of our time.

One of the aims of the European Social Rights Pillar is the Work-life balance Initiative which addresses the challenges of work-family balance faced by working parents and carers. Therefore, a directive on the balance between the working and professional life of parents and carers have recently been adopted in the European Union. It sets several new or higher standards for absent parents, paternity and guardianship and enforces a greater use of flexible employment contracts. Its aim is to increase the inclusion of women in the labor market and to promote greater use of parental leave by male workers.

Motivated by this, a comparative analysis and critical overview is made between the policies existing in the member states of the European Union and the Republic of North Macedonia which are directly related to the promotion of family-work balance. The purpose of this paper is to see how the Macedonian labor and the legal system is prepared to respond to the challenge posed by this Directive and to provide suggestions and guidance that would improve the situation in the domestic labor market.

Keywords: *work-life balance, work, employment, family policies, flexibility, labor law legislation.*

1. INTRODUCTION

The reality of today's workforce is that workers hold several different roles in life. People increasingly juggle a range of activities, interests and relationships outside work while still striving to meet growing demands in the workplace for quality goods and services around the clock. How to combine work with life is a fundamental issue for many people. An issue that policymakers, social partners, businesses and individuals are seeking to resolve. Simultaneously, new challenges and solutions are transforming the interface between work and life: an aging population, technological change, higher employment rates and fewer weekly working hours.

Work-life balance is the lack of opposition between work and other life roles. It is the state of equilibrium in which demands of personal life, professional life and family life are equal.

Although the literature is replete with discussion on work-life balance, the definitions of work-life balance are many and varied. Almost every article on work-life balance has a different definition of what work-life balance actually is. Work-life balance is defined as "achieving satisfying experiences in all life domains to a level consistent with the salience of each role for the individual.... (that) introduces the possibility of a hierarchy of roles; however... it does not demand that a hierarchy is neither necessary nor desirable for balance".[1] Greenblatt is describing work-life balance as acceptable levels of conflict between work and nonwork demands.[2]

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[1] Reiter, N., *Work Life Balance: What DO You Mean? The Ethical Ideology Underpinning Appropriate Application*, The Journal of Applied Behavioral Science, NTL Institute, 2007, p. 277

[2] Greenblatt, E., *Work/life balance: Wisdom or whining*, Organizational Dynamics, 2002, p. 177

Enabling a better work-life balance for workers across the life course has been a European Union policy goal for many years as it is central to ensuring that work is sustainable for all. It is also an important factor in determining the participation of women and older workers in the labor market. The work-life balance consists of, but it is not limited to, flexible work arrangements that allow employees to carry out other life programs and practices. The term „work-life balance" is recent in origin, as it was first used in the United Kingdom and the United States of America in the late 1970s and 1980s, respectively. Work-life balance is a term commonly used to describe the balance that a working individual needs between time allocated for work and other aspects of life. Areas of life other than work-life can include personal interests, family and social or leisure activities. Technological advances have made it possible for work tasks to be accomplished faster due to the use of smartphones, email, video chat and other technological software. These technological advances facilitate individuals to work without having a typical 9 to 5 o'clock workday.

The International Labor Organization defines work-family balance as one of the greatest challenges of our time. Reconciling work and family is an essential aspect of promoting equality in the field of labor and reducing poverty. The realization of equal opportunities for men and women ensures equal participation of women and men in all areas of the public and private sectors, equal status and treatment in the exercise of their rights and equal benefits from the results achieved.[3]

The term "harmonization of private and professional life" or "work-life balance" is becoming an increasingly pressing issue in European Union policies. Following the withdrawal of the Maternity Leave Directive, the Commission decided to take a broader approach in addressing women's underrepresentation in the labor market. One of the deliverables of the European Pillar of Social Rights[4] is the Work-life Balance Initiative which addresses the work-life balance challenges faced by working parents and carers. This initiative takes into account the developments in society over the past decade to enable parents and people with caring responsibilities to better balance their work and family lives and to encourage a better sharing of caring responsibilities between women and men. It was based on the results of

[3] Relevant ILO Conventions and Recommendation: Convention Maternity Protection Convention, 2000 (No. 183); Part-Time Work Convention, 1994 (No. 175). Workers with Family Responsibilities Convention, 1981 (No. 156); Workers with Family Responsibilities Recommendation, 1981 (R165). Part-Time Work Recommendation, 1994 (R182); Reduction of Hours of Work Recommendation, 1962 (R116)

[4] European Pillar of Social Rights, booklet, adopted by The European Parliament, the Council and the Commission, 2017. The Pillar sets out 20 key principles and rights to support fair and well-functioning labor markets, structured around three chapters: equal opportunities and access to the labor market, fair working conditions, social protection, and inclusion

the public consultation and two-stage social partner consultation, and the analysis of the accompanying impact assessment. On 17 November 2017, the European Parliament, the Council, and the European Commission formally proclaimed the European Pillar of Social Rights, which included an initiative to support work-life balance. Subsequently, in June 2019, the Council adopted a new Directive on work-life balance for parents and carers. The Directive aims to increase women's participation in the labor market and outlines several new or improved minimum standards for parental, paternity and carers leave, as well as flexible working arrangements, aiming to also increase men's take-up of these.[5]

Main elements of the directive:

- paternity leave - fathers or second parents will be able to take at least 10 working days of leave around the time of the birth of a child, paid at a level equal to that currently set at EU level for maternity leave (in line with article 11 of Council Directive 92/85/EEC). The right to paternity leave will not be subject to a prior service requirement. However, the payment of paternity leave can be subject to a six-month prior service requirement. Member states with more generous parental leave systems will be able to keep their current national arrangements.
- parental leave - an individual right to 4 months of parental leave from which 2 months are non-transferable between the parents and are paid. The level of payment and the age limit of the child will be set by member states.
- carer's leave - a new concept at the EU level for workers caring for relatives in need of care or support due to serious medical reasons. Carers will be able to take 5 working days per year. Member states may use a different reference period, allocate leave on a case-by-case basis and may introduce additional conditions for the exercise of this right.
- flexible working arrangements - the right for parents to request these arrangements has been extended to include working carers.

In addition to feminists arguing for women's inequality with men in the family and separation of family responsibilities, the term "work-life balance" has also been widely used in employment policies.

Due to changes in employment forms and job requirements and changes in family structure, reconciliation of work and family life in recent years in the European Union has become very important. In particular, the evolution of society and the changing character of jobs require organizational change and greater flexibility, while taking into account the needs of both workers and employers. In response to new needs, some

[5] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU

countries have implemented new family policies with an emphasis on increasing parental employment rates. They are designed to support women in overcoming obstacles to full participation in the labor market compared to their male colleagues.

In addition to promoting family-work balance, the goal of these employment policies is to make full use of the labor force of both men and women. However, given the overall employment rate of women, they still fall behind men.[6] For women and men to have access to the labor market on the same basis, there is a need for institutional policies to enable the reconciliation of private and professional life.

The Government of The Republic of North Macedonia "inherited" the ratified Convention No. 156 on Workers with Family Responsibilities from the previous Socialist Federal Republic of Yugoslavia. When the political system changed in 1991, so did the legal framework to allow for major developments such as capital transformation. Today the entire policy framework on labor relations, family protection, child protection and social protection is new. For this reason it is interesting to examine whether the specific needs of workers with family responsibilities are well-recognized in the new legislation, what successive governments since 1991 have done to promote the principles and values of Convention No.156 and the impact on workplaces and workers, and the measures to be taken to implement the new Directive on work-life balance.[7]

2. LEGAL AND POLICY MEASURES IN THE EUROPEAN UNION

To address the challenges that working parents carers face in reconciling work and family responsibilities, the European Commission proposed the 'Work-life balance' Initiative in April 2017. This initiative is a key deliverable of the European Pillar of Social Rights. The Directive on work-life balance sets some new or higher standards for parental, paternity and carers leave and the right to request flexible working arrangements. It takes account of the needs of small and medium-sized

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6 The authors found that while there is diversity across countries and life stages relative to family composition, living as a couple with a child is the most prominent structure for 35-49 year olds. The household workload consists primarily of care responsibilities, with childcare occupying more time than caring for relatives. Additionally, the study found that for women, time spent working in the home does not differ significantly across countries. The gender gap exists relative to perceptions of gender roles and inequality in time spent doing household tasks. Additionally, the study found that men perceived that they do fewer household chores whereas women felt that they do more than their fair share of chores. Kotowska, E.I. *et al., Second European Quality of Life Survey: Family life and work*, Office for Official Publications of the European Communities, Luxembourg, 2010, pp.1-96

7 Cruz, A., *Good practices and challenges on the Maternity Protection Convention, 2000 (No. 183) and the Workers with Family Responsibilities Convention, 1981 (No. 156): A comparative study*, International Labour Organization, 2012, p. 109

companies and makes sure that they are not disproportionately affected. The new Directive is complemented with policy and funding measures, supporting EU countries in enforcing existing dismissal protection legislation, developing formal care services and addressing economic disincentives for second earners to work.[8]

The adopted Directive aims at modernizing the existing European Union legal framework in the area of family-related leaves and flexible working arrangements. The Directive on work-life balance for parents and carers includes:

- Introduction of paternity leave. Fathers/equivalent second parents will be able to take at least 10 working days of paternity leave around the time of the birth of the child, compensated at least at the level of sick pay.
- Strengthening of the existing right to 4 months of parental leave by making 2 out of the 4 months non-transferable from a parent to another, and compensated at a level to be set by the Member States. Parents will also have the right to request to take the leave in a flexible way (e.g. part-time or in a piecemeal approach).
- Introduction of carer's leave for workers providing personal care or support to a relative or person living in the same household. Working carers will be able to take 5 days per year.
- Extension of the existing right to request flexible working arrangements (reduced working hours, flexible working hours and flexibility in place of work) to all working parents of children up to at least 8 years old and all carers.

To complement the adopted legislative, a set of non-legislative measures are taken to support the Member States in achieving these common goals. These include:

- Ensuring protection against discrimination and dismissal for parents (including pregnant women and workers coming back from leave) and carers;
- Encouraging a gender-balanced use of family-related leaves and flexible working arrangements;
- Making better use of European funds to improve the provision of formal care services (childcare, out-of-school care and long-term care);
- Removing economic disincentives for second earners which prevent women from accessing the labor market or working full-time.

This will benefit individuals, companies and the wider society. Parents and carers will profit from a better work-life balance. Moreover, the foreseen increase in women's employment, their higher earnings and career progression will positively

[8] [https://ec.europa.eu/social/main.jsp?langId=en&catId=1311&furtherNews=yes&newsId=9285], accessed 15. January 2020

impact their and their families' economic prosperity, social inclusion and health. Companies will benefit from a wider talent pool and a more motivated and productive labor force, as well as from less absenteeism. The rise in women's employment will also contribute to addressing the challenge of demographic aging and ensuring Member States' financial stability.[9]

The new Directive will help working parents and carers by not obliging them to choose between their family lives and their professional careers. It sets new or higher minimum standards to create more convergence between the EU Member States by preserving and extending existing rights. As mentioned, the new Directive will improve working parents and carers conditions and lead to women's higher employment rate, earnings and better career progression. Gender pay and pension gaps, as well as women's exposure to poverty, will be reduced. Fathers will have more opportunities and incentives to participate in family life. Caregivers looking after an elderly, ill or disabled relative will be able to take time off from work. More women in the labor market will increase the available talent pool. Skills shortages will be addressed. Businesses will better attract and retain workers. Workers will be less absent from work and more motivated, which will improve companies' productivity. In Member States public finances will be more sustainable by reducing unemployment and increasing tax incomes. Increasing labor supply will boost competitiveness. Demographic challenges will be addressed by making full use of our human capital.[10]

3. POLICIES FOR WORK/LIFE BALANCE IN THE REPUBLIC OF NORTH MACEDONIA

At the national level, according to the Law on Labor Relation, the full-time hours of work should not exceed 40 hours per week. The workweek lasts, by rule, five workdays. The law, i.e., a collective agreement may stipulate a working time to be less than 40 hours but not less than 36 hours of work per week. This kind of working time shall be deemed full-time hours. If the full-time working hours are not defined by law or collective agreement, 40 hours of work per week shall be deemed full-time hours.[11] The official working time is from 8 am until 4 pm from Monday to Friday. The employee shall be entitled to a weekly rest period of at least 24 uninterrupted hours, plus the 12-hour daily rest period referred to in article

[9] [https://ec.europa.eu/social/main.jsp?catId=1311&langId=en], accessed 20. January 2020

[10] European Commission, *A new start to support work-life balance for parents and carers*, 2019, p. 2

[11] *Law on Labour Relations* ("Official Gazette of the Republic of Macedonia" no. 62/05, 106/08, 161/08, 114/09,130/09, 50/10, 52/10, 124/10, 47/11, 11/12, 39/12, 13/13, 25/13, 170/13, 187/13, 113/14, 20/15, 33/15, 72/15, 129/15 and 27/16). Article 116 (1), (2), (3), (5)

133 of the present law. By rule, Sunday or other day in the week shall be the day of weekly rest.[12] Usually the weekend is free but many private companies also work on Saturday. Employees are entitled to annual leave of between 20 and 26 working days per year with up to seven days paid leave for marriage, death of close family members, professional examinations and other employer requirements.[13]

Men are still considered to be the heads of the household and are expected only to work. Women are expected to juggle a full-time work schedule by doing the housework, taking care of the children, making meals, etc.

As we point out, our country has a 40-hour working week with a 30 minute rest period during daily working hours plus sick leave benefits.[14] Following EU standards, flexible employment contracts and flexibility of working time are available in the Republic of North Macedonia.[15]

Harmonization policies for work-life balance are covered by both social and labor legislation. They usually include:

1. Availability of affordable services - Institution for early childhood education and care and residential care centers for adults;
2. Right to unpaid / paid leave;
3. Flexible work engagement - a free and flexible work approach;
4. Cash benefits.

Below we have reviewed each of the policies with suggestions for their possible correction.

3.1. Affordable services - Institution for early childhood education and care – kindergartens and residential care centers for adults

Surveys on time-use show that women usually do most of the unpaid housework and childcare, so these family responsibilities can affect women's inclusion in the labor market. The extent and form of women's participation in the labor market are often related to whether they have young children or other persons in their care-seeking households.

12 *Ibid*, article 134

13 *Ibid,* article 137 and 146

14 *Ibid,* article 131 and 112

15 *Ibid,* article 46 - 54

Data show that gender gaps in employment in North Macedonia - 19 percentage points, are driven mainly by the very low labor force participation of women.[16] Employment rates for women are lower than men at all levels of education, although the differences decline somewhat at higher education levels. Few women in North Macedonia work part-time, though the main reason for part-time work is the lack of full-time jobs, followed by "other family or personal responsibilities" and "looking after children and incapacitated adults." Mothers, particularly those with small children up to the age of 6, are much less likely to be employed relative to non-mothers. The main overall impediments to female work activities, as reported by women themselves in the Labor Force Survey, are "family/caring responsibilities" and "other personal and family obligations."[17] Studies show that the traditional division of household labor in which the burden of care for the household and its dependents automatically falls on women represents a substantial impediment to women's work activities in the labor market in North Macedonia. In other words, the high competing demand for women's time to care for the household and its dependent family members (children and the elderly) leads to low female attachment to the labor market. Study shows that a higher number of respondents from North Macedonia relative to the EU countries believes that "it is better for everyone involved that the man earns the money and the woman takes care of the home and children."[18] The share of people who agree with this statement is highest among the self-employed and the jobless. One-third of women in North Macedonia believe that their primary role is to give birth and take care of the home and family rather than to work, 38 percent believe that it is more difficult for women to be managers and politicians or in top positions, and 40 percent believe that working mothers cannot establish as close a relationship with their children as non-working mothers. Inactive women are more likely to hold each of these strongly traditional views.[19]

An insufficient supply of childcare services puts further constraints on female work activities. Several issues related to eldercare (the inadequate availability of services, the amount of time involved, the social norms that limit the use of residential care) are also seen as obstacles to female work activities. On the other hand, increasing the number of children in the family has little effect on the employment rate of male parents.

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16 Based on the Labor Force Survey, [https://countryeconomy.com/labour-force-survey/macedonia], accessed 10. February 2020

17 Dávalos, M, E., *Trends in Labor Markets in FYR Macedonia: A Gender Lens*, World Bank, 2018, p. 3

18 Mojsoska, B., N.; Petreski, M.; Öztas, A., "*National Research on Low Female Labour Market Participation (Quantitative Based Evidence from a New Survey*)." Skopje, UN Women, 2017, p. 27

19 *Ibid*.

As childcare is often an obstacle for women working full time, providing childcare services is very important. Childcare facilities mostly serve children of mothers who are working full-time or part-time. One of the main reasons for the initiative to extend maternity leave in the Republic of North Macedonia was the inadequate conditions in kindergartens. Quality is important for potential users of formal care services for children and the elderly. So, even in a situation where maternal leave would increase, the problem of inaccessibility and quality of services in kindergartens remains unresolved, i.e. after the expiry of parental leave, parents will face the same problem again - lack of adequate quality of kindergarten services where they will have to leave their children. Therefore, it is necessary to have quality conditions in kindergartens throughout the country. Supply of eldercare with day-based services and availability of inexpensive residential care centers. This is one of the key measures that will positively impact the balance between work and family life and increase women's participation in the labor market.

3.2. Right on unpaid / paid leave

First, a clear distinction should be made between maternity leave, parental leave and paternity leave. In the Member States, division of the leave is made by determining the obligation and length of use by parents. The exercise of these rights plays a key role in the employment rate of women. The effectiveness of leave policies depends on several factors, such as the level of payment, length of leave, flexibility to use leave and the employment sector (public or private).

Another aspect that is often missing in leave policies is equal opportunities for women and men. If it is mainly women who are taking long parental leave, then this can reinforce stereotypical assumptions about the domestic responsibilities of men and women and may encourage discrimination. The fact that father leave is usually not taken into account in policies to reconcile work and family life can result in problems of reintegrating women back into the labor market, as well as reinforcing gender segregation as few fathers make use of such absence, although it is in principle available to them as well.

The North Macedonia legislation does not specifically regulate or protect the right to paternity leave, and no incentives exist to encourage men to take leave for childcare. Implicitly, the legislation protects the right of fathers to take a very short paid leave due to fatherhood (2–7 days, which is currently being further regulated through collective (bargaining) agreements). In 2014, the authorities introduced an unpaid paternity leave of up to three months until the child reaches the age of 3. However, although it was intended to serve as potential leave to be used by any parent, the Labor Code delegates this right to "female workers," whereas the Law on Mandatory

Social Contributions uses the general term "worker." Although the right to maternity leave can be used by either of the parents, there is a negligible take-up rate of parental leave by fathers. Data from the Health Insurance Fund show that in 2017, there were in total only 79 fathers who used this benefit instead of the mothers (about 0.76 percent of the total number of people who took parental leave).

Gender inequality in the absence of paternity leave can be remedied through several institutional measures, such as:

- Adoption of policies for longer compulsory paid leave for the father. For example, at least 40 days until the mother recovers from childbirth. The Law on Labor Relations of the Republic of Northern Macedonia offers an opportunity, but not as an exclusive right to paid paternity leave. Fathers can take leave only if the mother does not exercise the right to maternal leave.[20] The right for its use is left to the father's choice because it is not compulsory. This can be an issue because in the society we live in, it carries with it a great deal of prejudice.
- Using parental leave based on the part-time model.
- Flexible paid leave policies. The current Law on Labor Relations provides only continuous maternity leave.[21]
- Supporting breastfeeding in the workplace by providing appropriate breaks and/or privacy breaks. Past research suggests that breastfeeding provisions might be more efficient in increasing breastfeeding rates when; they are combined with another set of family-friendly policies (such as shared parental leave); the organizational culture is supportive (where support by the line manager is crucial); and support is provided from a combined set of environments concurrently (such as work, home, community, health system). Past research also seems to indicate that interventions in the workplace to support breastfeeding might benefit mothers with lower socioeconomic status most.[22]
- Right to postpone use of leave.

3.3. Flexible work engagement - a free and flexible work approach

The literature lacks the evidence of flexible working hours impacting the work-life balance. However, two concepts are frequently used together in the studies. Flexible working hours have been introduced as a benefit for parent/caring employ-

[20] *Law on Labour Relations* (Official Gazette No. 62/2005) and its amendments (Last change Official Gazette No. 27/2016), article 167

[21] *Ibid,* article 165

[22] Vaganay, A.; Canónico, E.; Courtin, E., *Challenges of work-life balance faced by working families*, Directorate-General for Employment, Social Affairs, and Inclusion, European Commission, Brussels, 2016, p.17

ees to help them fulfilling work and life responsibilities and achieving work-life balance. In the recent work-life balance survey, researchers found that employees believe that flexible working practices improves workplace morale, which might positively influence work-life balance. Also, employees believe that employers can help them balance their work and life roles. As an example, flexible working hours is one of the best activities to increase employee wellbeing, as it helps an employee deal with responsibilities outside the workplace.[23]

Employment law emerged and evolved along with economic changes. Flexible working hours have recently gained a lot of attention from organizations and scholars as family-friendly policies. Nowadays, flexible working hours are becoming important to workplaces. A lot of organizations offer flexible working hours to employees due to the benefits that flexibility gives to both employee and employer. Greater employee productivity and higher organization profitability are the most common benefits.[24]

Also, flexible working hours promote and facilitate work-life balance. Reduced stress and increased employee wellbeing are outcomes of the work-life balance. Besides, some researchers argue that flexible working practices facilitate work-life balance, and with shifting family patterns such practices are beneficial for both women and men.[25]

The existence and development of different forms of work have been repeatedly acknowledged by the European institutions. In its Green Paper on modernizing labor law of November 2006, the European Commission noted that: „Rapid technological progress, as well as globalization, have fundamentally changed European labor markets. Fixed-term contracts, part-time work, on-call and zero-hours contracts, hiring through temporary employment agencies and freelance contracts have become an established feature of the European labor market, accounting for 25% of the workforce".[26] As the Lisbon strategy illustrates, Europe's achievement of the labor market targets fixed in 2000 and revised in 2005 relied on developing forms of "atypical or non-standard" work arrangements that allow "for more flexibility, either internal or external quantitative flexibility. Non-standard forms of employment

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23 Pruyne, E.; Powell, M.; Parsons, J., *Developing a Strategy for Employee Wellbeing: A Framework for Planning and Action*," Ashridge Business School, Nuf-field Health, 2012

24 Shagvaliyeva, S., *Impact of Flexible Working Hours on Work-Life Balance*, American Journal of Industrial and Business Management, *vol.* 4, no. 1, 2014, p. 20-23

25 Thomson, P., *The Business Benefits of Flexible Working*, Strategic HR Review, *vol.* 7, no. 2, 2008, pp. 17-22, [http://dx.doi.org/10.1108/14754390810853129], accessed 05. June 2020

26 European Commission, 2006

allow for adapting hours of work, organization of working time and the responsiveness of work to fluctuations in the demand for production or services".[27]

On the other hand, as these forms of work have only developed in more recent times, some adjustments to the rights and protection of workers are needed to adapt to these "new" situations. The majority of workers' rights and protection have been built around so-called "standard" employment relationships – the main features being the permanence of a contractual relationship between the worker and an employer, with rights and protection being developed along the way. Some of the principal characteristics of work such as pay increases, participation in the representative process, unemployment subsidies and pension rights are linked to employment tenure. Moreover, new flexible payment schemes and vocational training systems also appear to be linked to job tenure. The so-called "standard" employment arrangements are considered as ensuring employment tenure and therefore guaranteeing the whole range of rights and protection linked to this form of employment.[28]

The choice between working in a job and caring for a family member also depends on the structure of the labor market. When the labor market is open to the development of part-time and flexible working hours, reconciling a job and caring at home is feasible, especially for women (with the extreme and exceptional example of the Netherlands, where the female part-time rate represents more than half of female employment). In contrast, in countries where this opportunity is rare or difficult, such as in Greece, Croatia (culture), in Lithuania (employer attitudes), Romania or Serbia, experts consider that the structure itself pushes female workers out of the labor market.[29]

The traditional eight-hour working day is no longer the norm in North Macedonia society, too. The introduction of flexible working hours, part-time work and work from home are not new in our labor law. In 2005, new legislation reforming the North Macedonia labor market came into effect.[30] The law introduces numerous innovations in terms of employment services and contracts – such as part-time work, on-call work, project work and work/training contracts. It also introduced changes regarding the involvement of the social partners in the management of

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27 The so-called 'Wilthagen matrix' – Wilthagen, T.; Tros, F., *The concept of 'flexicurity': a new approach to regulating employment and labour markets,* 2004, p. 171

28 Broughton, A.; Biletta, I.; & Kullander, M., *Flexible forms of work: 'very atypical' contractual arrangements*, 2010, p. 3

29 Bouget, D.; Spasova, S.; Vanhercke, B., *Work-life balance measures for persons of working age with dependent relatives in Europe*, A study of national policies, European Commission, 2016, p. 32

30 Law on Labour Relations (Official Gazette No. 62/2005)

the labor market. The main aim of the law was to make the North Macedonia labor market more flexible to encourage job creation. The need for flexible employment arrangements has been underlined on several occasions. Developing these forms of work is considered necessary for achieving economic growth through the adaptation of business strategies and productivity to globalized markets and economies. It should be noted that work flexibility offers convenience in planning, not reducing the working time.[31]

Aside from the existing norms of flexible working in the Law on Labor Relations (article 46-53), following possibilities are included:

- Short-time work - a temporary reduction in working time intended to maintain an existing employer/employee relationship. It can involve a partial reduction in the normal working week for a limited period.
- Job sharing or work sharing - is an employment arrangement where typically two people are retained on a part-time or reduced-time basis to perform a job normally fulfilled by one person working full-time. Job share employees, who don't have a constant workload and do not need to constantly commute to a job daily, lower their stress levels, resulting in healthier lives and work-life balances. This type of arrangement allows the employee to work part-time to spend more time with their families, attend school, or pursue other personal interests. New mothers find that it is a way to continue their careers while not having to deal with the stress and guilt that comes with putting their child in full-time daycare.

Flexibility in working hours - refers to the schedule which allows employees to start and finish their workday when they want. This means that employees can come to work earlier or later than the set time. It includes the opportunity to work on Saturdays to meet a maximum of 40 working hours a week.

- Work from home over the phone or video call – accordingly, workers can balance work and housework and reduce travel-related difficulties (costs, travel time, and downtime). People who work from home have an easier time eating healthy and striking a manageable work-life balance. Eating healthier and having more time to spend with your family can help you feel less stressed, which will make for a happier more productive workday.
- Periodic work - potentially very useful for parents who cannot find adequate care during school hours.
- Total annual working hours - such work assignments determine the total number of hours employees are expected to work with normal pay within a period of one year.

[31] Atkinson, C.; & Hall, L., *Flexible working and happiness in the NHS*, Employee Relations, *vol.* 33, no. 2, 2011, pp. 88-105

This kind of work engagement of parents with children up to a certain age can be encouraged by a mild subsidy to employers.

Because of the potential obstacles or challenges that human resource practitioners usually face when they implement work-life balance policies, employers should consider flexitime carefully. How organizations implement work-life balance policies determines their success.[32]

3.4. Cash benefits

Cash benefits are another dimension of reconciliation policies. These include family benefits and one-off payment benefits in case of childbirth. In North Macedonia, the recent amendments to the Law on Child Protection introduced a progressive increase in the allowance for newborns. One-off payment benefits for the first child in the amount of 5.000 denars, for the second 20.000 denars and the third newborn 60.000 denars. At the same time, in addition to receiving a one-time allowance, all families with minimum incomes and welfare beneficiaries are given access to the right to child benefits and education benefits.[33] These amendments intend to reduce child poverty, but not to provide work-life balance.

The objective of striking a good work-life balance for people who have to care for dependent relatives cannot be reached by specific carer's benefits alone. The success of this objective indeed largely depends on the interplay between a broader set of social and employment policies. This balance very much depends on the pattern of family values in society and the gender distribution of economic activity, more precisely on employment and social policies in place allowing people with dependent relatives to balance work and care.[34]

Women under pressure to care for a dependent family member will compare their wages on the labor market to the carer's allowance, and more generally to family income resources. When the cash benefit is low, some experts conclude that it is too low to have a substantial effect on the choice of a relative to move from their job to care for a dependent family member. However, others point to the specific segment of the labor market with unskilled workers, low pay and undeclared work. In this case even a low allowance may have a disincentive effect.[35]

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32 *Mageni, G. F.; Slabbert, A.D., Meeting the challenge of the work-life balance in the South African workplace*, South African Journal of Economic and Management Sciences, *vol.* 8, no. 4, 2014, p. 175-186

33 *Zakon za zastita na decata*, Sl. Vesnik na RM, бр. 170 од 29.12.2010

34 Bouget; Spasova; Vanhercke, *op, cit,* note 29, p. 11

35 *Ibid,* p. 32

4. THE EFFECT OF COLLECTIVE AGREEMENTS

Governmental initiatives and national or sectoral collective agreements are important for providing the overall framework for a work-life balance strategy. Collective bargaining has been crucial in developing initiatives on flexible working time in EU Member States countries, both at sectoral and at a company level. This is typically done through human resource management policies, often in consultation with workers and/or via collective agreements at a company level. This framework needs to provide sufficient space for developing specific arrangements that serve the needs and preferences of both workers and employers.

Furthermore, within the frameworks provided by these company policies, sometimes the modalities for work-life balance arrangements are formalized in a written agreement between the employer and the worker. Such arrangements can also be included in national, sectoral and/or enterprise-level collective agreements.

For example, in Finland, most collective agreements at local level include the opportunity of developing flexible working time arrangements to help improve work-life balance, but there are large differences between sectors in the way these measures are implemented. One example is the collective agreement for the private social services sector, where the social partners published a guide for companies on the benefits of flexible working time. In Denmark, social partners in the manufacturing sector have tried to encourage the adoption of flexible forms of working at local level. The health of employees in public hospitals in Helsinki and their work-life balance improved when they were given more time between working shifts (a more employer-friendly form of flexible working). In Italy, the recently approved Jobs Act and the draft laws in relation to work-life balance are intended to support flexible working time schemes and promote part-time work to meet parents' needs, including the opportunity to request parental leave on an hourly basis. Companies are offered relief on social security contributions if they address work-life balance through collective bargaining. In Austria, while the statutory working time remains the same, the social partners introduced some new aspects through collective bargaining, including the free time option which allows workers in certain sectors to choose between a wage increase and working time reduction. As a result, workers can reduce working hours to better reconcile work and family responsibilities without losing their existing income.[36]

[36] Lave, O. V.; Boehmer, S., *Policies to improve work–life balance*, Eurofound, Wyattville Road, Ireland, 2015, p. 4

In our country, however, the topic is a low priority for social partners. There should be efforts to implement existing flexible arrangements at the company-level through social dialogue, supported by central social partners' agreements.

Last but not least, government measures and legislation can also shape the conditions for work-life balance, as well as regulate certain responsibilities in the context of occupational health and well-being.

5. CONCLUSION

Extensive policy in all EU Member States suggests that a whole spectrum of measurable benefits or value-adding practices can be seen in a work-life balanced system. Understanding how working time is organized and how this is impacting on the balance of work versus private life is of fundamental importance. A satisfactory work-life balance is achieved when an individual's right to a fulfilled life inside and outside paid work is accepted and respected as the norm, to the mutual benefit of the individual, business and society. The policy has focused on how to increase employment rates among women and older workers, and work-life balance is an important factor in determining their participation.

Harmonization policies for work-life balance are covered by both social and labor legislation. They usually include the availability of affordable services – an institution for early childhood education and care and residential care centers for adults, right on unpaid / paid leave, flexible work engagement - a free and flexible work approach and cash benefits. We have reviewed each of the policies with suggestions for their possible correction.

The issue of how to enable more people to participate in the labor market and to continue to do so until an older age has become a key policy issue in all EU Member States and the Republic of North Macedonia. These challenges might be met by adopting an approach to work that puts sustainability at its center. Sustainable work means that „living and working conditions are such that they support people in engaging and remaining in work throughout an extended working life".

There is a wide variation on the entitlement of paternity and family leave, with the Member States having much more generous payment or length than our country.

Flexible working practices are beneficial for both employee and employer. Hence, in the first place flexibility was introduced to the workplace to help employees with kids or employees who care for siblings to manage their time between work and life. As flexibility gives an employee the ability to control when, where, and how much time do they work, flexibility contributes to improvement in the allo-

cation of work and life responsibilities. Thus, an employee might end up fulfilling his/her working as well as well non-working roles easily. Finally, the achievement of inside the work and outside the work responsibilities leads to finding a work-life balance which increases overall life satisfaction. To summarize, it might be said that the use of flexible working practices positively influences on work-life balance and overall life satisfaction of the employee.

While a European legislative framework and the national legislation provide basic rights for parents to reconcile professional and private life, collective agreements have been and will be important in providing much-needed additional rights tailored to specific constituencies. Moreover, collective agreements are important in ensuring the proper implementation of existing rights.

A work-life balance system after the EU Directive on work-life balance for parents and carers, in its purest form, must be applied in the Republic of North Macedonia's workplace due to EU integration. Therefore, further efforts need to be done on a national level. The policy suggestions given in this paper may improve work-life balance during everyday life. However, this still needs to be explored through focused research. The major challenge in the implementation of a work-life balance system in the Republic of North Macedonia will be on the management, which has to learn to manage worker outputs rather than the workers. The country should do its utmost to raise awareness of the directive and encourage the competent institutions to set high standards especially in the area of childhood education and care centers, and residential care centers for adults.

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UDK 347.56:614.25]:343
614(4-67EU)
Review article

CAUSATION IN MEDICAL MALPRACTICE

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ABSTRACT

Court proceedings in the field of medical law are currently a growing issue given the increasing migration of doctors and medical staff. Because of that fact, it is crucial to establish the standard of quality of health protection in the European Union (EU). Following the presentation of the existing levels of protection connected with the prevention of malpractice, the paper distinguishes between the legal documents of the EU and the Council of Europe because many documents related to health care and quality are adopted in the EU and in the Council of Europe. The general conclusion is that there is no uniform or cross-sectoral definition of quality in health care, however it has been found that important elements of health care quality include effectiveness, efficiency, access, safety, equity, appropriateness, timeliness, acceptability, satisfaction, patient responsiveness or patient-centeredness, and continuity of care. The health care aspect is analysed in the continental legal system and the common law legal system. The issue of causation is observed through different theories in the continental legal system and various case law examples in the common law legal system. The authors concluded that it would be preferable to adopt a theory of objective imputation as a legal standard for causation in criminal liability in medicine, because it analyses several possible causes in close or remote connection with the resulting consequence, i.e. said theory considers as relevant only the legal causes that result in a harmful event through the violation of due diligence. The paper primarily deals with criminal liability for malpractice, but it also presents the civil aspects in the states (for example the USA) which recognise only civil liability for malpractice.

Keywords: *causation, criminal law, malpractice, quality*

1. INTRODUCTION

In the last few decades, medicine has become the subject of many judicial proceedings, and people have become acquainted with the technological advances through media outlets and publicity.[1] Hyper-specialisation in every field of medicine requires specific expertise in the analysis and evaluation of the clinical case in question if damage is committed.[2] Today we are also witnessing a considerable wave of migration among the physicians in the EU. Therefore, it is important to assess its potential impact on the quality of care. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications assumes that all EU doctors meet the same professional standards. However, a number of high-profile incidents of medical malpractice among the migrating EU doctors have raised concerns about the potential risks for safety and the quality of care. The mobility of patients between EU Member States has also drawn attention to the quality of care and the regulations of each Member State related to the quality and causation in the event of medical malpractice.[3] In order to reduce malpractice, the health care organisation uses the following training procedures to assess the competency and training needs of its workforce: the implementation of a mandatory training programme to meet the requirements arising from these standards, the provision of access to training to meet the safety and quality training needs, and the monitoring of the participation of the workforce in the training.

In order to analyse causation, the paper initially focusses on the standards prescribed in EU legal documents and the documents of the Council of Europe.

Malpractice causation requires the establishment of a correlation between an act and the standard of care that has not been complied with. For that purpose, the paper analyses the standards of care prescribed in the Declaration on the Promotion of Patient Rights in Europe, the Convention on Human Rights and Biomedicine, the Treaty of Maastricht, the Lisbon Treaty amending the Treaty on *European* Union (TEU) and the Treaty Establishing the *European* Community (*TEC*), the European Charter of Patients' Rights – Basic Document, ECJ ruling and Directive 2011/24/EU of the European Parliament and of the Council.

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1 Vojković, H., *Građanskopravni standard medicinskog tretmana*, Zbornik radova Pravnog fakulteta u Splitu, *Vol.* 56, no. 3, 2019, p. 568

2 Ferrara, S. D. *et al.*, *Malpractice and medical liability. European Guidelines on Methods of Ascertainment and Criteria of Evaluation*, Int J Legal Med, *vol.* 127, no. 3, 2013, p. 546

3 Footman, K. *et al.*, *Cross-border health care in Europe*, Denmark, 2014, p. 29; More information about causality and malpractice, and the elements of criminal offence of malpractice in Croatia can be found in Roksandić Vidlička, S., *Kaznena djela protiv zdravlja ljudi* in Cvitanović, L. *et al.*, *Kazneno pravo – Posebni dio*, Zagreb, 2018

The following section analyses causation. The establishment of causation is a rather complex element of the evidentiary procedure, because a medical intervention conducted *lege artis* does not always guarantee the expected outcome. The term *outcome* is used because causation issues generally occur in result crimes. Causation is connected with a medical error and a subsequent consequence as two different terms that have different legal effect.

Further analysis deals with two different legal systems: continental and common law. These systems are described in separate chapters. In the continental legal system, a competence of various courts in the EU is shown through the theory of equivalence, the theory of adequacy and, most importantly, the concept of objective imputation in criminal matters. All these theories illustrate different ways of establishing whether the standard of quality of medical care is achieved in each case. A special emphasis is on the relationship between the judge and the expert medical witness, including the potential issues that may arise in that particular case.

The common law legal system is analysed through criminal law and the cases pertaining to the United Kingdom. The analysis of the common law system also includes the USA, even though the provisions regulating medical matters in the USA do not recognise criminal liability, but all cases are conducted on the basis of civil liability.

The aim of the paper is to provide an overview of different solutions for establishing the criteria for causation and different standards prescribed in various documents across Europe. Upon analysing different theories of causation, the focus will be placed on the most appropriate theory of objective imputation.

2. STANDARDS OF PROTECTION IN EUROPE

Since EU documents refer to quality, the issue of interpretation of the term and its application to individual cases is essential for the establishment of causation. The Court of Justice has not only referred to "medical science and medical standards",[4] "existing scientific literature and studies, the authorised opinions of specialists [etc.]",[5] but it has also emphasised the significance of "taking into consideration

[4] Case C-157/99 B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen [2001] ECR *I* -404, § 92

[5] *Ibid.* § 98; *ECJ* decided that normal treatment provided by insurance company or financed by national law, must be understood as treatment / examination according to international medical science and medical standards accepted at the international level. Roksandić Vidlička, *op. cit.*, note 3, p. 265

all the relevant medical factors and the available scientific data".[6] Therefore, it seems that there is a place for both the scientific approach on the one hand, and empirical experience on the other hand. The European states, to a large extent, meet these standards of quality through the obligation to provide treatment in compliance with the current international state of science because the treatment of patients must be adequate and appropriate.[7]

An important document for the quality standard was adopted at the European Patient Rights Conference in Amsterdam in 1994, where the World Health Organization (WHO) adopted the Declaration on the Promotion of Patient Rights in Europe[8], which encompasses the most important patient rights. The Amsterdam Declaration is the first comprehensive international document proclaiming patients' rights and urging states to adopt laws and rules defining the rights and responsibilities of patients, medical professionals and health care institutions. Art. 2. § 1 – 9 regulates the patient's right to information about available health services; personal health status; intended medical interventions and their potential risks and benefits, the alternatives to the proposed treatment, diagnosis, prognosis and course of medical treatment, the patient's right not to be informed about his or her medical condition. All listed rights and risks may result in medical error and as such are relevant for determining causation. Moreover, human rights apply not only to patients, but to health workers as well, after they have been adopted in national legal systems.[9]

The most important European document in the field of medical law adopted by the Council of Europe is the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: the Convention on Human Rights and Biomedicine (known as the Oviedo Bioethical Convention), which entered into force on 1st December 1999. The fundamental principle prescribed by the Oviedo Bioethical Convention is that all people should enjoy the benefits of the same high ethical standards in medicine and science.

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6 Case C-173/09 Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa, [2010] ECR *I* - 581, § 62

7 Patients' Rights in the European Union Mapping eXercise, Final Report, available at: [https://ec.europa.eu/health/sites/health/files/cross_border_care/docs/2018_mapping_patientsrights_frep_en.pdf], pp. 43-44, accessed on 10. June 2020

8 *A Declaration on the Promotion of Patient's Rights in Europe*, ICP/HLE 121, World Health Organization, 28 June 1994. Available at [http:// www.who.int/genomics/public/eu_declaration1994.pdf services_co108_en.pdf], accessed on 10. June 2020

9 Cohen, J.; Ezer, T., *Human rights in patient care: A theoretical and practical framework*, Health and Human Rights, *vol*. 15, no. 2, 2013, p. 10

The European Union is a supranational organisation established by a series of treaties. The degree of standard of public health care was initially introduced in the Treaty of Maastricht in 1993. Article 129 (amended and renumbered as Article 152 of TEC and today as Art. 168. of TFEU) provided that "the Community shall contribute towards a high level of human health protection by encouraging co-operation between Member States, and, if necessary, lending support to their action". The Community had no jurisdiction to harmonise national laws, hence it was limited to a cooperation of policies or programmes.[10] Evidently, all standards must be prescribed within the national legislation and as such applied when determining causation in each case. In terms of harmonisation of national law via EU law (i.e. positive integration), the Member States are still responsible "for the definition of their health policy and for the organisation and delivery of health services and medical care", which includes "the management of health services and medical care and the allocation of the resources assigned to them".[11] Hence, it derives that a uniform and cross-sectoral definition of quality standard in health care cannot be established.[12] However, a common conclusion is that the most important elements of health care quality include effectiveness, efficiency, access, safety, equity, appropriateness, timeliness, acceptability, satisfaction, patient responsiveness or patient-centeredness, and continuity of care.[13]

The EU's legislative activity is also reflected in the adoption of declarations, recommendations and directives in the field of medicine and health[14], such as the European Charter of Patients' Rights – Basic Document[15], and in the organisation of the Active Citizenship Network in Rome 2002. Art. 8 of the European Charter of Patients' Rights prescribes the right to the observance of quality standards, so that each individual is granted access to high quality health services on the basis of the specification and observance of precise standards. Art. 9 regulates that each individual has the right to be free from harm caused by the poor functioning of health services, medical malpractice and errors, and the right of access to health services and treatments that meet high safety standards. All health professionals must adopt high safety standard of medical treatment, which is an important element for establishing causation in medical error.

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10 EU health policy trends, a study prepared by LSE Health, February 2009, p. 24

11 Frischhut, M., *Standards on quality and safety in cross-border healthcare* in den Exter, A., (ed.), *Cross-border health care and European Union law*, Rotterdam, 2017, p. 60

12 *Ibid.*

13 *Ibid.,* p.63.; Vojković, *op. cit.*, note 1, p. 569

14 Available at: [http://ec.europa.eu/health/], accessed on 10. June 2020

15 Available at: [http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co1008], accessed on 10. June 2020

Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border health care envisages the provision of safe, high quality, efficient and quantitatively adequate health care to citizens on their territory. Therefore, it derives that high quality should be interpreted on the basis of the case T-177/13.[16] Although it might be unclear as to what *high level* in health care protection refers to in terms of the quality of care, it should be emphasised that high level does not imply "the highest level", as recently confirmed by the General Court. The Directive provides rules for facilitating the access to safe and high-quality cross-border health care and promotes cooperation on health care between the Member States in full respect of national competencies in organising and delivering health care.[17] The rights of patients to receive health care in other Member States of the EU depend upon both the individual rights and the social rights.

In the matter of resolving medical malpractice cases, according to the 2008 study of the Council of Europe, the patients' prefer the following: future prevention (deterrence effect), restoration of a violated right, financial compensation, explanation and apology.[18]

3. CAUSATION

Medical error occurs when the treatment was not in line with the required and generally accepted professional quality standard. Hence, (medical) error may be defined as a (medical) violation of the duty of care or a consequence of manifestly negligent conduct.[19] In that case, causation needs to be questioned.[20] Errors in the diagnosis and treatment are considered the necessary preconditions for criminal liability. However, even if they are proved, that is still not enough for conviction.

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16 Case T-177/13 TestBioTech and Others v. Commission [2016] ECR *I* - 736. The high level does not necessarily, in order to be compatible with that provision (i.e. TFEU Article 168 (1)) have to be the highest that is technically possible..."

17 Directive 2011, Art. 1

18 Turković, K.; Roksandić Vidlička, S.; Maršavelski, A., *Recommendation on alternative dispute resolution in medical liability in Council of Europe member states*, Book of proceedings of the 18th World Congress on medical law, 2010. in Turković, K. *et al.* (eds.)*., Hrestomatija hrvatskog medicinskog prava*, Pravni fakultet Sveučilišta u Zagrebu, 2016, p. 886; Physicians in many states in Europe provide services according to the *gold standard* following the protocols of proceeding, however we cannot avoid the question of whether the standard can really be fully applied if the conditions are not entirely appropriate (equipment, organisation, personnel). Roksandić Vidlička, *op. cit*., note 3, p. 265

19 Mrčela, M.; Vuletić, I.: *Granice nehajne odgovornosti za kazneno djelo nesavjesnog liječenja*, Zbornik radova Pravnog fakulteta u Splitu, *vol.* 54, no.3, 2017, p. 690

20 Watson, K.**,** Kottenhagen, R., *Patients' Rights, Medical Error and Harmonisation of Compensation Mechanisms in Europe,* European Journal of Health Law, *vol.* 25, no. 1, 2017, p. 10

The prosecutor must prove two additional liability requirements: the occurrence of consequences and a causal nexus between the errors in treatment and consequences.[21] The classification of error is important for discovering its cause and detecting the most common problems in the provision of health care services, and it has a positive role, i.e. it serves to provide guidelines for improving the quality of health care services and the overall organisation of the health care system.[22] The court is required to conduct an *ex ante* evaluation, i.e. to imagine being in the same space–time circumstances in which the facts under examination took place.[23] *Ex ante* evaluation must consider all diagnostic and therapeutic hypotheses formulated with respect to knowledge of the true pathological state/condition, deduced *ex post* from the data collected after the event in question, since only such an evaluation can reflect the aspects of evaluation and decision-making existing in the space–time conditions in which health care professionals were working.[24]

The central issue of medical liability is to establish causation, since liability exists only if the error of the physician caused harm to the patient's health.[25] There must be a causal link or causation between the act performed by the physician or his/her omission and the resulting consequence. It is necessary to establish that the consequence resulted from the act/omission of the physician, i.e. that the cause of the consequence was the act or omission of the physician. Causation has an objective nature and precedes guilt, hence, if there is no causal link, no guilt can be established. Causation issues generally occur in result crimes[26], i.e. those acts which are considered to be completed only by the occurrence of a specific consequence contained in the definition of the criminal offence and in the case of derivative omission[27] offences whereby the guarantor is legally bound to avert the occurrence of the consequence. The existence of a causal link between the physician's act/omission and a consequence that occurred in the form of an injury to the patient's life, body, health or other legal good is often called into question due to medical solidarity, even

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21 Vuletić, I., *Medical Malpractice as a Separate Criminal Offense: a Higher Degree of Patient Protection or Merely a Sword Above the Doctor´s Heads? The Example of the Croatian Legislative Model and the Experiences of its Implementation*, Medicine, Law and Society, *vol*. 12, no. 2, 2019, p. 44

22 Roksandić Vidlička, S.; Ćepulić, E.; Babić, T., *Scandinavian model of insurance from medical error – can it live in framework of Croatian legislative*, Zbornik radova, 1. Kongres pravnika u zdravstvu, 2008, p. 90

23 Ferrara *et al.*, *op. cit.*, note 2, p. 546

24 *Ibid.*

25 Zečević, D.; Škavić, J., *Kaznenopravna i građanskopravna odgovornost liječnika – teorija i praksa,* Medicinska naklada, Zagreb, 2012, p. 18

26 Bohlander, M., *Principles of German Criminal Law*, Oxford, Portland, Oregon, 2009, p. 40

27 *Ibid.*

in situations of extremely gross errors committed by the physician.[28] The establishment of causation is a rather complex element of the evidentiary procedure, because a medical intervention conducted *lege artis* does not always guarantee the expected outcome. In other words, the occurrence of consequences does not imply the existence of a criminal offence. Because of the uncertain etiology of some health conditions or different reactions of patients to certain drugs and treatment procedures, causation is very difficult to determine in some cases. There are cases where it is not possible to determine the causal relationship between the medical negligence and the injury because the injury resulted from a series of causes. Therefore, the mere existence of a harmful consequence does not imply the existence of causation and liability of the physician, since the consequence can occur independently of the error made.[29]

Medical error should be distinguished from the subsequent consequence. A subsequent consequence is an unwanted outcome of a medical procedure that occurs despite a medically correct and timely procedure performed using the correct equipment and treatment (drugs, chemicals), with optimal organisation of work. Therefore, if unforeseen circumstances – subsequent consequence, which cannot be imputed to the accused, occurred during the treatment, then his/her acts should be assessed within the domain of unforeseen circumstances.[30] It should be noted that not every adverse event or harmful outcome should be automatically identified as a medical error.[31] In order to make such identification, all circumstances leading to an adverse outcome need to be clearly established through professional medical expertise. Although it usually implies something unwanted, unfavourable and negative, the mere existence of a subsequent consequence should not be *a priori* understood as a product of a medical (professional) error, malpractice and/or negligence, nor should it prejudice one's guilt. Furthermore, it should not be understood as a safe solution that unconditionally leads to the release of any responsibility (moral, civil, criminal) for its occurrence.

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28 Simonović, B., *Teret dokazivanja dijagnostičkih grešaka i njihovih posledica,* Glasnik prava, 6, 1997, p. 29

29 Supreme Court of Croatia, IV Kž 52/2004-2 of 30 June 2004

30 Roksandić Vidlička, S., *Aktualna pitanja pojedinih kaznenih djela protiv zdravlja ljudi u svijetlu donošenja nacrta izmjena hrvatskog kaznenog zakona*, Godišnjak Akademije pravnih znanosti 1/2010 in Turković, K. *et al.* (eds.)*, Hrestomatija hrvatskog medicinskog prava*, Pravni fakultet Sveučilišta u Zagrebu, 2016, p. 825

31 Petrović, O., *Treba li odlučivati između komplikacije i stručne pogreške?*, Liječnički vjesnik, *vol.* 135, 2013, p. 101

5. CONTINENTAL LAW LEGAL SYSTEM

Two legal systems co-exist across the European continent. The first and the most common one is continental law, while the second one is common law.

A comparative overview of the criminal codes of the majority of European countries shows that there are two main approaches to regulating medical errors: through general criminal offences against life and body (typical for Western European countries) or by prescribing separate criminal offences referred to as medical malpractice which are designed for the work domain of medical professionals (typical for Eastern European countries, such as the countries of former Yugoslavia and Ukraine).[32]

One approach is to treat every medical procedure as a type of bodily injury and, therefore, qualify cases of medical malpractice as criminal offences of causing bodily harm to a patient. German law, which considers the cases of medical malpractice under § 223 regulating the general crime of causing bodily harm, is a typical example of such legislative approach. The practical consequence of such an approach is that every medical procedure partially constitutes *actus reus* of the criminal offence, unless the defendant can prove the existence of grounds for the exclusion of that *actus reus*. This approach is common in Western European countries. However, it can lead to significant practical difficulties in the cases involving elective medical procedures (e.g. plastic surgery).[33]

Another possible approach for a certain legislator is to prescribe medical malpractice as a separate crime (in a separate chapter of the criminal code). This kind of regulation allows the specification of details of medical malpractice, the legal grounds of criminal liability and the appropriate penalty. A practical consequence of this model is that not every medical procedure constitutes *actus reus* of a criminal offence, but only the procedures characterised by special circumstances (e.g. only the ones deviating from the medical standards). Therefore, the criminal domain is even narrower than in the first model. This criminal offence emphasises a stronger deflection from the physician`s objective liability.[34] A typical example of such an approach is Croatia, since the Croatian Criminal Code provides for a special offence of negligent treatment (Art. 181).[35]

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32 Vuletić, *op. cit.,* note 21, p. 40

33 *Ibid.*, p. 42

34 Turković, K.; Roksandić Vidlička, S., *Reforma kaznenog zakonodavstva u području zdravstva – Kaznena djela protiv zdravlja ljudi de lege ferenda*, Zbornik radova Aktualnosti zdravstvenog zakonodavstva i pravne prakse, Novalja, 2011. in Turković, K. *et al.* (eds.), *Hrestomatija hrvatskog medicinskog prava*, Pravni fakultet Sveučilišta u Zagrebu, 2016, p. 869

35 Vuletić, *op. cit.,* note 21, p. 42

In the continental law system, the objective determination of the act of committing the criminal offence primarily requires the identification of the medical procedures in question and determining whether they are appropriate and regular from the standpoint of the medical profession according to objective criteria. Even though the legal theory and the judiciary apply different theories to determining causation, objective imputation presents itself as the most appropriate theory in this case.[36]

Since the theory of equivalence had certain shortcomings, e.g. its broadness, as it takes into account even the distant and irrelevant causes, a new theory of adequacy was introduced in the second half of the XIX century. The theory of adequacy does not perceive natural causation as sufficient because the outer consequence must occur as an adequate or a typical consequence of the conduct of the accused.[37] In other words, human actions must be experientially appropriate in order to lead to a specific consequence, because otherwise, there is no causation. The theory of objective imputation emerged in the XX century in the German doctrine that followed the theory of adequacy, and although it has not been completely implemented by the common law, it has, gradually, assumed primacy in the German doctrine. According to this theory, an act can be perceived as the cause of the consequence when it jeopardises the object of an offence, and the harmful event occurs as a consequence. The first condition is that the perpetrator exceeds the limits of the permissible risk, thus endangering the object of the action.[38] For the existence of criminal liability, it is necessary to establish that a harmful event or risk, created by the violation of due diligence, resulted as a consequence. In this sense, the theory of objective imputation should be applied as dominant. This means that the court must ask the expert witness whether the same consequence would have occurred if the perpetrator had applied the necessary internal and external due diligence. Internal due diligence represents a prediction of the risk to the protected legal good and external due diligence presents the adjustment of further conduct to the previous knowledge of a dangerous situation.[39] The theoretical learning about the objective imputation is reduced to determining specific constellations in which objective imputation of consequences is excluded. Such objective imputation will be excluded in cases of remote and legally irrelevant actions, if taking action reduces the risk of violation or endangerment of the protected legal good,

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36 See more in Novoselec, P.; Bojanić, I., *Opći dio kaznenog prava,* Zagreb, 2013, pp. 150-158

37 Munivrana Vajda, M.; Ivičević Karas, E., *Criminal law*, Supplement 57 Croatia, International Encyclopedia of Laws, 2016, p. 57

38 Martinović, I., *Problem uzročnosti u kaznenom pravu,* Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 19, no. 1, 2012, p. 84

39 Mrčela; Vuletić, *op. cit.,* note 19, p. 694

if the risk remains equal or does not increase in a legally relevant manner, if the consequence would have occurred even if the perpetrator had complied with the regulations, if the consequence was the result of an unpredictable external factor, and if the perpetrator acted contrary to a legal norm and caused the consequence, but not the one which the violated legal norm is intended to avert.[40]

A problem can arise when it is not possible to determine with absolute certainty whether the consequence would be safely remedied if the necessary attention was attributed. This also raises the question of the required standard of certainty in this regard. The Croatian literature advocates the standpoint that a high degree of probability or probability in line with certainty is required. According to the prevailing opinion in the German literature, in accordance with the *in dubio pro reo* rule, one must be acquitted whenever the absence of a consequence cannot be established with a probability in line with certainty. This rule is supplemented by the theory of increased risk (*Risikoerhöhungslehre*) according to which it is necessary to prove that the violation of due care has led to a significant increase in the risk of endangering the object of action. If such an increase has occurred, then it is enough for the omission to be considered causal. In this sense, the *in dubio pro reo* rule should be used only in a situation where, with a probability in line with certainty, it cannot be determined whether the negligent conduct has led to an increase in risk at all.[41]

In addition, the judicial practice in continental law has been increasingly adopting the concept of *prescriptive alternative behaviour*. According to a judgment of the Bjelovar County Court[42] in Croatia, a surgeon at a hospital lacking the necessary surgical equipment was released from liability for a patient's death; he was accused of failing to transfer the patient to an appropriate specialised hospital in time due to a high level of probability of the patient`s death. In this particular case, the expert witness established that the accused surgeon had committed malpractice because he failed to consult a cardiac surgeon or a vascular surgeon and refer the injured person to a specialised facility under a slight suspicion of aortic rupture, since such injury could not be successfully treated at the surgeon`s hospital due to the lack of adequate equipment. However, the Court of Appeal accepted the claim that this was not the case of defendant's omission.[43] The findings derived from the

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40 Martinović, *op. cit.,* note 38, p. 93

41 Mrčela; Vuletić, *op. cit.,* note 19, p.695

42 Judgment of the Municipal Court in Bjelovar, K-105/2009 of 14 September 2011. Roksandić Vidlička states that *prescriptive alternative behaviour* is often used in jurisprudence in Croatia, and she emphasises the importance of determining causality for the final outcome of criminal proceedings. Roksandić Vidlička, *op. cit.*, note 3, p. 261

43 Judgment of the County Court in Bjelovar, KŽ-443 / 2011-3 of 16 February 2012

presented evidence do not suggest a reliable conclusion that the deterioration of the victim's health and death was a consequence of these procedures. In fact, it is evident from the findings and the expert opinion of the School of Medicine in Zagreb that the mortality resulting from the aortic surgery was up to 40%, and that the 60% chance of survival does not provide a solid basis for the causal link between the surgeon`s omission and the resulting consequence, since it cannot be reliably ruled out that the same consequences would not have occurred if the injured person had been transferred to a specialised hospital immediately after the accident. In addition, it is disputable whether the patient would die during the operation because of the aorta rupture. In this case, it was rather challenging to prove whether the consequences caused by acting *non lege artis* could be imputed to the surgeon if the same consequences would have occurred provided that he had acted *lege artis*. The court accepted that the death in this particular case could not be excluded even if the injured person had been transferred in timely manner, since the survival rate in such cases is statistically only 3%, while in 97% cases of aortic rupture caused by traffic accidents the patients are proclaimed dead on arrival. In other words, if the surgeon had acted *lege artis*, the possibility of a fatal outcome would not be excluded, but there would be at least a small possibility for the patient to survive.[44] In such cases, the German courts have also decided on acquittal by relying on the procedural principle of *in dubio pro reo*, which is accepted by some legal theoreticians, although they differ in the degree of the required probability.[45]

On the contrary, the Court of Appeal in Brussels convicted the physician because, due to his malpractice (lack of due care and failure to act *lege artis*), the patient lost a 90% chance of survival. However, the Court of Cassation vacated the judgment at the first instance because the court could not establish causation between the malpractice and the death of the patient in the remaining 10% of cases where negligent treatment did not result in death. The court concluded that, since no "certain" causation was established between the medical error and the patient`s death, there was only a "loss of chance for survival", so the physician cannot be held liable. [46] In criminal law, a physician cannot be convicted if the patient loses

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44 *Ibid.*

45 However, in above-mentioned example, the probability of survival was higher than the probability of death, which may lead to the conclusion that the surgeon needs to be liable for the patient's death. Novoselec, P., *Sudska praksa*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 19, no. 2, 2012, p. 937

46 Court of Appeal in Brussels, 27 February 1974, *De Verz.,* 1974, 637 cited in Callens, S., *Medical Civil Liability in Belgium. Four Selected Cases,* European Journal of Health Law, *vol.* 10, no. 2, 2003, p. 122. In Belgian civil law, however, the compensation for the "loss of the chance for survival" is possible, because it is easier for the patient to prove a causal link between the error and the injury. Dias Pereira, G. A., *Existing challenges in medical liability: causation, burden of proof and informed consent,* The ev-

his "chance of survival", but he/she may be convicted if causation is established between the physician`s medical error and the injury or death of the patient. Although the jurisprudence of the European states generally accepts the *theory of equivalence*, it still raises a question whether a criminal court can convict a physician if the harm that the patient suffered is merely considered a "loss of chances of being cured or surviving". Hence, according to the *theory of increasing risk*, the perpetrator would be liable for the consequence, because a threat to a legal good can only be tolerated within the limits of the permissible risk of the medical activity. An example is a surgeon who, by gross violation of the rules of profession, causes the death of a patient, but he/she is released from liability because a fatal outcome would have occurred even if the physician had acted *lege artis*.[47]

In this sense, the Committee on Judicial Opinions of the School of Medicine in Zagreb stated that it is inadequate to ground the expert's statement or the indictment on assumptions rather than on facts, and that it would be ethically and deontologically unacceptable for the doctors to deny any treatment options to the patient even if the patient is suffering from a serious incurable disease. They also concluded that it is absurd to criminalise infusion urography as the cause of death of a patient with a severe and incurable disease and attribute the fatal outcome to medical negligence. [48]

According to the *theory of prescriptive alternative behaviour*, the causal consequence must be realised through the risk arising from a medical error, which would not be the case if the same consequence would have occurred for the patient even if the physician had not made an error. The charges against the specialist doctor were dismissed, because he prescribed and administered additional 25 doses of radiation after 6 doses of treatment following the operation, which led to a subsequent consequence and sepsis, after which the patient died. All the evidence pointed to the fact that the deceased was treated in the usual and appropriate manner *(lege artis)* and the fatal outcome was due to the very nature of the disease, i.e. malignant cancer. Sepsis did not contribute to the fatal outcome, because there is no evidence that sepsis was directly related to additional radiation. If the radiation therapy that the physician ordered subsequently affected the patient`s current condition, i.e. sepsis, it still cannot be claimed that the radiation therapy had been determined improperly, since the physician administered the relevant therapy in good faith

er-growing challenge of medical liability: national and European responses*,* Conference, Strasbourg, 2-3 June 2008, Council of Europe, 2009, p. 143

47 For more information on Legal Certainty see Vuletić, *op. cit.*, note 21, p. 57

48 Municipal Court in Zagreb, KO-1169/02 cited in Zečević; Škavić, *op.cit.,* note 25, p. 151

and according to the best knowledge *(lege artis)*. The fact that this additional therapy did not produce the expected results cannot be imputed to the physician.[49]

Although medical causation does not operate in line with the laws of physics, where a single cause always and unequivocally causes a certain effect, there are nevertheless some rules, general medical knowledge and experience based on which certain widely-known facts lead to a certain consequence. These are common knowledge to the extent that, for example, inflammation and perforation of the appendix likely cause peritonitis and consequently sepsis.

However, it is very difficult to establish direct causation, especially in the cases of *cumulative causation* when the consequence is caused by multiple simultaneous actions, each of which may result in the consequence. This occurs, for example, when the physicians work in a team. Common law, therefore, often uses *hypothetical causation* which requires the establishment of whether a medical error is generally appropriate to cause harm to a patient's health. In this regard, it is necessary to reduce the number of hypothetical theses and circumstances in terms of what would have happened if something else had happened. It is only necessary to prove the real circumstances, the actual causation, and to proceed solely from an established medical error. Therefore, the court must determine (with the assistance of an expert witness)[50] whether a specific medical error in the particular case caused, or was appropriate, or could have caused the resulting consequence. In the aforementioned process of proving causation, the existence of an error should be proved with absolute certainty, and the existence of a causal relationship between the error and the consequence should be proved with no less than a high degree of probability. In fact, in medicine, it is generally not possible to prove with absolute certainty that a particular error of a physician directly caused the consequence.[51] In other words, the causal link between a medical error and an injury to the health or body, or the death of a patient exists only if the court, on the basis of the professional medical expertise, concludes that *lege artis* procedure would have saved or prolonged the life of the patient with a likelihood of probability in line with certainty. Probability in line with certainty means a degree of certainty that excludes reasonable doubt.[52]

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[49] Decision of the Municipal State Attorney in Split, DO-K-1601/01

[50] Vuletić, *op. cit.*, note 21, p. 48

[51] Simonović, *op. cit.,* note 28, p. 31

[52] Radišić, J., *Odgovornost zbog pogrešne lekarske dijagnoze i nepreduzimanja potrebnih dijagnostičkih mera*, Revija za pravo osiguranja, *vol.* 10, nNo. 1, 2011, p. 56. A free assessment of evidence means that the court can freely adjudicate a conviction based on certain presented facts, but it must not, on its own initiative, lower the standards required to reach a decision or go below the limit of "the highest degree of certainty". Martinović, *op.cit.,* note 38, p. 91

The existence of causation, with regard to the *ex nihilo nihil fit* principle, is a particularly challenging issue in the cases of derivative omission offences where the perpetrator does not act or take any action. Since there is no real causation in these cases, only a hypothetical one is possible where omission and consequence are correlated only if the omitted conduct would have eliminated the consequence. Instead of the hypothetical process of elimination, the judge should engage in the hypothetical process of addition and seek to find an answer to the question of what would have happened had the accused carried out the omitted conduct.[53] If we want the consequence of the omission to be objectively imputed to the physician, the following three questions must be answered: "was there a legal obligation for the physician to avert the occurrence of the consequence", "would the compliance with those legal obligations effectively avert the occurrence of the consequence" and "was it possible in specific circumstances to prevent the occurrence of the consequence".[54] In other words, the question arises as to what would have happened if the omitted action had been taken, or what would have happened if there had been no such breach of obligation. If the consequence would not have occurred, such omission must be imputed to the physician, and if the result would have occurred (if the answer is "the same"), the consequences will not be imputed to the physician. However, a certain degree of probability of avoiding the consequences is also required here, because a high degree of probability in line with certainty must be achieved. If such a degree of probability does not exist due to the principle of *in dubio pro reo,* the obliged action will not eliminate the consequence.[55] Common law has been increasingly adopting *hypothetical causation* in the cases of medical omissions. Thus, in a case with two completely different diagnoses made by a physician within a short time of only a few days, where a recent death of a patient was caused by an illness which the physician failed to diagnose, hence omitting to prescribe the appropriate treatment, the Supreme Court in Croatia concluded that this sort of (lack of) care represents solid grounds for the suspicion that the physician had committed malpractice. It can be reasonably concluded that according to the presented evidence, the physician misdiagnosed the patient and prescribed the treatment that caused the aggravation of the patient`s condition and, eventually, his death.[56]

In terms of the physician`s liability, it must be proved that the deterioration of the patient's health or the death of the patient is not the consequence of a natural, fatal course of the disease but of the medical error instead. The causation in court

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53 Munivrana Vajda; Ivičević Karas, *op. cit.*, note 37, p. 57

54 Bavcon, LJ. *et al.*, *Kazensko pravo, splošni del,* Uradni list, Ljubljana, 2009, p. 180

55 For more information on pseudocausality see Novoselec; Bojanić, *op. cit.,* note 36, p. 160

56 Supreme Court of Croatia, IV Kž-120/1991-2 of 18 December 1991

proceedings is always proved with the assistance of expert witnesses, to whom the court refers several important questions generally summarised as follows: "what happened?"; "why did this happen?"; "was the event predictable?" and "could the event have been avoided?".[57]

The protocol of procedures for proving causation in medical cases should play an important role in the cases where those protocols have been adopted and implemented by each individual hospital, whereas in the cases where these protocols do not exist or the physician failed to comply with them, it is necessary to determine the applicable standards of care for conducting a particular medical procedure.[58] A case conducted before the Rijeka County Court describes all acts or omissions that led to the occurrence of serious bodily injury, and the consequences that followed, including a life-threatening act and the amputation of one leg, including the medical standards of care that must be fulfilled.[59] The first part refers to the fact that the surgeon failed to act with due care in accordance with the rules of the medical profession when selecting the appropriate treatment and performing the surgical procedure for appendicitis, namely he chose laparoscopic appendix removal surgery despite being aware that there is a risk of damage to the abdominal aorta. There were no organised specialist medical consultations with other surgical professionals in the shift, nor was he or the surgical team specialised for treating all surgical injuries, hence they failed to undertake all necessary measures to prevent and detect the injury in the process of preparation and implementation of the operation. The protocol of procedure was not applied in this case.

5.1. Court and medical expert

Medical experts are invited to deliver their expert opinions in criminal cases. Expert witnesses are in a very privileged position as they may provide a statement of opinion/evaluation as evidence, unlike other witnesses who can only give evidence of fact. Whichever party invites the experts, their duty is clear – to provide impartial and objective evidence for the court and not for the party that invited them. If

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57 Altamura, M. *et al.*, *The legal status of Uncertainty,* Nat. Hazards Earth Syst. Sci., no.11, 2011, p. 803

58 Even so, the patients in Norway find it difficult to prove the physician's responsibility for negligent treatment. Most crime reports are dismissed or the patient loses the case. This is particularly true for criminal liability, because even a charge for a serious crime will be difficultly accepted by the court. Sonederland, K., *Medical Malpractice-the Legal Situation in Norway*, European Journal of Health Law no. 3, 1996, p. 177.; Vojković, *op. cit.*, note 1, p. 570

59 Roksandić Vidlička, S.; Pražetina Kaleb, R., *Utvrđivanje pravnog kontinuiteta i tumačenje elemenata bića kaznenog djela nesavjesnog liječenja*, Zbornik radova s međunarodnog kongresa, 1. Kongres KOKOZA i 3. Hrvatski kongres medicinskog prava s međunarodnim sudjelovanjem", Rabac, 2019, p. 314-315

an expert witness evaluation is to be used, it must be disclosed to the prosecution. The prosecution, however, is under an obligation to disclose all its evidence to the defence. [60]

Unlike other countries, where the opinion of at least two experts is required, Croatian system only requires one assessment. Additional opinions by the same or different medical experts are warranted only in situations where the initial opinion has been ambiguous or contradictory. Criminal liability will be excluded if there is a disruption of causation.[61]

In principle, it can be said that determining the type of guilt in medical cases almost always requires expert evaluations, because only a medical expert will be able to assess with competence whether or not a certain consequence was foreseeable (or should have been foreseeable) to a doctor in a given situation, or if the doctor was aware (or should have been aware) of the inadequacy of a certain diagnostic or therapeutic procedure.[62] In accordance with the *iura novit curia* principle, Croatian law operates under the premise that the court knows the law, hence it does not require interpretative assistance in resolving legal issues. Assistance is required only for the determination of facts in the fields where the court does not have respective expertise, which, in medical cases, implies a mandatory engagement of medical experts. Accordingly, it is important for the court to establish clear parameters for the medical expert assessment and to ensure that the relationship between the judge and the medical expert does not cross the line of expert assistance to the court: the medical experts should not *de facto* write the decision for the court through their evaluation. Therefore, the court must limit the expert's role to providing only the data which are legally relevant for deciding liability.[63] Judges usually incorporate the verbatim evaluations of the medical experts into their decision, and thus the medical experts indirectly help draft the court decision, which is not only inappropriate, but also questionable from the perspective of the constitutional competences of the judiciary. This dependence on a medical expert's evaluation raises another issue, which is the near indemonstrability of the legal standard of criminal causation between a doctor's error and the subsequent consequence for the health or life of a patient. In many decisions, the court accepts the findings of the medical expert, even though they may not seem generally

60 Papagiannopoulos, K., *The ideal and impartial medical expert: tips and tricks for a safe medicolegal practice*, J Thorac Dis. *vol.* 11, no. 7, 2019, p. 1010

61 Vuletić, *op.cit.*, note 21, p. 45

62 *Ibid.*, p. 46

63 Novoselec, P., *Opći dio kaznenog prava*, Osijek, 2016, p. 22

convincing. Consequently, medical experts once again have a decisive impact on the type (and quality) of the judgement.[64]

The assessment of credibility of the expert report and the decision on which of several similar expert reports will be the basis for determining the decisive circumstances is made exclusively by the court on the principle of free assessment of evidence. The court is obliged to reasonably explain its assessment of evidence as to which evidence it has accepted and which it has not, and why it has assessed the evidence in a certain way. The court is not obliged to accept the expert's finding and opinion, but it must have more substantial reasons for that than in relation to other evidence. The court must not simply dismiss the expertise without providing proper reasoning. Therefore, if the parties to the proceedings dispute the mechanism of occurrence of the injury, an expert opinion will be necessary. And if the fact of the injury is not disputable, then no expertise is required.[65]

In determining and evaluating the expert's findings and opinions, the following guiding questions are important[66]:

1. Has there been a violation of the standard of care, what does it consist of and was it obvious by the standard of an average doctor of similar standing as the accused?
2. Where does the standard of care derive from and does the established practice deviate from good practice in this respect?

3. Did the act (omission) cause the consequence or was the causation disrupted?
4. If the concurrent causes were also involved, was the act (omission) of the accused the one that significantly increased the risk of consequences?

5. Did the doctor recognise or should have recognised the risk at the moment of (not) taking the action, according to the criteria of the average doctor of similar standing as the accused?

6. At that time, was it foreseeable or should it have been foreseeable for the doctor that the consequences could occur according to the criteria of the average doctor of same standing as the accused?

6. COMMON LAW LEGAL SYSTEM

The common law legal system exists in England, the United States and other countries colonised by England.

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64 Vuletić, *op. cit.*, note 21, p. 50

65 Mrčela; Vuletić, *Liječnik i kazneno pravo*, Zagreb, 2019, pp. 98-99

66 *Ibid.*, p. 23

By analysing the current legal system of the United States, it has been noted that the most important reform of the physician liability system for malpractice in the United States began in 2005 by the adoption of the Health Act, whose primary aim is to regulate medical malpractice litigation.[67] Considering the special working conditions of medical staff and the largely humanistic nature of their work, certain legal systems give precedence to civil law protection. This is particularly notable in the countries where health care is largely privatised. A typical such example is the USA, where medical errors are almost never treated under criminal law protection but dealt with in civil litigation for the compensation of damages in 90% cases. Medical errors are mostly resolved through a developed settlement system.[68] Even though this paper analyses only criminal law, USA law is an exception because it settles medical cases under civil law. The Health Act introduces pre-trial screening panels that consist of physicians, lawyers, and patients' representatives, and in a particular case where a doctor is sued for malpractice, they try to determine whether there is a deviation from the standard of due care[69], whether there is a causal link between the act or omission of a physician and the resulting adverse consequences, whether there is a liability of the physician or a shared responsibility of the physician and the patient. The pre-trail screening panel can result in accepting the panel's decision or making a suitable arrangement among themselves, or the patient may decide to go to court. In case the patient does not accept the panel's decision or does not reach an agreement with the physician, and decides to take legal action, then all that is presented before the pre-trail screening panel can be used as evidence in the court proceedings, and the patient may be required to deposit a court fee, which discourages them from taking legal action. In addition, due to the complexity of the matter, special medical courts have been established because the judges who deliberate in these cases must specialise in medical law. Alternative dispute resolution, arbitration and mediation methods have also been introduced.[70] Also, the common law, especially in litigation, raises the question of using a doctor's apology as evidence of his liability, despite the fact that an apology can only be an expression of empathy intended for a grieving family.[71] The most

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67 Health Act, 354. Available at [http://thomas.loc.gov/cgi-bin/query/F?c109:1:./temp/~c10983l-jHe:e1001], accessed on 10. June 2020

68 Vuletić, *op.cit*, note 21, p. 40

69 For more information on due care as an element of guilt see Kurtović Mišić, A.; Sokanović, L., *Namjera kao stupanj krivnje u počinjenju kaznenih djela zdravstvenih radnika*, Zbornik radova s međunarodnog simpozija „2. Hrvatski simpozij medicinskog, prava", Vodice, 2016., p. 133

70 Gregory, C.M., *Recent Developments in Health Care Law: Note: Capping Noneconomic Damages in Medical Malpractice suits is not the Panacea of the "Medical Liability Crises",* WM. Mitchell L. Rev., *vol.* 31, no. 3, 2005, p. 1031

71 The legal nature of apology is discussed within the rules of evidence in the Anglo-American legal system; it is defined broadly as a statement made by the perpetrator to his victim in order to be under-

recent case that has drawn attention to the issue of legal implications of an apology occurred in California in March 2013 when the oral surgeon Dr. Steven Paul removed wisdom teeth of Marek Lapinski, a twenty-four-year-old programmer in good health. Mr. Lapinski stopped breathing during a routine operation and died three days later at the hospital. Dr. Paul, who was present at the hospital at the time of death, apologised to the mother of the deceased patient. An autopsy determined that the cause of death was an overdose of anaesthesia (propofol), so the Lapinski family filed a lawsuit against Dr. Paul for medical negligence.[72]

In English law, the physician`s liability is also based on the criteria that there is no guilt for negligence, if the physician acted in accordance with a standard of care accepted by the competent medical authorities for certain specialisations. The increase of disputes over medical negligence in the UK has prompted a review of the clinical negligence liability system and has been discussed in the case of *R. v Adomako*, *Bolitho v City of Hackney HA, Marriot v West Midlands HA, Pearce v United Bristol NHS Trust and Chester in Afshar*. [73] In particular, the English judicature emphasises that clinical practice standards are not static, so the judiciary is allowed to apply a wide margin of appreciation, which leads to a case where the existing system is replaced with a new system of redress. In 1994, a case of *R. v Adomako* occurred.[74] The defendant, Mr. Adomako, was an anaesthetist. He participated in an eye operation which required that the patient be put under general anaesthesia. During the operation, and under Mr. Adomako's supervision, a crucial tube disconnected from the ventilator and the patient suffered a fatal cardiac arrest. Mr. Adomako was convicted of manslaughter by breach of duty. Mr. Adomako was unaware of the disconnection and was convicted of manslaughter. This conviction was upheld by the House of Lords. In the cases of manslaughter by criminal negligence involving a breach of duty, it is a sufficient direction to the jury to adopt the gross negligence test. If such a breach of duty has been established, the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the severity of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when the breach occurred. The jury will have to consider

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stood as an apology, or at least an expression of remorse or regretting something done. Helmreich, S. J., *Does "Sorry" Incriminate? Evidence, Harm and the Protection of Apology*, Cornell J.L. & Pub. Pol'Y , *vol.* 21, no. 2, 2012., pp. 567-570

72 Gailey, L., *"I'm Sorry" as Evidence? Why the Federal Rules of Evidence Should Include a New Specialized Relevance Rule to Protect Physicians,* Def. Counsel J., *vol.* 82, no. 2, 2015, p. 172

73 See more in McHale, J.V., *Medical Malpractice in England - Current Trends,* European Journal of Health Law, *vol.* 10, no. 2, 2003, p. 136

74 R. v Adomako (1994) 3 W.L.R. 288

whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal. The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount to a criminal act or omission in their judgment.

In 1997, the *Bolitho v City of Hackney HA* case concerned a 2-year-old child who was being treated for respiratory problems and who suffered two cases of acute air deficiency in one day. In both cases, the department nurse summoned the doctor, but the doctor did not arrive.[75] Later that day, the baby stopped breathing, causing cardiac arrest, and, while resuscitated, sustained severe brain damage. The court concluded that it was the doctor's negligence because he was not present to undertake the necessary measures and the evidence was contained in the fact that even if the doctor had been present at the time of the cardiac arrest, brain damage would have continued until the doctor intubated the patient.[76] The test of expertise is the customary standard of care of an average skilled physician. A physician does not need to possess the highest level of expert skills at the risk of being found negligent, but it is sufficient that he/she exercises the customary degree of skills and prudence of an average competent physician.[77]

In addition to exercising reasonable care, a physician is obliged to keep up with new developments in their respective field.[78] In the ruling, the court emphasised the need for any body of medical opinion to be reasonable and responsible.

The limits of liability set in the *Bolitho case* were upheld in 1999 in the case *Marriot v West Midlands HA* where Mr. Marriott suffered head injuries after he fell in his home. He was taken to hospital and was released for home care the following day after undergoing a brain CT. However, his condition did not improve, and he was examined by a general practitioner eight days after being discharged from the hospital, where he was subjected to neurological tests that showed no abnormalities. Four days later, when his condition worsened, Marriott was admitted to the hospital where he underwent surgery for skull fracture and internal bleeding. Ultimately, he was left paralysed with a speech disorder. Liability in English tort law is determined by the "*but-for*" test. The test asks, "but for the existence of X, would Y have occurred?" If the answer is yes, then factor X is an actual cause of

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75 See more in Vojković, *op. cit.*, note 1, p. 583

76 McHale, *op. cit.,* note 73, p. 137

77 Nys, H., *On Medical Liability in Council of Europe Member States, A comparative study of the legal and factual situation in Member states of the Council of Europe*, Strasbourg, 2005, p. 8

78 *Ibid.*

result Y. For the existence of negligence, it is necessary to establish that: (i) the person was obliged to provide care; (ii) the duty of care has been violated, (iii) the direct consequence of that injury has been caused by legally recognised damage.[79] In the case of concurrent causes, causation can be established if the breach of duty materially contributed to the injuries. However, in many cases the cause of injury is unclear, which led the House of Lords to decide that the material increase in the likelihood of injury was not enough for establishing causation. In general, the "*but-for*" test can be perceived as a filter to exclude the acts that had no effect on the outcome. In case there are two unrelated potential causes and both could have caused the injury, causation depends on the nature of the events and the order in which they occurred. It is also possible that an act of another person, without which the damage would not have occurred, occurs between the physician's negligence and the patient's injury. Exceptionally, the causation chain can be interrupted if an independent cause starts a new chain of causation, irrespectively of the conduct of the accused.[80] Hence, the English judiciary advocates the standpoint that a medical error can interrupt the causation in case of *novus actus interveniens*, i.e. an action or event that represents an "extraordinary", "powerful" or "so potent" contribution to the cause.[81]

In Scotland, which, despite being part of the UK, has its own separate legal system, the model of health care liability is very similar to the one adopted in England and Wales. This is especially true in case of medical liability, so the issues of standards of medical care and causation are dealt with in the same way as in the English law. However, Scottish judicature sometimes exhibits innovation in particular areas of medical liability, so in the cases of damage caused by the treatment and/or diagnosis, the court will almost always invoke the formulation of the *Hunter v Hanley test*. In *Hunter v Hanley test*, in order to determine a physician's responsibility, three facts need to be established: first and foremost, common and normal practice must be analysed; secondly, it must be proved that the defendant did not adopt this practice, and thirdly, it is crucial to find that the doctor acted in a way opposite of any expert possessing average skills.[82]

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79 The rules of civil procedure in England and Wales allow the initiation of proceedings for damages in medical negligence cases within 3 years from the date of the act/omission or within 3 years from the date the victim became aware of possible medical negligence. Bryden, D.; Storey, I., *Duty of care and medical negligence,* Continuing Education in Anaesthesia, Critical Care & Pain, *vol.* 11, no. 4, 2011, p. 124

80 Munivrana Vajda; Ivičević Karas, *op.cit.*, note 37, p. 57

81 For more information on causality in the case *R v Cheshire* see Ormerod, D, *Smith and Hogan Criminal Law,*2011, p. 69.; Carstens, P., *Medical negligence as a causative factor in South African criminal law: novus actus interveniens or mere misadventure?* S. Afr. J. Crim. Just. *vol.* 19, no. 2, 2006, p. 197

82 Blackie, W. G. J., *Medical Negligence in Scotland,* Eur. J. Health L., *vol.* 3, no. 2, 1996, p. 136

7. CONCLUSION

Common law research shows that criminal common law determines causation by deciding whether a physician's act/omission constitutes a medical error or subsequent consequence in terms of guilt or negligence, and not whether a violation of prescribed protocols or procedures has resulted in the deterioration of health. For example, in the case of liability for malpractice, it is necessary to prove that the deterioration of the patient`s condition did not arise from the nature of the primary disease or injury but rather from the act/ omission of the physician. However, the research conducted indicates that public prosecutors' offices and courts have many difficulties in establishing the causal link between a physician's act/omission and a detrimental effect on a patient's health. These issues occur because the question arises as to whether the perpetrator used the necessary internal and external due care, or, when it is not possible to determine with certainty, whether the consequence would have been safely eliminated, if the reasonable and competent degree of skill had been taken.[83]

As a result, a patient must show that he suffered harm because of the physician's fault which can consist of negligence, lack of skill, improper information. When defining reasonable care, the conduct of a physician is compared with that of the *bonus medicus* or the standard of the prudent and competent physician with the typical qualities and skills, placed in the same circumstances as the defendant physician (objective standard of care).[84] The deviation from the professional standard will be considered a fault for which a physician can be held liable, even if they regards their actions as reasonable.[85]

All documents mentioned in this paper that have been adopted by the European Union and the Council of Europe determine the standards of health care that must be provided. Even though it is not necessary to provide the highest level of health care protection, all available means must be taken in consideration in a specific state, city or hospital.

This raises the issue of the required standard of certainty and standard of quality. Is it sufficient to have a high degree of probability or probability that is in line with certainty (overwhelming certainty)?[86] Causation does not exist if the consequence would still occur despite providing treatment with due diligence in accordance with the medical standard of care.

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83 Vojković, *op. cit.*, note 1, p. 577

84 Nys, *op. cit.*, note 77, p. 3

85 *Ibid.*

86 Vuletić, *op.cit*, note 21, p. 56

In order to avoid confusing causation with guilt, it would be preferable to adopt the *theory of objective imputation* that follows the theory of adequacy, as a legal standard for causation, in criminal and civil liability in medicine, because it analyses several possible causes that could be in close or remote connection with the resulting consequence, i.e. said theory considers as relevant only the legal causes that result in a harmful event through the violation of due diligence. After all, this is also in line with the established medical treatment protocols, since acting contrary to the prescribed protocols typically leads to a certain harm to the patient's health.

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UDK 004.738:061.1(4-67EU)
Professional paper

DIGITAL TRANSFORMATION OF BUSINESS ENTITIES UNDER THE CURRENT CONDITIONS – REALITY OR UTOPIA?*

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ABSTRACT

In recent years, the topic of penetration of information and communication technologies (ICT) in every sphere of our functioning has been resonating in our society, not excluding the business sector. The topic of digitisation and digital transformation of business entities is highly topical. This is evidenced by a rapid increase of the so-called start-ups as well as business entities that are changing the way of their production, distribution, communication and also their focus of activity to innovate both outwardly and inwardly and compete with other entities in the EU single market. In practice, this is not so simple, and transforming businesses face many obstacles that need to be removed. The penetration of ICT into the business sphere creates a single market that has a digital attribute, putting entrepreneurship and commerce into a completely different dimension. The aim of this paper is to point out the constantly evolving technologies and systems that are changing the business. In the article we will also point out the problematic areas of digital transformation of business entities and possible ways of simplifying the transformation process. Finally, we answer the question of whether the digital transformation of business in the current conditions is a reality or a utopia.

Keywords: *Business, digital transformation, digital single market, information technologies*

* This paper was prepared within the investigation of Grant Project APVV-17-0591 Human Legal and Ethical Aspects of Cybersecurity

1. DIGITAL TRANSFORMATION OF BUSINESS ENTITIES

Modern technologies change business and become a sophisticated part of competition. Nowadays, the mastery of information and communication technologies has become an indispensable part of the success of an individual in the labour market, a business in a competitive environment, as well as a way to improve the conditions of public institutions and the competitiveness of the country itself.[1] Information and communication technologies (ICT) have already become an integral part of our daily lives. However, their actual potential has many new opportunities in the Slovak economy. We no longer use the Internet only as a source of information, but also as a means of communication. The Internet is becoming a platform on which vast amounts of data from various sources are transmitted from customers to manufacturers and vice versa. The ability of manufacturers to collect, process and send information into the production process has led to the emergence of the so-called Internet of Things – IoT. This phenomenon has an impact not only on the industry and the economy, but on society as such.[2]

Given globalisation and the extent of this impact, economies are forced to adapt to these trends and modernise their industries, business models and companies to remain competitive and use the trends of technological progress.[3] In Slovakia, too, business entities increasingly use information technologies in order to establish themselves in the EU internal market as well as in the EU Digital Single Market. Changes in companies related to information technologies should be a priority if they want to remain competitive on both the domestic and international markets. More and more companies are developing or applying their digital strategy. Joining the EU single market and digital single market is essential if they want to be competitive and successful in the market.

According to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy of 10 May 2017, it is essential that EU businesses grasp the opportunities of digital technology to remain competitive at global level, that EU start-ups are able to scale up quickly, with full use of cloud computing, big data solutions, robotics and high speed broadband, thereby creating new jobs,

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1 Frendáková. A., *Význam a konkurencieschopnosť sektora IKT Slovenska*. Available at [http://www3.ekf.tuke.sk/mladivedci2011/herlany_zbornik2011/frendakova_andrea.pdf], accessed on 14. May 2020

2 Smart Industry Concept for Slovakia, adopted in October 2016, available at [https://www.mhsr.sk/inovacie/strategie-a-politiky/smart-industry], accessed on 14. May 2020

3 See Sokol, P.; Benko, R.; Rózenfeldová, L, *Legal Issues of Deception Systems in the Industrial Control Systems*, Recent Developments on Industrial Control Systems Resilience. Cham, Springer Nature, 2020, p. 302

increased productivity, resource efficiency and sustainability.[4] As stated in the Action Plan – Digital Single Market – Opportunity for Slovakia, the Digital Single Market initiative will serve as a necessary impetus to kick-start the development of the information society. This will contribute not only to the growth of the digital economy in Slovakia, but also of all industries that will undergo a fundamental transformation through information technologies. Entities that are able to create, besides common consumer goods, the highest quality digital content and to provide the best services will gain an enormous share in the market, taking advantage of the network effects and the zero marginal cost effect.[5]

In general, digital transformation can be understood as the complex rebuilding of any organisation so that information systems and software tools can work to an optimum extent, creating together a uniform, fully integrated environment. The benefits of digital transformation include:

- time saving because automation speeds up all processes and improves work performance,
- time reduction in implementing new services,
- quick response to customer requirements, flexibility,
- decision-making based on data is enabled by the system's ability to easily respond to the questions of commercial nature.[6]

As pointed by Novodvorský, digital transformation is not about converting paper documents into their digital version, as many people think. Digital transformation is a new industrial revolution and a unique opportunity to change or modify business models using available or emerging technologies.[7]

The new industrial revolution mentioned by Novodvorský in his study is to be understood as the so-called Fourth Industrial Revolution (Industry 4.0). As stated by

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4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy of 10 May 2017, available at [https://eur-lex.europa.eu/legal-content/SK/ALL/?uri=CELEX:52017DC0228], accessed on 14. May 2020

5 See also Action Plan – Digital Single Market – Opportunity for Slovakia available at [https://www.vicepremier.gov.sk/wp-content/uploads/2019/10/AP-DT-English-Version-FINAL.pdf], accessed on 14. May 2020

6 Maťovčík, D., *Digitálna transformácia*. [online] 2017. [cit. 2017-11-25], in: Danková, L.: Naščáková, J., *Digitálna ekonomika a digitálna transformácia*, Transfer informácií, *vol.* 36, 2017. Available at [https://www.sjf.tuke.sk/transferinovacii/pages/archiv/transfer/36-2017/pdf/033-037.pdf], accessed on 14. May 2020

7 Study of MICROSOFT, 2017, Slovenský biznis 4.0. Priekopníci digitálnej transformácie. [online] 2017, available at [https://info.microsoft.com/SlovenskybiznisPriekop nicidigitalnejtransformacie_338975_01Registration -ForminBody.html], accessed on 14. May 2020

Jeck, the Fourth Industrial Revolution means the transition from a simple digitisation phase to innovation based on mutual combinations of material, digital and biological technologies. Information and Communication Technologies (ICT) are at the epicentre of the Fourth Industrial Revolution and are the factor of economic and social changes more than ever. In parallel, the Fourth Industrial Revolution technologies are gradually penetrating the Slovak economy.[8]

The Fourth Industrial Revolution[9] also applies to the Smart Industry Concept for Slovakia, by which the Slovak Republic responds to the "tidal wave of Industry 4.0.". According to that concept, Slovak entrepreneurs are inclined to a possibility to take the unique opportunity to gain a significant competitive advantage in applying the concept known internationally as Smart Industry or Industry 4.0. The implementation of that concept into practice is based on the efficient execution of business processes in development, production and sales that are directly related to international economic relations. The development of smart industrial processes is changing the Slovak industry. Its results should be based on the creation of added value from product and process innovation, thus creating a smart industry of the future as one of the pillars of the development of Slovakia's economy with a significant impact on society.[10]

The Smart Industry Concept is aimed mainly at Slovak industrial enterprises as well as small and medium-sized enterprises, especially the suppliers of equipment, technologies and services, thanks to interconnected industrial production, which will be able to increase their competitiveness also towards larger enterprises.

The Fourth Industrial Revolution is changing the current form of Slovak industry. The implementation of automation and digital production, digitisation of control systems and the use of communication networks to ensure interoperability and flexibility of business processes are becoming a priority for industry.[11]

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8 Jeck, T., *Slovenská ekonomika a štvrtá priemyselná revolúcia: faktory a predpoklady*, Working papers, p. 4, available at [http://www.ekonom.sav.sk/uploads/journals/373_wp_4_priemyselna_a_sk_final.pdf], accessed on 14. May 2020

9 See also Hučková, R.; Sokol, P.; Rózenfeldová, L.*, 4th industrial revolution and challenges for european law (with special attention to the concept of digital single market)*, in: Duić, D.; Petraević, T. (eds.), EU law in context – adjustment to membership and challenges of the enlargement, Conference book of proceedings, Osijek, Sveučilište Josipa Jurja Strossmayera u Osijeku, 2018, available at [https://hrcak.srce.hr/ojs/index.php/eclic/issue/view/313/Vol2], accessed on 14. May 2020

10 Smart Industry Concept for Slovakia, available at [https://www.mhsr.sk/inovacie/strategie-a-politiky/smart-industry], accessed on 14. May 2020

11 Smart Industry Concept for Slovakia, available at [https://www.mhsr.sk/inovacie/strategie-a-politiky/smart-industry], accessed on 14. May 2020

In addition to the Smart Industry Concept for Slovakia, the Action Plan for Smart Industry of the Slovak Republic was adopted in October 2018, which aims to support industrial enterprises, service and trade enterprises, regardless of their size, focusing on creating better conditions for implementing the digitisation, innovative solutions and increasing competitiveness by reducing bureaucratic burdens, changing legislation, defining standards, changing training programmes and the labour market, co-financing research and the like. The Action Plan provides a set of 35 measures to be implemented by the end of 2020.

According to the authors of the Action Plan for Smart Industry of the Slovak Republic, its fulfilment will create the basic prerequisite for a successful transformation of the Slovak economy responding to the digitisation of industry, with the assumption of starting the digitisation process in most businesses and thus the gradual connection of Slovak businesses to the EU Digital Single Market.

2. DIGITAL SINGLE MARKET

It should be noted at the outset that the single market was created in the European Union as an instrument to ensure economic growth by promoting four freedoms: the free movement of persons, goods, services and capital, thereby bringing benefits to all citizens of the European Union. However, the digital era adds the need for a new fifth freedom, which is the free movement of data.

The objective of achieving a Digital Single Market in the EU has been presented as one of the European Commission's key priorities. The key reason is the need for reaping enormous economic opportunities arising from the integration of digital technologies in all spheres of the economy and the removal of barriers, particularly in e-commerce. This creates a Digital Single Market where individuals and businesses can seamlessly access e-services and exercise online activities under conditions of fair competition and with a high level of consumer protection, irrespective of their nationality or place of residence.[12]

On 6 May 2015, the European Commission presented the Digital Single Market Strategy in Europe, in which it specified its objectives and intention to create and operate a Digital Single Market within the EU. It can be said that the Digital Single Market Strategy is based on three pillars:

1. Better access for consumers and businesses to online goods and services across Europe

[12] See also Action Plan – Digital Single Market – Opportunity for Slovakia, available at [https://www.vicepremier.gov.sk/wp-content/uploads/2019/10/AP-DT-English-Version-FINAL.pdf], accessed on 14. May 2020

2. Creating the right conditions for electronic networks and services and innovation to flourish
3. Maximising the growth potential of the European Digital Economy

Given that the rate of digitisation varies widely across the EU Member States and that there are barriers to smooth adaptation in the EU Digital Single Market in almost every Member State and between them, it is essential to break down the existing barriers within each of the above pillars in the first place.

The first pillar, *Better access for consumers and businesses to online goods and services across Europe*, requires the removal of differences between the online and offline worlds to break down barriers to cross-border online activity, such as e-commerce, consumer and entrepreneur trust in e-commerce, cross-border parcel delivery services, which should be affordable and of good quality, setting up copyright for better access to digital content, reducing VAT related burdens and obstacles when selling across borders, etc. In this context, it will be extremely important to prevent geo-blocking.

The second pillar, *Creating the right conditions for electronic networks and services and innovation to flourish*, requires high-speed, secure and trustworthy network infrastructures and electronic services related to the distribution of digital content. In this context, it is necessary to modernise telecommunications rules, to set up an appropriate regulatory environment for online platforms, intermediaries and the collaborative economy, as well as to reinforce trust and security in digital services and in the handling of personal data of data subjects.

The third pillar, *Maximising the growth potential of the European Digital Economy*, requires investment in ICT infrastructures and technologies such as Cloud computing and Big Data, and research and innovation to boost industrial competitiveness as well as better public services, which will promote the building of a data economy, boost competitiveness through interoperability and standardisation and build an inclusive e-society.

Online platforms stimulate innovation and growth in the digital economy. They play an important role in the development of the online world and create new market opportunities, especially for small and medium-sized enterprises (SMEs). At the same time, platforms have become key guardians of the Internet, facilitating access to information, content and online trading. As an overview, it should be noted that almost a half (42%) of SME respondents used online market places to sell their products and services in 2017. In addition, 90% of respondents to the

Commission's Business-to-Business (B2B) business panel survey used online social media platforms for business purposes.[13]

Also, new approaches in the financial sector enabled by digital technologies (the so-called FinTech) can improve the access of businesses to finance, boost competitiveness, bring benefits to consumers and stimulate the growth of start-ups.

If we look at the Digital Single Market from a real perspective as seen by entrepreneurs, it should be noted that the Digital Single Market should bring the following benefits to entrepreneurs:

- uniform and simplified business processes across the European Union
- reduction of transaction costs when delivering content and services across borders (thanks to uniform contractual rules and a well-established VAT tax regime)
- regulations adapted to the digital era that promote fair competition, solve digital monopoly problems and promote innovative business models
- effective electronic communication with the public administration, which will save time and money of entrepreneurs
- ICT standards for engaging in digital space
- funding to support business innovation and government-supported living labs, where innovative solutions can be tested in practice, further scaled and improved
- new opportunities for data use and processing as well as provision of the free movement of data as the fifth freedom of the EU internal market

The unification of rules in the European Union can also be expected to significantly increase competition, which brings many challenges and opportunities. In general, it can be expected that businesses that can innovate and digitise their processes, but in particular offer services and products with high added value, will succeed. It is therefore important that such businesses receive appropriate support.[14]

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[13] Ecorys/Kantar TNS European SMEs dealing with digital platforms/Európske MSP pôsobiace cez digitálne platformy, January 2017, in COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on the Mid-Term Review on the implementation of the Digital Single Market Strategy A Connected Digital Single Market for All, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A228%3AFIN], accessed on 14. May 2020

[14] For more details see Action Plan – Digital Single Market – Opportunity for Slovakia, available at [https://www.vicepremier.gov.sk/wp-content/uploads/2019/10/AP-DT-English-Version-FINAL.pdf], accessed on 14. May 2020

3. WAY HOW BUSINESS ENTITIES OPERATE IN THE DIGITAL ENVIRONMENT

Business digitisation and digital transformation are also closely related to the way of operation of entrepreneurs, who are increasingly communicating and pursuing their business using information and communication technologies. When a company operates outwardly in the virtual world, the so-called virtual identity of a company is important. Like in the "classic" operation of a company outwardly such a company must identify itself in accordance with applicable legislation when pursuing its business, in the virtual world it is also essential for such a company to operate under its virtual identity and to be clearly identifiable. Until recently, only a few forms of validating a declared virtual identity with a true real identity were known. These were, for example, an electronic signature or an advanced electronic signature. With the adoption 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 (eIDAS Regulation), the possibilities of electronic identification of natural or legal persons have been expanded and improved. An advanced electronic signature has been replaced with a qualified electronic signature.[15] The eIDAS Regulation is a first concrete step of the European Commission in the Digital Single Market Strategy to become a reality in the EU by 2020. The eIDAS Regulation aims to reinforce trust in electronic transactions in the internal market by establishing a common basis for secure electronic interactions between citizens, businesses and public authorities, which will increase the efficiency of public and private online services, e-business and e-commerce in the EU. To this end, the eIDAS Regulation creates the conditions for the mutual recognition of key cross-border means of communication, such as electronic identification, electronic documents, electronic signatures and electronic parcel delivery services. It is a quite revolutionary regulation with a significant impact, in particular in the area of private law procedures and the filing of documents in the processes of authoritative application of law.[16]

It should also bring benefits to many companies that will be able to participate more easily in public tenders in other EU countries without having to deal with any paper documents.

At present, public procurement contracts are perceived by entrepreneurs as a great opportunity for growth, but on the other hand, they are discouraged by a high ad-

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15 For more details see Smejkal, V.; Kodl, J.; Uřičař, M., *Elektronický podpis podle nařízení eIDAS*, Revue pro právo a technológie, *vol.* 6, no. 1, 2015, p. 189 *ff.*

16 Polčák, R., *Nařízení eIDAS*, available at [http://ict-law.blogspot.sk/2014/09/narizeni-eidas.html], accessed on 14. May 2020

ministrative burden and a lack of transparency of the whole process. By simplifying the whole process and changing the setting of conditions, major opportunities for SMEs can be created[17]. On 18 April 2016, the Public Procurement Act[18] entered into force in which the respective European Directive[19] was transformed and which has a direct impact on the conditions of using electronic systems for public procurement. This is a major shift towards full and mandatory electronic communication at all stages of procurement ("eProcurement"). Another significant simplification may be downloading information from European linked registers (for example, from the Business Register or the Register of Contracts). Furthermore, the public administration plans to gradually accept electronic invoices for all commercial transactions by introducing the European "eInvoicing" system. Enabling the use of European interoperable solutions (including mobile solutions) for "eIdentification", "eSignature" and "eDelivery" under the eIDAS Regulation[20] also in the private sector will lead to the acceptance of these instruments guaranteed by legislation by entrepreneurs and their gradual transition to paperless operations. Under the Action Plan – Digital Single Market – Opportunity for Slovakia, this should become a reality by the end of 2019.[21]

In order for business entities to be able to rapidly develop and transform themselves digitally and at the same time to prosper and be competitive in the Digital Single Market, it is essential for both the EU and the Member States to create the right conditions for business entities, particularly in terms of legislation, so that laws, directives and regulations not hinder this process, but push it forward, thus opening up new opportunities for business entities to succeed in the common internal market. An important moment is also an increase in competitiveness not only towards other actors in the internal market, but also towards "strong" business entities operating outside the EU market and trying to establish themselves in the EU internal market.

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17 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS
Europe's next leaders: the Start-up and Scale-up Initiative, COM(2016) 733 final, available at [https://eur-lex.europa.eu/legal-content/SK/TXT/?uri=uriserv%3AOJ.C_.2017.288.01.0020.01.ENG&toc=OJ%3AC%3A2017%3A288%3ATOC], accessed on 14. May 2020

18 Act No. 343/2015 Coll. on public procurement, amending certain acts

19 Directive 2014/24/EU of the European Parliament and of the Council on public procurement

20 Regulation (EU) No 910/2014 of the European parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market

21 See the Action Plan – Digital Single Market – Opportunity for Slovakia, available at [https://www.vicepremier.gov.sk/wp-content/uploads/2019/10/AP-DT-English-Version-FINAL.pdf], accessed on 14. May 2020

For this reason, it is important to have an entrepreneurs' view of the conditions under which they are to be digitally transformed and succeed in the Digital Single Market. It is extremely important for business entities, especially SMEs, that market rules be set fairly so that their products and services can be sufficiently competitive on the online platforms. In addition, it is important for business entities, especially start-ups, that EU legislation be uniform and clear in all Member States, so that they do not encounter legislative obstacles in individual Member States. A serious issue is financial support through various forms of funding (different funds, projects, grants) and ensuring fair competition.

Given the fact that supply in the market is mainly driven by demand, it is also important to have a consumers' view appreciating the expansion of the supply of services and content, the flexibility and speed of the provision of services and the supply of goods in the digital market. On the other hand, the customers' satisfaction is based on the transparency, credibility of the market and the quality of goods and services and the protection of their personal data when using online platforms offered.

In connection with the above, it can be stated that online platforms bring great benefits and innovations to both consumers and suppliers resulting from digitisation and easy copying and distribution of content. Achieved technological and business innovations of the platform are welcome, but on the other hand it is necessary to set up the system so that concerns about the method of data collection and use and about the strong negotiating position of platforms compared to their customers use are sufficiently addressed. This strong position may be reflected in their discriminatory trading conditions, in particular for small and medium-sized enterprises, in the promotion of their own services to the detriment of their competitors, and in non-transparent pricing policies or restrictions regarding the setting-up of pricing and sales conditions.[22]

From this point of view, the issue of electronic commerce within the single internal market (not only the digital one) and the operation of Slovak companies in the common EU market is no less important. The above-mentioned transformation of companies can move them further in terms of competitiveness. The issue of electronic commerce is addressed by 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 ("Electronic Commerce Directive"). The Directive was transposed into domestic law by Act No. 22/2004

[22] See Action Plan – Digital Single Market – Opportunity for Slovakia, available at [https://www.vicepremier.gov.sk/wp-content/uploads/2019/10/AP-DT-English-Version-FINAL.pdf], accessed on 14. May 2020

Coll. on electronic commerce, amending Act No. 128/2002 Coll. on state control of the internal market in matters of consumer protection, amending certain acts, amended by Act No. 284/2002 Coll. ("Electronic Commerce Act").

4. AND WHAT IS THE POSITION OF DATA AND THEIR PROTECTION?

In the recent period, especially under the influence of both Member States' and the EU's policies on the protection of personal data and privacy of data subjects, in this case consumers, it is essential that their personal data and privacy be protected when using online platforms. It is important for consumers to have an overview of how their data are handled and for what purposes they are used. As stated in the Action Plan – Digital Single Market – Opportunity for Slovakia, it is necessary to ensure that consumer data are transferrable between platforms in an open format. Thus, the consumer will not be locked in one platform, but can switch between different platforms with his data, which will increase the transparency and quality of services. Platforms should give consumers access to all the data which they collect about them in the unprocessed state, through Personal Information Management System (PIMS) tools. The consumer should have the right to decide how the data about him will be handled.[23]

In the present era of the so-called fourth industrial revolution, data can also increase the competitiveness of business entities if they are able to use and apply them correctly, of course, in compliance with the legislative framework.[24] Entrepreneurs and the public sector need to learn how to make effective use of the data they have available to increase the added value of services for consumers and citizens. In this context, tools are emerging that allow the secure use of data that represent a significant economic value. Many innovative tools, such as Smart Disclosure, are also related to this[25], which enable consumers to make better decisions based on access to information and to use innovative data-based services and products. Smart Disclosure is an innovative tool that helps consumers make better decisions in their activities and helps them, in the virtual world, make better use of new products and services that use the collected data provided by the consumers.

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23 *Ibid*.

24 Rózenfeldová, L.; Šajtyová, D., *General Data Protection Regulation - New Dimension of Personal Data Protection (with particular regard to Business)*, Miesto, úloha a význam vnútroštátneho práva pri zabezpečovaní plnenia záväzkov vyplývajúcich z medzinárodného práva a európskeho práva: zborník vedeckých prác doktorandov a mladých vedeckých pracovníkov, Košice, Univerzita Pavla Jozefa Šafárika v Košiciach, 2018, p. 383

25 For example, American Smart Disclosure Policy, available at [https://www.data.gov/consumer/smart-disclosure-policy], accessed on 14. May 2020

It is about expanded access to data in machine-readable formats so that innovators can create interactive services and tools that enable consumers to make important decisions in sectors such as healthcare, education, finance, energy, transport and telecommunications. Of course, when using these data, it is necessary to follow the rules of anonymisation and pseudonymisation of the data of data subjects.

Due to frequent confusion between the terms anonymisation and pseudonymisation of data, it is necessary to clarify them at least briefly. Act No. 122/2013 Coll. on personal data protection, which preceded the current Act No. 18/2018 Coll. on personal data protection, defined the term anonymised personal data in its Section 4(3)(i), where anonymised data mean personal data adjusted in such a manner that they can no longer be attributed to a specific data subject. Anonymisation is therefore a process that deals with a change of personal data after which such personal data cannot be assigned to a certain identifiable individual at all, or only with a disproportionate effort in terms of time, cost and labour.

The current Act No. 18/2018 Coll. on personal data protection, in compliance with the GDPR, establishes and defines the term "pseudonymisation". Under Section 5(h), "*pseudonymisation means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person.*"

Section 39(1), which deals with the security of personal data processing, stipulates that "*taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks, including particularly a) the pseudonymisation and encryption of personal data*." Also, Section 78(8) stipulates that "*where personal data are processed for archiving purposes, scientific purposes or historical research purposes or statistical purposes, the controller and the processor shall implement appropriate safeguards to protect the rights of the data subject. Those safeguards shall ensure that appropriate and effective technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation and pseudonymisation.*"

The GPDR Regulation thus introduces essentially a completely new concept in European data protection law – pseudonymisation – for a process that handles data that are not anonymous, but also not directly identifying. As stated by Veselý, there are many discussions on the extent to which pseudonymised data can be re-iden-

tified. Re-identification is of crucial importance because it significantly determines whether or not a particular personal data processing operation will comply with the provisions of the GDPR Regulation which addresses the risk that data may reveal identifiable persons. The fundamental difference between pseudonymised data, which are directly regulated by the GDPR, and anonymous data, which are not regulated by the Regulation, but were regulated by Act No. 122/2013 Coll., is therefore whether or not personal data can be re-identified with a proportionate effort in terms of time, cost and labour.[26] To define the issue of re-identification of personal data, it is necessary to distinguish between direct and indirect identifiers. Direct identifiers can be defined as data that can be used to identify a person without additional information that directly reveal the person's identity, such as the name or contact information. Indirect identifiers are data that do not identify a person alone, but can reveal an individual identity in combination with other data, such as the date of birth, sex, and postal code. As a result, a person cannot be identified by his or her date of birth alone, but in combination with the sex and the postal code the selection can be narrowed down to a specific person. Thus, pseudonymisation includes the removal or masking of direct identifiers and, in certain cases, also indirect identifiers that could together reveal the identity of a specific person.[27]

In the light of the above, it is apparent that the protection of personal data and other data is currently, besides other areas, one of the EU's priorities.[28] Finally, in one of the fundamental pillars of the Digital Single Market, one of the objectives is to reinforce the trust and security of digital services in processing the personal data of data subjects, and this must not be forgotten. The development of digital technologies goes hand in hand with the reinforcement of trust in these technologies and their use also by ordinary consumers active in the digital market.

It is also necessary to note only marginally that without addressing the issue of cybersecurity of digital technologies it will be impossible to build trust in the activities of business entities and consumers in the virtual world and in the Digital Single Market. The digital world is by definition a fast-moving environment where policy needs to adapt to changing circumstances. As new technologies be-

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26 See Berthoty J. *et al.*, *Všeobecné nariadenie ochrane osobných údajov*, Praha, C.H.Beck, 2018, or Methodological guideline no. 1/2013 on the concept of personal data, available at [https://dataprotection.gov.sk/uoou/sites/default/files/metodicke_usmernenie_c._1_2013_k_pojmu_osobne_udaje.pdf], accessed on 14. May 2020

27 Veselý, P., *Pseudonymizácia a anonymizácia osobných údajov ako požiadavka GDPR,* available at [https://www.zoou.sk/33/pseudonymizacia-a-anonymizacia-osobnych-udajov-ako-poziadavka-gdpr-uniqueid-mRRWSbk196FPkyDafLfWAJWc7pG-Xzb6XqJG803ba64/], accessed on 14. May 2020

28 See Methodological guideline no. 3/2014 for the purpose of processing personal data, available at [https://dataprotection.gov.sk/uoou/sites/default/files/metodicke_usmernenie_c._3_2014_k_ucelu_spracuvania_osobnych_udajovpw.pdf], accessed on 14. May 2020

come mainstream, they can bring profound benefits to the economy and to our daily lives. However, it is essential that they be grounded in a set of rules to provide confidence to consumers and business alike. This means extending the Digital Single Market Strategy to keep up to date with emerging trends and challenges such as those related to online platforms, the data economy and cybersecurity.[29]

Cybersecurity is a serious issue that must also be addressed by business entities, especially those that have decided to get on the path of innovation, transformation and modernisation in order to achieve a more competitive position in the internal market.[30] It is also necessary to pay attention to the technological area of the functioning of business entities that need to be cyber-protected, especially in terms of the protection of trade secret, the flow of information that "runs" between business partners and is exchanged online. The same also applies to the protection of personal data and privacy of the consumer, who enters the data and information about him or herself during online activities. Systems must be set up to be able to defend against various hacker attacks and subsequent data misuse.

5. FINAL NOTES

The paper points out the current trends in the development of the digital market as well as the state and necessity of digital transformation of business entities that wish to establish themselves in the EU Digital Single Market.

We have come to the conclusion that it is necessary for Slovak business entities to innovate both inwardly and outwardly and to transform themselves, especially using information technologies. The pace of technological change means that entrepreneurs who are unable to cope with the transition will fall behind. Digital transformation is also an opportunity, especially for start-ups and SMEs, to create new and better products and services at lower cost and with fewer resources, with the EU shaping its policies to help businesses get the most out of it. As stated in the Action Plan – Digital Single Market – Opportunity for Slovakia, our country wishes to approach the implementation of the Digital Single Market proactively.

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[29] See COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on the Mid-Term Review on the implementation of the Digital Single Market Strategy A Connected Digital Single Market for all available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0228], accessed on 14. May 2020

[30] See Hučková, R.; Krunková, A., *Aspekty kybernetickej bezpečnosti - potreba ústavnej premeny? In: „Zmeny v chápaní práva: plurallita systémov, prameňov perspektív ...",* Bratislava, SAP - Slovak Academic Press, 2019, p. 293

It will try to offer its capacities and competencies for a proposal of modern common rules suitable for the 21st century to the maximum possible extent.

In order to fulfil the objectives set by Slovakia in the Action Plan, it will be necessary to focus on the following areas, which must necessarily become a priority. These priorities will be:

1. Building a data economy for better use of data
2. Digitisation of public services for an inclusive information society (e-society)
3. Online platforms to support the digital economy and the Smart Industry
4. Modern tools for the development of the digital creative industry
5. Education and digital skills for modern times

At present, however, we can also perceive negative phenomena, which can also be described as obstacles that hinder the smooth digital transformation of business entities and can be seen not only in legislative shortcomings, but in businesses themselves, too. The problem appears to be, for example, the management of a business which is based on the traditional functioning of the market and rejects new opportunities to gain a foothold in the market using technologies, fear of change, budget constraints of a business entity, etc. As stated by Říha, businesses that were not established in the recent past or currently, at the time of the so-called "Cloud", have deep-rooted systems, culture and skill sets that cannot be changed or replaced overnight.[31]

Excessive regulation of the market by individual Member States is also a negative phenomenon, which can be detrimental to business entities. The aim of the individual governments of the Member States, as well as of the EU itself, is to simplify and eliminate the current undesirable and unnecessary regulations wherever possible. It is also necessary to eliminate unnecessary and duplicate rules and to create new rules which should lead to the harmonisation and elimination of unnecessary regulations at the national level. As an answer to the question posed in the title of the paper whether the digital transformation of business entities under the current conditions is a reality or a utopia, it can be concluded that the digital transformation of business entities, whether in Slovakia or across the EU, is real and is indeed taking place. However, this process is not as smooth as it should be, not only for reasons on the part of the Member States and the EU, but, as mentioned above, on the part

[31] Říha, I.; Danková, L.;Naščáková, J., *Digitálna ekonomika a digitálna transformácia. In. Transfer inovácií 36/2017*, available at [https://www.sjf.tuke.sk/transferinovacii/pages/archiv/transfer/36-2017/pdf/033-037.pdf], accessed on 14. May 2020

of the businesses themselves. If the obstacles pointed out were removed, the digital transformation of businesses would be a reality, not just a utopia.

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UDK 347.46:341.62
330.32:341.61
Original scientific paper

THE PATH OF (R)EVOLUTION OF THE INTERNATIONAL INVESTOR STATE DISPUTE SETTLEMENT REGIME

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ABSTRACT

The idea of reforming the investor-state dispute settlement system (hereinafter: ISDS) has been simmering at the international level with the EU as the most prominent proponent of a complete reconstruction of the ISDS system, and its voice was amplified by the 2018 decision of the ECJ in the Achmea case. The EU has since called for the establishment of a standing body established by means of a multilateral legal instrument investment court (hereinafter: MIC), dedicated to the resolution of treaty-based disputes within and outside of the EU. The MIC has been presented as a matter of urgency by its proponents who claim that the substantive issues in the global investment system – investor liability, the freedom of states to regulate and the interests of third affected parties - cannot be resolved under the existing framework. This proposal was met with some degree of resistance from other parts of the world, as critics find that the MIC would fix the flaws of the existing system, but that it would perpetuate the issues and tilt the scale in favor of the states. In their view, moderate and gradual reform would suffice to remove the major flaws in the existing ISDS system.

Therefore, the ISDS landscape is being shaped in a battle of revolution versus evolution, which will determine whether the EU model will be adopted as the global solution, or will it remain within the boundaries of the EU. The authors give a critical overview of the rise and fall of ISDS as the preferred dispute resolution mechanism for investor claims (1), and the wave of resistance by states which prompted the global ISDS reform process (2). The paper than puts the spotlight on the EU perspective on ISDS reform, regarding intra-EU and extra-EU inves-

tor claims (3). This is followed by a discussion on the MIC which the EU is promoting as the universal replacement for the existing ISDS system (4), and the ISDS reform options developed through the UNCITRAL Working Group III (hereinafter: WG III) (5). Finally, the paper concludes with a discussion on whether the final solution could be compromise (6).

***Keywords**: investment arbitration, investor-state dispute resolution system (ISDS), Achmea decision, Multilateral Investment Court (MIC)*

1. INTRODUCTION

The reputation of ISDS, as the preferred dispute resolution tool selected by foreign investors against host states, has been under attack over the past decade. ISDS grew in popularity through history as an acceptable compromise and neutral forum which levels the playing field between the investor and the state in ISDS proceedings.[1] It was an alternative for dispute resolution through diplomatic channels or domestic courts (both of which could raise issues of state sovereignty) and it offered more procedural flexibility and subject-matter expertise of the decision-makers (arbitral tribunal).[2] However, with the dramatic raise in the number of ISDS claims and the growing success rate of the investors in arbitration, the voices for systematic reform or total abandonment of ISDS grew louder[3] based on concerns about the predictability, reliability, efficiency and fairness of the process.[4]

In Europe, the calls for the abolishment of ISDS escalated after the *Achmea* case of the European Court of Justice (hereinafter: ECJ). Under the Courts ruling the stipulation of the ISDS clauses in intra-EU bilateral investment treaties (hereinaf-

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1 Born, B. G., *International Arbitration Law and Practice*, 2. ed., Wolters Kluwer, Alphen aan den Rijn, p. 290

2 *Ibid*. For more about arbitration filing in ISDS see: Wellhausen, R., L., *Recent Trends in Investor–State Dispute Settlement, Journal of International Dispute Settlement*, *vol.* 7, no. 1, 2016, pp.12; Kahale, G., *Rethinking ISDS,* Brooklyn Journal of International Law, *vol.* 44, no. 1, 2018, pp. 34

3 Although investors did not indeed start using ISDS more frequently to pursue treaty-based claims with notable success, the notion promoted by some ISDS critics that investors overwhelmingly prevail in ISDS cases is factually incorrect. According to data provided by UNCTAD, out of the 647 cases concluded as of July 31st 2019, states prevailed in 230 and investors prevailed in 190 cases. Source: UNCTAD Investment Settlement Navigator, available at: [https://investmentpolicy.unctad.org/investment-dispute-settlement], accessed 29. April 2020. For more see also: Bronckers, M., *Is Investor–State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements*, Journal of International Economic Law, *vol.* 18, issue 3, 2015, pp. 655; Reinhard, Q., *Why TTIP Should Have an Investment Chapter Including ISDS*, Journal of World Trade *vol.* 49, no. 2, 2015, pp. 199. Gebert, A., *Small and Medium-sized Enterprises in International Economic Law*, Rensmann, Th. (ed.), Oxford University Press, Oxford, 2017, p. 292

4 Note by the UNCITRAL Secretariat, Possible Reform of Investor-State Dispute Settlement, pp.6-10, available at: [https://undocs.org/en/A/CN.9/WG.III/WP.142], accessed 29. April 2020

ter: BITs) is contrary to the EU law.[5] Consequently, the Member states (hereinafter: MS) were pushed engage in the termination of such treaties.[6]

The discussions on the global stage have been broad and geared at systematic reforms addressing the existing concerns related to ISDS. The most consistent and impactful discussions stem from the sessions of the WG III, with the aim of proposing reform options for the existing ISDS system.[7] The discussions and proposals of the WG III are largely government lead, and the participating states provide individual and joint submissions on the developed ISDS reform options. An important contributing factor to the current situation is the fact that most past ISDS disputes were resolved under the provisions of old generation BITs, which lack the nuanced regulation of the substantive and procedural issues which are prominent in modern times.[8] The new-generation BITs have already incorporated modern provisions on investor protection and ISDS, which may lead to more satisfactory outcomes in the future. Therefore, significant improvements may be attainable through the modernisation of the existing BITs, without abandoning ISDS as a whole. The EU has taken the opposite position, by strongly promoting the abolition of ISDS and its replacement with a standing MIC.[9]

Bearing in mind the potentially wide-ranging legal and economic consequences of the developed solutions, it is worth delving into the background of ISDS itself and the issues which gave rise to the current reform process.[10]

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5 Case 284/16, Slovak Republic v. Achmea B.V., 6. March 2018

6 European Commission - Press release: *Commission asks Member States to terminate their intra-EU bilateral investment treaties*, 18.06.2015 Available at: [http://europa.eu/rapid/press-release_IP-15-5198_en.htm], accessed 20. March 2020. See also: Schill, S., *W., The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?* Available at:[https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping], accessed 14. March 2020

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10 See also: Shenkin, T., S., *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty,* University of Pittsburgh Law Review, *vol.* 55, 1993, pp. 573

2. THE RISE AND GOLDEN DAYS OF INVESTOR-STATE DISPUTE RESOLUTION

2.1. Early investment protection mechanisms

Sovereign states have been entering into treaties and regulating international economic and political affairs for centuries. Foreign investments have traditionally been protected by means of multilateral or bilateral investment treaties (BITs) under different names.[11] However, the common thread in all such treaties was the wide range of substantive protections promised by the treaty parties to foreign investors. one treaty party The treaty protections guaranteed to investors have varied in scope over the years, but their nature remains the same.

They have long served as an effective incentive for potential foreign investors to invest in the host states, and therefore the states have been generous in their treaty guarantees, providing little to no qualifications or exceptions in their applicability. The majority of the BITs concluded in the late 20th century (the „old generation treaties") remain in the same form to this day, despite the ongoing global reform process which is aimed at modifying the policy and treaty framework of investment protection to remedy the existing shortcomings. This has resulted in a broad interpretation of the substantive treaty protections and a growing number of investor claims filed against states arises out of „old generation„ treaties[12]. This phenomenon will be addressed in more details below.

The original model of BITs contained dispute resolution clauses envisioning only state-to-state dispute resolution, which meant that the only recourse for foreign investors was a request of their home state to pursue a solution through the existing diplomatic channels. If the government of the home state found it unnecessary or inappropriate to act on behalf of a specific investor, the investors would be left with no remedy whatsoever. This was an untenable framework and it was not easily sustainable, especially considering the expansion and strengthening of international trade.

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[11] For more about multilateral investment treaties see: Shenkin, T., S., *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, University of Pittsburgh Law Review, *vol.* 55, 1993, pp. 593

[12] Most ILAs invoked in 2017 were concluded in the 1990s. UNCTAD, *Special update on investor–statedispute settlement: facts and figures, IIA Issues Note, International Investment Agreements*, 2017, p.4, available at: [https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/isds_settlement_facts_and_figures.pdf], accessed 29. April 2020

2.2. The emergence of ISDS

States started including a mechanism for the protection of foreign investments, which allowed them to seek redress against the host states for alleged treaty violations.[13] Their initial aim was to increase the attractiveness of the states for the investors. This provided the investors with access to justice and at least an opportunity to present their case in an equitable manner against an opponent which undoubtedly wields more power. With the introduction of ISDS clauses, the investors no longer had to seek redress before the domestic courts. Instead, it provided several alternative options, which were more likely to provide a neutral and acceptable outcome. Namely, with some variations, most BITs allow investors to initiate proceedings directly against the state in judicial or arbitral proceedings (*ad hoc or institutional*), after the mandatory attempt of amicable settlement (during the so-called "cooling-off" period).[14]

Ad hoc investment arbitration entails proceedings which are conducted outside of any established institutional framework, under the procedural rules chosen by the treaty parties. The most commonly used rules are the UNCITRAL Rules on International Arbitration, which provide the generally acceptable procedural rules which are based on international best practices. Institutional arbitration mostly takes place under the auspices of esteemed international arbitration institutions, such as ICSID (61%), ICC (2%) and SCC (6%).[15] Both ad hoc and institutional arbitration were quickly embraced by the investor community, as it equipped them with an effective shield from the harm caused by the state measures, which violated the existing treaty protections. Investors found several of the features of ISDS to be particularly attractive, which are largely in line with the advantages of arbitral proceedings in general[16]. Some of these characteristics are presented below.

3.3. The benefits of ISDS through investment arbitration

Neutrality – in legal disputes where sovereign states appear as parties, the traditional diplomatic or judicial proceedings did not provide a sufficient degree of protection and guarantee of neutrality for the investors. In investment arbitration,

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13 For more see: Reddie, A., *Power in international trade politics: Is ISDS a solution in search of a problem? Business and Politics*, *vol.* 19, no. 4, 207, pp. 738

14 The full texts of the majority of the global BITs can be found in the UNCTAD Investment Policy Hub Country Navigator, available here: [https://investmentpolicy.unctad.org/country-navigator], accessed 29. April 2020

15 *See* UNCTAD *supra* note 8., p.1; Reed, L.; Paulsson, J.; Blackaby, N.; *Guide to ICSID Arbitration*, 2nd ed., Wolters Kluwer, Alphen aan den Rijn, 2011, p. 48

16 *See* Born *op. cit.,* note 1, p. 71

each party has the opportunity to appoint one member of the arbitral tribunal, and the tribunal is not beholden to any national legal system. Any procedural issue to which the parties cannot agree is resolved by the arbitral tribunal or a neutral appointing authority.[17] Therefore, ISDS conducted in the form of investment arbitration provides the degree of neutrality which leads to the legitimacy and acceptance of the final arbitral award by both sides.

Efficiency – arbitral proceedings have been traditionally perceived as more efficient than court proceedings, especially due to the absence of an appeals mechanism. Over time, with the increasing complexity of the disputes and the evolution of the legal strategies of the disputing parties (including numerous dilatory tactics), arbitral proceedings have become longer and more burdensome on the parties.[18] However, this is not an inherent trait of arbitration, and the disputing parties and the arbitral tribunal can create a procedural framework which will ensure time and cost efficiency. This corresponds with the general principle of party autonomy which applies in arbitral proceedings across jurisdictions and industries.[19]

Expertise of the decision makers – ISDS claims arise from a network of around 3000 BITs and thousands of investments of various kinds and levels of complexity.[20] Therefore, the arbitral tribunal deciding such cases should consist of persons with subject-matter expertise who can deliberate on subject matter of the dispute without excessive outside support.[21] The fact that disputing parties in arbitral proceedings can appoint persons with the necessary level of expertise contributes to their sense of justice and guarantees their ability to fully present their case.[22]

Procedural party autonomy – in ISDS proceedings, where the disbalance of powers of the disputing parties is obvious, arbitration provides a compromise solution, where both parties can influence the structure and features of their proceedings through consensus. However, this will largely depend on the contracting states and the arbitration rules they stipulate in the ISDS clause. Depending on the

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17 *Ibid*. See also: Joubin-Bret, A.; Legum, B., *A Set of Rules Dedicated to Investor–State Mediation: The IBA Investor–State Mediation Rules*, *ICSID Review - Foreign Investment Law Journal*, *vol.* 29, no. 1, 2014, pp. 19

18 *Ibid*., p. 82

19 Born, G., B, *International Arbitration Law and Practice*, 1. ed., Wolters Kluwer, Alphen aan den Rijn, 2009, pp. 234–40

20 *See* UNCTAD, *op. cit.,* note 14

21 Blackaby, N.; Parastides, C.; Redfern, A.; Hunter, M. *Redfern and Hunter on International Arbitration*, Oxford, 6h edition, 2015, p. 318

22 *See* Born *op. cit.,* note 1, p. 77

level of care and diligence devoted to the drafting of the ISDS clause, the arbitral proceedings can result in a mutually acceptable outcome.[23]

Finality of the decision – a major contributing factor to the efficiency and reliability of arbitral proceedings in comparison to judicial proceedings is the finality of arbitral decisions. Arbitral awards are final and cannot be appealed, wither at a second-instance tribunal, nor at a domestic court. (it can only be challenged under limited circumstances).[24] Therefore, the parties cannot extend the proceedings through appeals, thus adding to the costs and legal uncertainty pending the enforcement of the awards. The added advantage of arbitral awards rendered in ICSID arbitrations (International Centre for Settlement of Investor Disputes), is that, beside their final and binding nature, they can also not be challenged before a national court.[25] Such awards can only be annulled in special proceedings under the ICSID rules.[26]

Enforceability – the enforceability of arbitral awards is one of the main advantages of international arbitration, by virtue of the ICSID Convention[27] and the New York Convention. These two conventions allow the direct enforcement of international arbitral awards in over 170 countries around the world. The enforceability of arbitral awards can only be denied under a narrow set of conditions provided in the two respective conventions.[28]

As the practice of ISDS started to proliferate and investors became increasingly reliant on the ISDS clauses in the applicable BITs, the host states became increasingly weary, especially those which were frequently in the Respondent's seat, and have suffered significant losses. Although statistics do not show any significant trend in favor of one side over the other,[29] the resistance against ISDS became more intensive with each passing year.

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23 *See* Born *op. cit.,* note 19, pp. 234–240

24 *See* Born *op. cit.,* note 1, p. 81

25 Article 53 of the ICSID Rules. See also: Reed, L.; Paulsson, J.; Blackaby, N.; *Guide to ICSID Arbitration*, 2nd ed., Wolters Kluwer, Alphen aan den Rijn, 2011, p. 48

26 Article 52 of the ICSID Rules. Reed, L.; Paulsson, J.; Blackaby, N.; *Guide to ICSID Arbitration*, 2nd ed., Wolters Kluwer, Alphen aan den Rijn, 2011, p. 165

27 The enforceability of ICSID arbitral awards is provided in Article 54(1) The full text of the ICSID Convention is available here: [https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx], accessed 29. April 2020

28 The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the full text of the Convention is available here: [http://www.newyorkconvention.org/new+york+convention+texts], accessed 29. April 2020

29 In 2017, the host states prevailed in one third of the total 530 cases, while the investors were successful in one quarter of the cases. The remaining cases were either settled on confidential terms, discontinued

3. THE BIRTH OF THE RESISTANCE AGAINST ISDS

Although ISDS clauses initially resulted in a modest number of claims, there was an abrupt explosion in the late 20th century which shook the host states out of their comfort zone and made them question ISDS and its perceived qualities. As the number of investor claims grew, it became apparent that the broad investment protection guarantees provided in the various BITs have enabled the investors and the arbitral tribunals to broadly interpret and enforce these provisions against the state.[30]

Claimant investors mostly relied on the fair and equitable treatment (FET) standard and indirect expropriation as the basis for their claims.[31] These were also the most common grounds on which the ISDS tribunals found the state liable for treaty violations.[32] Additional problems were created for states whose BITs contained a so-called „umbrella clause" which extended the liability of the state for any harm caused to the investors, based on any action of the state which otherwise does not violate the treaty provisions.[33] Such clauses allowed the investors to benefit from treaty protections for contract violations as well.[34]

4. THE EU PERSPECTIVE ON ISDS REFORM

4.1. The stance of the EU on ISDS ante-*Achmea*

Any discussion about the EU position on ISDS reform requires a brief reflection on the existing division of competencies within the EU with regards to the BITs. Before the enactment of the Lisbon Agreement, the EU held the exclusive competence in the pre-investment phase for the conclusion of the agreements which implied the access to the single EU market.[35] EU Member States (hereinafter: MS)

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or the investor was not awarded any monetary relief, ddespite prevailing on the merits of the claim. *See* UNCTAD, *op. cit.,* note 8, p.4

30 Stanivuković, M., *„Umbrella Clause" in Bilateral Investment Treaties* in *Private International Law and Foreign Invensment Protection*, Journal of Private International Law, Open Regional Fund Legal Reform, University of Podgorica, 2008, p. 31

31 The FET clause was invoked in 80% and indirect expropiration was alleged in 75% of the available cases. *See* UNCTAD, *op. cit.,* note 8, p. 5

32 65% for FET claims and 32% for claims of indirect expropriation. *See* UNCTAD, *ibid.*

33 Cervantes-Knox, K.; Thomas, E., International Arbitration Group, DLA Piper UK LLP, *Practice Note on Umbrella clauses in bilateral investment treaties, available at*: [https://uk.practicallaw.thomsonreuters.com/7-3817477?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29&comp=pluk], accessed 29. April 2020

34 *See* Stanivuković, *op. cit.,* note 30, p. 35

35 The Lisbon Treaty entered into force on 1.12.2009. The full name of the Treaty is Treaty on the Functioning of the European Union 2012/C 326/01, Official Journal C 306, 17. 12. 2007. Available at:

held the competence at the post-investment phase, i.e. they were in charge of the investment protection.[36] Such a framework aimed to protect the legal security and a favorable business and investment climate, while the EC maintained a liberal market which facilitated the entry of foreign investors to the EU market.[37]

The foreign direct investments fell into the exclusive jurisdiction of the EU after the conclusion of the Lisbon Treaty.[38] However, the provisions of the Lisbon treaty still left some uncertainties in this regard. Furthermore, questions still existed regarding the jurisdiction over the existing BITs which were concluded between MS, the MS and third countries and those concluded by the EU and acceded to by its MS.[39]

The ECJ had previously established that the EU exercises exclusive jurisdiction over foreign direct investments and that this applies to all investments, regardless of whether they are made by legal entities or natural persons, as long as they serve for the establishment or maintenance of a direct relationship between capital investors and the beneficiary business venture for the purpose of conducting a specific economic activity.[40]

[https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4301854], accessed 31. March 2020

36 Also see: Miljenić, O., *Zaštita investicija po Ugovoru o energetskoj povelji*, Energetski institute Hrvoje Požar, Zagreb, 2019, pp. 462; Titi, C., *International Investment Law and the European Union: Towards a New Generation of International Investment Argreements,* The European Journal of International Law, *vol.* 26, no. 2, 2015, p. 643

37 *Ibid*, Miljenić, p. 463. See also: Communication from the Commission: *Towards a comprehensive European international investment policy*, COM (2010) 343 final, 7.7.2010., p. 11. Available at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF], accessed 31. March 2020. See also: Shan, W.; Zhang, Sh., *The Treaty of Lisbon: Half Way Toward a Common Investment Policy*, European Journal of International Law, *vol.* 11, 2010, p. 1049. See also important cases before Achmea of the ECJ: Case C 402/05, Kadi and Al Barakaat International Foundation vs. Council and Commission, 3. September 2008; Case C 246/06, Commission vs. Sweden, 3. March 2009; Case C 205/06, Commission vs. Austria, 3. March 2009; Case C 118/07, Commission vs. Finland, 19. November 2009; Case C 264/09, Commission vs. Slovakia, 15. September 2011; Case C 171/08, European Commission v. Portuguese Republic, 8. July 2010; Case C 446/04, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, 12. December 2006

38 See art. 207 of the Treaty on the Functioning of the European Union 2012/C 326/01, Official Journal C 306, 17. 12. 2007. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4301854], accessed 31. March 2020. For more see: Kleinheisterkamp, J., *Investment Protection and Eu Law: The Intra- and Extra-Eu Dimension of the Energy Charter Treaty*, Journal of International Economic Law, *vol.* 15, no. 1, 2012, pp. 85

39 This definition was provided in the Case C 446/04, FII Group Litigation v Commissioners of Inland Revenue, 12. December 2006. For more on this topic, see: Miljenić, *op. cit.,* note 36, p.464

40 Miljenić, *ibid.*; Reinisch, A., *The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements*, Santa Clara Journal of International Law, *vol.* 12, iss. 1., 2014., p.

The Court of the EU has taken the position that the EU exercises exclusive competence over indirect investments as well based on its implicit foreign competences, according to Article 63 and 64 of the TFEU. According to most authors, this would include portfolio investments (such as the short-term investments aimed at the acquisition of company stock, without any aspirations to affect the management and control over the business entity).[41]

The Court of the EU held that the BITs concluded with third countries which later became MS had to be amended and harmonized with EU law. If this is not possible, (for example, if the other contracting state rejects such amendments), such treaties must be terminated in compliance with the Vienna Convention on the Law of International Treaties. In this sense, for the MS in transitional phase facing such situations, The Regulation 1219/2012 was adopted.[42] This Regulation obliges the MS to notify the EU on the treaties which preceded the conclusion of the Lisbon Treaty, and which they wish to maintain in force.[43]

The issue with such treaties, which were concluded mostly between the so-called old MS and the so-called newer MS from Eastern and Central Europe prior to their EU accession, was that these were international treaties whose status should not be altered by EU accession, so it could not be determined with certainty whether EU law or international law should prevail.[44]

141; Eilmansberger, Th., *Bilateral Investment Treaties and EU Law*, Common Market Law Review, *vol.* 46, 2009, pp. 383

41 Miljenić, *ibid.*, p. 465. See also: Communication from the Commission: *Towards a comprehensive European international investment policy*, COM (2010) 343 final, 7.7.2010., p. 3. Available at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF], accessed 31. March 2020. Schreuer, C., H.; Malintoppi, L.; Reinisch,A.; Sinclair, A., *The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge, 2010, p. 1260

42 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Official Journal L 351/40 20.12.2012. Avilable at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1219&from=HR], accessed 31. March 2020

43 Art. 2. of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Official Journal L 351/40 20.12.2012. Avilable at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1219&from=HR], accessed 31. March 2020. See also: Miljenić, *op. cit.,* note 36, p., 465-466

44 Miljenić, *ibid.*, p. 471. See also: Pinna, A., *The Incompatibility of Intra-EU BITs with European Union Law, Annotation Following ECJ, 6 March 2018, Case 284/16, Slovak Republic v Achmea BV,* Paris Journal of International Arbitration, Cahiers de l'arbitrage, No. 1, 2018, pp. 73; Pohl, J., *Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?*, European Constitutional Law Review, *vol.* 14, no. 4, 2018, pp. 767

In this sense, arbitral tribunals have upheld their jurisdiction in such cases, and in response, the Commission pressured the five MS which maintained their BITs with other MS in force, by initiating so-called "infringement proceedings". The MS in question proposed the termination of the problematic treaties and their replacement with a treaty among MS which would provide the investment protections which existed under the BITs.[45]

The situation was resolved only in early 2018 in the *Achmea* case, where the ECJ found that dispute resolution clauses in BITs concluded between MS violate the TFEU.[46]This decision of the ECJ has opened the floodgates for the intensive discussions about the viability of the existing ISDS system and the need for its systematic reform.

This case ensued after Slovakia reversed its policy of liberalization of the health market in 2006[47] which lead Achmea to file a claim against Slovakia in 2008, alleging the breach of the provisions of the of the Slovakia-Netherlands BIT. The arbitral proceedings were seated in in Frankfurt, under the UNCITRAL Rules of Arbitration. In 2012, the arbitral tribunal decided in favor of Achmea and found that Slovakia violated its BIT obligations, ordering the payment of approximately EUR 22,1 million in damages. Slovakia challenged the jurisdiction of the arbitral tribunal before the German Courts questioning the compatibility of the arbitration clause in Article 8 of the BIT with EU law. The Higher Regional Court of Frankfurt[48] rejected this claim, so Slovakia appealed this decision before the German Federal Court of Justice. This court referred questions of compatibility to the ECJ for a preliminary ruling,.[49] The ECJ held that matters of EU law can only be adjudicated by EU courts and confirmed the exclusive jurisdiction of EU courts over EU law matters, which made the Achmea claim non-arbitrable. that they not arbitrable. Thus, the ISDS clause in the Slovakia-Netherlands BIT was declared incompatible with EU law.

The MS swiftly moved to action following this decision, negotiating in bilateral and multilateral settings to create an appropriate mechanism for the termination

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45 European Commission - Press release: *Commission asks Member States to terminate their intra-EU bilateral investment treaties*, 18.06.2015 Available at: [http://europa.eu/rapid/press-release_IP-15-5198_en.htm], accessed 18. January 2018

46 Miljenić, *op. cit.,* note 36, p. 475

47 Thereby, the Slovak government prevented Achmea from distributing the profits it obtained through its insurance acivities in the country

48 Case 26 Sch 3/13 of the *Oberlandesgericht Frankfurt*, decision of 18 December 2014

49 Case I ZB 2/15 of the *Bundesgerichtshof*, decision of 3 March 2016

of the intra-EU BITs.[50] The UK was also among the states which declared their willingness to join the movement, despite the fact that they are on the verge of leaving the EU, upon which they would no longer be bound by EU law.[51]

4.2. The EU position on ISDS post-Achmea

After the *Achmea* decision, the EU continued insisting on the termination of BITs concluded between MS, although some of them resisted this approach. intra-EU BITs, regardless of the resistance from some MS. The Commission emphasized that the availability of ISDS for investors from MS who have concluded BITs with other MS, puts them in a more favorable position than those from MS which have not (the former could choose between national courts and investment arbitration, while the latter could only rely on judicial remedies).[52]

According to the position of the Commission, the arbitral tribunals would thereby exclude the MS national courts and the ECJ, thus denying the full effect of the EU legislature. Furthermore, the position held by the ECJ in *Achmea* questioned the viability of such dispute resolution clauses, because even if arbitral tribunals were established on this basis, the arbitral award could not be recognized and enforced within the EU, as it is contrary to the position of the ECJ.[53]

Therefore, after a series of discussions in early 2019, 21 MS (including the UK) issued a declaration expressing their intent to terminate their intra-EU BITs.[54] This declaration also clarified that the sunset clauses contained in the existing BITs

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50 For more about intra-EU after Lisabon Treaty see: Borovikov, E.; Crevon-Tarassova, A.; Evtimov, B., *International Arbitration Review Europian Union*, Charter, J., H. (ed.), ed. 8, Law Business Research, London, 2017, pp.188. For more about intra-EU before Lisabon Treaty see: Söderlund, C., *Intra-EU Investment Protection and the EC Treaty*, Journal of International Arbitration, *vol.* 24, No. 5, 2007, p. 455; Marshall, M., *Investor-state dispute settlement reconceptionalized: Regulation of disputes, standards and mediation,* Pepperdine Dispute Resolution Law Journal*, vol.* 17, no. 2, 2017, pp. 234

51 EU member states agree to terminate their intra-EU BITs: is this the end of intra-EU BIT arbitrations and what about Brexit?, available at: [http://arbitrationblog.practicallaw.com/eu-member-states-agree-to-terminate-their-intra-eu-bits-is-this-the-end-of-intra-eu-bit-arbitrations-and-what-about-brexit/], accessed 29. April 2020

52 Miljenić, *op. cit.,* note 36, p. 485. See also: Burkhard, H., *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice,* Max Planck Institute Luxembourg for Procedural Law Research Paper Series Research Paper, No. 3, 2018, pp. 5. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3152972], accessed 14. April 2020

53 Miljenić, *op. cit.,* note 36, p. 48; Hobér, K., *Recent trends in energy disputes, Research Handbook on International Energy Law*, Kim Talus (ed.), Edward Elgar Publishing, Cheltenham, 2014, p. 227

54 Declaration of the Member States of 15 January 2019 on the legal consequences ofthe Achmea judgement and on investment protection, available at: [https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en], accessed 30. March 2020

would also be extinguished once the terminations are effectuated. In addition, the signatories of the declaration took the position that the *Achmea* reasoning also applies to the ISDS provisions provided in the Energy Charter Treaty (ECT), if invoked among EU MS.[55]

In 2019, five MS (namely, Finland, Luxembourg, Malta, Slovenia and Sweden) adopted a declaration which was largely similar to the initial declaration, carving out the ECT ISDS mechanism, stating that it was inappropriate to adopt such a broad interpretation of *Achmea* before this issue was settled by the national courts. On the same day, Hungary released its own declaration, explicitly limiting the application of the *Achmea* reasoning only to intra-EU BITs and not any ISDS proceeding based on the ECT.

Following the declarations of the EU and its MS which determined the path forward for investment protection within the EU, following the *Achmea* decision from January 15th and 16th 2019, the EU MS agreed on a plurilateral treaty for the termination of intra-EU BITs on 24 October 2019.[56] This agreement reflects the decision of the EU and its MS to terminate the BITs between EU MS in a plurilateral manner, rather than bilaterally. This solidified the position of the EU in its determination to eliminate ISDS and to create the platform for its replacement by the MIC, which it has been promoting intensively in international circles, including in the WG III meetings.

Interestingly, in its statement announcing this agreement, the EU referred to some MS which did not endorse the text of the treaty on the termination of BITs between EU MS and once again announced potential infringement proceedings against such states.[57]

4.3. The development of the idea of the MIC at the EU level

In its submissions to the WG III, the EU asserted that ISDS can only be reformed in a systematic way through the introduction of the MIC.[58] They also encouraged

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55 *See ibid.*

56 Statement: EU Member States agree on a plurilateral treaty to terminate bilateral investment treaties 24 October 2019, available at: [https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en], accessed 29. April 2020

57 For more details, *see* Statement *supra* note 56; Delaume, G., *ICSID Arbitration and the Courts,* American Journal of International Law, *vol.* 77, no. 4, 1983, pp. 784

58 UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) Thirty-seventh session New York, 1–5 April 2019, Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union and its Member States, p. 1., available at: [https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1], accessed 29. April 2020

UNCITRAL to develop this concept through further discussion as a matter of priority.[59] However, this idea has been present in the EU discourse since 2015.

Over time, the scope and details of the MIC project of the European Commission has evolved, but it has been consistent.[60] In 2016, the MIC was only a concept, and by 2020 it has become a constant refrain which is repeated in any ISDS reform forum.

Over the span of three years, the EU conducted a number of activities aiming at creating the preconditions for the establishment of the MIC, including an impact assessment process (1 August 2016), public consultations (21 December 2016) and stakeholder meetings on the possibility of the establishment of the MIC (20 November 2017 on 22 March 2019). This resulted in the publishing of the **negotiating directives** for a MIC. One year later, on 22 March 2019, a Stakeholder meeting on the **establishment** of a MIC was held. This is only a brief overview of the progression of the MIC as a future staple of the EU investment protection framework.[61]

Although on the surface it may seem that the ECJ decision in *Achmea* was the catalyst for the campaign of the European Commission for the establishment of the MIC, the reality is that this idea has much deeper roots. Namely, the MIC is not only a conceptual aspiration of the EU, but it is also an obligation which was stipulated in two existing international treaties signed by the EU (which will most likely be included in other agreements in the future).

These provisions can be found in the Comprehensive Economic and Trade Agreement (CETA) concluded between the EU and Canada and the Free Trade Agreement between the EU and Vietnam. The dispute resolution clauses in both these treaties provide for a permanent tribunal of first instance and a built-in appellate mechanism.[62] The tribunal itself does not have an institutional structure, and the

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59 *Ibid*., p. 14

60 The European Commission, The Multilateral Investment Court Project. Here it is clearly stated that the European Commission has been working on the establishment of a standing multilateral investment court since 2015. Available at: [http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608], accessed. 29. April 2020

61 For more see: Howse, R., *Designing a Multilateral Investment Court: Issues and Options,* Yearbook of European Law, *vol.* 36, 2017, pp. 210; Alvarez Zarate, J. *Legitimacy concerns of the proposed multilateral investment court: Is democracy possible*, Boston College Law Review, *vol*. 59, no. 8, 2017, p. 2770; Bungenberg, M.; Reinisch, A., *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement,* Saarbruecken, Wien, 2018, p. 20

62 CETA, Chapter 8 Section F; EU-Vietnam FTA, Chapter 8.II Section 3. See also commentars in: Bernasconi-Osterwalder, N.; Mann, H., *A Response to the European Commission's December 2013 Document*

Secretariat of ICSID should provide administrative support to the tribunal and the disputing parties.[63]The tribunal itself consists of one national of each disputing state and it is chaired by a person of a nationality different than that of the disputing pa whose nationality differs from that of both parties.[64] The proceedings can be governed by the ICSID Convention (including the Arbitration Rules and the Additional Facility Rules) the UNCITRAL Arbitration Rules or any other procedural rules selected by the parties.[65]

Despite this detailed dispute resolution framework which was designed in accordance with the desires of the parties, these treaties also contain a forward-looking obligation to pursue and negotiate the establishment of an MIC, which would replace the existing treaty mechanism. [66] The EU-Vietnam FTA provides a similar provision in Article 15.

Therefore, although the *Achmea* decision helped accelerate the process of moving towards the termination all intra-EU BITs, including their ISDS clauses, the European Commission had previously undertaken the obligation to contribute to the establishment of the MIC as the alternative for the existing ISDS system with all of its perceived flaws. The strong language of the cited provisions of the CETA and the EU-Vietnam FTA reflect the long-term dedication of the EU Commission with regard to this matter.

Although the EU and its MS are on the verge of banishing ISDS from its legal framework and intensively promoting the establishment of the MIC at the international level, the current proposal for the MIC was met with skepticism in the international fora, particularly at the WG III. The sections below are dedicated to

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"Investment Provisions in the EU-Canada Free Trade Agreement (CETA), The International Institute for Sustainable Development, 2014. Available at: [http://power-shift.de/wp-content/uploads/2014/06/reponse_eu_ceta.pdf], accessed 11. April, 2020. See also: Schacherer, S., *TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor–State Disputes under Mega-regionals*, *Journal of International Dispute Settlement, vol.* 7, no. 3, 2016, pp. 630

63 CETA, Article 8.27.16. The issue is still open in the EU-Vietnam FTA (See Article 12(18)). The full text of the EU – Vietnam FTA is available here: [http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437], accessed 29. April 2020. See also: Hübner, K.; Deman, A., S., Balik.T., *Writing the Rules of 21st Century Trade: The EU and the New Trade Bilateralism,* Journal of European Integration, *vol.* 39, issue 7, 2017, pp. 843

64 CETA, Article 8.27.6; EU-Vietnam FTA, Article 12(6). See also: Kukucha, C., J., *Canadian Sub-federal Governments and CETA: Overarching Themes and Future Trends." International Journal: Canada's Journal of Global Policy Analysis*, *vol.* 68, no. 4, pp. 528

65 CETA, Article 8.23.2; EU-Vietnam FTA, Article 7(2)

66 CETA, Article 8.29. See also: Happ, R.; Wuschka, S. *From the jay treaty commissions towards multilateral investment court: Addressing the enforcement dilemma*, Indian Journal of Arbitration Law, *vol.* 6, no. 1. 2017, p. 113

the international discussions on the major concerns related to the ISDS system as it stands, as well as the current MIC model, as expressed in the government submissions to the UNCITRAL Secretariat.

5. THE ISDS REFORM MOVEMENT AT THE INTERNATIONAL LEVEL

5.1. The situation beyond the EU

Outside the EU, the discussions on the need for ISDS reform have been conducted in a broader and more nuanced manner. A comprehensive study and analysis conducted by UNCTAD showed that various countries are taking different approaches in ISDS reform, primarily through treaty re-negotiation. There were five main approaches taken in treaties concluded in 2018, where some treaties have no ISDS provision, or they provide for a standing ISDS mechanism, or a limited ISDS mechanism. Some treaties provide an improved ISDS procedure, while others rely on the traditional ISDS procedures.[67]

Due to the increasing concerns and demands for reform, the Secretariat of UNCITRAL mandated the WG III to 1. identify he most prominent ISDS concerns, 2. determine the need for reform in such areas and 3. propose viable reform options. The WG III is currently at the third stage, where it is developing and proposing reform options for the identified areas of concern. The entire process is government-lead, with delegations from all over the world gathering twice a year (in Vienna and New York) to discuss and propose various options. In-between sessions, there are numerous regional and bilateral meetings, where delegations exchange their views and positions. It is a gradual and systematic process, which is focused on the procedural aspects of ISDS, while the substantive matters remain outside of its scope.

WG III has grouped the major concerns related to ISDS into three main categories:

1. Consistency, coherence, predictability and correctness of arbitral awards
2. Arbitrators and decision makers
3. Cost and duration of ISDS cases (with focus a on arbitration proceedings),

The global ISDS reform discussions within the framework of the WG III reflect the diversity and specificity of issues which concern individual nations. The nu-

[67] *See* UNCTAD, *op. cit.,* note 8

merous country submissions to the UNCITRAL Secretariat provided by governments reflect their positions on the identified concerns and the reform options which would meet their needs. Aside from the EU MS which promote the MIC, most other countries support a more, targeted approach to ISDS reform, based on the outlined reform framework.[68]However, the option of establishing a standing investment courts and appellate mechanism (stand-alone or integrated in the court) was supposed to be the specific topic of the 39th session of the 39th WG III meeting in New York.[69]

5.2. The MIC as the proposed solution of the EU and its MS

The key benefit of the MIC in the view of the EU is that, just like its FTAs, investment adjudication could be given the features of judicial proceedings in international and domestic courts through the MIC..[70]This has been interpreted by some as another attempt form the EU to impose its position in contradiction to its standing international obligations and those taken by its MS.[71]

The key fetures of the proposed MIC are:

- a first and second instance tribunal
- full-time judges with the requisite qualifications for the highest judicial positions (nominated by the states)
- a specialized secretariat

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68 Individual and joint submissions by governments to the UNCITRAL Secretariat, including Indonesia (A/CN.9/WG.III/WP.156); European Union and its member States (A/CN.9/WG.III/WP.159 and Add.1); Morocco (A/CN.9/WG.III/WP.161); Thailand (A/CN.9/WG.III/WP.162); Chile, Israel and Japan (A/CN.9/WG.III/WP.163); Costa Rica (A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178); Brazil (A/CN.9/WG.III/WP.171); Colombia (A/CN.9/WG.III/WP.173); Turkey (A/CN.9/WG.III/WP.174); Ecuador (A/CN.9/WG.III/WP.175); South Africa (A/CN.9/WG.III/WP.176); China (A/CN.9/WG.III/WP.177); the Republic of Korea (A/CN.9/WG.III/WP.179); Bahrain (A/CN.9/WG.III/WP.180); Mali (A/CN.9/WG.III/WP.181); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182); Kuwait (A/CN.9/WG.III/WP.186); Kazakhstan (A/CN.9/WG.III/WP.187); and the Russian Federation (A/CN.9/WG.III/WP.188 and Add.1). All of these submissions are available on the official website of UNCITRAL WG III: [https://uncitral.un.org/en/working_groups/3/investor-state], accessed 29. April 2020

69 The 39th session of the UNCITRAL WGIII was indefinitely postponed due to the Covid-19 outbreak, and it has not taken place as of the date of the submission of this paper. More information on the most recent developments regarding the UNCITRAL WG III sessions is available here: [https://uncitral.un.org/en/working_groups/3/investor-state], accessed 29. April 2020

70 Statements of Commissioner Malmström at a High Level Event hosted by the Belgian Minister for Foreign Affairs, Didier Reynders

71 Alvarez Zárate, J. M. A., *Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?* Available here: [https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/9/], accessed 29. April 2020

- permanent structure
- transparency in its operations
- resolution of disputes arising under existing investment treaties and future treaties on an opt-in basis
- no new opportunities for an investor to bring a dispute against a state
- the adjudicators will not be appointed by the disputing parties
- effective mechanisms for the enforcement of the decisions.

5.3. Analysis of the identified concerns regarding the proposed MIC model

The EU and its MS have been active in the global ISDS reform discussions, including the sessions of the WG III.[72] Their positions and the proposed model of the MIC were presented in the submissions made to the UNCITRAL Secretariat[73]. However, outside of the circle of the MS, the MIC was met with a substantial degree of skepticism both in terms of its structure and mandate.[74] Some governments have voiced their disagreement with this approach by advocating for a more gradual and targeted reform of the existing ISDS system[75], while others were more ouverte in their explicit disagreement with the MIC proposal.

The Russian Federation[76] was particularly direct in its rejection of the MIC, which it provided in its submission to following the 38th session of WG III.[77] The Russian federation submission particularly outlined the following concerns: (1) Uniform-

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72 Report of the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019), available at: [https://undocs.org/en/A/CN.9/1004], accessed 29. April 2020

73 *See* UNCITRAL Working Group III, *op. cit.,* note 58

74 Alvarez Zarate, *op. cit.,* note 71

75 Possible reform of investor-State dispute settlement (ISDS),Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, Note by the Secretariat, available at: [https://undocs.org/en/A/CN.9/WG.III/WP.182], accessed 29. April 2020. In this submission these four governments proposed a „Suite" approach to ISDS reform, where each country should choose the appropriate options and incorporate them into their respective investment protection instruments. The submission provides a list of possible solutions for each identified concern in the current ISDS system

76 Submission from the Government of the Russian Federation, Possible reform of investor-State dispute settlement (ISDS), available at: [https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1] Accessed 29.04.2020. In its submission, the government of the Russian Federation provides a comparative overview of the existing ISDS system and the potential effects of the establishment of the MIC, strongly emphasizing the potential negative effects on the states and investors which would arise out of the MIC as proposed by the EU and its member states.

77 For more about BITs in Russian Feredration see: Alekseenko, A., P., *New Russian Model BIT and the Practice of Investment Arbitration*, Manchester Journal of International Economic Law, *vol.* 16, issue 1, 2019, pp. 79

ity of judicial practice would not be guaranteed, (2) increasing fragmentation of the existing investment protection regime, (3) The diversity of decision makers would not be ensured, (4) Costs would continue to be high, (5) The caseload of the system would determine the duration of the proceedings and (6) The budget and allocation of the costs of the MIC.[78]

In addition, the investor community expressed serious concerns with the MIC model for dispute resolution by enumerating the perceived ways in which the MIC would harm both sides in both parties in the dispute, and severely damage the investment environment. The most important and substantive concerns are summarized below.

RIGID STRUCTURE - The ad hoc nature of ISDS has been the source of main criticisms by those seeking to eliminate ISDS, since in their view, the inconsistency, incoherence of ISDS is created by its ad hoc nature (in the appointment of arbitrators and procedure). Therefore, the EU proposed the MIC as a permanent and reliable institution, which would provide a predictable and trustworthy mechanism for dispute resolution. However, such a rigid structure, in which the investor would have no influence, even in matters of procedure, could significantly decrease the quality of the proceedings, as well as the perception of fairness. Considering the fact that the MIC was envisioned as an institution financed and staffed by states, it is hard to imagine any type of reliance on the side of investors that they will be provided with an effective process.

The ad hoc nature of ISDS proceedings was born out of the fact that it is hard to pre-emptively design an institution and one set of rules which will accommodate the resolution of thousands of disputes arising out of thousands of BITs and investment schemes. Therefore, it is questionable, at best, whether the MIC could contribute to the desired degree of coherence and legitimacy of the final decisions.

In addition, regardless of the perceived benefits of an institution such as the MIC, the costs of the infrastructure, staff and maintenance would be significant, even without adding the costs of the proceedings which the states would also have to pay as disputing parties. It is questionable how these costs could be allocated fairly, and how the state contributions would affect less developed states.

APPELLATE MECHANISM - ISDS has been known as the dispute resolution forum in which the parties satisfy themselves with an efficient process which is concluded with a final award without recourse to a second instance forum. ISDS awards can be challenged and annulled, but they cannot be reviewed on the facts

[78] *See* Submission form the Government of the Russian Federation, *ibid.*, pp. 3-7

or the law before an appellate body. ISDS critics have readily pointed-out the instances where different arbitral tribunals have reached divergent conclusions in the interpretation of the same BIT language. Therefore, it was proposed that the MIC could have a built-in appellate body which would review first-instance decisions on the facts and the law, in hopes to enhance the consistency of the awards.

The open-ended architecture of the MIC appellate body would also allow disputing parties which are not subject to the convention establishing the MIC to appeal arbitral awards before the MIC. However, this proposal fails to address the real danger that the availability of an appellate mechanism would slowly turn appeals proceedings into the rule rather than exception – both states and investors would be duty bound to pursue all options to reverse an unfavorable decision.[79] This applies *a fortiori* for states whose adverse costs and financial penalties are charged to the tax payers. This would inevitably extend the duration and cost of the proceeding. In addition, it is questionable if it is truly possible to develop precedent in ISDS due to the diverse provisions of the applicable BITs, applicable laws and fact-specific claims in each case.

In addition, there is a danger that the binding nature of the appellate decisions would allow the perpetuation of incorrect decisions, turning them into binding interpretation tools for future cases arising out of the same treaty. This would also extend to treaty parties which are disputing parties which may not be able to adopt such an interpretation under their mandatory law.

LACK OF PARTY AUTONOMY – The MIC (as proposed) would have a number of standing judges, nominated by states for a fixed period of time. The judges would receive a salary and they would not be paid directly by the disputing parties. The parties in the dispute would not be able to impact the constitution of the panel of judges deciding their case, which should ensure the independence and impartiality of the judges.

However, this would be a large step backwards, as it would deny the disputing parties the ability to appoint the arbitrators who would approach the case with the desired level of subject-matter expertise and experience. Randomly appointed judges are less likely to possess the knowledge and skills necessary to conduct analysis in certain industry-specific disputes, or in the context of a specific legal

[79] Even in the existing ICSID framework, where annullment proceedings can be initiated under very limited conditions, an extremely high percentage of ICSID awards is subject to the annullment proceedings. See: Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, pp. 11-15., available at: [https://icsid.worldbank.org/en/Documents/resources/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf], accessed 29. April 2020

system where the investment took place. Therefore, the judges will either have to seek expert advice to a higher degree, or they will reach erroneous or incorrect decisions in matters of high significance. In addition, the party autonomy exercised in the appointment of arbitrators is what created at least some degree of balance between investors and states in what would otherwise be a severely asymmetrical proceeding. Furthermore, long-term tenures at the MIC would negatively impact the diversity of the institution and it would dispose of a narrow pool of persons who would be willing to accept such a rigid service after practicing under the current ISDS framework.

6. INSTEAD OF A CONCLUSION - THE PATH FORWARD THROUGH COMPROMISE SOLUTIONS

As universal solutions and sweeping reforms are unlikely to lead to an acceptable outcome at the international level, it is worth exploring some effective solutions which may address the existing concerns. Considering the broad scope of the discussions in WG III which is lead by the governments in this process, there is an extensive menu of alternative reform options which may enhance ISDS as we know it. Although the EU and its MS will continue on the path towards establishing a permanent investment dispute resolution body within their jurisdiction, the rest of the world is most likely going to remain on a path of evolution rather than revolution.

Therefore, ISDS and the MIC will continue to co-exist, and the level of consistency in the quality of investment protection can be maintained even within two diverging systems – one institutional and one ad hoc.

The more pragmatic submissions by governments to the UNCITRAL Secretariat have provided an overview of the most effective reform options, and they have proposed an opt-in system, where states could sign a multilateral instrument indicating the reform options they accept. Thus far, the WG III has compiled an elaborate list of reform options which can be implemented independently, or in combination with other reform options. An overview of these proposals reveals the opportunities to resolve some of the existing concerns related to ISDS through targeted and gradual reform.

Concerns related to the correctness and consistency of ISDS awards can be accomplished through the provision of binding interpretation notes[80] and the involvement of the states in the clarification of the treaty provisions to concerned

[80] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session Vienna, 14–18 October 2019, Possible reform of inves-

investors. From the substantive side, the gradual adoption of new-generation treaties and precise protection standards can improve the consistency of treaty interpretation.

The adoption of a strict procedural timetable and mechanisms for the early dismissal of frivolous claims could improve the time and cost efficiency of the ISDS proceedings. Parties can also be ordered to deposit security for costs, which will encourage strategic and well-founded procedural conduct of the parties.[81]

In order to improve the accountability of arbitrators and to ensure their independence and impartiality, a Code of conduct for arbitrators could be adopted, providing the explicit prohibition of "double hatting" of the prospective candidates. The secretariats of UNCITRAL and ICISD have recently published the Draft Code of Conduct for ISDS Adjudicators, which is open for public comment.[82] The Draft Code of Conduct addresses general requirements of independence and impartiality of the adjudicators, as well as ISDS-specific concerns (such as double hatting, issue conflict and repeat appointments).[83] The broad definition of "adjudicator" in the Draft Code of Conduct covers not only arbitrators, but also judges, members of commissions and different standing bodies.[84]

The concerns of the lack of transparency in ISDS can be addressed and resolved through a wide-spread ratification of the Mauritius Convention which extends the application of the UNCITRAL Transparency Rules to treaty-based investment disputes, regardless of whether the respective treaty predates the Rules themselves. The Transparency Rules provide for a procedural framework where all the non-confidential documents and information pertaining to investor-state proceedings will become transparent and accessible (including the party submissions, submissions by non-disputing third parties and introducing public hearings).

The Transparency Convention extends the application of the Transparency rules to the investment protection legal instruments adopted by 1 April 2014, which in-

tor-State dispute settlement (ISDS), Note by the Secretariat, para. 43, available at: [https://undocs.org/en/A/CN.9/WG.III/WP.166], accessed 24. April 2020

81 Some of these proposals are already under consideration in the most recent amendment process for the ICSID Rules of Arbitration. For more details on the reform process of the ICSID Rules, see: ICSID, Proposals for Amendment of the ICSID Rules — Working Paper #4, Volume 1, February 2020, available at: [https://icsid.worldbank.org/en/amendments], accessed 29. April 2020

82 Draft Code of Conduct for ISDS Adjudicators available at: [https://icsid.worldbank.org/en/Documents/Draft_Code_Conduct_Adjudicators_ISDS.pdf], accessed 16. June 2020

83 *Ibid.*

84 *Ibid.*

cludes the old-generation treaties, regardless of the applicable arbitration rules.[85]Its wide adoption would generate the systematic reform without complex multilateral or bilateral re-negotiations of treaties. Therefore, the desired reform effects (including those pursued by the EU in their MIC proposal) could be accomplished though one legal instrument applied to the existing ISDS framework, based on international consensus.[86] Such an instrument should foster the amicable and collaborative resolution of disputes[87] to the possible extent, seeking to leave adverse proceedings as the last resort.

In terms of the pursuit of a permanent institutional solution for the first instance and appellate mechanisms in ISDS, it is difficult to envisions such an outcome at the international level. Due to the numerous doubts and gaps in the concept of the MIC as it stands, it is unlikely that it will be introduced in the near future. Therefore, it may be more realistic to pursue reforms of ISDS at the international level and build upon the framework of ICSID as the most trusted and developed ISDS institution.

Regardless of the approach which will ultimately be chosen, it is most likely to succeed if it is based on compromise which will accommodate the diverse nature of the treaties which give rise to the disputes and subsequent proceedings. The respective benefits of the flexible ad hoc methods and institutional frameworks will have to be harnessed to enhance legal security and to enable the best outcome for all parties involved.

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85 *The Mauritius Convention on Transparency: A Model for Investment Law Reform?* Available at: [https://www.ejiltalk.org/the-mauritius-convention-on-transparency-a-model-for-investment-law-reform/], accessed 29. April 2020. See also: Calamita, J.; Zelazna, E., *The Changing Landscape of Transparency in Investor-State Arbitration: The UNCITRAL Transparency Rules and Mauritius Convention*, Politics and Governance, *vol.* 8, no. 1, 2020, pp. 344

86 *Ibid*.

87 It may be noted that institutional rules on mediation which could apply to ISDS have been developed. ICSID adopted its Conciliation Rules in 1967, as well as its Fact-Finding Additional Facility Rules in 1978. In 2018, ICSID initiated work on a new, stand-alone set of mediation rules for investment disputes. The Energy Charter Conference adopted a Guide on Investment Mediation in 2016, providing guidance on the conduct of investment mediation under the Energy Charter Treaty. The Mediation Rules of the International Chamber of Commerce (ICC) and Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) were both adopted in 2014 and may apply to Iinvestor-State disputes. Ad hoc Rules for Investor-State Mediation have been adopted by the International Bar Association (IBA) and were released in 2012. For more about mediation in ISDS see: Yong Kyun, K., *States Sued: Democracy, the Rule of Law, and Investor-State Dispute Settlement (ISDS)*, International Interactions, *vol.* 43, no. 2, 2017, pp. 304; Shang, S. *Responding to the ISDS Legitimacy Crisis by Way of Mediation: Implications from CEPA's Dispute Resolution Mechanism,* Journal of International Business and Law, *vol.* 18, no. 2, 2019, pp. 220; Zhao, Ch., *Investor-State Mediation in a China-EU Bilateral Investment Treaty: Talking About Being in the Right Place at the Right Time*, Chinese Journal of International Law, *vol.* 17, no. 1, 2018, pp. 111–135

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UDK 347.232(4-67EU)
Review article

RESTRICTIONS ON THE ACQUISITION OF CERTAIN CATEGORIES OF REAL ESTATE IN RELATION TO THE BASIC MARKET FREEDOMS IN THE EUROPEAN UNION

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ABSTRACT

The acquisition of ownership of real estate in the European Union is regulated by national laws of the Member States. As one of the cornerstones of the EU legal system is the prohibition of discrimination based on the nationality, all national systems have to allow citizens of other EU Member States to acquire the ownership of real estate under the same conditions that apply to their own citizens. Nevertheless, there are certain exceptions to this rule that allow the Member States to exclude certain categories of real estate from being accessible to non-citizens, such as agricultural land, forests, secondary homes and excluded areas under special nature protection regimes.

Moreover, many States have been granted the right to transitional restrictions for the acquisition of agricultural land upon their accession to the EU, lasting for several years, during which period non-citizens were prevented from acquiring the ownership of such property. After those grace periods have ended, many countries have introduced different new measures aiming at protecting their agricultural land from being taken over by foreign investors, only by different means. Such measures, even though they are not explicitly preventing non-citizens from the acquisition of the ownership, make it practically almost impossible for them to get it.

Although the objectives behind all these practices of the Member States, such as prevention of the land-grabbing and land speculation, preserving agricultural communities and supporting the development of rural regions are quite justifiable, they still collide with basic market freedoms in the European Union.

The paper will show the multitude of legal approaches to the acquisition of real estate by non-citizens throughout the European Union. It will show the development of national policies regarding the "restricted" categories of real estate – agricultural land, forest land and land under specific protection regimes – and these national legal norms will be put in perspective with the basic freedoms of the EU internal market. The aim of the paper will be to question the

validity and legality of such restrictions that are still in different covert forms very present on the territory of the EU Member States and offer an answer to whether such a practice presents an infringement of the internal market of the European Union.

Keywords: *acquisition of real estate, restrictions of real estate acquisition, acquisition of agricultural and forest land, transitional period, basic market freedoms, discrimination on grounds of nationality*

1. INTRODUCTION

This paper consists of four main parts. The first part starts with an overview of the existing European legislation significant for the cross-border transfer of real estate, followed by the display of fundamental freedoms of the European internal market. The second part of the paper is related to national legal frameworks on property transactions. It gives an insight into a mosaic of different restrictive measures seen in the legislation of the Member States. This part also includes a sub-chapter on transitional periods for the acquisition of agricultural land of several Member States upon their accession to the EU. Further sub-chapter presents the developments in the post-transitional periods and newly introduced measures aiming at preserving the status quo of non-nationals in the "new" Member States. The third part of the paper is dealing with reactions on the EU level to the developments in Member States. The fourth and final part of the paper explains the proportionality test, a tool for the assessment of national measures. Member States are obliged to use it to ensure that their restrictive measures are appropriate and acceptable from the viewpoint of the EU law.

The aim of this paper is not to offer an exhaustive list of all measures that could possibly lead to discrimination of non-nationals in the acquisition of ownership. The list of measures presented in the following chapters is of a merely informative character to give the reader a feeling of the variety of provisions that could be found in national legislative acts regarding this topic. The purpose of the paper is to show that the interaction between the national legal systems, that on one hand try to protect their national interests, and the European Union, that on the other hand tries to reinforce the internal market of the Union, is of a permanent character.

2. LEGAL FRAMEWORK ON PROPERTY ACQUISITION ON THE LEVEL OF THE EUROPEAN UNION

The first question that needs to be answered before deliberating on the property acquisition in the European Union is the question of legislative competence. One needs to distinguish between matters that fall under the competence of the EU,

potential shared competences and those that remain in the exclusive jurisdiction of national states. The European law does not put property/ownership acquisition verbatim in any of these categories. It does, however, refer to "property ownership systems" that are explicitly excluded from the jurisdiction of the Union. The Article 345 of the Treaty on the Functioning of the European Union is the only provision regarding the subject of ownership in general in the TFEU. It reads "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."[1] Even though the current wording, purely linguistically interpreted, could suggest that, on the basis of the Article 345, the European Union does not have lawmaking competence at all in the area of ownership rights, this is not correct, and in many ways the Union still does influence the right of property of its citizens[2]. The expression "system of property ownership" has been controversial for decades and many scholars and practitioners have attempted to interpret the real objective of the European lawmaker behind it. The historical development shows that this article was originally limited to the ownership of undertakings[3]. Even though the current wording of the Article 345 is still quite ambiguous, it can be assumed that it sets down a negative competence for the EU, limited to the type of ownership (private or public) on the national market of its Member States. Hence, all other aspects of property law (including the acquisition rules) would fall in the competence of Member States as well. However, notwithstanding this Article, the EU is both actively legislating in this area and creating an impact on property law in all Member States through the practice of the Court of Justice of the European Union.

Firstly, the Union is affecting proprietary rights through its legal framework on the internal market and prohibition of discrimination[4]. All national property-related provisions have to be aligned with these EU norms. Secondly, EU has an extensive legal infrastructure on human rights protection that its Member States need to adhere to. The instrument for that is the Charter of Fundamental Rights of the

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1 Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26.10.2012

2 The historical background of the development of the Article 345 TFEU, changes of the original wording of the article, the interpretation of its meaning and its scope of application in property law can be found here: Akkermans, B.; Ramaekers, E., *Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations*, European Law Journal, *vol.* 16, no. 3, 2010

3 Based on the text of the Schumann declaration: « *L'institution de la Haute Autorité ne préjuge en rien du régime de propriété des entreprises*. » See: Mataczyński, M., *What Did the European Community Founders Actually Mean by Saying That the Treaties Shall in No Way Prejudice the Rules in Member States Governing the System of Property Ownership? Analysis of Article 345 TFEU*, Adam Mieckiewicz University Law Review, *vol.* 4, 2014, p. 40

4 See *infra*, Chapter 2.1

European Union[5] that has its background in the European Convention for the Protection of the Human Rights and Fundamental Freedoms[6] and its Protocol I. After the Lisbon Treaty entered into force, the Charter was granted the same legal value as the Treaties of the European Union and is together with them legally binding in all EU Member States. The Charter has reference to property in its Article 17 that affirms "everyone's right to own, use, dispose of and bequeath his lawfully acquired possessions". Furthermore, the Charter's Article 21 outlaws any discrimination based on property, among other grounds. There are other rights protected by the Charter that can be taken into consideration in regard to the acquisition of property by non-nationals, such as the freedom to choose an occupation (Article 15) and the freedom to conduct a business (Article 16). These legal norms are generally applicable in all Member States and compel them to conform to the Union's legal norms even in the domains of the exclusive national competence (such as rules on property ownership).

Such obligation of the Member States, specifically regarding the rules of property law, was repeatedly confirmed by the Court of Justice of the EU in the *Fearon v Irish Land Commission*, *Konle v the Republic of Austria*[7], and the more recent *Essent* case. Although the Court in the Konle judgment underlined that the Article 345 is "an expression of the principle of the neutrality of the Treaties" to the property rules of Member States[8], it also clearly stated that "…Article 345 TFEU does not mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty, which rules include, inter alia, the prohibition of discrimination, freedom of establishment and the free movement of capital".[9]

The Union is also influencing property rights of its citizens by passing secondary legislation related to the ownership matters (increasingly in the domain of consumer protection but also regarding the sale of the new build, timesharing, energy-efficient building, mortgage finance and consumer loans)[10], which aims at approximation and/or unification of law on the internal market.

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5 Charter of Fundamental Rights of the European Union, *Official Journal C 326, 26.10.2012*

6 European Convention on Human Rights, Council of Europe [https://www.echr.coe.int/ Documents/ Convention_ENG.pdf], accessed on 14 March 2020

7 Case C-182/83, *Fearon & Company Limited v Irish Land Commission*, ECLI:EU:C:1984:335, and case C-302/97, *Konle v Republic of Austria*, ECLI:EU:C:1999:271

8 Case C-105/12, *Essent and Others*, ECLI:EU:C:2013:677, par. 29

9 *Ibid*., par. 36

10 Mišćenić, E., *Europsko privatno pravo*, *Opći dio*, Školska knjiga, Zagreb, 2019, p. 78

The foregoing shows that, notwithstanding the Article 345 of the TFEU and the absence of the common property law in the EU, the Union is still significantly influencing the ownership right of its citizens.

2.1. EU fundamental freedoms and their relevance for the acquisition of property

Cross-border real estate transactions need to serve the proper functioning of the internal market of the Union. The accomplishment of the objectives of the EU regarding the establishment of the internal market requires that cross-border real estate transactions are in principle unrestricted. Therefore, the rules on the cross-border transactions of real estate are governed by the primary and secondary EU law norms that regulate the fundamental freedoms in the EU. These are the relevant freedoms for the cross-border acquisition of ownership that are guaranteed by the Treaties: the free movement of workers (articles 45 – 48 TFEU), right of establishment (articles 49 – 55), freedom to provide services (articles 56 – 62) and free movement of capital (articles 63 – 66).

All restrictions to the cross-border transfer of immovables in the Union, that would hinder the EU citizens from acquiring the property in another Member State and thus preclude them from exercising their fundamental rights as guaranteed by the Treaties, are outlawed.

How exactly are fundamental freedoms of the internal market related to the cross-border acquisition of immovables?

- Free movement of workers – as it implies the right of each EU citizen to work in another EU country and reside there, together with his/her family, and thereby be treated equally as the domestic workers, it also entails their right to have a free access to the real estate market (both as a prospective tenant and an owner);
- Freedom of establishment – in regard to real estate acquisition it presumes the absence of any restriction towards foreigners in the access to real estate and premises that are needed for the implementation of the work. It also means that on the basis of this freedom the EU citizens can request the access to the real estate for the purpose of their housing, besides the real estate for the purpose of their undertaking;
- Freedom to provide services – although Treaties do not explicitly affirm the right to real property for EU citizens who provide services in another country (while for those exercising the freedom of establishment this right is explicitly recognized), the CJEU has decided that "persons providing services cannot be

excluded from the benefit of the fundamental principle of non-discrimination in regard to access to ownership and the use of immovable property"[11]; this can be also concluded from the provision of the Regulation No 492/2011 on freedom of movement for workers within the Union which in its Article 9 refers to the right of housing, including the ownership, for a worker who is a national of a Member State and employed in the territory of another Member State[12];

- Free movement of capital – possibly the most relevant freedom for the cross-border real estate transactions in the European Union. This freedom applies to both intra-EU movement of capital and the movement between EU Member States and third countries[13]. In reference to the purchase of real estate, for the applicability of this principle it is irrelevant whether the real estate acquisition is for professional or private purposes.

Another cornerstone of the EU law is the prohibition of discrimination on the grounds of nationality (as defined in the Article 18 TFEU). The principle of non-discrimination on grounds of nationality in the area of real estate transfer applies to not only the mere eligibility to acquire real estate, but also to other procedural and side aspects of the acquisition (such as loan and subsidies eligibility, right to use the real estate etc.). This prohibition due to its subsidiary character to the market freedoms has its relevance in case when none of the market freedoms is applicable to a particular case of real estate acquisition[14].

3. NATIONAL LEGAL FRAMEWORKS ON PROPERTY ACQUISITION

Since the EU does not have the lawmaking competence in the area of ownership rights to determine its scope and content, it is left to national states to determine the terms and conditions regarding the transfer and acquisition of real property, taking into consideration the EU legal framework[15]. One of the basic and oldest principles of real estate/land law is *lex rei sitae,* according to which every state determines the rules applicable to real property situated in it[16]. Such national

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11 Case C-305/87 *Commission v Greece*, ECLI:EU:C:1989:218, par. 26

12 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, Official Journal L 141/1

13 With certain exceptions as defined in the Article 64 TFEU

14 Josipović, T., *Pravni promet nekretnina u Europskoj Uniji, Prilagodba hrvatskog pravnog poretka europskom*, Narodne Novine, Zagreb, 2003, p. 42

15 See Case Essent, *op.cit.,* note 8, par. 36 and Josipović, *op.cit.*, note 14, p. 13

16 Although each country in the EU has its own set of rules in the area of real estate law, there are certain similarities between some of the systems more closely connected to the other, for historical or other

provisions are then further intertwined with other law areas closely connected to property law, such as succession law and taxation, which creates a mosaic of as many different legal approaches to property transfer as there are Member States in the EU. However, this system, although present in every Member States of the EU, is influenced by the obligation of the States to comply with EU rules on the internal market and prohibition of discrimination. The transfer of the real property in all EU countries is in principle characterized by contractual freedom. Yet, this freedom can be substantially influenced by different factors such as consumer protection policies, public law restrictions, tax policies, inheritance rules or state subsidies granted to the building of homes[17]. All these factors can potentially lead to covert discrimination and inequality of the participants on the market.

Most EU Member States put the third-country nationals in a less favourable position, making it rather difficult for them to acquire property in general, and even impossible for some categories of real estate. Usually third-country nationals can acquire real estate only under the condition of reciprocity and sometimes particular approvals from the authorities. Certain countries allow for the acquisition of real property by third-country nationals only by means of inheritance[18].

When it comes to acquisition in favour of EU nationals, in the majority of EU countries there are no restrictions on the real estate acquisition, and they can acquire real estate under the same conditions as nationals of the state in question. Some countries even explicitly affirm the right to property of non-residents in their constitutions[19]. The Belgian Constitution, for example, grants "protection provided to persons and property for all foreigners on Belgian soil"[20], as well as the Constitution of the Grand Duchy of Luxembourg[21].

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reasons. More on families of legal systems in comparative real estate law, see: *Real Property Law and Procedure in the European Union, General Report*, European University Institute (EUI) Florence / European Private Law Forum / Deutsches Notarinstitut (DNotI) Würzburg, 31.5.2005, p. 8

17 *Ibid*., p. 22

18 See the Article 22 of the *Constitution of the Republic of Bulgaria*, Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006 , SG 12/6 Feb 2007

19 See, for example, the *Constitution of the Republic of Croatia* (Article 48), Official Gazette 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14; the *Constitution of the Republic of Slovenia* (Article 68), Official Gazette RS Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, and 75/16; the *Constitution of Romania* (Article 44), Official Gazette Part I No.233 of 21 November 1991 with the amendments in Part I, No.758 of 29 October 2003; the *Constitution of the Republic of Bulgaria*, *op.cit*. note 18, (Article 17)

20 See the *Belgian Constitution* (Article 191), Belgian Official Gazette of 31 January 2014 with the amendments from 29 November 2017

21 See the *Constitution of the Grand Duchy of Luxembourg* (Article 111), [http://www.legilux.public.lu/eli/etat/leg/recueil/constitution/20191214], accessed on 27 March 2020

3.1. An overview of restrictions regarding the real estate acquisition

On the different side, some EU countries practice restrictions in various forms. These countries mostly justify a special legal treatment of non-residents by their need to protect the national economy, in the interest of urbanistic reasons, states' defence and security strategies or to prevent the land-grabbing[22] and ensure the availability of farmland for local farmers. Hence, countries overtly discriminate between residents and non-residents, either permanently for certain types of real estate (holiday homes, forests or other protected areas of land), or temporarily, based on accession treaties signed by the said state and the EU. In the last decades these restrictions have gone through many changes, primarily because of the pressure from the EU regarding the incompatibility of such measures with the internal market.

Constitutional norms in several countries contain a provision by which, on the ground of public interest, certain classes of property can be acquired only by its nationals[23] or exclusively by persons domiciled in these countries[24].

Apart from the constitutional norms, even legislative acts in many EU countries put restrictions on the foreigners' acquisition of certain types of real estate. The most common is the ban on the acquisition of the agricultural land[25], forest land,

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22 More on the phenomenon of land grabbing in European countries can be found here: *Land Concentration, Land Grabbing and People's Struggles in Europe,* published by the Transnational Institute for European Coordination Via Campesina and Hands Off the Land Network, June 2013, [https://www.fian.be/IMG/pdf/2013_ 06_Land_in_Europe-jun2013_final.pdf#page=128], accessed on 2 April 2020

23 See for example the Estonian Constitution, Article 32, that states „On public interest grounds, the law may provide classes of property which may be acquired in Estonia only by citizens of Estonia, by certain categories of legal persons, by local authorities, or by the Estonian government." *The Constitution of the Republic of Estonia*, RT 1992, 26, 349, amended by RT I 2003, 29, 174, amended by RT I 2003, 64, 429, amended by RT I 2007, 33, 210, amended by RT I, 27.04.2011

24 As is the case in the Czech Charter of Fundamental Rights and Freedoms (as a part of the constitutional order of the Czech Republic), which in its Article 11, par. 2 allows that „the law may also provide that certain items of property may be owned exclusively by citizens or legal persons with their headquarters in the Czech and Slovak Federal Republic. The similar norm can be found in the Slovak constitution, referring to „citizens or legal persons residing in the Slovak Republic" (Article 20). The Czech Charter of Fundamental Rights and Freedoms, Ústavní zákon č. 2/1993 Sb. ve znění ústavního zákona č. 162/1998 Sb.; The Constitution of the Republic of Slovakia, Official Gazette 460/1992 Zb., 244/1998, 9/1999, 90/2001, 140/2004, 323/2004, 463/2005, 92,2006, 210/2006, 100/2010, 356/2011, 232/2012, 161/2014, 306/2014, 427/2015, 44/2017, 71/2017, 137/2017, 40/2019, 99/2019

25 See for example the Article 358.a of the *Act on Ownership and Other Real Rights* of the Republic of Croatia, Official Gazette 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 90/2010, 143/2012, 152/2014

areas under special nature protection regimes[26] and areas used for military purposes[27]. Some countries distinguish between natural and legal foreign persons in terms of eligibility for the acquisition of certain real estate categories. Such provision can be found in the Estonian Restrictions on Acquisition of Immovables Act[28] which allows the EU citizens to acquire agricultural or forest land in Estonia without restrictions, at the same time allowing the legal entities from EU countries the acquisition of a maximum of 10 hectares, unless they had been engaged in forest management or agricultural activities for longer than 3 years prior to the acquisition. This requirement can be substituted with an authorization of the local government.

Apart from described forms of a direct prohibition of acquisition for non-nationals, there are many more indirect restrictions that come in various forms[29] and they can, because of their end effect, be considered as covertly discriminatory towards non-nationals. These would be, for example, legal norms allowing the transfer of real estate only to those who are domiciled in the state or a certain region, or pre-emption right in the favour of neighbours, state[30], municipalities[31] or counties. Sweden, for example, requires that all natural and legal persons obtain

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26 *Ibid*. However, since the *lex specialis*, the *Nature Protection Act* of the Republic of Croatia, Official Gazette 80/13, 15/18, 14/19, 127/19 does not restrict the ownership of foreigners anymore, the provision from the Act on Ownership lost its applicability

27 This is the case with Spain and its restricted military areas (all islands, Strait of Gibraltar, Portugal or France borderland) where no real estate can be acquired without a prior approval. See the land report for Spain of the European Land Registry Network: [https://www.elra.eu/contact-point-contribution/spain/legal-restrictions-10/], accessed on 6 April 2020

28 Paragraph 4 of the *Restrictions on Acquisition of Immovables Act*, RT I, 23.02.2012, 11, [https://www.riigiteataja.ee/en/eli/ee/514112013013/consolide/current], accessed on 30 March 2020

29 An extensive overview of different measures in the EU countries aiming to protect the (local) owner can be found here: Swinnen, J.; Van Herck, K.; Vranken L., *Land Market Regulations in Europe*, LICOS Centre for Institutions and Economic Performance, KU Leuven, Discussion Paper, No. 354, p. 10 and further, [https://www.econstor.eu/bitstream/10419/126507/1/797825487.pdf], accessed on 3 April 2020

30 The Greek Law 998/1979 regulates the pre-emption right of the State before the intended sale of the private forest larger than 5 hectares. See the land report for Greece on [https://www.elra.eu/contact-point-contribution/greece/legal-restrictions-5/], accessed on 6 April 2020. The same procedure is prescribed by the Lithuanian Land Law for areas of state parks or areas under conservation, ecological protection and recreation priority, as well as areas under Natura 2000 protection, where the state has the pre-emption right to buy. See the land report for Lithuania [https://www.elra.eu/contact-point-contribution/lithuania/legal-restrictions-18/], accessed on 6 April 2020

31 For example, the Croatian Act on Protection and Preservation of Cultural Heritage in its Article 37 prescribes the pre-emption right of municipalities for the real estate in the category of cultural heritage. *Act on Protection and Preservation of Cultural Heritage*, Official Gazette 69/1999, 151/2003, 100/2004, 87/2009, 88/2010, 61/2011, 25/2012, 136/2012, 157/2013, 152/2014, 98/2015, 44/2017, 90/2018, 32/2020

permission for the purchase of the agriculture land (which also includes forests), in order to control the ownership structure in the country[32]. Some countries set a limit on the surface above which a permit from the competent authorities is required for the purchase of (agricultural) land[33]. Several countries require that any foreign investment into real estate is (subsequently) reported to the authorities[34]. Such norms could be a form of hidden, covert discrimination of non-nationals, while they obviously can put them in a weaker position compared to the residents and thus disable foreign investments.

All abovementioned restrictions could be classified in two groups. The first group are the restrictions of a rather permanent character, prohibiting the acquisition of the real estate of certain types in general (sometimes also to residents) and unlimited in duration (such as maritime areas, military areas, areas under special nature protection regimes etc.). Some examples of such permanent exceptions to the free movement of capital are the provisions of the Treaty on the European Union (its Protocol No.32) that permits Denmark to maintain the legislation which restricts the acquisition of second homes by non-nationals, the same exception granted in the favour of Malta following its accession in 2004 and restrictions regarding the acquisition of real estate on Åland Islands in Finland. The second category of restrictions are those that arise out of accession to the EU and are limited in duration.

3.2. New Member States in the EU and their transitional periods

More recent enlargements of the European Union in 2004 (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia), in 2007 (Bulgaria and Romania)[35] and 2013 (Croatia) gave the possibility to new Member States to keep the transitional restrictions on the acquisition of agricultural land following their accession to the EU for a certain period of time. The reason behind this concession of the Union was to enable the new Member States to

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32 See the land report for Sweden of the European Land Registry Network [https://www.elra.eu/contact-point-contribution/sweden/legal-restrictions-6/], accessed on 6 April 2020

33 Greece prohibited the purchase of an agricultural property exceeding 25 hectares without a prior approval of the authorities, *op.cit*. land report for Greece, note 30

34 For example, the French law prescribes an obligation to report such transactions to the Ministry of Economy, while Croatian transactions need to be reported to the Croatian National Bank. See the *Handbook for Real Estate Transactions*, Deloitte Legal, 2017, [https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Legal/ dttl-legal-deloitte-legal-handbook-for-real-estate-transactions.pdf], accessed on 26 March 2020

35 More about transitional arrangements for the enlargements from 2004 and 2007 can be found here: *European Union accession and land tenure data in Central and Eastern Europe*, FAO, Land Tenure Policy Series, Rome 2006, p. 27

adapt their internal systems to (substantially higher) land prices in the old Member States[36]. The "grace period" that was given to new Member States varies from one country to another, as it was a matter of pre-accession negotiations led between each country separately and the Union. The restrictions mostly did not incorporate the renting of the land, which was already before the transitory period accessible to the EU nationals of other states as well as the nationals of the state in question[37].

The 2004 wave of enlargement saw three different transitional arrangements regarding the real estate market in new Member States. The first possibility, that was negotiated by the Czech Republic, Hungary and Poland, referred to the prohibition of EU nationals from other Member States from the acquisition of secondary residences. The transitional period lasted five years after the accession. The second arrangement, agreed with the Czech Republic, Estonia, Hungary, Latvia, Lithuania and Slovakia, granted them with seven-year transition periods during which they were allowed to continue with restrictions on EU nationals acquiring agricultural and forest land. Hungary managed to negotiate even more favourable conditions, namely, that this restriction extends to not only foreign natural but also legal persons during the given period. On the other hand, Poland managed to negotiate the 12-year transition period for this arrangement[38]. These arrangements were to be reviewed by the EU after a certain time and then, if proven necessary, they could have been shortened or extended for up to three additional years. Upon the expiration of the three-year extension no further extension was possible. The third concession by the Union was given in a form of a general economic safeguard clause and it was applied to Slovenia. For up to seven years after its accession, the country was allowed to apply for authorization to take protective measures for its real estate market in the case of serious difficulties.

Hungary, Latvia, Lithuania and Slovakia had requested the extension of their transitional periods for another three years, while the Czech Republic, Malta, Cyprus, Slovenia and Estonia had not[39]. Since Poland had the longest transitional period of 12 years, it did not have the possibility to request the extension.

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36 An overview of the trends in land sales and land prices in the accession countries can be found here: Swinnen, J.F.M.; Vranken, L., *Land & EU Accession, Review of the Transitional Restrictions by New Member States on the Acquisition of Agricultural Real Estate*, Centre for European Policy Studies, Brussels, 2009, p. 35

37 *Ibid*., p. 15

38 More on the details of negotiations between the new member states and the EU can be found here: Mihaljek, D., *Free Movement of Capital, the Real Estate Market and Tourism: A Blessing or a Curse for Croatia on Its Way to the European Union*, p. 192, [http://www.ijf.hr/eng/EU3/mihaljek.pdf], accessed on 6 April 2020

39 EU Commission press release report: Frequently asked questions, Extension of transitional periods for the acquisition of agricultural land, 14 April 2011, MEMO/11/244, [https://ec.europa.eu/commis-

In the 2007 wave of enlargement Bulgaria and Romania took the possibility to restrict the EU citizens from acquiring land for secondary residences (excluding those who are residing in the country) for five years, and from acquiring forest and agricultural land for seven years after the accession. These two countries did not have a possibility to request a prolongation of their transitory periods.

During its negotiation period preceding the accession to the EU, Croatia arranged for a seven-year grace period regarding the sale of its agricultural land to non-nationals. This transitional period will expire in June 2020, but it is expected that Croatia will, like other countries that accessed the EU from 2004 onwards, request an additional period of three years.

However, during the transitional period it became evident that, despite the prohibition of alien acquisition, the number of such transactions actually increased in comparison with the period before the accession. The reason behind it could be that national laws allowed for certain exceptions to the rule of prohibition. For example, the land sale to the foreigner was allowed if the buyer was married to a national of the country in question and was residing and farming in the country for certain time before the purchase[40]. Furthermore, in all countries except for Hungary it was possible to acquire land by setting up a company with the registered seat in those countries, even in the case that the founders did not have the citizenship of that country[41], so the foreigners bypassed the regulations by purchasing land through locally registered companies or by local proxies[42]. In some countries in that period the grey area of transfer practices developed, such as "pocket contracts", which were one of the main mechanisms of land acquisition in Hungary[43]. These were contracts signed between a resident seller and a non-resident buyer that contained all the necessary details apart from the date of contract.

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sion/ presscorner/detail/en/MEMO_11_244], accessed on 27 March 2020

40 For more details on these exceptions see: Table I, Legal restrictions on the acquisition of agricultural land in the NMS, Swinnen *et al., op. cit.* note 36, p. 5

41 More on the exceptions acceptable in new Member States and particularly Slovakia can be found here: Bandlerova, A., Marišova, E., Schwarcz, P., *Ownership and use relationships to agricultural land in Slovakia after the EU accession,* Proceedings of the international conference on "Entrepreneurship in Rural Areas – EU business law I, Poľný Kesov, 12-13 May 2011, p. 20

42 For example, although foreigners were restricted from buying agricultural land in Poland until 2016, more than 200,000 ha of land was bought by Dutch, Danish, German and British companies, with the help of "fake" buyers – locals willing to help who were hired to buy the land and transfer it to the foreign company when it became possible. See: *op.cit*., *Land Concentration, Land Grabbing and People's Struggles in Europe*, note 22, p.18

43 It is estimated that around 1 million ha of agricultural land has been acquired by foreign companies in this period through "pocket contracts". *Ibid*., p. 133

They would subsequently be dated and registered in the land books after such registration would be allowed.

After the transitional period expired in 2011, all countries except for the Czech Republic applied for and were granted an extension until 2014. The extended transitional measures expired finally in 2014 (for Poland in 2016).

3.3. Post-transitional periods and "new measures" to preserve the status quo

After their transitional periods expired, some of the Member States still tried to preserve the effect of the restrictive measures and found new ways to efficiently prevent the agricultural land from the takeover by foreign investors[44]. Their new land laws changed the restrictions that were addressed by the Accession Treaties, but they introduced some new measures aiming at preserving the status quo in regard to alien acquisition of the agricultural land. Romania, for example, adopted in 2014 a new law on land acquisitions that granted the pre-emption right (in the following order) to co-owners, tenants, neighbouring owners and the State of Romania[45]. The procedure of offering the land to certain groups of potential buyers with pre-emption right was also introduced in Slovakia in 2014. If the intended sale resulted in none of the groups exercising their pre-emption right to buy, the land could then have been offered to a natural or legal person from another EU country. However, to be eligible for that, they needed to already have a permanent residence in Slovakia for at least 10 years[46]. This provision almost entirely prevented the foreign investments into Slovak land market. Poland also introduced new measures upon the expiration of its temporary restrictions, that were similar in nature to those in Romania. It further limited the surface on the agricultural land that can be bought and ordered that all transactions should be submitted for approval to the national agricultural property agency[47]. In 2014 Latvia set the new criteria for the eligibility of agricultural land buyers, following the expiration of their temporary measures like other countries did. Latvia made the approval of the

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44 During this period an important role was played by the general public, who put pressure on their national governments to prevent the foreigners from "grabbing" their land. Poland saw nationwide mass protests on the streets that lasted four months. See Ciaian, P.; Drabik, D.; Falkowski, J.; Kancs, D., *New regulations governing land sales in Central and Eastern Europe: Imposing restrictions via particularized institutions*, European Commission, JRC Technical Reports, 2017, p. 16

45 For a more thorough analysis regarding the specific provisions of this law, see Table 1 in: Ciaian, P.; Falkowski, J.; Drabik, D.; Kancs D., *New regulations governing land sales in Central and Eastern Europe. Moving towards a limited-access order?* In Market Impacts of New Land Market Regulations in Eastern EU Member States, Economics and Econometrics Research Institute Research Paper Series No 02/2016, ISSN:2031-4892

46 *Ibid*., p. 8

47 *Ibid*.

foreigners' land acquisition conditional on whether the buyer is registered for the economic activity, whether he had received direct payments under the Common Agricultural Policy, had no tax debts and gave a written statement confirming he would start with the agricultural activities within a certain time after the acquisition. Legal entities had to fulfill additional conditions, among which was that at least one of the owners or a permanent employee has professional education in agriculture[48]. The surface of the land available through these measures was also limited to a maximum of 2000 hectares in total. Notwithstanding the objections of the European Commission[49] to the land policy in Latvia, the Latvian Parliament passed a new law in 2017 that even further increased the level of restrictions for the foreigners. New provisions obliged all persons acquiring the land to speak the Latvian language[50] and they reinforced pre-emption rights of certain groups.

4. REACTIONS FROM THE EU INSTITUTIONS

EU institutions gave their opinion on the legal approach of Member States regarding the foreign land acquisitions on several occasions during the last decade. The Economic and Social Committee in its opinion from 2015 recognized that the fact that in some countries there are restrictions regarding the acquisition of agricultural land, and in some not, is leading to disparities between Member States. The Committee called on the European Parliament and the Council to "discuss whether the free movement of capital in respect of the alienation and acquisition of agricultural land and agribusinesses should be guaranteed, particularly in relation to third countries, but also within the EU"[51]. The European Parliament issued a study on the extent of the farmland grabbing in the EU in 2015, followed by a report on facilitating the access to land for farmers in 2016. The Parliament also requested from the Commission to clarify the permitted land market regulation mechanisms under the European law. In its study from 2015 it called on

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48 *Ibid*., p. 11

49 Commission raised objectives towards land sale policies of Bulgaria, Hungary, Latvia, Lithuania and Slovakia in May 2016, see the Commission press release, [https://ec.europa.eu/commission/presscorner/ detail/en/IP_16_1827], accessed on 28 March 2020

50 The required level of knowledge is B2 – upper-intermediate level of proficiency. Although the Act went through several amendments (the latest in February 2020), this provision remained in force. It applies not only to natural persons, but also to responsible persons in legal entities. For more details see the Latvian Act on Land Privatization in Rural Areas, consolidated version, available here: [https://likumi.lv/ta/id/74241#p28], accessed on 3 April 2020. Media reports on law amendments, Public Broadcasting of Latvia, available here: [https://eng.lsm.lv/article/economy/economy/saeima-passes-law-restricting-farmland-sales-to-those-with-latvian-language.a236865/], accessed on 3 April 2020

51 Opinion of the European Economic and Social Committee of 21.1.2015 on *Land grabbing — a warning for Europe and a threat to family farming (own-initiative opinion)*, points 1.8 and 1.9, Official Journal, C 242/15

the CJEU to "show more flexibility in its interpretation of national measures that can be undertaken to restrict the free movement of capital according to justifiable political objectives"[52].

4.1. Infringement procedures by the EU Commission

Although some authors argue that similar restrictions can be found also in the "old" EU Member States legislation[53], the European Commission found the measures that countries introduced after their transitory periods have expired disputable and in March 2015 formally requested from these States to submit their observations on the national provisions regarding the land acquisition. The Commission found that several norms could potentially "leave room for discriminatory treatment of investors from other Member States". The Commission further assessed that Bulgaria, Hungary, Lithuania and Slovakia's national laws contained "several provisions which, under EU law, may be considered to restrict the free movement of capital and freedom of establishment" [54]. The concerning provisions included "a residence requirement in the given country, restrictions on persons without a local residence or previous local business activities, various restrictions on persons lacking professional knowledge, […], as well as legal uncertainty related to the prior approval of sales contracts[55]. These letters of formal notice, by which the Commission required an answer from the Member States within 2 months, were the first stage of the EU law infringement process pursuant to the Article 258 of the TFEU. Only a month later, the same procedure was started against Latvia[56]. In both cases the Commission stated that, although the Member States are permitted to set their own legal framework to support rural development, these measures "must be in line with EU law".

Following these events, in May 2016 the Commission has formally requested all five countries to amend their legislation and bring it into line with the EU law within another two months. According to the press release published on behalf of the Commission, the Commission's "main concern in Bulgaria and Slovakia

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52 *Extent of Farmland Grabbing in the EU*, a Study of DG for Internal Policies, Policy Department B: Structural and Cohesion Policies, p. 58, May 2015, IP/B/AGRI/IC/2014-069, PE 540.369, [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/540369/IPOL_STU(2015)540369_EN.pdf], accessed on 31 March 2020

53 Ciaian *et al.*, *op.cit.* note 45, p. 12 and further

54 Press release of the European Commission from the 26 March 2015, IP/15/4673, [https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4673], accessed on 23 March 2020

55 *Ibid*.

56 Press release of the European Commission from the 29 April 2015, IP/15/4877, [https://ec.europa.eu/commission/presscorner/detail/EN/IP_15_4877], accessed on 23 March 2020

is that buyers must be long-term residents in the country, which discriminates against other EU nationals. Hungary has a very restrictive system which imposes a complete ban on the acquisition of land by legal entities and an obligation on the buyer to farm the land himself. In addition, as in Latvia and Lithuania, buyers must qualify as farmers. While the Commission agrees that national authorities should be able to properly regulate farm land markets to maintain such land in agricultural use and promote local development, it found a number of these measures excessively restrictive and discriminatory in terms of attracting investment in rural development."[57]

However, notwithstanding this warning of the Commission and some minor amendments to their land sale provisions, these countries did not entirely amend their legislation. Still, the Commission closed the case regarding Lithuania on 7 March 2019 and regarding Slovakia on 10 October 2019. The cases regarding Hungary, Latvia and Bulgaria still remain open[58]. In the meantime the Commission started another procedure against Hungary for alleged unlawful termination of foreign investors' usufruct rights related to agricultural land, which led to a referral to the Court of Justice of the EU on the ground of violation of principles of free movement of capital and freedom of establishment. In two separate proceedings[59] the CJEU found that Hungary has failed to fulfill its obligations arising from the EU law – principle of the free movement of capital and it infringed the right to property guaranteed by the Charter of Fundamental Rights of the EU by depriving the nationals of other Member States of their rights of usufruct on agricultural land[60,61].

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57 EU Commission press release, *op.cit*. note 49

58 As of 5 April 2020

59 Joined Cases C52/16 (*SEGRO Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala*) and C113/16 (*Günther Horváth v Vas Megyei Kormányhivatal*), ECLI:EU:C:2018:157, and the separate case C-235/17 (*European Commission v Hungary*), ECLI:EU:C:2019:432

60 The Court has found that, on the grounds of various forms of Hungarian policy of preventing the foreigners from acquisition of property on agricultural land, many of them have resorted to acquiring different forms of land usage, such as usufruct. This practice led to the situation in which the beneficiaries of usufruct rights were mainly non-nationals. Hence, the law affected mostly them, which the Court deemed a restriction on the free movement of capital and indirect discrimination based on the usufructuary's nationality or on the origin of the capital. See the press release of the CJEU No. 25/18 from 6 March 2018: [https://curia.europa.eu/jcms/ upload/docs/application/pdf/2018-03/cp180025en.pdf], accessed on 6 April 2020 and the press release No. 65/19 from 21 May 2019 [https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-05/cp190065en.pdf], accessed on 6 April 2020

61 More on Hungarian economic patriotism and reasoning behind their agricultural policies can be found in Rauchegger, C., Wallerman, A., *The Eurosceptic Challenge: National Implementation and Interpretation of EU Law,* Hart Publishing, 2019, p. 103 and further

Another example of continuing restrictions on foreign investors' land acquisition is Latvia. Although the EU Commission opened an infringement procedure against Latvia already in 2015, urging for changes in the then Latvian law on purchase of agricultural land, the country did not entirely adhere to the Commission's request. Namely, they abolished some of the challenged provisions, but introduced a new one - criterion of obligatory proficiency in Latvian language for the prospective land buyers. In the following years, the Commission did not officially refer Latvia to the CJEU, nor has it closed the case against it. The Commission argues that for the time being "it is more appropriate to continue the discussion with the Latvian government outside the formal infringement procedure"[62].

4.2. EU Commission Communication on the acquisition of farmland

Having noticed that "new" Member States are facing challenges to comply with the EU internal market rules in relation to their agricultural land policies and that these difficulties did not come to an end even long after the expiration of their transitory periods, in 2017 the Commission adopted an Interpretative Communication on the Acquisition of Farmland and European Union Law[63]. With this document the Commission is attempting to instruct the Member States on how to protect their agricultural land and bring their national provisions in line with the EU legal framework. The Commission recognized that cross-border land acquisition should be assessed both from the perspective of the free movement of capital (while the right to acquire, use or dispose of agricultural land falls under the principle of free movement of capital[64]) and the freedom of establishment perspective (if the investments in farmland are serving agricultural entrepreneurial activities). The Commission further enlisted certain objectives that were recognized by the CJEU in its cases and that are, from the viewpoint of the CJEU, acceptable as grounds for restrictions in cross-border land acquisitions[65]. These objectives include: increasing the size of land holdings to prevent land speculation, preserving agricultural communities to sustain and develop viable agriculture on the basis of social and land planning considerations, preserving a traditional form of farming

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62 Commission's reasoning given in 2019 in the proceeding in front of the European Ombudsman, initiated by a Danish farmer against Latvia, Case 34/2019/MOM, [https://www.ombudsman.europa.eu/hr/decision/en/113027], accessed on 8 April 2020

63 Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, Official Journal C 350/05

64 There are decisions of the CJEU that confirm that the acquisition of the agricultural land falls under the free movement of capital principle. See case C-370/05 *Anklagemyndigheden v Uwe Kay Festersen,* ECLI:EU:C:2007:59 and case C-452/01 *Ospelt and Schloessle Weissenberg Familienstiftung,* ECLI:EU:C:2003:493

65 More on these objectives can be found here: EU Commission Communication, *op.cit.*, note 63, p. 7

(where the land owner is also a farmer), planning a permanent population and an economic activity independent of the tourism sector in certain regions, protecting military areas from being exposed to risks. It is important to stress that this list of objectives is not closed, as acceptable objectives arise out of ad hoc approach of the CJEU and its deciding on a specific set of circumstances in a single case. However, it is pointed out that each particular restriction needs to be assessed in-depth in regard to its proportionality.

Finally, the Commission enlisted some of the most common restrictions in land acquisition models throughout the Union, and assessed them through the scope of the EU law[66].

- Prior authorization requested for the transfer of agricultural land – can be acceptable in some circumstances, but must not grant discretionary powers that can lead to arbitrary use by competent authorities. All persons affected must have access to legal redress.
- If having "sufficient connection with the commune" is the prerequisite for the approval of the land transfer – this measure is disproportionate and as such not acceptable in national legal frameworks[67].
- Pre-emption rights in favour of certain categories of buyers (tenant farmers) can be justified, and it is a more acceptable measure than the prohibition of acquisition for the persons who are not farmers. The Commission also assessed the privilege for acquisition in favour of local buyers and concluded that this might often constitute covert discrimination on the grounds of nationality while it is notorious that most of the locals are likely to be nationals of the state in question.
- Self-farming obligation as a prerequisite for the acquisition of agricultural land is not accepted as an appropriate measure, also the CJEU founds it disproportionate. If the objective of the state is to keep the land in agricultural use, this can be achieved by making the purchase conditional on the written statement of the buyer that the land will be kept in use for these purposes. The Commission also found that the obligation to personally engage in agricultural work could collide with the freedom to conduct a business, as guaranteed by the EU Charter of Fundamental Rights[68]. It also precludes legal entities from acquiring the ownership of the land, which is a restriction of the free movement of capital and freedom of establishment.

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66 *Ibid*., p. 8

67 Joined Cases *Eric Libert and Others v Gouvernement flamand* (C197/11) and *All Projects & Developments NV and Others v Vlaamse Regering* (C203/11), ECLI:EU:C:2013:288

68 EU Commission Communication, *op.cit*. note 63, p. 11

- Professional qualifications in agriculture as a prerequisite for buying agricultural land is a disproportionate measure. The Commission explains that none of the Member States have a "farmer" as a regulated profession that would require a certain level of education, and Member States so far have not proven why a certain level of qualification would be a *conditio sine qua non* for the acquisition of the agricultural land.
- The condition of having a registered residence in the vicinity of the land that is an object of the purchase[69] was also ruled out as incompatible with the internal market – the free movement of capital. Such a requirement would also collide with the right to choose a residence and move freely within the territory of the Member States, which is a right guaranteed by the TFEU (Article 21) and the Charter of Fundamental Rights of the EU (Article 45). Here the Commission drew a parallel with the requirement of speaking a language of the country in question (as seen in the Latvian legislation) and states that such a requirement would "meet very similar objections" as to its discriminatory effect.
- Limited surface of agricultural land available for purchase per investor is a restriction to the free movement of capital, whereby acquisition caps on the national level can be acceptable in certain circumstances. As with other measures, the justification and proportionality of this measure needs to be well examined to assess whether it can be replaced by different and more moderate measures.

Although it seems that Commission defined many national property acquisition provisions as disproportionate and as such not compatible with the EU law, it did say under which conditions certain measures could be deemed acceptable. In the final remark the Commission concludes: "The main condition is that the objectives are clearly set out and that the instruments chosen are proportionate to these objectives in the sense that they do not go beyond what is necessary and that they are not discriminatory"[70].

5. PROPORTIONALITY TEST OF THE NATIONAL MEASURES

The principle of proportionality (together with the principle of subsidiarity) is one of the general principles of European law. It is rooted in the Article 5 of the TEU and the Protocol No.2 (to the TFEU on the application of the principles of subsidiarity and proportionality) and further developed in the practice of CJEU. This principle applies both to acts of the European institutions and Member States.

[69] Case C-370/05, *op.cit.* note 64, par. 44

[70] EU Commission Communication, *op.cit.* note 63, p. 13

However, it is applied partially differently at these two levels[71]. From the Member States' side, it requires that each national measure is based on a fair assessment. The Treaties allow restrictions on foreign investments into agricultural land, but under the condition of proportionality of such restrictive measures. National measures that are restricting fundamental freedoms, such as the freedom of movement of capital, can only be justified if certain conditions are met: a measure must be appropriate, which means that it is suitable to pursue a certain legitimate objective, it must be necessary, meaning that it must not exceed the necessary minimum to achieve the objective and there are no other less restrictive means available to pursue the same objective. It also needs to be reasonable (proportionality *stricto sensu*), whereby the comparison is not made between more possible measures, but between the effect of a certain measure and the benefit that the measure is aiming to bring[72]. Moreover, the assessed measure must not be discriminatory. It is important to notice that the CJEU has already ruled that a national measure cannot be deemed disproportionate only because other Member States have adopted less strict measures[73].

The principle of proportionality is a tool by which the Member States can and are even obliged to assess whether the measure aiming at pursuing their national legitimate objective is acceptable from the EU standpoint. However, keeping in mind that national states tend to find any possible way to protect the national interests, and knowing that "*the application of the proportionality principle in the EU can be characterised as a balancing act [...] between the levels of government, between the remaining responsibilities of the Member States and integration, and between policies and individual rights*"[74], it is inevitable that the European Union starts to practice a more rigorous control of national restrictive measures if it wishes to maintain the functioning internal market.

6. CONCLUSION

The cornerstone of the EU is the internal market, established through the Union's basic market freedoms and the prohibition of discrimination on the basis of nationality. Any restriction on the acquisition of the property by non-nationals is incompatible with the idea of the internal market. Countries aspiring to join the EU

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71 More on the proportionality in acts of the Member States, as well as the „least restrictive means" test applicable for these acts can be found here: Sauter, W., *Proportionality in EU Law: A Balancing Act?*, Cambridge Yearbook of European Legal Studies, *vol*. 15, 2013, p. 452

72 Kellerbauer, M.; Klamert, M.; Tomkin, J., *Commentary on the EU Treaties and the Charter of Fundamental Rights,* Oxford University Press, 2019, p. 474

73 Case C-384/93 *Alpine Investments BV v Minister van Financiën*, ECLI:EU:C:1995:126, par. 51

74 Sauter, *op.cit.,* note 71, p. 466

need to remove any remaining barriers to the free mobility of trade, capital, labour and enterprise with the other members of the Union. A well-established internal market requires a functioning property market where real estate can be freely purchased and sold, otherwise the free movement of people and capital is hindered. Moreover, the principle of non-discrimination on grounds of nationality is inseparable from all fundamental freedoms. In the last decades Member States have gone through many changes in their national legal systems regulating the acquisition of the real estate property by the non-nationals. Certain categories of real estate are precluded from acquisition based on the Treaties (Denmark, Malta, Åland Islands), certain are still under transitional regimes (agricultural land in Croatia). However, there is still a specific category of covert discriminatory measures that can be found in "new" Member States since the expiration of their transitional periods. Even though the Union has addressed this problem on several occasions, and most importantly, started an infringement process against some of them, it cannot be concluded that all States have unconditionally adjusted their legislative framework to the European law. In order to help the Member States comply with the requirements of the EU law, the EU Commission has issued a document that compiled the most common measures and assessed their suitability for pursuing the legitimate objectives of the States. The mechanism advised by the Commission is the test of proportionality. It is yet to be seen in the following years whether the Member States will adhere to these requests.

Although this paper has shown that there have been cases of restrictions regarding different types of property, this has changed under the influence of EU law in the last decades. Nowadays restrictions refer mostly to agricultural land (which by definition in some countries includes the forest land as well). And as much as it is obvious that certain Member States persistently try to avert the foreign takeover of their land and they avoid fully complying with the internal market, it is also quite apparent that the Union is relatively tolerant towards such national policies (as for example with Latvia). The Union's hesitancy to proceed with some infringement procedures might be politically motivated, but it surely gives a message to other Member States that different rules apply for different subjects on the internal market. It is only a matter of time when other, compliant Member States will legitimately raise an objection regarding that, and that moment might be the end of the internal market as we know it.

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UDK 346(4-67EU:497.7)
339.137
Review article

ACTIONS FOR DAMAGES FOR BREACH OF EU COMPETITION LAW – EFFICIENT MARKET PROTECTION THROUGH PRIVATE ENFORCEMENT – WITH EMPHASIS ON NORTH MACEDONIA

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ABSTRACT

protection of the principle of free market competition is one of the fundamental principles on which the European Union was established, and as such it has been embedded in the Union's founding treaties. Articles 101 and 102 of the Treaty of the Functioning of the EU explicitly prohibit agreements which prevent and restrict free market competition, and abuse of dominant market position. However, despite the fact that the principle of free market competition is one of the cornerstones of the EU, in practice there are numerous cases where companies disrupt the internal market through destructive conducts. Led by the desire for greater profit, very often companies try to circumvent the internal market rules, while remaining unsanctioned in the process. In these situations, beside inflicting harm on the market and on the economies of the Member-States as a whole, the offenders also inflict concrete damage on their competitors, and direct and indirect customers. In this regard, an important issue which arises is the question of indemnifying specific victims of such anticompetitive conducts.

In the beginning, the European Commission through the Directorate General for Competition was the sole body which had jurisdiction in the enforcement of EU competition law. However, this approach proved highly inefficient as it was impossible to supervise the conducts on such a large scale, especially when taken into consideration the number of companies which operated on the market and the absence of clear division between internal market of the union and national market. It was even more difficult to provide compensation for all which were affected. This resulted in an initiative for decentralization of the enforcement of EU competition law, with great emphasis being placed on private enforcement.

The aim of this article is to give insight of the methods for private enforcement of EU competition law. The paper firstly provides an overview of the existing legislation within the European Union concerning the enforcement of EU competition law. It then turns to the Directive

2014/104/EU, the so-called "damages directive", which is considered the crucial instrument for providing more efficient protection of the internal market. The article examines the level of transposition of the Directive among Member-States, and the effects of its implementation. In addition, two important initiatives have arisen which will be also subject of analysis. The first initiative is for the increase of power of national competition authorities, which has resulted in the adoption of the Directive (EU) 2019/1. The second initiative is for enhanced level of protection of the consumers, through the introduction of collective redress mechanism in the form of class actions against the offending companies. This initiative has resulted in proposal for a directive of the European Parliament and of the Council, which has been accepted by the European Parliament in 2019. In anticipation of the final text, the article examines the key points contained within the proposal.

Finally, the article gives an insight into the current state of play of the national legislation of Republic of North Macedonia, and the level of harmonization with the EU acquis.

Keywords: *EU competition law, antitrust, damages, class actions, private enforcement*

1. INTRODUCTION

The main objective of the European Union (hereafter EU), is to achieve complete trade liberalization within its territory. The establishment of a single market was the main motive for the creation of the Union, and to this day it remains to be one of the fundamental principles which is deeply rooted in EU's main treaties. The Treaty on the Functioning of the European Union (hereinafter TFEU) as part of the Treaty of Lisbon, *i.e.* one of the two founding Treaties of the EU, explicitly provides that within the union's territory the "free movement of goods, persons, services and capital"[1] (*i.e.* the "Four Freedoms") is ensured within the single market. In this regard, the TFEU prohibits quantitative restrictions on imports[2] and exports[3] between Member-States. The greater significance is attached to the promotion of market freedom, the more important becomes the existence of an effective mechanism which can safeguard free market competition. Competition law aims to prevent all destructive actions that would have an adverse effect on the single market, and thus ensure efficient allocation of resources for the achievement of economic benefit.

The central provisions regulating prevention of unfair competition within the EU are Articles 101 and 102 of the TFEU. Article 101 deals with agreements, decisions and practices of undertakings which have the effect of prevention, restriction or distortion of competition within the internal market.[4] Article 101 contains an

1 Article 26 (2) TFEU (Lisbon)

2 *Ibid*., Article 34

3 *Ibid*., Article 35

4 *Ibid*., Article 101

inexhaustive list of such conducts. In particular, it invalidates conducts which would have the effect of:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[5]

If a conduct by an undertaking or association of undertakings is found to fall within either of these categorizations, it would be rendered void, unless proven that it contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.[6] There are several approaches which can be adopted in order to define the relationship between Article 101(1) and Article 101(3) and how should they be reconciled in their application.[7]

Article 102 on the other hand, prohibits the abuse of dominant position by one or more undertakings. In particular, Article 102 categorizes a s abusive, actions which consist in:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[8]

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5 *Ibid*., Article 101 (1)

6 *Ibid*., Article 101 (3)

7 Jones A.; Sufrin B., *EU Competition Law*, *Text, Cases and Materials*, Oxford University Press, 6th Edition, 2016, p. 183

8 TFEU, *op. cit.* note 1, Article 102

Given the specific nature of the EU as a *sui generis* organization, the question which arises is who is responsible for supervision and enforcement of the relevant competition law provisions. On one hand, the guarantee of free market competition is one of the key aspects of the EU, but on the other, all Member-States have their own national competition laws which are enforced by national competition authorities. While it is undisputed that the protection of the free competition is a common goal, for the purpose of effective protection of competition, a clear-cut scheme of duties and responsibilities is important. Given the fact that this is a matter of EU legislation, primarily the power for enforcement of EU competition law, lies within the European Commission (hereafter EC), more specifically the Directorate-General for Competition (hereafter DG COMP)[9]. Recourse against Commission's decision may me sought in front of the Court of Justice of the European Union (hereafter CJEU).[10] The CJEU may also give preliminary rulings related on questions related to interoperation of *EU acquis*, raised by courts of Member-States.[11]

The framework for the implementation of Articles 101 and 102 TFEU by the EC is laid down in Regulation 1/2003.[12] The rules are supplemented by Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to [Articles 101 and 102 TFEU].[13] In accordance with the Regulations, the Commission has a wide range of measures at disposal to prevent actions which impede competition. The EC may impose behavioral or structural remedies against undertakings, whose actions infringe Articles 101 and 102 of the TFEU,[14] may order interim measures,[15] and it may even impose severe fines amounting up to 10% of the undertaking's total turnover in the preceding business year.[16] All of this is related to prevention of destructive actions by undertakings in the single market, and in the case such actions are detected – their efficient sanctioning. The penalties provided for in Regulation 1/2003 are intended to restore the balance within

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9 Galev G., *Institutional System of European Community Antitrust Law,* Balkan Social Science Review, *vol.* 13, 2019, pp. 27-29

10 TFEU, *op. cit.* note 1, Article 263

11 *Ibid.*, Article 267

12 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJL 001/03. The Regulation was adopted before the entry into force the TFEU, so the original wording refers to Article 81 and Article 82 of the Treaty of Rome, which correspond to Article 101 and Article 102 of the TFEU

13 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004], OJL 123/04. The same principle for the wording of the Articles applies here as well

14 Council Regulation (EC) No 1/2003, *op. cit.* note 12, Article 7 (1)

15 *Ibid.,* Article 8 (1)

16 *Ibid.,* Article 23 (2)

the single market and at the same time deter undertakings from acting in such a manner in the future.

However, in addition to disruption of the single market and Member-States economies, such actions also inflict harm on direct or indirect customers, or competitors of the undertakings that have committed the infringements. In most cases it is the customers who are at the bottom of the market chain who suffer concrete damage, as the effect of the infringement very often is passed down on them. Aside from the question of removing anomalies in the single market, the issue of indemnifying concrete victims of such prohibited actions is of equal importance. Therefore, it is essential for the EU to have a mechanism that will provide adequate compensation for the damage suffered. Such a mechanism is in line with the principle of "full compensation" for the harm suffered established by the CJEU in the cases of *Courage v Crehan*[17] and *Manfredi*.[18]

Given the vast number of persons which may be affected by an unlawful conduct, it is impossible for the EC to act and provide protection and redress to all who have been inflicted. In addition, due to the nature of the single market and the level of integration within the EU, the effect of the infringement would always go beyond the borders of a single country and affect the community as a whole. Therefore, in 2014, at the proposal of the Commission, the European Parliament adopted the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member-States and of the European Union Text with EEA relevance.[19] This Directive is the first step towards ensuring the efficient and effective compensation through private enforcement.

2. THE NEED FOR PRIVATE ENFORCEMENT WITHIN THE EU

When discussing public enforcement from policy perspective, the key objective is usually seen in the creation of deterrent effect.[20] The deterrent effect is evident predominantly from the use and imposition of fines on wrongdoers as primary method for market correction. Public enforcement is conducted through the work

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17 C-453/99 *Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. and others* [2001] ECR I-6297

18 C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6641

19 Directive 2014/104/EU of the European parliament and of the council of 26 November 2014 on certain rules governing actions for damages under national law for infringement of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/14

20 Hüschelrath K., Peyer S., *Public and Private Enforcement of Competition Law - A Differentiated Approach*, Centre for Competition Policy, CCP- Working Paper 13-5, 2013, p.4

of national competition authorities, which have limited budgets and resources to be able to combat anticompetitive behavior successfully. According to Hüschelrath and Peyer, the use of deterrence-based approach, over alternatives such as prevention which requires changes in the competitive environment or stimulation of moral commitment, is justified primarily because it is the least expensive way of public enforcement of competition law.[21] On the other hand, there are several objectives which can be pursued through private enforcement. While deterrence from future misconducts and breaches can also be achieved through private enforcement, unless it is in the form of class action or collective redress mechanism, it seems more likely that fines imposed by national competition agencies are more effective in comparison to individual lawsuits and claims for damages. Nevertheless, this hinders an objective which unlike public enforcement, private enforcement of competition law can achieve – compensation of victims for breach of competition law. In line with this is the EC's White Paper on Damages actions for breach of the EC antitrust rules form 2008, where strong emphasis is placed on achievement of corrective justice.[22]

In the evaluation of the necessity of private enforcement of competition law within the EU it is inevitable to compare the EU initiatives with the established US system, and to draw from those experiences. From a historical standpoint, within the EU public enforcement has been more important than private enforcement.[23] In the US on the other hand, private enforcement has been the dominant approach. According to prof. Jones, 90% of all antitrust cases in the US involve private rather than public action.[24] This can be attributed to the fact that unlike the EU, the US has tradition of private enforcement of competition law dating from the Clayton Antitrust Act from 1914, which encouraged the utilization of private enforcement of competition law. Additionally, the characteristics of the US legal system itself have fertilized the sprout of this method: pre-trials discovery, consolidation of cases and class actions, joint and severable liability of infringers and possibility for contingency fees are just a number of concepts which stimulate private enforcement.[25]

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21 *Ibid.*

22 Commission of the European Communities, *White Paper on Damages actions for breach of the EC antitrust rules,* 2008, [https://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf], accessed 28. February 2020

23 Whish R.; Bailey D., *Competition Law*, Oxford University Press, 7th Edition, 2012, p. 295

24 Jones A., *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford University Press, 1999, p.79

25 Jones A., *Private Enforcement of EU competition Law: A Comparison with, and Lessons from the US*, Transnational Law Institute, TLI Research Paper Series, Research Paper 10/2016, p. 6

In stark contrast, the lack of these mechanisms has resulted in a very small number of cases for private enforcement of EU competition law, ranging from just 54 judgements in 1999 up to 146 in 2011.[26] These numbers can be attributed predominantly to the fact that unlike the US, the EU has member-states each with their own national legislation regulating competition law, making harmonization and unification more difficult. The principle of national procedural autonomy makes enforcement of EU competition law dependent on the procedural, evidential, and substantive rules governing civil litigation applicable in each Member-State.[27] Additionally, the EU *acquis* lacks provisions which would stimulate private enforcement. Namely, both of the founding treaties are silent on this issue, and for a long time there had been confusion and division in relation to the application of articles 101 and 102 of the TFEU and the rights which they confer upon individuals.[28] While there has been a strong initiative towards promotion of private enforcement of competition law, the period of a decade seems quite short for developing a mindset and measuring the results compared to the longer tradition in the US.

There is an ongoing debate for the need of establishment and promotion of mechanisms for private enforcement of EU competition law. While majority of authors supports this initiative and considers it beneficial both from policy[29] and economic perspective[30], there are some authors who look at it with a dose of suspicion and reluctance.[31] What is undisputed however, is that in the process of establishment of private enforcement system, experiences of the US system have to be taken into consideration. As evident from the initiatives within the past decade the EC has taken a proactive stance towards implementation of efficient mechanisms for private enforcement primarily through accepting concepts stemming from the common law systems. Private enforcement has been recognized as a necessity for achieving the objective of compensating victims of anticompetitive behavior in situation where the Commission itself does not have the power do so. In the White Paper form 2008, the Commission echoed the need to provide minimum rules regarding full compensation of persons affected by anti-competitive prac-

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26 Rodger B. (ed), *Competition Law: Comparative Private Enforcement and Collective Redress Across the EU,* Wolters Kluwer International, 2014, p.87

27 Jones, *op. cit.* note 25, p. 13-14

28 *Ibid.*

29 Berrisch G.; Jordan R.; Salvador Roldan R., *E.U. Competition and Private Actions for Damages*, The Symposium on European Competition Law, Northwestern Journal of International Law & Business, *vol.* 24, issue 3, 2004

30 Hüschelrath; Peyer, *op. cit.* note 20

31 Wills W.P.J., *Should Private Antitrust Enforcement be Encouraged in Europe?*, World Competition, *vol.* 26, Issue 3, September 2003, pp. 473-488

tices. Emphasizing that, due to the lack of an effective mechanism, victims fail to receive compensation of up to several billion euros annually.[32] These statistics quantify the cost of the absence of efficient mechanism for private enforcement.[33] The period of publication of the report coincides with the rise of the number of damages litigations for breach of competition law, most notably in Germany, the Netherlands and the United Kingdom.[34]

3. COMPENSATION FOR DAMAGES UNDER THE DIRECTIVE 2014/104/EU

As a result of the EC's initiative, Directive 2014/104/EU was adopted in 2014 as the first attempt to improve the possibility of adequate compensation for those affected by anti-competitive conducts.[35] The Directive is the most significant step towards decentralization of the enforcement of EU competition law.[36] The purpose of the Directive is to provide minimum standards in all Member-States for the compensation of victims of illicit practices, regardless for whether the victims are other companies or consumers. Bellow we outline the main features of the Directive.

Full compensation. The Directive incorporates the principle of full compensation established by the CJEU in the *Courage v Crehan* and *Manfredi* cases. Article 3 provides that Member-States are obliged to provide full compensation to both natural and legal persons.[37] Accordingly, full compensation should cover actual loss suffered, loss of profit, plus the payment of interest,[38] but should not be interpreted as widely as to cover punitive damages or multiple types of damages which would lead to overcompensation.[39] Since in practice it is very difficult for victims to prove and to substantiate the amount of loss, the Directive asserts a rebuttable presumption that cartels cause harm, and the national courts have the power to estimate the loss once the existence of cartel is established.[40] In order to be able

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32 Commission of the European Communities, *op. cit.* note 22. p.2

33 Whish; Bailey, *op. cit.* note 23, p. 295

34 Funke T.; Clarke O., *The EU Damages Actions Directive*, Getting the Deal Through – Private Antitrust Litigation, 2016, p.1 [https://www.osborneclarke.com/media/filer_public/28/2a/282a0ac7-4563-4b77-afff-83c283d357cf/the_eu_damages_actions_directive.pdf], accessed 20. February 2020

35 *Ibid.*

36 Rodger B.; Ferro M.S.; Marcos F., *The Antitrust Damages Directive: Facilitation Private Damages Actions in the EU?*, Journal of European Competition Law & Practice, *vol.* 10, 2019, p. 129

37 Directive 2014/104/EU *op. cit.* note 19, Article 3.1

38 *Ibid.*, Article 3.2

39 *Ibid.*, Article 3.3

40 Funke; Clarke, *op. cit.* note 34, p.1

to calculate the actual damages, the EC has issued practical guide for quantifying harm in actions for damages.[41]

Effects of national decisions. Decisions of national competition authorities which establish breach of competition law have two-fold effect: at national and at Union level. At national level, the Directive establishes that decisions for infringement are irrefutably established for the purpose of actions for damages in front of national courts.[42] This improves the position of the affected victims as they would not need to prove that over again that a violation has been committed. The Directive enlarges the number of authorities whose decisions have binding power, since in the past only decisions of the EC had binding effects upon national state courts. At the union's level, decisions rendered in one Member-State may not be binding upon courts in other Member-States, however can be presented as a *prima facie* evidence that infringement of competition law has occurred.[43]

Disclosure of evidence. Disclosure of evidence is one of the most notable novelties contained within the Directive. The concept of disclosure of documents is deeply rooted in the Anglo-Saxon legal tradition, but in recent years it has slowly started to emerge in continental law systems. The Directive explicitly provides that in proceedings related to actions for damages, upon requests of claimants, courts can compel the defendant or third parties to disclose evidence in their possession.[44] This provision is justified due to the fact that in most cases there is an inequality of information between the parties, as most of the affected parties have no insight into documents relevant to the infringement. Therefore, disclosure of evidence can restore the balance so that the claimants are able to support their claim effectively. However, the Directive provides that such requests must be justified, *i.e.*, there must be a reasoned justification for the party requesting the documents as evidence. Furthermore, the request must be specific and refer to a specific document or category of documents as evidence for whose relevance the claimant has to substantiate based on reasonably available facts and reasoned justification.[45] More importantly, the evidence sought should enable the aggrieved party to affirm its claim, not to serve as a basis for so-called "fishing expeditions`' for seeking new grounds for future claims.

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41 European Commission, *Commission Staff Working Document, Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty of the Functioning of The European Union*, 2013, [https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf], accessed 03. March 2020

42 Directive 2014/104/EU *op. cit.* note 19, Article 9.1

43 *Ibid.*, Article 9.2

44 *Ibid.*, Article 5.1

45 *Ibid.*, Article 5.2

In the event that the court requests the defendant to submit evidence, they should have appropriate measures to protect the information contained within the evidence.[46] In such situations, the courts have several measures to protect the confidentiality of the information. For example, courts can only disclose information to a limited number of people which can additionally sign an NDA or confidentiality agreement, or they may redact the content of the evidence. It is important to note that national competition authorities are held to a more lenient standard, as they can refuse to disclose evidence used in ongoing investigation.[47] A point of contention in the process of adoption of the Directive was the issue for disclosure of leniency statements and settlement submissions. Although the CJEU has held on two occasions, first in the *Pfleiderer*[48] and later in *Donau Chemie*[49] that such documents are not exempted form disclosure, the Directive adopts opposite approach and grants exemption on such categories of evidence.

Longer statute of limitations. Until the entry into force of the Directive, the statute of limitations varied among Member-States. The goal within the Directive is to provide predictability and fair chance for the aggrieved to receive compensation, by establishing longer limitation periods, and clear guidelines for their computation. Accordingly, Article 10.3 stipulates that the statute of limitations for the initiation of compensation proceedings shall be at least 5 years.[50] Additionally, the limitation period is subjective *i.e.* it is established and calculated from the perspective of the aggrieved party. The limitation period would not begin to run before the infringement has ceased; the aggrieved party knows the identity of the infringer; is aware that the behaviour constitutes an infringement of competition law; and that due to the infringement it has suffered harm.[51] Additionally, the Directive stipulates that the limitation period would be suspended or interrupted if an investigation is conducted, and that suspension would end at the earliest one year after the infringement decision has become final.[52] Accordingly, NCA's should publish their decisions in a timely manner so that confusions regarding the limitation periods are avoided.

Joint and several liability. In order enable the principle of "full compensation" to be effectively fulfilled, the Directive provides that infringing companies are

46 *Ibid*., Article 5.4

47 *Ibid*., Article 6.5

48 C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECLI:EU:C:2011:389

49 C- 536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* [2013] ECLI:EU:C:2013:366

50 Directive 2014/104/EU *op. cit.* note 19, Article 10.3

51 *Ibid*., Article 10.2

52 *Ibid*., Article 10.4

jointly and severally liable for the caused harm.[53] The aggrieved party has the right to seek compensation for the harm suffered by any of the infringing undertakings, which has two-fold effect – it gives the aggrieved party additional level of protection to recover damages regardless whether one of the infringing companies goes insolvent, or does not have sufficient assets, and additionally it prevents companies from shielding from liability by acting through affiliate or daughter companies. Once the victim(s) has been indemnified the undertaking may seek recourse against other infringing undertakings. However, the Directive provides two exceptions to this rule:

- The first exception relates to immunity recipients, which are jointly and severally liable only in relation to their direct or indirect purchasers of providers, and to the other injured parties only when full compensation cannot be obtained from the other undertakings involved in the infringement of competition law.[54] In this regard immunity recipients, limit the scope of their liability only towards their purchaser, and secure lowest ranking for indemnification towards all other aggrieved parties.
- The second exception relates to undertakings classified as small and medium entities (hereafter SME) under the Commission Recommendation 2003/361/EC, *i.e.* companies with market share of less than 5% at the time of the infringement, when the application of the rules of joint and several liability would seriously endanger the economic viability of the SME.[55] However the Directive provides for an exception to this exception, by stipulating that it would not apply in cases where the SME has already committed infringement in the past or where the SME was the leader in the coercion or infringement.[56]

Passing-on of overcharges. In cartel situations, very often the direct purchasers of the infringing undertakings have the opportunity to compensate for the increased prices by way of charging higher price than to their customers. In instances like this, the increased price may be passed down through the supply chain all the way to the end-customers, as these are the only one that do not have the chance to "pass-on" the overcharges. Prior to the adoption of the Directive the passing-on defense was not unanimously accepted.[57] Since the goal of the Directive is to achieve full compensation to the injured parties, seeking indemnification for loss which has been passed down, would inevitably lead to overcompensation. In order

53 *Ibid*., Article 11.1

54 *Ibid*., Article 11.4

55 *Ibid*., Article 11.2

56 *Ibid*., Article 11.3

57 Whish; Bailey, *op. cit.* note 23, p. 310-311

to avoid this, the Directive deals with the passing-on of overcharges. For instance, the infringing undertaking may seek reduction of the compensation claimed by its direct purchaser if it can prove that the overcharges have been passed down to its' direct purchasers. The burden of proof regarding the "passing-on" would be on the side of the infringing company, however it may request disclosure of evidence from the opposing side (for example, internal communication regarding price calculation, methodology for price determination towards its customers etc.).

The difference between what is claimed, and what the infringing undertaking would prove that has been passed down, is actually the loss suffered by the infringer's indirect customers. In reality, indirect purchasers have much more difficulty in proving that overcharges have been passed down to them. In order to allow indirect customers to claim damages, the Directive sets forth a refutable presumption that passing-on of overcharges has occurred when:

- the defendant has committed an infringement of competition law;
- the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
- the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them. [58]

The Directive was first concrete step towards implementation of effective mechanism for indemnification victims of anticompetitive behavior. The deadline for its transposition was 27.12.2016.[59] However, by the end of 2016, 21 of the Member-States failed to communicate successful transposition of the Directive, which led to the dispatch of Formal Notice to these Member-States at the beginning of 2017.[60] By the end of 2017 most of the Member-States took the necessary measures for implementation of the Directive, except Greece, Bulgaria and Portugal who did so at the beginning of 2018.[61]

Despite the implementation of the Directive, there hasn't been much of a shift in a positive direction in regard to decrease of anticompetitive actions, or successful indemnification of the victims of such actions. Although the Directive is a positive and necessary step towards higher level of protection from infringements of EU competition law, there are additional measures that need to be taken. In April

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58 Directive 2014/104/EU *op. cit.* note 19, Article 14.2

59 *Ibid.*, Article 21

60 Status of the transposition of the Directive 2014/104/EU, 2020, [https://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html], accessed 10. March 2020

61 *Ibid.*

2018, the EC announced the implementation of a New Deal for Consumers, with the aim of enhancing efficiency and effectiveness in consumer protection.[62] The New Deal should be implemented through two initiatives: strengthening the role national competition authorities, and establishment of collective redress mechanism. Both initiatives are elaborated below.

3.1. Strengthening the role national competition authorities

The strengthening of national competition authorities is one of the essential prerequisites for ensuring effective functioning of the single market. At the moment, the competences and the powers of NCA vary significantly from one Member-State to another. Additionally, even if at first glance it seems that some of the NCA's have the same competences and powers, there is a difference and imbalance regarding the enforcement activities. These imbalances have led to the creation of "safe havens" within the EU where anticompetitive actions remain unsanctioned.[63]

In 2017, the EC published Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member-States.[64] The Commission's Assessment estimates that due to the presence of undiscovered cartels, a loss оф 181-320 billion euros annually occurs, which is approximately 3% of EU GDP.[65] In the Assessment, the Commission identifies four factors that reduce the effectiveness of NCA's:

- Lack of effective competition tools;
- Lack of powers to impose deterrent fines;
- Divergences between leniency programmes in terms of summary applications, core principles, protection of self-incriminating material and interplay with individual sanctions can lead to less effective competition enforcement against cartels;

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62 European Commission, *European Commission Press Release*, 2018 [https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3041], accessed 15. March 2020

63 Burke P., *EU Directive strengthens competition authorities of the Member States to be more effective enforcers of EU competition law*, 2018, [https://www.carteldamageclaims.com/eu-directive-strengthens-competition-authorities-of-the-member-states-to-be-more-effective-enforcers-of-eu-competition-law/], accessed 15. March 2020

64 European Commission, *Comission Staff Working Document Impact Assessment Accompanying the Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal marke*t, 2017, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017SC0114], accessed 10. March 2020

65 *Ibid*., p.9

- Lack of safeguards for NCAs to act independently when enforcing the EU competition rules and have the resources they need to carry out their work.[66]

Taking these obstacles into account, on 11 December 2018, the European Parliament adopted Directive (EU) 2019/1 to empower the competition authorities of the Member-States to be more effective enforcers and to ensure the proper functioning of the internal market.[67] The Directive contains provisions aimed at making progress in each of the four directions identified as problematic.

Regarding the lack of effective tools to combat infringements of competition law, the Directive provides that Member-States should empower NCA's to conduct unannounced inspections, and particularly and at minimum: enter any premises, examine the books and other records related to the business and access any information; obtain copies of or extracts from such books or records and; seal any business premises and books or records for the period and to the extent necessary for the inspection; ask representatives for explanations on facts or documents relating to the subject matter and purpose of the inspection and record the answers.[68] Furthermore, NCA's are authorized to carry out unannounced inspections of homes of directors, managers, and other members of staff of undertakings or associations of undertakings if there is any doubt that documents which would be of interest to the investigation are located there.[69] In addition, Member-States are obliged to empower NCA's to grant interim measures in situations where there is a risk that the conduct may cause irreparable harm to competition.[70]

The Directive makes a significant step towards empowerment of NCA's in imposing deterrent fines. It requires Member-States to empower NCA's to impose effective, proportionate and dissuasive fines on infringers, either in their own enforcement proceedings, or in non-criminal judicial proceedings.[71] To prevent possible abuses by companies by setting up special purpose vehicles with ultimate intention to avoid penalties, the Directive provides a broad notion of "undertaking" by making referral to its interpretation by the CJEU and by explicitly providing that it should encompass parent companies, subsidiaries as well as potential legal or

66 *Ibid*., p.15

67 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11

68 Directive (EU) 2019/1, *op. cit.,* note 67, Article 6.1

69 *Ibid*., Article 7.1

70 *Ibid*., Article 11.1

71 *Ibid*., Article 13.1

economic successors of the undertaking.[72] Additionally, the Directive sets a minimum standard for the maximum fine that may be imposed by NCA's, which may not be less than 10% of the worldwide turnover of the undertaking or association of undertakings in the business year preceding the year in which the decision is rendered.[73]

The Directive also contains provisions aimed at establishing mechanisms for effective leniency programs. Firstly, Member-States are obliged to authorize NCA's to grant immunity to companies approaching for cooperation and disclosure of secret cartels.[74] The Directive also sets out the conditions which undertakings must meet to qualify for immunity. Most importantly, the applicant for immunity has to submit evidence for a secret cartel, which would enable the NCA to carry out a targeted inspection, and for whose existence the NCA does not possess sufficient evidence yet.[75] In addition, the applicant must fulfill the general requirements laid out in the Directive: the applicant must have ended its involvement in the cartel at the latest immediately after its leniency application; it has to cooperate with the NCA during the whole process which particularly encompasses disclosing relevant information and evidence; it has to remain at disposal of the NCA for establishment of the factual situation; it has to make its directors, managers and staff available for interviews with the NCA; it must not be involved in destruction and falsification of documents and it must not disclose its involvement in leniency program during the investigation.[76] The Directive also provides for the possibility for inclusion of a wider range of undertakings involved in anticompetitive practices wishing to cooperate. However, given the fact that not all applicants would fulfill the requirements for immunity, the Directive also provides for reduction of fines as part of the leniency programs. Accordingly, undertakings which that do not qualify for an immunity may receive a reduced sentence if they fulfill the general conditions, and submit evidence which represents significant added value for the purpose of proving an infringement.[77]

The Directive also provides that NCA's staff y must be protected from political or any other external influence in their operational activities. Particularly, staff cannot seek or take any instructions from government or any other public or private entity when carrying out their duties.[78] In order to safeguard the independence of

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72 *Ibid*., Preamble, paragraph 46

73 *Ibid*., Article 15.1

74 *Ibid*., Article 17.1

75 *Ibid*., Article 17.2

76 *Ibid*., Article 19

77 *Ibid*., Article 18

78 Directive (EU) 2019/1, *op. cit.,* note 67, Article 4.2.(b)

the NCA's, members have to be selected in clear and transparent procedures laid out in advance.[79] Additional protection is offered to the employees by limiting the grounds for their dismissal only to serious misconduct under national law, or if they no longer fulfill the conditions required for the performance of their duties. Particularly, employees cannot be dismissed if they exercise their powers granted by the Directive.[80] Member-States are also required to provide sufficient resources to NCA's for efficient and effective functioning (qualified stall, financial, technical and technological resources), as well as independence in the spending of the allocated budget.[81]

The adoption of this Directive is an important step towards strengthening the role of national competition authorities in the battle for securing free market competition. While it is undisputed that the strengthening of the role of the NCA's is a step towards more efficient public rather than private enforcement of competition law, the empowerment of the first approach would not undermine the efficiency of the latter. In this regard the methods of enforcement do not contradict, but rather complement each other. Namely, the effective detection and sanctioning of infringements of the NCA's can also result in increased actions for damages against infringing undertakings. Given the fact that the Directive was adopted a little more than a year ago, it is still too early to assess the impact it has on single market. Member-States have a deadline for implementation of the provisions by 4 February 2021, when more detailed reports on its application and effectiveness are expected.

3.2. Establishment of collective redress mechanism as a means for proper consumer protection

In recent years, a number of cases have been discovered within the European Union where companies have infringed EU competition law: starting in 2015 with the "Dieselgate"[82] emissions scandal up to the Facebook - Cambridge Analytica[83] case that was announced in 2018. These scandals have caused harm to a large number of citizens within the EU, and at the same time have allowed companies

79 *Ibid*., Article 4.4

80 *Ibid*., Article 4.3

81 *Ibid*., Article 5

82 In 2015, the US Environmental Protection Agency revealed that Volkswagen had installed software in Volkswagen, Audi, Skoda, Porsche and Seat to regulate the emissions of gases when testing vehicles so they could meet the set standards, whereas in the actual use of the vehicles the emission was 3 times higher

83 In 2018, it was announced that Cambridge Analytica was processing private data of millions of Facebook users without permission, which was then used for political purposes

to make illicit profits. One way to reduce the negative impact of such actions and prevent them from happening in the future is to establish an effective mechanism to compensate affected consumers.

While the need for collective redress mechanism has been advocated for longer period, the efforts have only resulted in the adoption of the Directive 2009/22/EC,[84] the so called "Injunctions Directive", according to which qualified representative bodies may seek injunctive relief and take actions aimed at to stop harmful practices, but do not have the power to seek compensation for consumers.

Currently within the EU, only 19 of the Member-States have within their legislation some sort of legal remedy to victims of mass harm.[85] However, there are significant differences within the legal systems, the effectiveness also varies from one Member-State to another, and most significantly, neither has adopted a mechanism to address cases with cross-border implications.[86] Consumers, on the other hands, do not have the necessary means to deal with the effects of anticompetitive practices - the procedures are complicated and quite expensive, so they have no incentive to initiate proceedings individually. By comparison, following the outbreak of the Dieselgate scandal, due to the existence of a developed class action system, consumers in the US have been able to obtain compensation for the value of the vehicle, or pair of the defects in the vehicles, and additional compensation in damages varying between $5,000 and $10,000 - unlike the EU, where Volkswagen still refuses any compensation.[87]

It was exactly Dieselgate that prompted the EC's proposal for adoption of a new Directive which should ensure consumer protection through the implementation of a collective redress mechanism (hereafter Proposal Directive).[88] On March 26 2019, the Proposal Directive was also adopted by the European Parliament.[89] The

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84 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L 110

85 European Parliament, *Press Release, First EU collective redress mechanism to protect consumers*, 2018, [https://www.europarl.europa.eu/news/en/press-room/20181205IPR21088/first-eu-collective-redress-mechanism-to-protect-consumers], accessed 10. March 2020

86 Vanhooydonck H., *Consumer Rights: Time for a Class Action Mechanism in the EU*, 2019 [https://www.greens-efa.eu/en/article/news/consumer-rights-time-for-a-class-action-mechanism-in-the-eu/], accessed 11. March 2020

87 *Ibid*.

88 European Commission, 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 [2018]

89 European Parliament, Position of the European Parliament adopted at first reading on 26 March 2019 with a view to the adoption of Directive (EU) 2019/... of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing

Proposal expends the existing 2009 Injunctions Directive. It takes into account recent developments which have transnational implications and aims to provide for effective cross-border protection mechanisms in various areas such as financial services, tourism, telecommunications, energy, data protection, health and environmental protection.[90] The main features of the Proposal Directive are:

- Introduction of new and harmonization of the existing systems for collective redress for mass harm caused by anticompetitive conducts.
- Reduction of the financial burden arising from procedures for indemnification of victims, as well as providing access to justice through the system of collective representation.
- Facilitated access to justice by enabling consumers to be represent by qualified representative entities (hereafter QRE) in proceedings related to anticompetitive conduct. Representative bodies can be in the form of consumer protection organizations, NGOs, or any non-profit organizations, which should not have a financial connection with a law firm.
- Striking a balance between effective consumer protection on the one hand, and protection of businesses from abusive lawsuits on the other hand. Namely, the Proposal Directive adopts the "loser pays principle", allowing the prevailing party to recover its legal costs, which at the same time acts as a preventive mechanism for filing frivolous lawsuits.[91]

From the outset of the publishing of the Proposal, parts of it have been subject to scrutiny and criticism. Most notably, the provisions regarding the QRE which should have the power to bring actions on behalf of the consumers have been criticized for being vaguely defined.[92] While the Proposal stipulates that these QRE would have to be independent and should not have financial agreements with law firms it does not contain detailed provision neither on the criteria which it should fulfill to be established as a QRE nor on the possibilities for its funding and budgeting. Additionally, unlike the procedures of the US style of class action, the Proposal fails to sufficiently address the manner in which it will be determined whether putative actions fulfill the criteria to be established as class actions. This can lead to abuse of the collective actions' procedures, and can be a powerful tool to pressure companies potentially facing negative press and public scrutiny.

Directive 2009/22/EC, 2019, [https://www.europarl.europa.eu/doceo/document/TA-8-2019-0222_EN.pdf], accessed 26. February 2020

90 European Parliament, *Press Release*, *op. cit.*, note 85

91 European Parliament, *Press Release*, *op. cit.*, note 85

92 Mc Tigue, M., *An EU Approach to Class Action Litigation*, 2019, p.2, [https://www.akingump.com/a/web/106088/Class-Actions-Alert.pdf], accessed 13. March 2020

Given the fact that some Member-States have already adopted systems for collective actions, it is important to note that the goal of the Proposal is not to abolish and replace those systems, but merely to provide a framework for specific representative actions which would give consumers at least one familiar and uniform mechanism on EU level.[93] One of the most significant steps towards effective consumer protection contained in the Proposal Directive is the possibility of indemnification for a group of persons who are not *de facto* consumers of an undertaking in the true sense of the word but may be affected by its anticompetitive practices. Article 3 of the Proposal Directive defines consumers in a broad sense as to include "personal data subjects" as defined in Regulation (EU) 2016/679 (GDPR Regulation).[94] This would enable individuals whose personal data is misused and processed without consent, as in the case of Facebook - Cambridge Analytica, to be able to use this mechanism to exercise their right for protection and indemnification.

The Proposal Directive contains groundbreaking idea (at least in the context of the EU), which raises the stakes higher and beyond competition law. The successful adoption of the collective redress mechanism for infringement of competition law across the Member-States can serve as a ground for potential expansion and use of the collective redress mechanisms for other types of disputes in the future. Once it is proven that the mechanism can function properly, then it becomes a matter of modification and adjustment for its application in other spheres of corporate, commercial or labor law. In the forthcoming period the Proposal Directive will be subject to debate between the European Parliament and the European Council. After successful approval by the European Council, the Directive can be passed, and subsequently Member-States would have the obligation to transpose it into national law. Only after the completion of these subsequent processes it will be possible to assess the impact which it would have on the single market.

4. COMPENSATION FOR DAMAGES UNDER THE LAW OF REPUBLIC OF NORTH MACEDONIA

Unlike the EU, Republic of North Macedonia has not reflected these trends within the national legislation, and is yet to take concrete steps towards establishment of a more efficient mechanism for indemnification of victims of anticompetitive conducts. According to recent study which measures the competitiveness of the countries from Western Balkans in general compared with EU members states from the perspective of competition law and trough evaluation of institutional

93 *Ibid.*

94 Proposal Directive, *op. cit.*, note 88, Article 3

and legislative factors, Republic of North Macedonia has the highest score and rank among the other countries from the region.[95] However, according to another study building up on this research, in all of these countries the progress in the competition policy area is significantly slower compared to other transition indicators and areas of harmonization with the EU *acquis*.[96]

In terms of the legislation, the principle of free market competition has been raised to the highest level and as such is established in the country's Constitution.[97] The main source is the Law on Protection of Competition (hereinafter LPC).[98] Article 6 of the LPC provides that the competent supervisory authority for the protection of the free trade is the Commission for the Protection of Competition (hereafter CPC).[99]In addition, a number of regulations and directives have been implemented in national legislation as part of the process of alignment with the *EU acquis*, which have been taken as by-laws.[100]

However, despite the process of alignment of national law with the relevant EU law, so far, no amendments have been made neither towards compensating victims of anticompetitive practice, nor towards strengthening the position of the CPC. According to the official annual reports of the CPC relating to the national market, in 2018 it rendered 6 decisions establishing infringement of competition law, and the total fine amounted to 18.461.544,00 MKD (298.470,00 EUR equivalent)[101], whereas in 2017 the Commission rendered 7 decisions, and the total

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95 Sanfey P.; Milatović J.;Krešić A., *How the Western Balkans can catch up?,* European Bank for Reconstruction and Development- EBRD: Working Paper No. 186, 2016, p. 5, [www.ebrd.com/documents/oce/pdf-working-paper-186.pdf], accessed 20. June 2020

96 Tosheva E;, Dimeski B., *The competition policy in Western Balkan countries: How far they have come on the EU accession "road",* Balkan Social Science Review, *vol.* 14, 2019, pp. 31-55

97 Constitution of Republic of North Macedonia, Article 55:
"The freedom of the market and entrepreneurship is guaranteed. The Republic ensures an equal legal position to all parties in the market. The Republic takes measures against monopolistic positions and monopolistic conduct on the market. The freedom of the market and entrepreneurship san be restricted by law only for reasons of the defence of the Republic, protection of the natural and living environment or public health."

98 Law on Protection of Competition (Official Gazette of the Republic of Macedonia no. 145/10, 136/11, 41/14, 53/16 and 83/18)

99 *Ibid.*, Article 6

100 In 2012, upon the proposal of the Commission for Protection of Competition, the Government of the Republic of North Macedonia adopted 9 decrees as by-laws in accordance with the LPC, transposing relevant EU Directives and Regulations concerning the free market protection [http://kzk.gov.mk/en/category/legal-framework/competition/by-laws/], accessed 20. January 2020

101 Commission for Protection of Competition, Annual Report, 2018 [http://kzk.gov.mk/wp-content/uploads/2019/05/Годишен-Извештај-на-КЗК-за-2018-година.pdf], accessed 18. January 2020

fines amounted to 635.893.622,00 MKD (10.280.555,00 EUR equivalent).[102] Without assessing the merits of the investigation, as some of the decisions of the CPC have been appealed and there are ongoing judicial proceedings, it is important to highlight the profile of the companies and the their respective fields of operation- telecommunications, pharmaceuticals, alcoholic and non-alcoholic beverages. Determining infringement of competition law in any of these instances inevitably means that the such conduct not only harms the market as a whole, but also causes harm to consumers, customers and competitors of these companies. However, to this date, there isn't a single case in which compensation in the form of damages has been awarded to any of these categories, nor have such proceedings been initiated. This might be the result of the fact that the national legislation does not contain specific rules for indemnification in situations like these.

In regard to compensation for damages, the LPC only contains a general provision stipulating that if an action amounts to infringement of competition law, the damaged party may seek indemnification in accordance with the law.[103] Under the national legislation, the *lex generalis* for compensation of damages would be the Law on Obligations, and for the procedure for indemnification would be the Law on Civil Procedure. However, these acts also do not contain specific provisions, as neither the Law on Civil Procedure contain rules for simplified procedures for victims of mass harm, or collective redress mechanisms in the form of class action, nor does the Law on Obligations contains guidance for indemnification of victims of mass harm for infringements of competition law. Additionally, unlike the previous EU Directives and Regulations, which were adopted in a form of by-laws, from 2012 onwards there have not been similar transpositions. The lack of specific rules combined with the high costs on which the injured party would have to be exposed *a priori* have deterrent effect, discouraging consumers from the thought of initiating legal proceedings despite the suffered harm. Therefore, it is advisable and important that steps are undertaken towards implementation of mechanism which would allow victims to be indemnified for the harm suffered as a result of anticompetitive conducts on the market.

In addition, it is necessary to align national legislation with the EU *acquis*, also in regard to strengthening the role of the Commission for Protection of Competition. As the principle body responsible for the enforcement of the LPC, the CPC is one of the main factors in ensuring the efficient functioning of the market and ensuring free market competition. The CPC's latest annual reports show that ac-

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[102] Commission for Protection of Competition, Annual Report, 2017 [http://kzk.gov.mk/wp-content/uploads/2019/05/Godishen-izvestaj-2017.pdf], accessed 18. January 2020

[103] LPC, *op. cit.*, note 98, Article 58

tion has been taken to prevent market abuses, but the number of cases processed is relatively small and he companies which were fined belong to one or two industries. There is no doubt that there is a great deal of secret cartels and abusive conduct in other industries that inflict harm from the market economy all the way to the end-consumers, but with the current status of the CPC and its available resources it is unrealistic to expect that greater efficiency and effectiveness can be achieved.

5. CONCLUSION

The functioning of the single market is impossible without an efficient and effective system of protection of the principle of free competition. Therefore, building mechanisms to ensure the protection of the single market is one of the European Union's top priorities. To this end, a number of initiatives have been undertaken in the past decade aimed at strengthening the role of NCA's and enabling consumers to receive indemnification for harmful conducts through private enforcement of EU competition law.

The adoption of the Directive 2014/104 / EU is the first concrete step taken by the EU in raising the level of protection against anticompetitive acts. This has ensured the decentralization of competences with regard to enforcement of EU competition law, thus giving NCA's greater powers. The competences of NCA's in the future should be further enhanced by the implementation of Directive (EU) 2019/1 by the Member-States. In addition, the EU gives emphasis on the effective and efficient consumer protection by introducing class action as a means for collective redress. The passing of the Proposal Directive is still in motion, but its adoption and implementation by Member-States is expected in the near future.

Although it is still too early to discuss any concrete benefits of the implementation of the directives, it is expected that the number of detected and sanctioned cartels by NCA's will increase in the coming years and that consumers will be able to receive proper indemnification for the harm suffered. Unlike the EU, so far there have not been any amendments to the existing national legislation which would reflect these global trends, but are expected within the near future.

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UDK 338.46:005.56](4-67EU)
Professional paper

THE NATURE OF SERVICES PROVIDED BY COLLABORATIVE PLATFORMS*

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ABSTRACT

The objective of this paper is to analyse the nature of services provided by collaborative platforms. In this regard, we consider the approach established by the European Commission in its European Agenda on Collaborative Economy, as well as the individual decisions of the Court of Justice which examined the nature of services provided by collaborative platforms Uber and Airbnb. On this basis we formulate the criteria that enable the classification of services provided by collaborative platforms as information society services or as underlying services. As the following step in this analysis we argue that it is necessary to establish not only the nature of services provided by collaborative platforms, but also the nature of the contractual relationships concluded between subjects participating in the collaborative economy.

Keywords*: collaborative economy, collaborative platforms, service, underlying service, information society service, ancillary service*

1. INTRODUCTION

The nature of commercial transactions performed in the digital environment differs from the traditional commercial transactions realised offline.[1] This is also the case of commercial transactions performed in the collaborative economy defined by the Commission as referring to "*business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of*

* This paper is funded by the Slovak APVV project under contract No. APVV-14-0598 and by the APVV project under contract No. APVV-17-0561.

1 See Hučková, R.; Červená, K., *Commerce and Technological Development*, DAYS OF LAW, 2014, part 4: Technological Development and Law, Brno: Masaryk University, 2015, p. 99-107

goods or services often provided by private individuals."[2] This definition of the collaborative economy illustrates the fact that commercial activities realised in the digital single market[3] are enabled by the existence and functioning of the new market participants - collaborative platforms - that facilitate temporary usage of goods and services on the market provided primarily by individuals as private persons outside the scope of their primary activities (employment, business).

It is necessary to point out that the commercial activities realised in the collaborative economy do not present new or innovative activities. In contrast, these transactions consist of the sale of goods or the provision of services that can also be realised by matching the supply and demand in a traditional setting. However, the specific feature of the commercial transactions performed in the collaborative economy is the widening of the previous bilateral relationships to multilateral relationships, where a new subject - collaborative platform - intermediates transactions between the concerned parties. Therefore, we can distinguish three main participants in the collaborative economy:

a) "*service providers who share assets, resources, time and/or skills - these can be private individuals offering services on an occasional basis ('peers') or service providers acting in their professional capacity ('professional service providers');*

b) users of these; and

c) intermediaries that connect - via an online platform - providers with users and that facilitate transactions between them ('collaborative platforms')."[4]

The participation of the collaborative platform on the commercial transaction consists of the creation of an online environment that simplifies the matching of supply and demand between the service providers and their users. The commercial transaction is later performed offline - outside the collaborative platform.

Another specific feature of the commercial transactions in the collaborative economy is the fact that these transactions usually do not involve a change of ownership, as the service providers only offer assets which they already own and which

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2 Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A European Agenda for the Collaborative Economy. (SWD (2016) 184 final). p. 3

3 For a definition of the digital single market and its features within the European Union see e. g. Treščáková, D. *The Impact of Digitalization and Innovation in International Trade*, Cifrovoje parvo, Moscow: Prospekt, 2020, p. 250

4 Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A European Agenda for the Collaborative Economy. (SWD (2016) 184 final). p. 3

are utilized for other than the previously intended purpose - sharing with third persons. This can be carried out for profit or not for profit, e. g. to compensate the expenses incurred.

The issue in this regard is the question of how to assess the nature of services provided by collaborative platforms themselves. Can such services be considered as information society services provided by intermediaries where the platforms benefit from the liability exemptions as stipulated in the Directive 2000/31/EC on electronic commerce, or as underlying services provided offline? In the following chapters we will provide the analysis of the Commission's approach as well as the interpretation adopted by the Court of Justice in its decisions on the nature of services provided by collaborative platforms Uber and Airbnb. The classification of services provided by collaborative platforms either as information society services or underlying services is crucial, as it redefines the position of the collaborative platforms' operators, their rights and obligations as well as the liability that may arise if the activities of the platform do not correspond to the applicable legislation (e. g. data protection[5], consumer protection[6] etc.). As this question may require the adoption of a new legislation on the European Union level, the criteria established by the Commission and even more so by the Court of Justice may prove helpful in the ongoing discussion on how to regulate services provided by collaborative platforms.

2. THE APPROACH OF THE EUROPEAN COMMISSION

It is clear that due to the varying nature of services offered within the collaborative economy it is not easy to classify the services provided by individual collaborative platforms, as these usually do not fit neatly into one specific category. We believe that a case by case analysis will therefore be necessary, firstly to identify the services in question, secondly to analyze their nature and thirdly to classify them as information society services, underlying services or ancillary services - a classification provided by the Commission in its European Agenda on Collaborative Economy. However, the task of determining the nature of services provided by collaborative platforms is made more difficult by the fact that we must not only consider what the collaborative platform in question claims, but also whether these claims correspond to the reality. The problem in this regard arises when platforms use the

[5] In this regard see e. g. Treščáková, D.; Hučková, R., *Specific Aspects of Personal Data Protection in Electronic Commerce*, Days of Law 2015: System Questions of Private Law, Brno: Masaryk University, 2016, p. 105-119

[6] See e. g. Hučková, R., *New Mechanisms for the Protection of Consumer Rights*, Studia Iuridica Cassoviensia, 2016, p. 46-55

classification of their services as information society services in order to make the liability exemptions as stipulated in the e-Commerce Directive applicable.

The Commission considers as the determinant relevant for the examination of the question of whether a collaborative platform provides underlying services *the level of control or influence* that the collaborative platform exerts over the provider of such services. This determinant allows us to consider, whether a platform does not hide under the cover of the information society service category while also acquiring benefits from exerting a significant level of control or influence over the service provider. Significant in this regard is, firstly, that the Commission does not consider the control exerted by the platform over the user and its consequences, and secondly, the scope of control or influence to be exerted in this regard in order for a minimum threshold to be met.

In order to identify the level of control or influence exerted by the platform over the provider of the service, the Commission proposed a number of factual and legislative criteria to be considered, specifically:

a) *the criterion of price*; It is an established practice that collaborative platforms provide tools for individual services providers used to determine the final price to be paid by the user. However, if service providers cannot differ from the price set by the platform, this may indicate that the platform controls this important aspect of the transaction (one of the key contractual terms).
b) *the criterion of stipulating other key contractual terms*; The question is, who sets the relevant terms and conditions, which determine the contractual relationship between the service provider and the user.
c) *the criterion of ownership of key assets*; In this context it is necessary to determine, who is the owner of the key assets that are shared in the individual commercial transactions (vehicle, property, professional knowledge and experience etc.).

As the Commission states, in the case of a cumulative fulfillment of all of the above mentioned criteria, there are "*strong indications that the collaborative platform exercises significant influence or control over the provider of the underlying service, which may in turn indicate that it should be considered as also providing the underlying service (in addition to an information society service).*"[7]

[7] Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A European Agenda for the Collaborative Economy. (SWD (2016) 184 final). p. 3

The Commission's test to assess the nature of services provided by collaborative platforms that requires cumulative fulfillment of all of the above mentioned criteria to constitute that a collaborative platform is the provider of the underlying service, can be regarded as very strict, especially as regards the last criterion - the criterion of key assets ownership. As Devolder states, "*this requirement runs counter to the very concept of the sharing economy (i. e. optimizing the use of underutilized resources by sharing them between peers).*"[8] We can assume that collaborative platforms will only rarely be considered as the owners of the assets shared, as this is in conflict with the way in which they conduct their business, the main objective of which is to connect persons in possession of the key assets with persons looking for such assets for a remuneration. Our conclusion is also supported by the analysis of the advocate general Szpunar, who stipulated when analyzing the business activities of the collaborative platform Uber, the fact that this company does not own the vehicles in question is irrelevant, since "*a trader can very well provide transport services using vehicles belonging to third persons, especially if he has recourse to such third persons for the purpose of those services, notwithstanding the nature of the legal relationship binding the two parties.*"[9] The fact that collaborative platforms are not the owners of key assets enables them to optimize their business activities in comparison to the functioning of traditional service providers.

We believe that the above stipulated criteria are not the only criteria to be examined when trying to determine the nature of services provided by collaborative platforms. Here, it is also necessary to consider the specific position of service providers, specifically whether they act as professional or non-professional service providers. This may also provide a tool in determining the legal relationship established between the individual service providers and the platform, which may take form of an employment relationship, commercial relationship between two professional traders or even consumer relationship (only in specific cases). On the basis of this determination it will also be possible to determine the party liable for the non-performance or defective performance of the service intermediated by the collaborative platform.

Moreover, the fact that a collaborative platform provides services other than information society services will not automatically lead to the conclusion that the collaborative platform is the provider of the underlying service, as it does not provide proof of influence and control as regards the provision of underlying service.

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8 Devolder, B., *Contractual Liability of the Platform*, The Platform Economy. Unravelling the Legal Status of Online Intermediaries, Cambridge: Intersentia Ltd, 2019, p. 63

9 Opinion of the Advocate General Szpunar delivered on 11. May 2017, C-434/15 Asociación Profesional Elite Taxi. ECLI:EU:C:2017:364, p. 55

The main conclusion of the Commission in this regard is a general rule, according to which "*the more collaborative platforms manage and organize the selection of the providers of the underlying services and the manner in which those underlying services are carried out - for example, by directly verifying and managing the quality of such services - the more apparent it becomes that the collaborative platform may have to be considered as also providing the underlying service itself.*"[10]

It is necessary to point out the fact that the above stipulated rules formulated by the Commission in order to define the nature of services provided by collaborative platforms are not included in a generally binding regulation or a directive, but form a part of a legally non-binding guidance. Therefore, although these guidelines should be considered, it is also possible to deviate from them, e. g. when it is necessary to take into account the specific features of the collaborative platform's activities.

3. THE APPROACH OF THE COURT OF JUSTICE

In contrast to the Commission, the Court of Justice (hereinafter only as "Court") approached the issue of analysing the nature of services provided by collaborative platforms and the definition of criteria relevant for such determination in a less restrictive manner. Specifically, the Court examined in its decisions the nature of services provided by collaborative platforms Uber and Airbnb, which will be closely examined below.

3.1. Uber

The first decision in which the Court interpreted the nature of services provided by collaborative platforms was the Judgement of the Court in the case C-454/15 Asociación Profesional Elite Taxi[11] (hereinafter only as "Uber Spain"), in which the Court analysed the nature of services provided by the collaborative platform Uber.

The company Uber Technologies Inc. was established in San Francisco (USA) in 2009 and operates in Europe through a private limited liability company Uber B. V. established and localized in Holland, which is a subsidiary of the Uber Technologies Inc. (hereinafter together only as "Uber").

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[10] Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A European Agenda for the Collaborative Economy. (SWD (2016) 184 final). p. 7

[11] Judgement of the Court of 20 December 2017, C-454/15 Asociación Profesional Elite Taxi. ECLI:EU:C:2017:981

The Uber's Terms of Use define the services provided by Uber as services which consist of the provision of a technological platform connecting its users and unprofessional drivers, who as independent third parties provide transport and other logistical services to users. The connection between users and unprofessional drivers is realised through an application, to the use of which Uber grants users "*a limited, non-exclusive, non-sublicensable, revocable, non-transferable license,*"[12] on the basis of contractual law. The use of this application is conditioned on the basis of a registration, after which the user can reserve a ride through the application, which will be provided by a non-professional driver within the limited territory. The payment for the provision of the transport service is realised through the application from the user's account.

Uber approaches the issue of determining the nature of services provided by the platform by defining these services as exclusively information society services. This is demonstrated in numerous provisions of its Terms of Use, where Uber requires from the user the acknowledgement of the fact that his or her "*ability to obtain transportation, logistics and/or delivery services through the use of the services does not establish Uber as a provider of transportation, logistics or delivery services or as a transportation carrier.*"[13]

The dispute in the main proceedings was the action brought by a professional taxi drivers' association Asociación Profesional Elite Taxi (hereinafter only as "Elite Taxi") in Barcelona (Spain), which accused Uber of infringing the legislation in force as well as of misleading practices and acts of unfair competition (provision of transport services without the required licenses and authorisations). The Commercial Court No. 3 Barcelona asked the Court to interpret the relevant EU legislation to define the nature of services provided by collaborative platforms.

The Court firstly distinguished an intermediation service from a transport service by stating that "*an intermediation service consisting of connecting a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey is, in principle, a separate service from a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle.*"[14] According to the Court, this intermediation service meets, in principle, the criteria for classification as an 'information society service'. Here we can see that collaborative platforms usually do provide information society services. The question

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12 Uber's Terms of Service, p. 3. Available online: [https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=united-states&lang=en], accessed 20. June 2020

13 *Ibid.*

14 Judgement of the Court of 20 December 2017, C-454/15 Asociación Profesional Elite Taxi. ECLI:EU:C:2017:981, p. 34

is, however, whether these are supplemented by other services or other activities of the platform that can cause the inapplicability of the relevant provisions of the e-Commerce Directive on liability exemptions.

However, the Court also stated that a service in question is more than an intermediation service as in this case the provider of that intermediation service "*simultaneously offers urban transport services, which it renders accessible, in particular through software tools such as the application at issue in the main proceedings and whose general operation it organises for the benefit of persons who wish to accept that offer in order to make an urban journey.*"[15] The relevant aspect identified in this regard as the aspect that eliminates the possibility to define services provided by Uber as exclusively information society services is *the creation of the urban transport services' offers and organisation of its operation* for the benefit of the persons willing to accept such offers. The creation of the urban transport services' offers is also manifested in the fact that without the application provided by Uber "*the drivers would not be led to provide transport services and persons who wish to make an urban journey would not use the services provided by those drivers.*"[16]

Another factor identified by the Court as relevant for the analysis of the nature of services provided by Uber is the company's influence on the requirements that must be fulfilled by the non-professional drivers in order to be able to provide services using Uber's application. The Court considered in this regard the fact that Uber exercises *decisive influence* over these conditions, as it:

a) determines at least the maximum fare,
b) receives that amount from the client before paying part of it to the driver,
c) exercises a certain control over the quality of the vehicles,
d) exercises a certain control over the drivers and their conduct, which can, in some circumstances, result in their exclusion from the platform.

Due to the above stated determinations, the Court reached the conclusion that "*intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as 'an information society service' (…), but as 'a service in the field of transport'.*"[17] In this regard the Court also pointed out that this interpretation is confirmed by the previous case law, according to which "*the concept of 'services in the field of transport' includes not only transport services in themselves, but also any service inher-*

[15] *Ibid.* p. 38
[16] *Ibid.*, p. 39
[17] *Ibid.*, p. 40

ently linked to any physical act of moving persons or goods from one place to another by means of transport."[18]

An identical conclusion was reached by the Advocate General Szpunar, who in his Opinion similarly focused on the two aspects according to which Uber is to be considered as the provider of transport services. These include, firstly, the fact that Uber not only matches the supply to demand, but also creates the supply itself as "*it also lays down rules concerning the essential characteristics of the supply and organises how it works,*"[19] and secondly the fact that Uber exerts control over all of the relevant aspects of a transport service (price, the minimum safety conditions as regards vehicles and drivers, recommendations as regards the time when drivers provide their services, control over the drivers' behaviour by means of the ratings systems, possibility to exclude the driver from the platform etc.).

The consequence of the classification of services provided by Uber as services in the field of transport is the exclusion of the possibility to apply the provisions of the Directive 2000/31/EC on electronic commerce on these services. In this case Uber cannot apply the liability exceptions as stipulated in Articles 12-15 of this Directive (mere conduit, caching and hosting exemptions supplemented by the prohibition of imposing a general monitoring obligation).

Moreover, the provisions of the Directive 2006/123/EC on services in the internal market[20] are also not applicable, as the Article 4 (1) (d) of this Directive expressly excludes services in the field of transport from its scope of application.

In this regard, the Article 58 (1) of the Treaty on the Functioning of the European Union (hereinafter only as "TFEU") could be applicable, as this Article in connection with the freedom to provide services in the field of transport refers to the provisions of the TFEU relating to transport. Article 90 TFEU in this regard stipulates that "*the objective of the Treaties shall, in matters governed by this Title, be pursued within the framework of a common transport policy.*"[21] However, as non-public urban transport services are not yet regulated within the scope of the European Union law, the national law of individual Member States must be considered in this regard. Therefore we can conclude that with the exception of the identification of the nature of services provided by the collaborative platform

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18 See Judgement of the Court of 15 October 2015, C-168/14, Grupo Itevelesa and others. ECLI:EU:C:2015:685. p. 45-46

19 Opinion of the Advocate General Szpunar delivered on 11. May 2017, C-434/15 Asociación Profesional Elite Taxi. ECLI:EU:C:2017:364. p. 43

20 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. *OJ L 376, 27.12.2006, p. 36–68*

21 Article 90 of the Treaty on the Functioning of the European Union. *OJ C 326, 26.10.2012, p. 47–390*

Uber, it is not possible to apply the relevant legislation of the European Union as regards the regulation on the conditions for the provision of intermediation services. The individual Member States will be required to deal with this issue in their own capacity.

The above stipulated conclusions were further applied by the Court in its judgement in the case C-320/16 Uber France. The Court similarly interpreted the nature of services provided by a collaborative platform - Uber France (subsidiary of the Uber B. V. company). Uber France as a defendant faced an action brought by a private person in relation to misleading commercial practices, the aiding and abetting of the unlawful exercise of the profession of taxi driver, and the unlawful organisation of a system for putting customers in contact with persons carrying passengers by road for remuneration.

The Court applied its conclusions reached in the judgement in the case C-434/15 Uber Spain. The Court specifically considered the fulfilment of the criterion of the creation of the transport services' offers and the criterion of the decisive influence exercised over the conditions for the provision of services by non-professional drivers. In this regard the Court stated that the service in question does not inherently differ from the service that was considered in the case C-434/15 Uber Spain. Due to this the Court stated that the examined national law "*concerns a 'service in the field of transport' in so far as it applies to an intermediation service that is provided by means of a smartphone application and forms an integral part of an overall service the principal element of which is the transport service.*"[22]

In conclusion we can state that both of the above analysed decisions of the Court considered the question of whether the intermediation service, which consists of connecting individual persons with non-professional drivers by means of an online platform (online component), and the transport service (offline component) form two separate services that must be distinguished and that require the application of different legal regimes, or whether these services form one service of a mixed nature, where the transport service is the primary part of the service, while the intermediary service is only of supplementary nature. These decisions conclude that due to the fact that Uber on the one hand creates the supply and demand, and on the other exercises decisive influence over the conditions for the provision of such services, the other option is applicable, meaning that the services provided by Uber are to be considered as services in the field of transport, an integral part of which forms the intermediation service.

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[22] Judgement of the Court of 10 April 2018, C-320/16 Uber France. ECLI:EU:C:2018:221, p. 27

3.2. Airbnb

Criteria established by the Court for the purpose of identifying the nature of services provided by Uber were later implemented by the Court in its recent judgement in the case C-390/18 Airbnb Ireland, in which the Court applied these criteria to Airbnb Ireland UC (hereinafter only as „Airbnb Ireland") that operates the collaborative platform Airbnb.

Airbnb Ireland is a company established under Irish law with its seat in Dublin. The company's activities consist of the operation of an electronic platform that intermediates the conclusion of a contract for the provision of an accommodation service between hosts (professional or non-professional) and users looking for such accommodation on payment of a commission. Apart from the main service provided by Airbnb Ireland, the purpose of which is the centralization of the accommodation offers, the company also offers the hosts other ancillary services, such as:

a) a format for setting out the content of their offer,
b) optional photography services,
c) optional civil liability insurance,
d) optional guarantee against damages for up to EUR 800.000,
e) optional tool for estimating the rental price having regard to the market averages taken from that platform,
f) a ratings system, whereby the host and the guest can leave an evaluation on a scale of zero to five stars.

Moreover, Airbnb Ireland uses services provided by the company Airbnb Payments UK Ltd (hereinafter only as „Airbnb Payments") established under UK law with its seat in London. Airbnb Payments ensures the transfer of the rental price from the guest to the host, to which a commission is added in the amount of 6 % to 12 % for the provisions of Airbnb Ireland services.

As regards the relationships established between the individual users of the Airbnb platform and the platform itself, it may be stated (similarly as regards the platform Uber) that these are established on the basis of a contract conluded at the time of the registration of an individual (host or guest) on the platform. However, the situation is complicated by the fact that the users do not only conclude the contract for the use of platform with Airbnb Ireland, but also conclude a contract on the provision of a service consisting of the transfer of payments realised on this platform with Airbnb Payments.

In addition, as regards the relationship established between the hosts and guests on the basis of commercial transactions concluded with the help of the platform, Article 1 (1.2) of the Airbnb's Terms of Services states that „*As the provider of the Airbnb platform, Airbnb does not own, create, sell, resell, provide, control, manage, offer, deliver, or supply any Listings or Host Services, nor is Airbnb an organiser or retailer of travel packages under Directive (EU) 2015/2302. Hosts alone are responsible for their Listings and Host Services. When Members make or accept a booking, they are entering into a contract directly with each other. Airbnb is not and does not become a party to or other participant in any contractual relationship between Members, nor is Airbnb a real estate broker or insurer.*"[23]

According to the Airbnb, it is necessary to strictly distinguish between, on the one hand, intermediation services provided by the platform to the individual hosts and guests (by Airbnb Ireland and Airbnb Payments), and on the other, accommodation services provided exclusively between the individual hosts and guests on the basis of a contractual relationship concluded between these parties without a participation of the platform.

The differentiation of the relationships established on the Airbnb platform was contested in the proceedings brought by the Association for Professional Tourism and Accommodation (hereinafter only as „AHTOP"), which lodged a complaint *inter alia* for the provision of services without the licence as required by French law. The AHTOP contested the argument that Airbnb Ireland merely connects its users through the platform, as it also provides other services that may amount to intermediation in property transactions. On the basis of this complaint, the Public Prosecutor attached to the Tribunal de grande instance de Paris brought charges against the Airbnb. The investigating judge later refered to the Court for a preliminary ruling the question of whether services provided by the Airbnb Ireland are to be interpreted as information society services as defined by the the relevant EU law, or not.

The Court firstly stated that the intermediation service in question (connecting professional or non-professional hosts with users seeking to rent their properties by means of an electronic platform) is a service within the meaning of Article 56 TFEU and the Directive 2006/123/EC. However, it is not clear whether this intermediation service is to be considered as an information society service within the meaning of Article 2 (a) of Directive 2000/31/EC on electronic commerce.

[23] Article 1 (1.2) of the Airbnb Terms of Service. Available online: [https://sk.airbnb.com/terms#sec201910_1], accessed 20. June 2020

To assess whether the service at issue in the main proceedings is an information society service the Court examined the fulfilment of the cumulative criteria that define the service as an information society service, specifically whether the service in question is normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. As regards the first condition of the provision of a service for remuneration, it is clear that Airbnb Ireland provides its services for a commission (in the scope of 6 to 12 % of the rental price) paid by the guest and not by the host. The second and third conditions consisting of the obligation to provide the service at a distance and by electronic means were also fulfilled due to the fact that the relationship between hosts and guests is established with the help of an electronic platform without the concurrent presence of the provider of the service on one hand and its users on the other (hosts and guests). Similarly, as regards the last condition of the service provision at the individual request of the services' recipient, the Court stated that this condition is met as hosts advertise their offers on the platform and users individually choose the offers best suited for them. Due to the fact that all of the above stated conditions were cumulatively satisfied, the Court held that the examined intermediation service can be considered as an information society service within the meaning of Article 2 (a) of Directive 2000/31/EC on electronic commerce.

In addition, the Court also analysed the argument, according to which the intermediation service in question is not subject to the specific liability regime established for the provision of information society services as it forms an integral part of the underlying accommodation service. In this regard the Court stated that such an intermediation service "*cannot be separated from the property transaction itself, in that it is intended not only to provide an immediate accommodation service, but also on the basis of a structured list of the places of accommodation available on the electronic platform of the same name and corresponding to the criteria selected by the persons looking for short-term accommodation, to provide a tool to facilitate the conclusion of contracts concerning future interactions. It is the creation of such a list for the benefit of both of the hosts who have accommodation to rent and persons looking for that type of accommodation which constitutes the essential feature of the electronic platform managed by Airbnb Ireland.*"[24] Due to this, because of its importance, "*the compiling of offers using a harmonized format, coupled with tools for searching for, locating and comparing those offers, constitutes a service which cannot be regarded as merely ancillary to an overall service coming under a different legal classification, namely provision of an accommodation service.*"[25]

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[24] Judgement of the Court of 19 December 2019, C-390/18 Airbnb Ireland. ECLI:EU:C:2019:1112, p. 53

[25] *Ibid*., p. 54

The first argument that led the Court to the above-stated conclusion is the fact that the intermediation service in question is not indispensable to the provision of accommodation service. Neither the hosts nor the guests are required to use the Airbnb platform to provide offers or search for the short-term rent of real estate. Even before the creation of the platform there were many ways in which hosts were able to offer their real estate for rent as well as ways in which guests looked for the available real estate (reality offices, advertisements in print/electronic form etc.). In this regard we may conclude that Airbnb Ireland does not create the supply and demand for accommodation services without which the provision of these services would not be possible.

The second argument in this regard concerns the fact that Airbnb Ireland does not in any way stipulate or limit the rent price (e. g. by establishing the minimum or maximum price) to be paid for the provision of an accommodation service. The fact that Airbnb Ireland provides hosts with an optional tool for estimating rental price having regard to the market averages taken from the platform does not challenge this conclusion, as the responsibility for setting the rent is left to the host alone.

Another argument in favour of the conclusion reached is the fact that none of the ancillary services provided by Airbnb Ireland, considered separately or together, "*constitute an end in themselves, but rather a means of benefiting from the intermediation service provided by Airbnb Ireland or of offering accommodation services in the best conditions; (…) even taken together, the services, optional or otherwise, (…) do not call into question the separate nature of the intermediation service (…) and therefore its classification as an 'information society service', since they do not substantially modify the specific characteristics of that service.*"[26]

The last argument formulated by the Court in this regard was the impossibility of comparing the services provided by Airbnb Ireland with services provided by Uber as examined by the Court in the case C-434/15 Uber Spain and in the case C-320/16 Uber France. The reason for this is, beside the fact that these judgements were adopted in the context of urban transport subject to Article 58 (1) TFEU, mainly the fact that it is not possible to establish that Airbnb Ireland exercises the same level of a decisive influence over the provision of the underlying accommodation service, as it does not determine the charged price and does not select service providers that may offer their services through its platform.

[26] Judgement of the Court of 19 December 2019, C-390/18 Airbnb Ireland. ECLI:EU:C:2019:1112, p. 64

On the basis of these arguments the Court stated that Airbnb Ireland provides an intermediation service that can be classified as in 'information society service' under the eCommerce Directive.

The main contribution of this decision is primarily the confirmation of the criteria established by the Court in its judgements in the case C-434/15 Uber Spain and in the case C-320/16 Uber France, as well as the further identification of the applicable legal regime as regards the services in question. Similarly as in the Uber decisions, the Court considered the criterion of the creation of supply and demand of services, whereby without the participation of a collaborative platform the functioning of the market in this area would not be possible, as well as the criterion of the existence of decisive influence of the collaborative platform over the conditions for the provision of such services.

In this regard we may consider the mutual relationship between the above stated criteria and their importance for the application in individual cases. It is, however, not clear from the analysis of the Court's decisions, whether these criteria stipulate cumulative conditions, the fulfilment of which signifies that the service in question cannot be separated from the underlying service, the result of which is the inapplicability of the liability regime established for the provision of information society services (despite of the fact that the service conforms to the definition of an information society service). Some guidance in this regard provides Advocate General Szpunar, according to whom: "*The criterion relating to the creation of a supply of services constitutes only (…) an indication that a service provided by electronic means forms an inseparable whole with a service having material content. It is not sufficient that a service provider creates a new supply of services that are not provided by electronic means (…)* [as] *the creation of those services must be followed by the maintenance, under the control of that provider, of the conditions under which they are provided.*"[27] We support this conclusion, as the creation of a new form of the supply of services provided by electronic means may be replicated by other platforms or achieved through other means, but the way the platform operates and how it affects its users (whether service providers or those seeking such services) defines the nature of the different contractual relationships concluded with the help of the platform. Here the application of the contractual freedom - a principle generally recognized in continental law - may have to be limited for the purpose of providing protection to the concerned parties, especially as regards those platform users that fall into the category of consumers and therefore require a higher level of protection. Such an interference must be, however, based on specific objectives supported by the

[27] Opinion of the Advocate General Szpunar delivered on 30 April 2019, C-390/18 Airbnb Ireland. ECLI:EU:C:2019:336, p. 65

relevant legislation. The issue in the context of collaborative economy is, however, how to apply the existing legislation (consumer law, commercial law, etc.) on new transactions, the existence of which was not expected at the time of its adoption, specifically, how to adjust the existing legislation typically regulating bilateral relationships (e.g. between traders and consumers) to multilateral relationships concluded with the help of a platform. What must be noted in this regard is the fact that most types of services provided by collaborative platforms are not regulated on the European Union level (urban transport or accommodation), but are subject to the provisions of national law that may even differ in different regions or cities of the Member State. This, of course, may not only lead to legal uncertainty as to the applicability of the existing legislation but also to legal fragmentation hindering the cross-border provisions of services by collaborative platforms. In this case it will usually be national courts of individual Member States that will have to analyse the nature of services provided by collaborative platforms and the results (as is clear from the decisions already adopted) will probably differ due to the specificities of the analysed national law. It is questionable, whether national courts will be able to use the criteria established by the Court to differentiate between collaborative platforms acting as intermediaries or as providers of the underlying services. The following section of this paper outlines the second step needed for the consideration of the position held by collaborative platforms.

4. DISCUSSION

The above stated analysis presents only the first step in understanding the services provided by collaborative platforms within the collaborative economy. The next step would be the analysis of the contractual relationships that are established between the individual subjects participating in the collaborative economy, namely collaborative platforms and its users, who include service providers on the one hand and users of these services on the other. It is also necessary to distinguish different categories of service providers, as these can be professionals acting within their trade, business, craft or profession, or non-professionals that act outside their trade, business, craft or profession and that may even be classified as consumers under the provisions of consumer law. This categorization of subjects will determine the applicability of legislation (commercial law as regards relationships established between collaborative platforms and professional service providers or consumer law as regards relationships established between collaborative platforms and non-professional service providers), the establishment of liability (of the collaborative platform or of the service provider), as well as the possibility to establish an employment relationship between collaborative platforms and service provid-

ers, if certain criteria are met (criterion of remuneration, criterion of the nature of work and subordination criterion).

The important factor to be considered in this regard is the fact that the relationships established within the collaborative economy are contractually based. In practice this is accomplished by concluding contracts between collaborative platforms on the one hand and its users on the other at the time of the user's registration on the platform, whereby users must agree with the terms of conditions as stipulated by the platform. Due to the applicability of the contractual freedom principle, we may argue that the way in which the nature of the relationship between the collaborative platform and its users is defined, must be acknowledged. However, such classification will not always correspond to the reality (as was clear from the analysis provided in the previous text e. g. as regards Uber and its relationship to its drivers). Due to this it will be necessary, e. g. when determining the party liable for the non-performance of the underlying service, to examine the true nature of the individual contractual relationships that resulted from the cooperation of the collaborative platform and its users, and whether this corresponds to what the platform claims.

Another factor to be considered is the absence of legislation applicable in the case when the Directive 2000/31/ES on electronic commerce is deemed inapplicable due to the fact that the collaborative platforms in question provides underlying services, the integral part of which form information society services. In such a case it is difficult to determine the applicable European Union legislation, as services in question (e. g transport services, accommodation services) will usually be regulated on the national level by the legislation of individual Member States. The need to apply national legislation that differs from one Member State to another results in the legal fragmentation and legal uncertainty hindering possible cross-border expansion of the collaborative platforms' services due to high costs of adapting to different legal regimes in individual Member States. This undesirable outcome will undoubtedly limit the expansion of the digital single market as imagined by the Commission in its Digital Single Market Strategy for Europe.[28] Moreover, even in the case when the Directive 2000/31/ES on electronic commerce is applicable,

[28] See: 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/2015/0192 final

this Directive excludes from its scope such legal areas as tax law[29], consumer law[30], personal data protection law[31] or competition law[32], within which liability of collaborative platforms may arise if the relevant obligations stemming from these legal areas are infringed.

5. CONCLUSION

The objective of this paper was the analysis of the nature of services provided by collaborative platforms. As the Commission stated, collaborative platforms can be the providers of information society services, underlying services or ancillary services. In this regard it is, therefore, necessary to examine the nature of services provided by a collaborative platform individually, taking into account all of the relevant aspects. The question of whether collaborative platforms act as providers of the underlying service is key in order to determine the applicability of the liability exemptions as stipulated by the Directive 2000/31/EC.

The Commission considers as the determining factor in this regard the level of influence or control exerted by the collaborative platform over the service provider. In order to determine the level of influence or control exerted by a platform, the Commission stated as the relevant criteria to be examined the criterion of price,

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[29] In the context of the collaborative economy see: Pantazatou, K., *Taxation of the Sharing Economy in the European Union*, in: Davidson, N. M. *et al*. (eds.), The Cambridge Handbook of The Law of the Sharing Economy, Cambridge: Cambridge University Press, 2018, pp. 368-380; Viswanathan, M., *Tax Compliance and the Sharing Economy*, in: Davidson, N. M. *et al*. (eds.), The Cambridge Handbook of The Law of the Sharing Economy, Cambridge: Cambridge University Press, 2018, pp. 357-367; Barry, J. M., *Taxation and Innovation - The Sharing Economy as a Case Study*, in: Davidson, N. M. *et al*. (eds.), The Cambridge Handbook of The Law of the Sharing Economy, Cambridge: Cambridge University Press, 2018, pp. 381-393

[30] In the context of the collaborative economy see: Devolder, B., *Contractual Liability of the Platform*, in: The Platform Economy. Unravelling the Legal Status of Online Intermediaries, Cambridge: Intersentia Ltd, 2019, pp. 31-87; Domurath, I., *Platforms as Contract Partners: Uber and beyond*, in: Maastricht Journal of European Comparative Law, *vol.* 25, no.5, 2018, pp. 565-581

[31] In the context of the collaborative economy see: Lloyd, I. J. *Information Technology Law,* 8th edition, Oxford: Oxford University Press, 2017, pp. 1-201; Riordan, J., *The Liability of Internet Intermediaries*, Oxford: Oxford University Press, 2016, pp. 290-352; Polčák, R., *Právo informačních technologií*, Praha: Wolters Kluwer ČR, 2018, pp. 391-485

[32] In the context of the collaborative economy see: Bostoen, F., *Competition Law in the Peer-to-Peer Economy*, in: Devolder, B. (ed.), The Platform Economy. Unravelling the Legal Status of Online Intermediaries, Cambridge: Intersentia Ltd, 2019, pp. 143-171; King, S. P., *Sharing Economy: What Challenges for Competition Law?*, Journal of European Competition Law & Practice, *vol*. 6, no. 10, 2015, pp. 729-734.; Capobianco, A.; Nyeso, A. *Challenges for Competition Law Enforcement and Policy in the Digital Economy*, Journal of European Competition Law & Practice, *vol.* 9, no. 1, 2017, pp. 19-27; Lougher, G.; Kalmanowicz, S., *EU Competition Law in the Sharing Economy*, Journal of European Competition Law & Practice, *vol*. 7, no. 2, 2015, pp. 87-101

the criterion of stipulating other key contractual terms and the criterion of the ownership of key assets. In addition, other factors may also be considered, such as the fact that the platform incurs the costs and assumes all the risks related to the provision of the underlying service or if an employment relationship exists between the platform and the provider of the underlying service. The criteria stated, especially the criterion of the ownership of key assets, were later criticized, due to their conflict with the way in which the collaborative economy operates.

Due to the non-binding nature of the Commission's guidelines, the author closely examined the individual judgements adopted by the Court of Justice that approached the issue of determining the nature of services provided by collaborative platforms in a less restrictive manner. The Court firstly analysed whether the services provided by collaborative platforms Uber and Airbnb fulfil the definition criteria of the 'information society service'. The Court later examined the relationship between the information society services provided by platforms and the underlying services that form the substance of commercial transactions concluded on platforms. Specifically, the Court considered whether the information society services form an integral part of the underlying service (transport or accommodation service) or not. In this regard the Court identified as the relevant criteria the criterion of the creation of the supply and demand and the criterion of the decisive influence exercised over the provision of the underlying service. The decisive influence criterion can be determined e. g. by defining the subject stipulating the final price for the underlying service provided, collecting the final price from the user, exercising the control over the shared assets' quality or over the persons providing the underlying services, as well as by examining the nature of ancillary services provided by the platform. The application of these criteria enabled the Court to determine, whether information society services provided by collaborative platforms can (Airbnb) or cannot (Uber) be separated from the underlying service.

The application of these criteria on other collaborative platforms not yet examined by the Court will demonstrate their functionality and can help the individual Member States in the process of adopting appropriate regulation on the functioning of collaborative platforms in their territory. Moreover, these criteria should be complemented by the examination of the individual multilateral contractual relationships concluded between the subjects participating in the collaborative economy, which will predominantly be based on the provisions of national law of the Member States.

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Topic 5

EU and Economic challenges

UDK 336.761:347.77.012
Preliminary communication

TRANSFORMATION OF FINANCIAL REGULATORY GOVERNANCE THROUGH INNOVATION FACILITATORS - CASE STUDY OF INNOVATION HUB IN CROATIAN CAPITAL MARKETS

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ABSTRACT

FinTechs have attracted great attention for their potentially disruptive impact on financial ecosystem. They represent a great opportunity for democratisation of financial systems and better access to finance, but also a possible risk for financial stability. Regulatory framework is trailing behind fast-moving technological advancements. Innovation facilitators, i.e. innovation hubs and regulatory sandboxes have been designed as new governance models to promote technological innovations and regulatory efficiency in financial services. The UK is a global pioneer in this area with Project Innovation that started in 2014, while other Member States followed. Croatia has established its first innovation facilitator in a form of Innovation hub in May 2019. The purpose of this paper is to examine the level of financial regulatory innovation and potential for transformation of regulatory governance from "command and control" system to more alternative and collaborative approach characteristic for innovation facilitators. Research methodology combines secondary data, semi-structured interviews and comparative assessment of UK's and Croatia's approach to financial regulatory governance, using the most different case method. Results point to incremental changes in governance culture, nonetheless a positive step forward in promoting a culture of dialogue and better policy-making.

Key words: *FinTech, financial regulatory governance, Innovation hub, capital markets*

1. INTRODUCTION

FinTech is defined by the Financial Stability Board (FSB) as "technology-enabled innovation in financial services that could result in new business models, applications, processes or products with an associated material effect on the provision of

financial services".[1] Financial sector is a frontrunner consumer of digital technologies.[2] There are more than 12.000 FinTechs operating globally, with a growth rate of 200% since 2010. This trend has been decelerating since 2016, because investors became more cautious about business models and cycles.[3] FinTechs have attracted great attention for their potential disruptive impact on the financial system and could cause far-reaching change for financial ecosystem and its incumbent institutions, revolutionising access to capital and financial services for individuals, businesses and other interested participants.

Fintechs have already become a regulatory Pandora's Box for its dynamic and diversity, but foremost because they are simultaneously a great opportunity and threat to financial stability.[4] The UK pioneered regulatory innovation through design of innovation facilitators, innovation hubs (IH) and regulatory sandboxes (RS) to enhance flexible and supportive regulatory governance of Fintech. Other countries worldwide have been replicating this governance regime.

There are a few studies on impacts of Fintech and its rising trend for Central and South Eastern European (CSEE) countries.[5] The focus of this paper is on newest EU Member State (MS) Croatia and its recently established Innovation hub. The

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2 European Commission, *FinTech Action plan: For a more competitive and innovative European financial sector*, COM(2018) 109 final, 2018, p. 1, [https://eur-lex.europa.eu/resource.html?uri=cellar:6793c578-22e6-11e8-ac73-01aa75ed71a1.0001.02/DOC_1&format=PDF], accessed 10. March 2019

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5 Deloitte, *FinTech in the CEE region: Charting the course for innovation in financial services technology*, Department for International Trade, Deloitte, 2016, [https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/central-europe/ce-fintech-in-cee-region-2016.pdf], accessed 10. April 2019; Raiffeisen Bank International, *CEE FinTech Atlas 2018 – Exclusive insights into 19 Fintech ecosystems in Central and Eastern Europe*, 2019, [http://www.fintechatlas.com/], accessed 10. April 2019; Kerényi, Á., *The Fintech Challenge: Digital Innovations from Post-Communist EU Member Countries*, Centre for Economic and Regional Studies of the Hungarian Academy of Sciences – Institute of World Economics, 2018, p. 1-47, [http://www.tepsa.eu/the-fintech-challenge-digital-innovations-from-post-communist-eu-member-countries-adam-kerenyi-iwe-hungary/], accessed 10. April 2019; Stern, C., *FinTechs and their emergence in banking services in CESEE*, Focus on European Economic Integration, Q3/17, Oesterreichische Nationalbank, 2017, p. 42-58

purpose is to examine the level of financial regulatory innovation and potential for transformation of regulatory governance from "command and control" system to more alternative and collaborative approach characteristic for innovation facilitators.[6]

Research methodology combines secondary data, semi-structured interviews and comparative study of UK's and Croatia's approach to financial regulatory governance, using most different case method.[7] They are combined to identify similarities and differences in regulatory approaches in order to evaluate impact that Innovation hub could have on alteration in internal culture of Croatian financial regulatory authorities (Annex 2). Furthermore, Croatian IH was compared to all Member States that have operational IHs analysed in the ESAs' Report[8] (Annex 1). Semi-structural interviews were conducted during second half of 2019 with high-level officials and experts from public and private financial sector that is Fintech related. Additionally, information from the newly opened IH by the Croatian National Bank (CNB) was added, based on basic information provided on their IH's website.[9]

Following short introduction, the paper provides brief background of European regulatory governance generally and more specifically with regard to Fintech and innovation facilitators. It also presents key aspects of regulatory financial innovation in the UK. Fourth part is based mostly on empirical evidence from interviews on FinTech and organisation and operation of Innovation hub in Croatia. Fifth part examines the level of transformation of financial regulatory governance through case study of Innovation hub combined with opportunities and challenges of policy-making in Croatia while final chapter summarizes the main conclusions.

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7 Seawright, J.; Gerring, J., *Case Selection Techniques in Case Study Research – A Menu of Qualitative and Quantitative Options*, Political Research Quarterly, *vol.* 61, no. 2, 2008, p. 294-308

8 ESAs, European supervisory authorities: European Security and Markets Authority, European Banking Authority, European Insurance and Occupational Pensions Authority, *Report – FinTech: Regulatory sandboxes and innovation hubs*, ESMA, EBA and EIOPA, JC 2018 74, 2019, [https://eba.europa.eu/documents/10180/2545547/JC+2018+74+Joint+Report+on+Regulatory+Sandboxes+and+Innovation+Hubs.pdf], accessed 10. May 2019

9 Croatian National Bank, *Innovation hub*, [http://fintechhub.hnb.hr/home], 2020, accessed 10. January 2020. CNB's IH has a secondary focus and relevance for this study since Croatia has divided financial regulation and supervision on banking and non-banking sector with two public authorities, namely CNB and HANFA (Croatian Financial Services Supervisory Agency) and the primary focus of this paper is on Croatian capital markets

2. EUROPEAN FINANCIAL REGULATORY GOVERNANCE

Competition is a fundamental force of efficient financial markets. European policies have a long-term record of imposing competition on European financial systems, e.g. Lisbon strategy, Financial Services Action Plan, Capital Markets Union, Single Euro Payment Area. Despite many positive changes, European financial playground still lacks vibrant allocation of resources.[10] But if we hypothetically set aside the reason these policies were initiated, i.e. competitiveness of European financial markets, transformation of European financial governance has provided new set of powers and supplementary global influence for the EU.[11] Couple of convenient circumstances have contributed to this development, e.g. single currency in the EU, corporate scandals in the US, global financial crisis.[12] Because of its unique political setup, the EU had to apply matrix of things to enhance Single European Financial Market. Massive financial regulatory reform was executed through Financial Services Action Plan, introducing new methodology set up of the Lamfalussy Process, formulating procedural reform through comitology of financial services, multilevel and network arrangements, which ensured speed of legislative process.[13] By the time implementation was receiving first positive and negative impact assessments, the Global financial crisis (GFC) has created imperative demand for new regulatory and supervisory reform, which also created momentum for supranational power enlargement. "A crisis is a terrible thing to waste"[14] and Committee of European Securities Regulators' – CESR's ambitions to grow in authority proved their critics wrong. Not only that so-called "Himalaya Report"[15] did not "sink like a Titanic"[16] but it reached quite the opposite stellar dimension. In the post GFC regulatory environment, CESR was transformed into

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10 European Central Bank, 2009-2019 – *Surveys on Access to Finance for Enterprises*, [https://www.ecb.europa.eu/stats/ecb_surveys/safe/html/index.en.html], accessed 10. March 2019; World Economic Forum, *The Europe 2020 Competitiveness Report, building a more competitive Europe*, 2014, [http://www3.weforum.org/docs/WEF_Europe2020_CompetitivenessReport_2014.pdf], accessed 10. May 2019

11 Mügge, D. (ed.), *Europe and Governance of Global Finance*, Oxford University Press, 2014

12 Mügge, D., *Introduction*, in Mügge, D. (ed.) Europe and Governance of Global Finance, Oxford University Press, 2014, p. 1-15

13 Posner, E., *The Lamfalussy Process: Polyarchic Origins of Networked Financial Rule-Making in the EU*, in: Sabel, F.; Zeitlin, J., (eds.), Experimentalist Governance in the European Union – Towards a New Architecture, 2012, p. 43-60

14 Lannoo, K., *A crisis is a terrible thing to waste*, CEPS Commentary, [https://www.ceps.eu/wp-content/uploads/2009/08/1847.pdf], 2009, accessed 10. March 2018

15 Committee of European Securities Regulators, *Preliminary Progress Report: Which supervisory tools for the EU securities markets? An analytical paper by CESR*, Ref 04-333f, CESR, 2004, [https://www.esma.europa.eu/sites/default/files/library/2015/11/04_333f.pdf], accessed 10. May 2019

16 European Commission, *Results of the Commission's „Exchange of views" on Financial Services Policy 2005-2010*, Brussels, 18th July 2005, p. 5

new European securities supervisory authority - ESMA[17] along with two supranational bodies in their field, European Banking Authority - EBA and European Insurance and Occupational Pensions Authority - EIOPA.[18] Finally, Fintech is a product of financial globalisation requiring co-ordination of regulatory and supervisory bodies worldwide and the EU has acquired superior know-how in this area.[19]

2.1. European regulatory governance for FinTech and innovation facilitators

How to effectively regulate FinTech? It appears like a Sisyphean task - FinTech is such a dynamic and fast changing sector in which laws are outdated almost by the time they enter into force. Additionally, traditional financial regulation is rather stringent, because historically it needed to prevent (and punish) fraud and systemic risk. Furthermore, financial crises evolve because promising financial innovations have an affair with moral hazard, bad risk evaluation and inadequate regulation and supervision. In that respect, Fintech has destructive potential for customer fraud and systemic risk.

Nevertheless, FinTech has a distinctive social innovative potential that should give regulatory authorities courage to be flexible and take risks. FinTechs are already reshaping financial ecosystem through challenging incumbents and providing customers with better and cheaper financial products and services. Empirical studies show that this process is not a "Game of Thrones", rather a combination of competition and collaboration.[20] FinTech revolution lays in its potential to democratise financial systems. FinTechs are changing financial systems by upgrading the core function of a financial system – efficient allocation of resources. New

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17 Moloney, N., *The Age of ESMA – Governing EU Financial Markets*, Hart Publishing, Oxford, UK, 2018

18 Wymeersch, E., *The institutional reforms of the European Financial Supervisory System, and interim report*, Financial Law Institute, Gent University, WP 2010-01, 2010; Moloney, N., *The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule Making*, 12 European Business Organization Law Review, 2011, p. 41-86; Ferran, E., *Crisis-driven regulatory reform: where in the world is the EU going?*. in: Ferran, E. *et al.* (eds.), The Regulatory Aftermath of the Global Financial Crisis, Cambridge University Press, 2012, p. 29-54

19 Ferran, E., *Financial Supervision*, in Mügge (ed.), note 11, p. 16-34

20 McKinsey&Company, note 3; FSB, note 1; World Economic Forum & Deloitte, *Beyond Fintech: A pragmatic assessment of disruptive potential in financial services*, Part of the Future of Financial Services series, 2017, [http://www3.weforum.org/docs/Beyond_Fintech_A_Pragmatic_Assessment_of_Disruptive_Potential_in_Financial_Services.pdf], accessed 10. May 2019; World Economic Forum& Deloitte, *The Future of Financial Services – How disruptive innovations are reshaping the way financial services are structured, provisioned and consumed*, An industry project of the Financial Services Community, Final Report, 2015, [http://www3.weforum.org/docs/WEF_The_future__of_financial_services.pdf], accessed 10. May 2019

platforms are skipping traditional financial intermediaries and more efficiently connect supply and demand of individuals and businesses on a global scale, providing capital for literally any project with sufficient demand. These projects can come from individuals with innovative ideas, businesses, entrepreneurs, NGOs, governments, etc. Fintechs therefore have potentials to democratise the financial system by diminishing power structures of incumbent financial institutions such as banks, insurance companies, stock exchanges, e.g. Facebook's crypto-currency Libra. It would be naïve to think "the power will go to the people". New champions will most likely be data intensive and platform-based business models.[21] Therefore, future regulation will probably be most challenging in areas of data protection, digital rights and ethical standards. Nevertheless, it is providing unprecedented set of opportunities for capital raising and financial borrowing at so many different levels, allowing individuals and groups the opportunity to materialise their innovative projects.

Presently, European Fintech regulation is still in a developing phase. It addresses two interlinked EU policies, the Capital Markets Union and Digital Single Market. The European Council and the European Parliament want to see FinTech development across the EU with flexible arrangements enhancing cross-border operations and investments.[22] The Fintech Action Plan is therefore focused on policy measures supporting FinTech development across European markets rather than building a regulatory framework.[23]

At a European level, innovation facilitators are designed as new governance models to promote technological innovations in financial services through a more interactive relationship between regulatory authorities and firms. The UK is a global pioneer in this area with Project Innovation that started in 2014, while other Member States followed with operational innovation hubs during 2016-17 and acceleration of regulatory sandboxes during 2018-19.[24]

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21 *Ibid*.

22 European Council, *European Council meeting – Conclusions*, General Secretariat of the Council, 19 October 2017, Brussels, [https://www.consilium. europa.eu/media/21620/19-euco-final-conclusions-en.pdf], accessed 10. March 2018; European Parliament, *Report on FinTech<Titre>: the influence of technology on the future of the financial sector, </Titre>*, <DocRef><Commission>{ECON}Committee on Economic and Monetary Affairs</Commission>, Rapporteur: <Depute>Cora van Nieuwenhuizen, 2017, [</Depute>, 28.4.2017, http://www.europarl.europa.eu/doceo/ document/A-8-2017-0176_EN.html], acessed 10. April 2019

23 European Commission, note 2.

24 ESAs, note 8; Cambridge Centre for Alternative Finance, Academy of Internet Finance, *Guide to promoting financial & regulatory innovation – Insights from the UK*, University of Cambridge Judge Business School, Zheijang University, 2018, [https://www.jbs.cam.ac.uk/fileadmin/user_upload/research/

Innovation hubs operate as an information desk with trained professionals giving non-binding guidance and support regarding regulatory and supervisory issues. It is designed as a mutually useful meeting point, i.e. on the one hand, it provides FinTechs with information and clarification regarding regulatory and supervisory expectations in a timely manner and, on the other hand it provides regulatory authorities with market data on innovation in financial services and information about policy (re)directions.

Regulatory sandboxes are organisational units that function as a laboratory for testing innovative financial products, services, business models or delivery mechanisms. It is designed as a vibrant meeting point where both parties work closely together in an open and truthful collaboration. Regulatory authorities are open-minded in exploring regulatory possibilities for new financial prototypes, fast tracking it to the market but dedicated to sustaining market integrity and investor protection. It does not mean that rules are not applied. All EU regulatory sandboxes operate by the EU and national financial rulebook, having limited space for waivers.

The following sections will closely examine two starkly different cases of innovation facilitators – one "going live" in a country with enormous financial leverage and regulatory salience in the EU, used to thinking outside the box - the UK. The other, only making its first attempts in a country that struggles to break away from bank-domination in the financing of the economy - Croatia.

3. REGULATORY FINANCIAL INNOVATION IN THE UK

The UK is considered a global leader in financial and regulatory innovation, exporting its financial regulatory methodology worldwide. London is ranked fourth on the Global Fintech Hubs list,[25] accounting for approximately 70% of European volume.[26] The UK is in the top scoring indicators for competitiveness, qual-

centres/alternative-finance/downloads/2018-06-ccaf-whitepaper-guide-to-promoting-financial-regulation-innovation.pdf], accessed 10. April 2019

25 Academy of Internet Finance *et. al.*, *The Future of Finance is Emerging: New Hubs, New Landscapes Global Fintech Hub Report*, 2018, [https://www.jbs.cam.ac.uk/fileadmin/user_upload/research/centres/alternative-finance/downloads/2018-ccaf-global-fintech-hub-report-eng.pdf], accessed 10. May 2019

26 Ziegler, T. *et al.*, *Shifting Paradigms – The 4th European Alternative Finance Benchmarking Report*, Cambridge Centre for Alternative Finance University of Cambridge Judge Business School, University of Agder School of Business Law, Invesco, CME Group Foundation, 2019, [https://www.jbs.cam.ac.uk/fileadmin/user_upload/research/centres/alternative-finance/downloads/2019-04-4th-european-alternative-finance-benchmarking-industry-report-shifting-paradigms.pdf], accessed 10. March 2019; Demertzis, M.; Merler, S.; Wolff, G., *Capital Markets Union and the FinTech Opportunity*, Journal of Fi-

ity of institutions, rule of law, innovativeness, ease of doing business, etc.[27] Comparatively to other European countries, the UK has an exceptionally developed financial system that is market-based with a long regulatory tradition of promoting competition, i.e. business-friendly regulatory governance without destructive preferential treatment to market incumbents and high consumer protection level.[28]

The Project Innovate started as an idea of two to three people in the Financial Conduct Authority - FCA. Their unique regulatory style consists of an "ego-killing" approach, ability to listen and engage in a massive public consultation process, know-how in constructing regulatory innovation agenda in collaboration with other stakeholders, speed and flexibility in making changes where they can increase customers benefits and finally, all of the above managed without undermining its own authority and integrity.[29]

Firstly, the FCA stated publicly that they weren't doing "that great of a job" in promoting innovations. "Regulators are known for some of the very high-profile stuff we do, which is dealing with things that go wrong in markets, but our overarching objective is to make markets work well. And that's much more than just dealing with misconduct, it's making sure that the right products come into market, making sure that innovators feel they have the ability to launch it to markets, and I felt we weren't doing that well enough. So, this project is addressing a gap, and that gap is about people's ability to launch new products, to innovate…and it's us being sensitive to where our rules, where the rulebook, where the regulations actually just don't make sense for people wanting to do a different type of business. Hub therefore need to challenge us, the FCA, to change those processes, to change those rules where we think it's in the best interest for consumers."[30]

Secondly, the FCA published Call for input, wanting to know what triggers difficulties for innovator businesses in a regulatory system and what practical help do small innovators need from IH. The FCA found out there are many areas in which

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nancial Regulation, *vol.* 4, issue 1, 2018, pp. 157-165, [https://doi.org/ 10.1093/jfr/fjx012], accessed 10. March 2019

27 World Bank, *Doing Business 2019 – Training for Reform*, 16th edition, 2019, [http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf], accessed 10. May 2019

28 Black, J., *Regulatory Styles and Supervisory Strategies*, in: Moloney, N.; Ferran, E.; Payne, J. (eds.) The Oxford Handbook of Financial Regulation, Oxford University Press, 2015; Armour, J. *et al.*, *Principles of Financial Regulation*, Oxford University Press, UK, 2016

29 Cambridge Centre for Alternative Finance, note 24

30 Financial Conduct Authority, Martin Wheatley, *FCA's Project Innovate "Innovation Hub" launches*, video, 2014, [https://www.youtube.com/watch?v=PmSALpjHnoo], accessed 10. March 2018

they fail to support innovators properly, e.g. difficulties to navigate the regulatory system, lack of legal certainty, inadequate FCA website information. This helped them to focus and prioritise areas important to the innovators' community.[31]

Finally, managing change is a process that requires competent and dedicated experts engaging in literally hundreds of meeting activities, preaching and proactively spreading policy ideas, enchanting in public consultation and receiving valuable information that can help identify possible policy and process changes. These included: roundtables, "surgeries", thematic workshops, monthly showcase events, events and conferences, consultation processes, innovation sprints, along with workshops, roadshows, roundtables, conferences and panel sessions hosted by other organisations.[32] By 2018, the FCA's Innovation hub supported over 500 firms and additional 70 firms through regulatory sandboxes.[33]

4. FINTECH AND INNOVATION FACILITATORS IN CROATIA – VIEW FROM THE BOX

Croatian financial market is a bank-based system.[34] Retail banks, in more than 80% of foreign ownership, are focused on traditional operations such as savings and loans. Subsequently, policy initiatives for more diversified operations and financial markets development fall short because of underdevelopment of Croatian financial market, e.g. securitisation, covered bonds.

Fintech is in embryonic stage in Croatia, counting app. 15 FinTechs in 2018.[35] There are some Croatian IT firms generating technological solutions for domestic and foreign financial institutions: COMBIS, IN2 for Croatia Bank and Incendo for Splitska Bank; regional players: Asseco for most of Croatian banks, including Zagrebačka Bank, Comtrade for Addiko Bank,[36] as well as centrally developed software solutions by foreign "parent" bank and implemented locally in bank's subsidiaries, e.g. George, new platform for communication with retail clients in

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31 Cambridge Centre for Alternative Finance, note 24, p. 13

32 *Ibid*., p. 14, 42-43

33 Woolard in UNSGSA FinTech Working Group and CCAF, *Early Lessons on Regulatory Innovations to Enable Inclusive FinTech: Innovation offices, Regulatory Sandboxes, and RegTech*, Office for the UNSGSA and CCAF: New York, NY and Cambridge, UK, 2019, [https://www.unsgsa.org/files/2915/5016/4448/Early_Lessons_on_Regulatory_Innovations_to_Enable_Inclusive_FinTech.pdf], p. 56, accessed 10. March 2019; Cambridge Centre for Alternative Finance, note 24, p. 56

34 Croatian National Bank, *Annual Report 2017,* CNB, *2018,* [https://www.hnb.hr/documents/20182/2521149/e-gi-2017.pdf/d1605b20-e073-442b-8a36-704db15c051b], accessed 10. March 2019

35 Raiffeisen Bank International, note 5

36 In Deloitte, note 5, p. 106

Erste Bank. Aircash is a Croatian pioneer FinTech providing P2P payments. Another rare example is Oradian, focusing on financial inclusion. So far, FinTechs had the greatest impact in the banking sector, firstly in the payments system, followed by back office and credit risk (due to development in artificial intelligence) with indications of high frequency trading development within next 5 years. There are signals of Fintech products and services inflowing the insurance market.

Croatian capital market is classified as MSCI Frontier Emerging Market.[37] According to Cambridge Centre for Alternative Finance, Croatia makes 0.004% of the European alternative finance market in 2017, measured by comparative market volumes of alternative finance transactions.[38] Comparatively, that is a 1.2% market share in South East Europe (SEE), 1.2 times bigger than Serbia, 32 times smaller than Slovenia, 22 times smaller than Bulgaria and Romania. In Croatia, as well as other SEE markets, foreign platforms outnumber local platforms, with usually one model type dominating the entire alternative finance volume, e.g. P2P consumer lending in Bulgaria, invoice trading in Slovenia, reward- and donation-based crowdfunding in Greece.[39] Estonian Funderbeam, an equity-based crowdfunding is a leader in alternative finance since its establishment in Croatia in 2017. Funderbeam SEE is 20% owned by the Zagreb Stock Exchange (ZSE). ZSE was characterised as very innovative for its proactive approach to FinTech. Alongside collaboration with the Funderbeam platform for start-up financing, it has also initiated its own platform for SMEs financing called Progress. ZSE's goal is to collaborate with Fintech to support growth for start-ups and SMEs, which will, hopefully, lead them to be listed on ZSE and included in the regulated market.

Respondents have identified some positive changes and opportunities powered by Fintech and number of obstacles for FinTech development in Croatia. Generally, they believe Fintechs are bringing benefits for consumers, providing them with more options, i.e. better, faster and cheaper service. FinTech will cut banks margins, which will lead to more competition and improved competitiveness of Croatian financial markets. One respondent perceived Fintech as an opportunity to bypass intermediary technologies and catapult straight to the most advanced solutions for Croatian capital market. There are indicators pointing that FinTech has growth potential in Croatia, e.g. IT is the fastest growing industry in Croatia supported by excellent higher education in STEM area.

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37 MSCI, *MSCI Croatia Index*, 2019, [https://www.msci.com/documents/10199/c0db0a48-01f2-4ba9-ad01-226fd5678111], accessed 10. April 2019; MSCI, *MSCI Emerging Markets Index*, 2019, [https://www.msci.com/documents/10199/c0db0a48-01f2-4ba9-ad01-226fd5678111], accessed 10. April 2019

38 Ziegler *et al.*, *op. cit.,* note 26

39 *Ibid*., p. 134-135

Respondents have identified following obstacles for FinTech development in Croatia:

- Regulatory uncertainty – sluggish pace of keeping up with technological innovations (e.g. ESMA with regard to crypto-currencies and consequently spill-over effect on MS national regulatory authorities - NRAs) and lack of clear regulatory framework,
- Accountability issues – who will be responsible in case of FinTech failure at detriment for consumers,
- Bank-based system – retail banks with traditional financial products and slow on financial innovations (private banker vs. online services); bank have weak interest in financing FinTechs,
- Absence of locally available venture capital,
- Non-supportive institutions – absence of proactive approach of NRAs: "They don't seem to be willing to step out of their comfort zone",
- Lack of intensive workshops, roundtables and other activities, not only from regulatory authorities, but also from academia and business supporting institutions (chambers, associations...),
- Lack of public policy support for the IT sector – high income tax and absence of double taxation agreements between the USA and Croatia.

Regulatory and supervisory framework has changed radically in Croatia over the last decade due to post-financial crisis regulatory reform and transposition to EU law due to 2013 EU accession. CNB has even before the crisis conducted strict and for that time rather unconventional macroprudential policy (e.g. penalties for excessive credit growth, high reserve requirements). Fortunately, these measures ensured stability for Croatian financial system during the crisis, although economic slowdown could not be avoided anywhere in Europe. MiFID I & II has completely reshaped regulatory and supervisory landscape of Croatian capital markets. Most investment firms have closed or consolidated their businesses because of regulatory changes and/or financial crisis. All respondents agree there is an enormous burden on both public and private sector in implementation and compliance with EU law. Additionally, EU regulation is addressing sophisticated financial instruments and services, emphasising competition, while Croatian capital market has modest levels of volume, liquidity and alternative trading venues, requiring more basic regulatory framework. There are no additional laws governing Fintech. In March 2018, the European Commission presented a proposal for a regulation on crowdfunding service providers, which should enter into force during Croatian presidency of the EU in 2020. One respondent raised concerns

about negative effects implementation of crowdfunding regulation might have on Croatian capital market's efficiency because of possible gold-plating.

Croatia has two national regulatory authorities for the financial system, CNB - covering banking sector and HANFA - covering non-banking sector. HANFA has established Innovation hub in May 2019. In the period between 2017-18 there were number of enquires, mostly concerning crypto-currencies that indicated a demand for a specialist devoted to Fintech in HANFA. Additionally, committees on the EU level have also advocated for establishment of innovation facilitators in MS. HANFA also wanted to send out a signal that they are open for Fintech and want to learn about new trends and innovative models. The main motive is to enhance Croatian capital markets and lower the risk of missed opportunities as well as keep close attention to potential risks because of new technologies. In addition, HANFA's goals include fast-tracking application procedure for authorisation. HANFA's IH is open for firms from EU and worldwide, communicating in Croatian and English. Innovation hub has full support of HANFA's leadership (Annex 1).

In the preparation phase, HANFA has not conducted specialised analysis or public consultations to identify key issues and challenges with regard to FinTech. For the establishment of Innovation hub, HANFA has used in-house experts, following ESAs' "Principles for establishment and operation of innovation facilitators"[40] and other MS experiences. Innovation hub is placed within the Regulatory harmonisation and international cooperation division, having 2 people dedicated primarily to Innovation hub and 9 on flexible basis throughout HANFA's departments, with a prospect for enlargement. Enquiries are placed through standardised application form, screened by 2 coordinators. Admissibility assessment is preformed within a week. In case of a positive screening test, the enquiry is than forwarded to specialised unit (e.g. capital markets, insurance department, etc.) HANFA's IH is a member of the European Forum for Innovation Facilitators – EFIF, platform supporting EU institutions' efforts with regard to Fintech, has initiated bilateral agreements outside the EU (e.g. Israel, Abu Dhabi), exchange of information with CNB's IH and is open for co-operation with other authorities within Croatia, e.g. consumer protection, competition, data protection.

HANFA has organised a kick-off meeting with 30 representatives of app. 20 consultancy and legal firms working in the area of new technologies, followed by a series of meeting with dozens of individual firms. In the first months of IH's operations there was a moderate demand for IH's support, mostly from foreign

[40] ESAs, note 8

and non-regulated parties, dominantly from insurance sector. This trend has been shifting more towards MiFID financial services area and has matured into more concrete projects. Some practices of other IHs show that regulated parties do not utilise innovation hubs' services because they already have established channels of communications. Very early first impressions point to promising collaboration with FinTech and their concerns remain in the area of finding and retaining staff and possible bad risk assessment.

HANFA is open to regulatory adjustments if there is evidence that they are obstructing innovations, following criteria of investor protection and systemic risk observations. However, this type of regulatory changes is rather slow. HANFA could make faster alterations if they are within their jurisdictions, e.g. ordinances. HANFA also made it very clear that transformation of regulatory governance has very limited range. This is because Croatian administrative process is very formal, strict and hierarchical. Therefore, Innovation hub is primarily designed to help innovative firms get to the market faster and less costly.

With regard to possibilities of HANFA establishing a regulatory sandbox in Croatia, it is too early. There is no opposition, however, comparative experiences show that it is very costly operation and anecdotal evidence suggests that regulatory sandboxes are very efficient only in London and Singapore. UNSGA FinTech Working Group analysis is on the same track, stating that is it extremely resource intensive, takes between 6-18 months to develop and warns that app. 25% of established sandboxes might have too high of ambitions because of this "high-profile indicator of regulatory innovations".[41]

Croatian National Bank has just recently established an Innovation hub for banking and payment services.[42] So far, it operates as a website through which FinTechs can ask questions with regard to regulatory requirements through the standardised application form. CNB considers innovation facilitators to be a constructive approach to exploring regulatory options with regard to Fintech. Prior to the IH, CNB has established in-house FinTech working group, formed by experts from different departments with a goal to observe and analyse trends on FinTechs, report to the management, educate other departments regarding Fintech, etc. They

41 UNSGSA, note 33, p. 31

42 Croatian National Bank, note 9; Croatian National Bank, *Guverner Vujčić predstavio Inovacijski hub HNB-a*, 17 December 2019, [https://www.hnb.hr/-/guverner-vujcic-predstavio-inovacijski-hub-hnb-a?inheritRedirect=true&redirect=https%3A%2F%2Fwww.hnb.hr%2Fpretraga%3Fp_p_id%3Dcom_liferay_portal_search_web_portlet_SearchPortlet%26p_p_lifecycle%3D0%26p_p_state%3Dmaximized%26p_p_mode%3Dview%26_com_liferay_portal_search_web_portlet_SearchPortlet_mvcPath%3D%252Fsearch.jsp%26_com_liferay_portal_search_web_portlet_SearchPortlet_keywords%3Dinovacijski%2Bhub], accessed 10. January 2020

have also established co-operation with Faculty of Engineering, which provides informative and educational support. They had number of consultative meetings with banks and other FinTechs, upon their requests. Additionally, they are cooperating with other national banks to discuss developments in FinTech sector. CNB has so far not organised public consultation or published a research on Fintech in Croatia.[43] CNB respondent stated that they are "very aware of situation and dynamics for the Fintech area in Croatia", and described regulatory approach toward FinTech: "Our legal responsibility is to keep bank deposits safe. As long as Fintech does not jeopardise savings we keep monitoring only. However, we are very cautious with regards to crypto-currencies".

During the preparation period for establishment of HANFA's and CNB's innovation hubs, there was no discussion of possibility to have a joint innovation hub. Notwithstanding, HANFA, CNB and the Ministry of Finance have several protocols and memorandums in place since 2008 for information exchange and cooperation in the area of financial stability and supervision.[44]

5. REGULATORY INNOVATION AND TRANSFORMATION OF FINANCIAL REGULATORY GOVERNANCE THROUGH INNOVATION FACILITATORS IN CROATIA

Financial regulatory governance of NRAs in Continental Europe can be characterised as predominantly "command and control" system. It is characterised as strict and conservative, has formal hierarchical management structure, very detailed set of rules, what is permitted and what is illegal and principal-agent relationship between regulator and regulated entities.[45] Financial governance has good argumentation for such a set-up. Historically, financial regulation was built up trying to prevent and punish financial fraud. Problems of asymmetric information were approached from a principal-agent supervisory arrangement. Secondly, financial systems can have far-reaching detrimental effect on economies and societies in case of crisis, with potential global spill-over effect, so controlling systemic risk and moral hazard requires non-relaxed approach and constant looking for possible suspects.

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43 It has been identified as key priority research area for 2019, see Croatian National Bank, *Research Priorities Programme*, 2018, p. 5, [https://www.hnb.hr/documents/20182/2569921/ep21112018_istrazivacka-konferencija_dokument.pdf/4f584313-e330-4f89-8d43-5752eb19dd52], accessed 10. March 2019

44 Croatian National Bank, *Cooperation with institutions in the Republic of Croatia*, 2015, [https://www.hnb.hr/core-functions/financial-stability/roles-and-cooperation/cooperation-with-institutions-in-the-republic-of-croatia], accessed 10. March 2019

45 Zeitlin, *op. cit.,* note 6

On the other side, regulatory sandbox is more alternative and experimentalist governance approach.[46] It is based on collaboration between regulators and (un) regulated parties in a joint project characterised by trust and partnership. Parties are on the "same side" doing their best to help innovative projects get to the market faster, easing up unnecessary regulatory burden where possible. It also provides flexibility that is crucial for innovations. Innovation hubs are also based on promptness, competences and approachability of dedicated experts in regulatory authorities, helping innovative business navigate more easily through financial regulatory system. It is considered a useful platform for identifying regulatory obstacles and policy adjustments, e.g. Netherland's Authority for Financial Markets - AMF revised interpretation of some rules.[47]

Most of respondents were positive about opportunities Innovation hub could have in Croatia on a better quality of communication between regulator and private sector. One respondent stated that a case of good project, where innovative firm receives fast and approachable guidance on regulatory and supervisory requirements (and if needed fast-track for authorisation process), gets faster access to the market and proves to be a value added for consumers, will be a good signal for both private sector and regulator that they can work together and build trust relationships. This way, when the parties meet again for discussion on unnecessary regulatory burden or bureaucratic obstacle, they could be more open for dialogue and changes, conditioned that subject matter is not singular self-interest and will bring more operational efficiency for the market and consumers. This hypothesis was somewhat acknowledged by respondent from regulatory authority who pointed that communication with FinTech representatives are already a good sign of dialogue and step forward in building culture of consultation.

Nevertheless, transformation of regulatory governance is very limited because of the nature of administrative process in Croatia. It is very formal, strict and hierarchical. Innovation hub is designed to help innovative firms get to the market faster and less costly. Respondent agreed that regulatory authority is open to regulatory adjustments if there is evidence that current state is obstructing innovation, under criteria of investor protection and risk observation. However, this process is slow because the procedure of changing laws includes other institutions (e.g. Ministry of Finance) and is a lengthy procedure. They can make faster alterations if they are within their jurisdictions, e.g. ordinances. Another respondent warned that

46 *Ibid*.

47 UNSGSA *et al*., *op. cit.*, note 33, p. 20

some firms have different agendas: single-minded self-interest that are not in accordance with public good, some foreign companies do not have strategies in line with best interest of Croatian fiscal policies, some managers have criminal record and there is a threat of money laundering (e.g. Danske Bank scandal in Estonia, recent CNB's investigation of Zagrebačka Bank).

Most different case selection evaluation between Croatia and the UK point that Croatia is a trend-follower (Annex 2). Like many EU Member States, it has established Innovation hub following UK regulatory innovation concept but following ESAs and EU MS list of recommendations.[48] Croatian NRAs were not engaged in extensive public consultation. Furthermore, neither of regulatory agencies published a study on Croatian FinTech market or a policy paper to be a starting point for public dialogue (or the academic community for that matter). According to the FCA, it is crucial to understand your starting position and get feedback from the other side about operational problems due to regulatory issues, in order to filter out ideas and policies that are in the best interest of consumers and market development.[49] CNB and HANFA do not have joint Innovation hub and this could cause operational inefficiencies once the IH gets more workload. Experiences of other MS with IHs point that close co-operation between public institutions is essential because Fintech operations are cross-sectoral.[50]

There is also a question of incentive to transform financial regulatory governance. Perception of respondents about Croatian National Bank is generally positive and they are viewed as "very competent and politically independent Croatian institution". In the last couple of years, the CNB has been in the public eye because of the Swiss francs (CHF) loans. Due to dramatic appreciation of CHF, large number of loans denominated in CHF created massive default on those loans. Public reacted in outrage and legal actions. This could lead the CNB to be more risk avoidant and approach carefully regulatory and policy matters with regard to Fintech. HANFA has proven in action through Innovation hub's establishment its willingness to promote and support FinTechs. They have full support of leadership for IH's operations. However, perception of the HANFA's political independence is lesser then CNB's because of the recent change of management due to Agrokor bankruptcy procedure, the largest Croatian privately held company covering food and retail sector across the SEE region. The Government view was that HANFA did not monitor and act accordingly. This could also lead to risk avoidant behaviour by HANFA towards FinTechs.

48 See note 8

49 Cambridge Centre for Alternative Finance, note 24

50 ESAs, note 8

The current talks between FinTechs and NRAs are conducted in-house with press release that covers general agenda vs. on-line streaming of public consultations organised by the European Commission available to wider audience on the web 24/7.[51] Respondent from regulatory authority stated that very often, they organise events on other regulatory matters with stakeholders as public consultations but the culture of public dialogue is underdeveloped in Croatia. Private sector often turns to informal channels of communications. This comment is in line with research on business environment and policy-making in Croatia.

Croatian business environment is burdened with clientelism, corruption, crony capitalism[52] and captured state.[53] In Croatia, reforms are not implemented during favourable macroeconomic and political conditions. Instead, they are predominantly organised during crisis period or because of an outside pressure, e.g. EU membership.[54] Results of policy reforms are characterised as "modernisation without development".[55] Studies on policy making and policy implementation point that Government strategies lack implementation plans, steering capacity are low due to inefficient policy coordination (horizontal co-ordination between ministries) and lack of serious impact assessment studies.[56] In comparison to other EU MS, Croatia has drastically lower level of participation of stakeholders in public consultations and policymaking processes.[57]

EU integration has contributed to many improvements in these processes, especially in the area of transparency and access to information. For example, the Government of Croatia has adopted the Code of public consultations in 2009

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51 E.g. European Commission, *Is EU regulation fit for new financial technologies?*, Conference: #FintechEU, 23 March 2017, [https://ec.europa.eu/info/events/finance-170323-fintech_en], accessed 10. March 2018

52 Franičević, V., *Privatization in Croatia - Legacies and Context*, Eastern European Economics, *vol.* 37, no. 2, 1999, p. 5-54; Franičević, V.; Bićanić, I., *EU Accession and Croatia's Two Economic Goals: Modern Economic Growth and Modern Regulated Capitalism*, Southeast European and Black Sea Studies, *vol.* 7, no. 4, 2007, p. 637-663

53 Petak, Z., *Policy Making Context and Challenges of Governance in Croatia*, in: Petak, Z.; Kotarski, K. (eds.) Policy-Making at the European Periphery – The Case of Croatia, Palgrave Macmillan, Switzerland, 2019, p. 29-46

54 Petek, A., *Features of Croatian Public Policies*, in: Petak, Z.; Kotarski, K. (eds.), *ibid.*; Vučković, V.; Šimić Banović, R., *Who and What is stalling reforms in Croatia?* Proceeding "Clientelism in Croatia", Centre for Democracy and Law Miko Tripalo, (forthcoming)

55 Fukuyama in Kotarski, K.; Petak, Z., *Croatia's Post-communist Transition Experience: The Paradox of Initial Advantage Turning into a Middle-Income Trap*, in: Petak, Z.; Kotarski, K. (eds.), *op. cit.,* note 53, p. 8

56 *Ibid.*, p. 32-37

57 Petak; Vidačak in Petak, *op. cit.*, note 53, p. 35; Vidačak; Škrabalo in Kotarski; Petak, *op. cit.*, note 55, p. 16

and in 2017 central online platform for public consultation was opened which is successful in promoting public dialogue[58] and there are additional areas for improvement.[59]

Aforementioned discussion leads to a conclusion that Croatian NRAs are currently operating in the environment, which hampers innovativeness of regulatory governance. Changes are occurring mostly due to the outside pressure and not as a Government strategic approach. Croatian NRAs are still branded as "command and control" system with traditional hierarchical principal-agent governance. Adding up non-supportive business environment and underdeveloped culture of public dialogue, transformation of financial regulatory governance will be a lengthy process. HANFA's Innovation hub will not provide revolutionary changes, but should be perceived as a positive evolutionary step in changing the culture of public dialogue, policy-making and transformation of regulatory governance.

6. CONCLUDING REMARKS

Fintech revolution leaders are in Asia and the US. Europe, minus the UK, is a trend follower. FinTech covers huge area, interconnecting and changing financial ecosystem. It is making great progress by providing easier access to finance for individuals and groups. It also represents risk for financial stability because, among other factors, regulatory framework is trailing behind fast-moving technical advancements.

The UK is regulatory innovator and a global leader in financial regulatory governance. They understood that innovative capacities and growth opportunities would be hindered by traditional regulatory approach. Innovation hubs and regulatory sandboxes enhance mutually beneficial dialogue. It is a platform for information sharing and learning trough collaboration. It requires partnership, flexibility, efficiency, trust and competence. This type of co-operation between regulator and (un)regulated parties has been promoted in EU's policy-making process since construction of European financial regulatory and supervisory architecture. The rest of Europe is following the UK's example, different MS being at different stage of transformation of financial regulatory governance, especially with regard to NRAs' culture and principal-agent governance.

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58 Vidačak, I.; Kotarski, K., *Interest Groups in the Policy-Making Process in Croatia*, in: Petak, Z.; Kotarski, K. (eds.), *op. cit.*, note 53, p. 83-106

59 European Commission, *Country Report Croatia 2019 Including an In-depth Review on prevention and correction of macroeconomic imbalances*, SWD(2019) 1010 final, 2019, p. 69-73, [https://ec.europa.eu/info/sites/info/files/file_import/2019-european-semester-country-report-croatia_en.pdf], accessed 10 March 2019

Croatia is catching up very slowly, hampered by the late EU membership and not so efficient transition to modern democracy and economic system. Case study of Croatian innovation hub in capital markets area shows that Croatia is not active in financial regulatory innovation, rather is a trend follower. Results show incremental changes in financial governance culture. Both private and public sector representatives agree that innovation hubs are constructive mechanism for grasping modern financial trends. They are perceived as a positive step forward in promoting a culture of dialogue and better policy-making. Financial governance in Croatia is still considered very strict and hierarchical. Past experiences of banking and economic crisis provide a good argument for taking a cautious approach in financial regulatory governance by the NRAs. Recommendations should therefore be focused on improving business environment, competitiveness, culture of public dialogue and enhancing institutional capacities. This benchmark report could serve as a policy paper to stimulate public dialogue and discussions on further improvement of FinTech regulatory governance in Croatia.

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Annex 1. Comparative assessment of ESAs "Best practices" regarding design and operation of Innovation hubs in EU Member States with existing Innovation hubs and newly opened Innovation hub in Croatia

Main categories	**National competent authorities**	**Croatia (HANFA)**
IH objectives	Enhance firms understanding of regulatory and supervisory expectations (+ Learn about innovative models and trends)	Same.
General objectives	Promoting stability, consumer protection, UK: effective competition, mitigating risk of regulatory arbitrage	Safeguarding the stability of the financial system and supervising the legitimacy of supervised entities' operations
Functions	Non binding guidance on conformity of their business models with regulatory requirements	Same 1. to support the development of innovative projects 2. to reduce the time needed for innovative projects entering the market 3. to lessen regulatory uncertainty 4. to facilitate access to HANFA by creating a special contact point 5. to enable faster, simpler and individual access to projects that fulfil the required conditions 6. to be an active catalyst in promoting interaction between the financial industry and innovative technological solutions, research, development and society economic needs.
Staff	1-9 (IT: 30 on flexible basis; UK: 30 dedicated solely to IH)	11 = 2 coordinators and 9 on flexible basis from other departments
English proficiency level		Yes.

Main categories	National competent authorities	Croatia (HANFA)
Service for users	All firms (incumbents and new entrants), regulated & unregulated, adopting innovative products, services, business models or delivery mechanisms	Same. Opened to firms from EU and worldwide.
Users	Unlicensed start-ups (predominantly), regulated entities (credit institutions, insurance companies, payment institutions), technology providers to financial institutions	Same, with precisely defined conditions of positive or negative indicators with regard to innovative ability and consumer protection.
Communication channels	Telephone, mail, online meeting, physical meetings	Same.
Standardised application forms	Description of general characteristics of innovative product, services or model and technology used (blockchain, AI, machine learning, big data analytics)	Same.
Time duration for answer		Admissibility assessment within 7 days.
Number of enquires	Dozens to hundreds	N/A The trend shows decrease in enquires amount, but increase of significant project opportunities.
Record keeping	Publication of structured reports & transparency actions; publication of statistics	Information in Annual Report.
Follow up activities	Case officer help with application procedure for authorisation	Yes, one of the core functions.
Common enquires	Areas: whether certain activities need authorisation, licencing process, whether or not anti-money laundering issues arise; applicability of consumer protection regulation; regulatory requirements	N/A

Main categories	National competent authorities	Croatia (HANFA)
Events		Kick-off meeting with 30 representatives of app. 20 consultancy and legal firms working in the area of new technologies. Followed by series of meetings with dozens of individual firms. Upon request opened to: workshops, discussions, roundtables, etc.
Dialogue	Firms raise concerns about regulatory treatment & suggest changes in legal framework to better support innovative businesses	HANFA is open to regulatory adjustments if there is evidence that they are obstructing innovations, following criteria of investor protection and systemic risk observations.
Frequent Q&A on website		Planned in the future.
Interaction between competent authorities	Joint IH for Twin peaks (BE & NL); Memorandum of Understanding (MoU) Common platform for information exchange Working together on cross-sectoral issues	No joint IH between HANFA and CNB. Collaboration and exchange of information through existing bilateral MuO and EFIF.
Interaction with other authorities	Consumer protection, competition, data protection, MoU	Open for collaboration.
FinTech Forum	Consultative body with representatives from Fintech, incumbent players, lawyers, consultancy firms	Open for collaboration.
Multijurisdictional IH	MoU	None.
Opportunities	Better understanding of innovation in financial services Keeping pace with emerging technologies (DLT, big data analytics, AI, machine learning)	Same.

Main categories	National competent authorities	Croatia (HANFA)
Operational challenges and risks	Difficulties finding and retaining staff, domestic coordination - cross-cutting issues, cross-border co-operation – guidance regarding more than 1 jurisdiction, regulatory arbitrage – different approaches from NRA, understanding of indicative guidance, perception of preferential treatment (public articulation of general policies)	Difficulties finding staff, bad risk assessment.
Regulatory sandbox		Too early. At least not in the next year due to high costs of RS.
Transformation of regulatory governance		Very limited. Croatian administrative process is very formal, strict and hierarchical. IH is designed to help firms get to the market faster and less costly.

Annex 2. Comparative assessment of FCA'a and HANFA's Innovation Hub operational activities according to most different case selection

UK (FCA)	*Croatia (HANFA)*
STARTING POINT	
2-3 people start the project in 2014	2-3 people
Culture of innovation	Culture of trend-following
SUPPORT FROM LEADERSHIP	
Highest level of leadership	Support from HANFA leadership Initiated at HANFA level (highest levels of Government not engaged in the process)
EXSTENSIVE PUBLIC CONSULTATION & ENGAGEMENT	
Call for Input – to identify key issues and challenges facing innovator businesses	No.
Methodology - public consultation: ideation, creation and ongoing formulation of RS & Innovative agenda 1. provided CFA with external expertise, insight to steer direction and focus of FCA regulatory & innovation activities 2. Identify trends and potential issues at early stage 3. Engagement of FCA team 4. New information can help identify possible policy and process changes 5. Provides demonstration of FCA commitment 6. Consultation process useful if incumbents are opposing pro-innovation initiatives 7. increase the impact beyond firms directly involved – world leader of regulatory innovation	Methodology – Following ESAs policy paper: "Principles for establishment and operation of innovation facilitators" in European Supervisory Agencies (ESAs) Report: FinTech: Regulatory sandboxes and innovation hubs (April 2018)
Findings: - difficulties to navigate the regulatory system - lack of legal certainty & clarity - regulatory uncertainty (e.g. digital currencies) - accessing bank accounts for small businesses - inadequate FCA website information	No.

ENGAGEMENT ACTIVITIES	
1. **Roundtables** - to focus on the FCA & the Innovation Hub asking for feedback to improve operations	**Kick-off meeting** with 30 representatives of app. 20 consultancy and legal firms working in the area of new technologies. Planning for more meetings with: start-ups, IT community, regulated entities.
2. **Surgeries** - to provide support to businesses experiencing specific and common issues working with the regulatory framework, including Q&A sessions to explore problems and coaching sessions to educate attendees	None at the moment, can be organised upon demand.
3. **Thematic workshops** - to draw on industry expertise to discuss emerging trends in the sector and consider potential impact from a regulatory perspective.	None at the moment, can be organised upon demand.
4. **Monthly 'Showcase Events'** - to allow firms to talk through potential solutions to common problems	None at the moment, can be organised upon demand.
5. **Events and conferences** - to enable a wide range of stakeholders to participate and engage in a variety of issues, topics and themes	None at the moment, can be organised upon demand.
6. **Consultation processes** - that openly invite input and perspectives from a whole range of stakeholders, from industry experts and practitioners to the general public	None at the moment, can be organised upon demand.
7. **Innovation sprints** - to bring together multiple stakeholders to address and collectively solve a specific problem identified	None at the moment, can be organised upon demand.
workshops, roadshows, roundtables, conferences and panel sessions – hosted by other organisations	Lectures and workshops with stakeholders at the Croatian Chamber of Commerce
2018: 100 firms involved in RS directly & thousands of firms indirectly	N/A
Importance of high levels of external engagement with a wide variety of stakeholders is therefore an essential element to an effective and high impact process of innovation.	Culture of stakeholder meetings with public dialogue, public questions and consultations are underdeveloped in Croatia.

Internalising Innovation	
Working closely with firms to develop, co-create and redefine the design, processes and approaches to supervision, monitoring and regulation itself	IH could provide a window of opportunity for adjustments in regulatory framework. However, the Croatian administrative process is very formal, strict and hierarchical. IH is primarily designed to help firms get to the market faster and less costly.
Facilitate Innovation: 1. 12 Proof of Concepts (redefine regulatory reporting for both regulator and the regulated) 2. RegTech Team's TechSprints (Proof of concepts to address specific industry challenges, e.g. money & mental health)	None.
International Cooperation	
Collaboration agreements: China, Singapore, Hong Kong, South Korea, Australia, Canada	Member of EFIF.
GFIN – Global Financial Innovation Network	No.
Outcome	
Too early but indications that Project Innovate is: - resulting in new firms investing in new generation technologies - better financial products and services - promote competition - build regulator's capacity to enhance integrity of financial service	N/A
World leader - Influential trend-setting centre for financial & regulatory innovation.	Trend-follower.

UDK 658:159.942(4-67EU:497.5)
338.46(497.5)
Original scientific paper

MULTIDISCIPLINARY APPROACH TO MANAGING ANIMATION TEAM IN EUROPEAN BUSINESS CONTEXT

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ABSTRACT

A successful manager knows how to successfully lead a team, and the more satisfied the employees are, the more they are willing to contribute. The final result is a better company image in the market and positive economic performance indicators. Company profits when the organization continually invests in developing the business capabilities of managers to manage their teams. This paper contains managerial specific challenges, outlines the profile of an emotionally intelligent leader, and compares leadership styles in the context of EU, on the example of animation in Croatian tourism. The aim of the paper is to show how emotional intelligence influences the capabilities of animation team managers in business tasks. It will be pointed out how a manager can improve his or her emotional and communication skills. The animation manager develops emotional intelligence and communication skills by integrating technology into the business of his animation team. The descriptive method and method of compilation are used to define emotional intelligence in european practice. Questionnaire is made for analysis, to detect how significant is correlation between development of emotional intelligence and usage of information-communication technology in an animation.

Keywords: *management, tourist animation, emotional intelligence, information and communication technology*

1. INTRODUCTION

Management is the process of designing and maintaining an environment in which individuals, working together in groups, effectively achieve their chosen goals.[1] The authors Hellriegel and Slocum also gave a general definition of management, in which they stated that management represents the skill of achieving a certain effect created through other persons.[2] According to the above-mentioned definition, it can be concluded that in the initial considerations, the concept of management in Europe was based on people as the main factor for achieving positive business results. Management is the process of designing, directing and harmonizing all factors of the production and service processes in which individuals, working together in a company, effectively accomplish their chosen goals in performing the functions of planning, organizing, recruiting, leading and controlling.[3] Leadership, in other hand, is a narrower term than a management, which is why it is often cited as just one of the functions of management. Leadership is the process in which an individual exercises influence over a group, to achieve a common goal.[4] Author Northouse gave a good direction in the scientific study of leadership and found a connection between theory and contemporary business practice in Europe. The reason why for a long time leadership was viewed as one of the functions of management is that of the statement by the authors Weihrich and Koontz, who defined management precisely through functions. The five functions of management are: planning, organizing, recruiting, leading and controlling.[5] As such considerations have been stated in the last century, it is necessary to revise the fundamental principles and functions. Nowadays, definition of management points out new important elements, so previous definition of management is replaced by the new one. Management is a steering influence on market, production and/or resource operations in an organization and its units that may address both people and non-people issues and is exerted by multiple organizational actors through either anticipatory norm-setting (strategic management) or situational intervention (operational management), with the aim of achieving the unit's objectives.[6] It gives a new perspective of management in the European context. In this century, the term leadership has been taken out of the context of management and is being studied separately. In the second half of the last century

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1 Weihrich, H.; Koontz, H., *Management*, Zagreb, MATE, 1998, p. 4

2 Hellriegel, D.; Slocum, W.J.Jr., *Management. (5)*, New York, Addison Wesley Publishing Company, 1988, p.6

3 Cerovic, Z., *Hotel Management*, Opatija, Faculty for Tourism and Hospitality Management, 2003, p. 7

4 Northouse, P.G., *Leadership: Theory and Practice* (6), Thousand Oaks, CA, SAGE, 2013, p. 5

5 Weihrich; Koontz, *op. cit.* note 2, p. 21

6 Kaehler, B.; Grundei, J., *HR Governance – A Theoretical Introduction*, Berlin, Springer, 2019, p. 22

many researchers have noted the need to often use the synonym of leadership when defining the term management. Furthermore, the term manager has also long been associated with the concept of leader, although both in theory and in practice they can be separated. A manager is an expert whose first task comes from the management process, that is, executes planning processes - decision making, organizes work and business, engages and leads people, controls human, financial, physical and information resources, in order to accomplish the task.[7] A leader, according to author Buble, is a manager, who identifies with the leader and usually has a practical importance that translates as a leader.[8] A leader is a narrower term than manager, since the manager has a formal position in the business organization, while the leader is often outside the hierarchy. In his book, author Northouse lists the main traits of leaders: intelligent, self-confident, determined, integrity and sociability.[9] However, the definition of a leadership needs to be supported by newer context. In European context it is analyzed from various perspectives, such as social, corporate, political, etc. Leadership consists of the efforts of one member of an organization with respect to other members to help them achieve their goals.[10] Furthermore, there is another newer definition of leadership and leader. Leadership is about the capacity of an individual to inspire and motivates.[11] For the purpose of elaborating the defined problem, paper starts with an overview of manager specific challenges in EU, and it is followed by the research methodology, findings with discussion and at the end is given the conclusion. The data used in this research were generated using the questionnaire, which is developed by authors. It was created for animation teams and managers in the area of Split (south Croatia, EU). For the research two hypotheses were put forward. H1: An emotionally intelligent manager of animation possesses a high degree of influence on the feeling of satisfaction of the employees in the animation team. The second major hypothesis H2: Information and Communication Technology influences directly and indirectly the positive development of emotional intelligence of all members of the animation team. Two auxiliary hypotheses have also been put forward to make the research of the highest quality possible. S1: The application of information and communication technology in animation management is essential for successful business communication between managers and team members. S2: Emotional intelligence development is a prerequisite for successful

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7 Cerović, *op. cit.* note 2, p. 7

8 Buble, M., *Management*, Split, Faculty of Economics, 2000, p. 7

9 Northouse, *op. cit.* note 2, p. 5

10 Samah Hatem, A. *et. al.*, *Understanding of the Meaning of Leadership from the Perspective of Muslim Women Academic Leaders*, Journal of Educational and Social Research *vol.* 6, no. 2, 2016, pp. 225-236

11 Van der Wagen, L.; White, L., *Human Resource Management for the Event Industry*, Oxford, Taylor & Francis Ltd, 2014, p. 217

management of the animation team. With this questionnaire can be elaborated the possibilities of enhancing emotional intelligence and communication using information and communication technology.

2. MANAGER SPECIFIC CHALLENGES IN EUROPEAN UNION

Animation in tourism is a European product, considering that the first animation club is open in Europe, in 1950. First animation club in Europe was Club Mediteranee, located in France. Since 1950s till today many tourist destinations developed their own animation offer, so today animation can be found in the offer of cities, hotels, resorts, clubs and camping resorts. In 2019 total number of tourist overnight stays increased, according to the European Union. Spain is leading European country, with total of 469 mil overnight stays (www.ec.europa.eu/eurostat, access date: January 31, 2020). According to the same source, France contributed to European tourism with 446 mil of overnight stays, while Germany had 436 mil overnight stays in 2019 (www.ec.europa.eu/eurostat, access date: January 31, 2020). In the whole EU foreign tourists realized 1.5 billion overnight stays, while domestic tourists realized 1.72 billion overnight stays (www.ec.europa.eu/eurostat, access date: January 31 2020). In Croatia was registered increase of 10% of total overnight stays, comparing to the previous year 2018. The consumption of domestic tourists in EU is as twice as smaller than consumption of foreign tourists, in Croatia in 2019 was registered that foreign tourists spend six times more than domestic tourists, according to Eurostat analysis (www.ec.europa.eu/eurostat, access date: January 31 2020). Considering numbers and consumption, it is evident that there is a huge space for animation development in EU. In the same time, animation affects total tourist consumption, and that should all managers consider. Considering the fact that modern tourism makes up 10% of the total GDP in Croatia, tourist animation requires standards, and the standards should be implemented to achieve quality[12]

2.1. Importance of animation managers

An effective manager is an active leader, creating a positive work environment in which the company and its employees have the opportunity and incentive to achieve a high and required level of results.[13] The animation team manager should be a proactive leader, continually creating a comfortable work environment, while encouraging his team to achieve the best results and permanently ensuring op-

[12] Bruža, D.; Rudančić, A., *Total Quality Management in Hotel Systems within the framework of globalization*, Economic Ideas and Practice, *vol.* 36, no. 1, 2020, pp. 67-83

[13] Buble, *op. cit.* note 2, p. 8

portunities for his team to be more successful. Cerović states that the manager is a professional person organizing the work.[14] The animation manager uses all his / her acquired professional skills, acquired knowledge and continuously develops his / her skills to make the right decisions. An animation manager actually exists to influence a team of animators, to communicate and execute tasks as successfully as possible, in order to achieve organizational goals together. In that sense, it is important to have qualified animation manager. If the manager is successful in transferring his knowledge and experience to his team, while keeping in minds the differences between the people in the team, his team will also be more successful in achieving the required goals. Employees play the role of direct service providers.[15] In order to make a profit, it is crucial to learn how to provide the best possible service. According to Bruža, Miloloža and Santo in their research, there are different levels of management in the hotel system in Europe[16], and one of the levels of management is precisely animation management. The manager should be aware of his or her technical skills and then be able to work with the employees and apply the acquired knowledge, in order to fulfill everything planned.[17] The emphasis on synergy is common in all special programs, and all those involved in the creation and realization of the content of the animation program.[18] In order to fulfill this, it is necessary to clarify which elements are most important. The basic set of 21st century skills are learning skills: critical thinking, creative thinking, collaboration, communication.[19] It is these skills that help the animation manager to lead his team as successfully as possible, to understand, support, nurture them, and at the same time to monitor the success of the program. The specific challenges of animation managers in terms of human resource management in European context are: recognizing a creative animator, professional selection of individuals and their potentials, organizing work and tasks, creating a vision, emotional challenges, resolving conflicts, evaluating collaboration, managing time and stress. When recognizing a creative animator, the animation manager should create an environment in the team that will suit the creativity of the animators, where they

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14 Cerović, *op. cit.* note 3, p. 7

15 Granić, E. *et. al.*, *We are happy here and we will stay, what about you? The cross-level impact of employee loyalty and performance on student loyalty*, The South East European Journal of Economics and Business, *vol.* 13, no. 2, 2018, pp. 7-18

16 Bruža, D.; Miloloža, I.; Santo, T., *Pre-opening hotel management-phases and procedures*, Interdisciplinary Management Research 15, 2019, pp. 33-50

17 Bruža, D.; Rudančić, A., I*nfluence of information-communication trends on business communication in hotel industry*", Interdisciplinary Management Research 14, 2018, pp. 3-23

18 Bruža, D.; Rudančić, A., *Special city programs in the function of growth and development of tourism and hospitality offer*, Interdisciplinary Management Research 13, 2017, pp. 121-138

19 Glavaš, J. *et. al.*, 2017. *Employability of university of applied sciences graduates*, Interdisciplinary Management Research 13, 2017, pp. 825-840

will realize their creative potential. The animation manager should therefore be the first to select potential animators for his team, since most human resources departments in hotel systems view economic performance through work efficiency. The biggest risk here is that one's creative potential is not recognized, simply because of the rigid technical elements and the way the human resource manager selects the most suitable employees. This may be true in other departments, but in the animation department, creativity must take precedence. Creative potential is a personality trait, which means that it reflects on different life and professional situations.[20] Author Ranković points out that there are various tests in the professional selection of individuals, such as the Getcels and Jackson TAT test, the Rorschah technique, specially designed creativity tests and others. When organizing work and tasks, the animation manager must keep in mind the job characteristics. Tourist animation is a specific activity, which complements basic services. In her book, Ranković pointed out that job characteristics can be defined through skill diversity, task identity, task significance, autonomy, and evaluation point.[21] When planning tasks, he must take into account the main factors of animation performance, such as space, program, and staff. In the presentation of the results of the study of the impact of emotional intelligence on the performance of the animation team in the continuation of the work, influential variables will be presented, which represent the specified specifics that the animation manager encounters on a daily basis. New constellation which this research points out: Every leader is a manager, while every manager is not necessarily a leader.

2.2. Profile analysis of an emotionally intelligent leader

The employee profile in each company means the totality of his / her skills, knowledge, abilities and competences that he / she can provide to the company in which he / she is employed. In order to make the most of the potential that every tourist animator can provide, the animation manager must know what kind of animator profile to employ for each and every part of the animation program. To be able to do this, as an animation manager, he must first and foremost fulfill the required profile of an emotionally intelligent tourist animation leader. As Cerović stated in his book Animation in Tourism, the general characteristics of the animator are determined by these requirements: psychophysical traits, talent and sense of contact with the guest, the required level of education and traits that will satisfy the guest.[22] When analyzing the profile of an emotionally intelligent leader in tourist animation in EU,

[20] Ranković, B., *Emotional intelligent company*, Beograd, Alma, 2018, p. 23

[21] Cerović, *op. cit.* note 2, p. 23

[22] Cerović, Z., *Animacija u turizmu*, Opatija, Faculty for Tourism and Hospitality Management, 2008, p. 67

it is important to emphasize how the psychophysical qualities that the manager carries within himself and whether he or she is competent to do the job. In addition to their appearance and age, they include talents for specific tasks, professionalism, interest, energy, effort and will to resolve conflicts, attentiveness and confidentiality towards all team members. According to some studies to date, the most important component is communication, which will be discussed below. In this section it can be emphasized that communication skill implies that the animation manager has a distinct memory, skills in communicating with top management and members of his department as well as with guests. There is also resistance to the various pressures that are constantly imposed through tourist animation, and the ability and ease of verbal expression. The overall health of the leader is also reflected in the psychophysical and mental balance throughout the engagement. In addition, the final component in forming a leader's profile is the definition of emotional intelligence. As Salovey and Mayer have established in their works, emotional intelligence is the ability to perceive and manage their own feelings, as well as others, and to direct and act with the help of such feelings. Emotional intelligence is the ability to constantly recognize your emotions, understand them, and manage them, both in your own and in others' emotions. In the profile of an emotionally intelligent leader, several crucial factors can be observed. Ranković in her work, and before her Goleman in his, emphasize that these components are: self- awareness, empathy, self-control, intrinsic motivation and social behavior.[23] Self-awareness refers to the correct perception of oneself and others in the environment. Empathy encompasses the ability to understand and perceive others' feelings. Self- control, the most important component of a leader's profile, is the ability to control one's emotions, delay the response to challenges, tolerance, and process emotions into a positive outcome. Intrinsic motivation is the desire to achieve results that positively impact the animation team. Social behavior is the ability to manage relationships with all members in the animation team, in the hotel system as a whole and in relationships with guests. The profile of the emotionally intelligent animation team leader thus formed implies the effective management of human resources in the animation team. An animation manager with the ability to communicate with a team achieves goals faster even in times of crisis, such as when the entire team needs to do more than planned, knowing that it will not necessarily be accompanied by higher revenues. As a conclusion of this section, it can be stated as follows: When creating the profile of an emotionally intelligent animation leader, the animation manager must continuously develop and simultaneously implement an operational human resources strategy that is most likely to reach productive utilization of all knowledge, skills and competencies that the animation team members possess.

[23] Ranković, *op. cit.* note 3, p. 24

3. HUMAN RESOURCE MANAGEMENT IN ANIMATION IN EU

Managing human resources in the animation team is a challenge for every animation manager in the whole EU. The very term human resources refers to the totality of human resources in an organization. It includes of knowledge, skills, abilities, creativity, motivation and work energy. All this is required to achieve organizational goals effectively. Pržulj states that this is the total intellectual, psychological, physical and social energy.[24] Employees are not just one of the most important resources of a company. They are also the most expensive and problematic resources. Given the increasing importance of human resources in Europe, the management of these resources is considered a strategic interest of the organization engaged in higher levels of management. Without human efforts and their valuable skills, there is no organization and its successes. The specificities of human resource management in the animation department in EU can be reflected in the following statements: the total results of the animation department are the sum of the individual results achieved; the results of the work depend on the motivation of the animator and the animation manager; only the animation team leader can shape the vision and lead the team to that realization; the human resources in the animation department have a long-term impact on the image of the animation manager; human resources are correlated with all departmental business functions; investing in animator training and motivation is more cost effective than investing in any other department resources. Human resource planning for the organization of events is unique. Perhaps the most important specificity is that many events have "pulsating" organizational structures. This means that the organizational structure grows in terms of staff as the event approaches, but decreases rapidly when the event ends.[25]

3.1. Concept of human resources management

The leader must know the process of planning and managing human resources. Getz outlined the concept of human resource planning. According to him, this concept consists of seven main stages:

1. human resource management strategies and objectives;
2. human resource management policies and procedures;
3. recruitment, selection and introduction;
4. training and professional development;

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[24] Pržulj, Ž., *Human Resource Management*, Belgrade, Faculty of Commerce and Banking, 2007, p. 16

[25] Hanlon, C. M.; Cuskelly, G., *Major sport events Managing fluctuating staff Inducting event staff, Event Management*, International Journal University of Queensland, Brisbane, Australia, *vol.* 7, no. 4, 2002, pp. 231-244

5. monitoring and evaluation;
6. termination of business relationship, deployment and re-recruitment;
7. assessment of the planned HRM process and outcomes.[26]

The event's human resources strategy seeks to support its overall mission and goals. Managers of animations should make decisions about how many workers / animators are necessary for the realization of entertainment programs and events, which skills / qualifications / experience are necessary. Also, when in the process of planning the program, the quantity of entertainers/staff needs to be determined (for example, only for the exclusion of the stage events). What is most important in the overall process of leading an animation team is the correct leadership style, that is, how the animation manager fulfills all the prerequisites for being a successful animation team leader. It is well known that there are several types and styles of leadership. So far, three main leadership styles in EU have been identified and explained in all research. A successful leader has a visible impact on the team which is following him. He motivates and encourages animators to do their best at any given moment and to perceive the set vision as their own. This is achieved by the emotionally intelligent leader of the animation team. A noticeable lack of emotional intelligence is identified when the animation manager relies entirely on the hierarchy and the power he or she has in that position. In this case, the final results are lacking, the vision is unfulfilled, and this can be reflected in the economic performance indicators of the animation department. Daniel Goleman states that there are 6 leadership styles: command style, authoritative / visionary style, coaching style, affiliate / associate style, democratic style and progressive / striking style.[27] In order to link the leadership style to emotional intelligence and indicate a correlation, each of the styles will be briefly explained. The command style is often negative, but useful in crisis situations and thus gives the leader specific direction in high-risk situations. The visionary style encourages the members of the animation team towards the realization of the vision, creates a mostly positive atmosphere, and is useful in situations where clear direction, concrete tasks and accurate execution are required. The coaching style is used to help team members contribute more to their team, connect animators with managerial goals and is highly positive. Affiliate / collaborative style creates a harmonious atmosphere, allows all members of the animation team to connect with each other, and is ideal at the beginning of the work and during a stressful period. The intensity is positive and strengthens the interconnectedness. The democratic style of an animation leader is of positive

[26] Getz, D., *Event Management and Event Tourism*, New York, Cognizant Communication Corp., 1997, p. 22

[27] Goleman, D., *Leading Resonant Teams*, Leader to Leader 25, 2002, pp. 24-30

intensity, appreciates the contribution of each member, respects their diversity and encourages the animation team members to become more involved with the team and the vision of the leader. The progressive style of the leader is characteristic when the team is composed of competitive members, so the leader thus produces high quality results. There is high motivation within the whole team, but often a negative influence on the animation team due to the expressed ambition of the team members. In this case, the leader sets high goals, exciting tasks and programs that are challenging for animators. An emotionally intelligent animation team leader anticipates future stressful situations, approaches each member individually, adjusts the animation program plan, and motivates the members as the animator's motivation decreases. When an animation manager does not achieve the positive effects of acting on their team, then it is classified as emotionally unstable or unintelligent, or deviates from the team leader profile. The hardest part is identifying potential conflicts and resolving them. The following section describes in more detail how to enhance the emotional intelligence and communication skills of leaders using information and communication technology.

3.2. The correlation analysis of emotional intelligence and communication skills in the use of information and communication technology in EU

In order to achieve successful communication, certain prerequisites must be met. These assumptions are correlated with information and communication technology and emotional intelligence of the animation team leader. When the animation manager is emotionally stable and uses the full potential of the use of information and communication technology in his work, then stability and assurance are achieved that each member of the animation team will fully complete the planned tasks and achieve a vision together. The stability and security of the individual in every respect should be an imperative goal.[28] Employee performance is a multidimensional structure, as Granić, Babić-Hodović and Arslanagić-Kalajdžić cite in their research, in which they mention that this structure has different explanations, depending on the source cited.[29] In this case, the manager takes all the planned activities that are in the strategy of the animation department of a particular system. In the case of emotional intelligence development in the case of EU, various techniques are used during managerial training and personal development. An animation manager can be a successful leader if he or she knows how to manage themselves and others in communication processes, using information and communication technology tools. Through communication, the views and feelings of the interlocutor are expressed

[28] Vojinović, Ž.; Leković, B.; Glavaš, J., *Risk Management of the socio-economic system and insurance as a stability instrument*, Interdisciplinary Management Research *vol.* 15, 2019, pp. 203-218

[29] Granić *et.al.*, *op. cit.* note 2, p. 7

and the outcome can be positive and negative. As Galičić and Šimunić state in their research, for the rational application and development of information technology in hotel companies, several prerequisites need to be met: to recognize the need to apply information technology; to plan the construction and development of the business system as a whole; standardize equipment, documentation and methods of using information technology; to organize the process of managing and managing the conditions of application of information technology.[30] Given that animation is one of the departments of the hotel system across whole EU, the above can be applied within the research of the problems of this paper. Information management has certain specificities, and they are conditioned by a number of elements. In the animation team, business communication is subject to information and communication trends, i.e. ICT greatly affects the quality of communication between team members and the animation manager. Using technology, the animation manager has control over the team, shortening the time in the process of transmitting information and tasks, thereby influencing the control of stress factors. By reducing stress, it enhances emotional intelligence, that is, leads to controlled conditions. The most important information and communication tools for successful communication are: direct communication using mobile devices, via text messaging and video calls, the use of group calling applications, emails and social networks. In one study on the impact of information and communication technology and tools on business communication, significant results were obtained. In that study, Bruža and Rudančić stated the degree of frequency of use of certain attributes in business communication. There is a noticeable progress in the use of modern technological solutions for the transfer of information. The way and means of business communication ICT are most influential on official email and social networks. 57% of the respondents in this survey stated that information and communication trends have the greatest influence on the use of official email as a means of business communication, which is confirmed by the percentage of choosing this answer.[31] With greater use of information and communication tools to improve communication among members of the animation team, the degree of controlled conditions is increasing. This makes the animation manager more able to respond properly to all situations. The use of information technology intensifies communication, reduces costs and supplies, enhances procurement and marketing through information and communication infrastructure, enables real-time information for managers, and encourages

[30] Galičić, V.; Šimunić, M., *Information Systems and Electronic Business in Tourism and Hospitality*, Faculty of Tourism and Hospitality Management in Opatija, 2006, p. 98

[31] Bruža, D.; Rudančić, A., I*nfluence of information-communication trends on business communication in hotel industry*", Interdisciplinary Management Research, *vol.* 14, 2018, pp. 3-23

the development of new businesses.[32] To conclude this consideration, it can be stated that for the information system in hotels as well as in the animation department, the property management system (PMS) is one of the most important information and communication applications for the manager.[33]

4. ANALYSIS OF RESEARCH RESULTS

The assumption is that the animation manager is not necessarily a leader, because as already stated, every leader is a manager, while every manager is not necessarily a leader. The authors set out the main and supporting hypotheses as the starting point. The subject of the research is the influence of emotional intelligence on the management of the animation team, regarding the tourist business in Croatia. The goal of the research is to show how emotional intelligence influences the ability of the animation team manager to successfully manage the animation team. The purpose of the research is to present the level of influence of information and communication technology on the development of emotional intelligence and communication skills. Animation teams were observed in two cases of animation teams in one camp in Stobreč near Split and in one tourist club in Dubrovnik. These two animation departments are representative for a number of reasons. The main reasons are the number of members of both teams, complete coverage of animation activities for all guest groups, the number of visits to the animation programs, the long history of business in both departments within their hotel and camping systems. Following these, two main hypotheses were put forward. H1: An emotionally intelligent animation manager has a high degree of influence on the animation team's sense of satisfaction. H2: Information and communication technology influence directly and indirectly the positive development of emotional intelligence of all members of the animation team. Through the first main hypothesis, the research examined how business psychology connects with business economics, that is, whether there is any and the degree to which it is correlated with the emotional intelligence and animation management. During the research, there was a need to establish auxiliary hypotheses, which could confirm or refute the main hypotheses. S1: The application of information and communication technology in animation management is essential for successful business communication between managers and team members. S2: Development of emotional intelligence is a prerequisite for successful management of the animation team. In the first part of the research, the EFQM Excellence model was used. It can be

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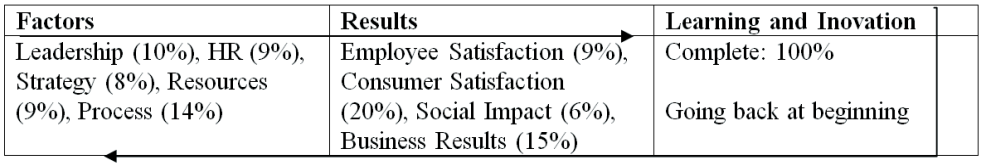
[32] Stipanović, C., *Concept and development strategy in tourism*, Opatija, Faculty for Tourism and Hospitality Management in Opatija, 2006, p. 205

[33] Kokaz, K.; Murphy, H., *An Investigation of dana management and Property Management systems in hotels*, Tourism and Hospitality Management, An International Journal of Multidisciplinary Research for South-Eastern Europe, *vol.* 17, no. 1, 2011, pp. 101-115

divided into three research phases: leadership strategy, processes and results.[34] This model ensured that all necessary variables were included to investigate the impact of information and communication technology and tools on the communication of animation managers and members and the quality of those relationships.

Figure 1. EFQM Excellence model in EU



Source: authors, following The European Foundation for Quality Management, [https://www.efqm.org/index.php/efqm-model/] Last accessed 15 January 2020

An important segment of the model is the combination of animation leadership, using a variety of information and communication channels, to successfully complete the process, manage human resources, to maximize business results. In this case, the results have a significant impact on reducing the stress and stressors of communication, the ability to control the situation and increase the satisfaction of members. This is achieved if the manager possesses emotional intelligence to some extent. The observed research variables are: direct communication using mobile devices, via text messaging and video calls, the use of group calling applications, emails and social networks.

Table 1. Frequency of Usage of Communication Attributes

Atribute	Frequently used (%)	Preferred to use (%)	Necessary for business communication (%)
Private email	68	70	68
Official email (shared email used by team)	70	65	60
Text and voice messages via cell phone	24	26	30
Social network (chat, video calling, combined)	45	42	44
Call via cell phone	85	75	80
Directly face to face (live or via video link)	78	70	68
Written messages on papers	10	8	5
Mixed (depending on the time, place, mode, type and content of business communication)	55	45	40

Source: authors research

[34] Cetinski, V. , *Strateško upravljanje razvojem turizma i organizacijska dinamika*, Opatija, Fakultet za turistički i hotelski menadžment, 2005, p. 23

Given that multiple choices were made, the animation department respondents overwhelmingly chose to use smart cellular telephones, whether audio or video, with results ranging between 75% and 85%. To a minimum, the classic method of communication, handwriting and conveying a written message is used, to which a small percentage of respondents, between 5 and 10%, responded. In addition to audio and video communication, the respondents indicated that it was very important to them to communicate via electronic mail, in which case between 60 and 70% of respondents stated that they use this type of communication - most often when sending materials, documents and programs for animation activities such as activity schedules, weekly work and assignment plans, and receiving feedback from surveys that guests complete. The third segment that facilitates their communication is the use of social networks and applications, through which they can again combine text messages and audio-visual calls. Almost 50% of respondents expressed a positive attitude towards this information and communication tool for successful communication. Consequently, the auxiliary hypothesis S1 could be positively confirmed. In order to validate or deny S2, it was necessary to carry out additional research in another set of questions, to evaluate the criteria related to the role and impact of emotional intelligence. The following are selected variables that are indicators of the existence or absence of emotional intelligence: compassion, listening, understanding, friendship, mutual support, conflict, stress, expression, and motivation by the leader. The questions were intended to measure certain elements of significance, which would contribute to the evaluation of their contribution to the overall assessment of the impact of emotional intelligence, and ultimately to the confirmation or refutation of H1, H2 and S2. By statistically processing the obtained data, the results indicated that H1 and H 2 were fully accepted and positively confirmed, while S 2 was partially accepted. The results according to the test elements are shown below. First, a tabulation of the numerical results will be presented, followed by a descriptive analysis and conclusions.

Table 2. Age structure of respondents

Age group	Frequency of appearance	Relative frequency
18-25	26	0,52
26-30	18	0,36
31-35	5	0,10
36 and more	1	0,02

Source: authors research

The total number of respondents was 50 and all respondents answered the age question. Out of the total, the majority of respondents were in the 18-25 age

group, or 52%. There are at least 36 of them in the group and there is only one respondent in this group, which represents 2% of the total.

Table 3. Respondents by gender

Gender	Frequency of appearance	Relative frequency
Male	22	0,44
Female	28	0,56

Source: authors research

The study was attended by 28 female persons and 22 male persons, i.e. the total female respondents was 56%, 12 percentage points higher than the number of male respondents, totaling 22. The following two tables show the statistical results of testing the elements of emotional intelligence the performance of the department and the frequency of susceptibility of the elements of emotional intelligence are influenced by information and communication technology.

Table 4. E.I. Elements evaluation on team performance

Statistical Indicators	Correlation with usage of ICT	Influence of Manager
Sample	50	50
Sum of grades Σ	195	215
Average rating X	3,50	4,0
Median M	3	4
The standard deviation δ	0,94	1,05
The variance σ	,890	1,580

Source: authors research

Table 5. Frequency of E.I. Elements Susceptibility to ICT Influence

	ELEMENT	GRADES				
	N = 50	**1**	**2**	**3**	**4**	**5**
1.	**Compassion**	20	25	5	0	0
	%	40	50	10	0	0
	Average	**1,7**				
2.	**Listening**	0	0	12	18	20
	%	0	0	24	36	40
	Average	**4,16**				
3.	**Understanding**	0	4	15	16	15
	%	0	8	30	32	30
	Average	**3,84**				

4.	**Friendship**	1	4	5	20	20
	%	2	8	10	40	40
	Average	**4,1**				
5.	**Mutual support**	6	9	18	7	10
	%	12	18	36	14	20
	Average	**3,12**				
6.	**Conflict**	0	3	12	25	10
	%	0	6	24	50	20
	Average	**3,84**				
7.	**Stress**	0	1	7	17	25
	%	0	2	14	34	50
	Average	**4,32**				
8.	**Motivation by leader**	0	0	6	14	30
	%	0	0	12	28	60
	Average	4,48				
	Overall average rating	3,70				

Source: authors research

It is important to point out that the participants in the survey could have assigned one of a total of five ratings, where a rating of one indicated the absence of influence of information and communication technology, and a rating of five indicated the full impact of that technology on the given elements, which were proposed as influencing factors, to the development of emotional intelligence. According to the results presented, the following conclusions can be drawn. Given the total number of respondents (50), the lowest average rating for the variable is compassion, with an average of 1.8, as an element subject to the lowest frequency of influence, using information and communication technology in business communication. In contrast, the highest impact of technology in business communication is on the motivation variable by the animation manager, with an average score of 4.48. In an in-depth interview with the heads of the animation department, such results are confirmed by their claims that by using various tools and applications during the performance of tasks, as well as during and before business processes, the tools have had the greatest impact on their employees, motivating them, while having contact with them throughout the duration of the job. Employees value it highly when they are in constant contact with the animation manager, and by using information tools and applications, they can more easily communicate and receive instant feedback on all tasks and goals of the program being performed. The next variable most influential when using this technology is the element of

stress, with an average of 4.32. This is a significant indicator that the degree of use of technology in business communication influences the level of stress.

The more demanding the tasks or situations, the greater the stress, but it is possible to control the stress and to a certain degree minimize it. It is very important for both the animation manager and the animators to be in touch, with technology enabling them to contact their manager at any time, reducing their stress on certain situations. Nevertheless, summing up all the results obtained, we reach an average score of 3.7. The main hypotheses H1 and H2 thus established can be positively accepted and confirmed. An emotionally intelligent animation manager has a noticeable effect on the employees' sense of satisfaction in his animation team. The more the team uses modern applications and smart devices for the purpose of constant communication and informing its employees, the more positively the employees will respond, perform tasks, have a sense of belonging and thus be more satisfied with their work. However, the development of emotional intelligence is not a prerequisite for successful management of the animation team. This opens the possibility for further research in this direction, analyzing what would be the preconditions for successful management of an animation team and whether the same preconditions are equally important for each animation team. According to this research, as a sample of two different animation teams operating in different environments and in business organizations, it could be recognized that the elements that affect emotional intelligence are alike. Likewise, the degree of use of information and communication technology was the same in both animation teams and there were no significant discrepancies that would make the continuation of the research potentially questionable.

5. CONCLUSION

Emotional intelligence has become an integral part of the contemporary manager's psychophysical profile. Emotional intelligence is the ability to constantly recognize emotions, understand them, and manage them, both in own and in others' emotions. Several crucial factors can be observed in the profile of an emotionally intelligent leader. The assumption is that the Croatian animation manager is not necessarily a leader, because as already stated, every leader is a manager, while every manager is not necessarily a leader. When the animation manager is emotionally stable and uses the full potential of the use of information and communication technology in his work, then stability and assurance are achieved so that each member of the animation team can fully complete the planned tasks and achieve a vision together. According to the results obtained, two main hypotheses were accepted and confirmed. With the auxiliary hypotheses, one auxiliary

was accepted, while the other was partially accepted. It was stated that emotional intelligence influences to some extent the success of leading an animation team, while the use of information and communication technology in communicating has a significant influence on the level of emotional intelligence in the direction of animation management. Emotional intelligence itself is not a prerequisite for a successful animation team in Croatia, but it certainly contributes to more positive results when it comes to the level of satisfaction and belonging of employees to a particular animation team. In the context of the research, an important segment of the model is the combination of animation leadership, using a variety of information and communication channels, to successfully complete the process, manage human resources, to maximize business results. In this case, the results have a significant impact on reducing the stress and stressors of communication, the ability to control the situation and increase the satisfaction of members, which is achieved if the manager possesses emotional intelligence to some extent. The observed research variables were: direct communication using mobile devices, via text messaging and video calls, use of group calling applications, emails and social networks. The main conclusion of the research that emerged from data analysis and theoretical framework analysis is that the animation manager in Croatia simultaneously develops emotional intelligence and communication skills, integrating technology into the business of his animation team.

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UDK 334.722.24(4-67EU:497.5)
Review article

SUCCESSFUL TRANSFER OF CROATIAN FAMILY BUSINESSES AS A PART OF THE EUROPEAN UNION POLICY – WHAT CAN WE DO?*

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ABSTRACT

It is a well-known fact that family businesses are one of the most important pillars of European Union countries, which includes Croatia as well. However, family businesses more often fail then survive the transfer of business between the generations. Number of Croatian family businesses which are facing this challenge is rapidly growing due to the fact that Croatian companies were mostly established in 1990's, and the first owners are soon to be retired. The loss of any successful company is an inexcusable loss for the economy and social welfare. Thus, it is an old challenge how to help these companies in transition, whether through transfer between generations of the family or by selling the business. This issue has been acknowledged on the EU level, and there were several studies on the importance and challenges which family business face throughout the EU countries. Also, the EU institutions discussed the possible policies for enhancing the success of family business in transfer, example of which is a Resolution of the European Parliament on family businesses in Europe in 2015. Further, successful transfer of family business is one of the goals in European Commission Entrepreneurship 2020 Action Plan. In this paper, we shall discuss the proposed policies towards family businesses on the EU level, and whether these policies are employed in Croatia. The analysis shall include the EU programs for financing the transition of family business including the option for financing the third person in buying the successful family business. Authors shall assess whether EU policies adequately address the importance of special governance within these companies. This paper aims to further explore some possibilities for enhancing governance of family businesses which may attribute towards successful transfer of these companies. Also, author shall explore alternative solutions for transfer such as transfer of shares on family foundations which in turn continue managing the family company, but also financially support the family members. It is of particular interest to analyze whether EU policies support introducing new measures on na-

* This paper is written under support of the University of Rijeka project (uniri-drustv-18-43) "Legal Aspects of Companies Restructuring and Transition Towards New Corporate Governance Culture"

tional level which could provide for greater variety of options for entrepreneurs which face the challenge of ensuring the transfer of their business. The conclusion shall be drawn on whether policy for enhancing transfer of family businesses in Croatia is adequate, together with possible options which could be introduced in order to achieve that goal.

***Keywords**: family business in the EU, Croatian family business, business transfer, family governance*

1. INTRODUCTION

Family businesses as a type of entrepreneurships in EU should be studied in order to understand different functions they provide for the economy and for the society.[1] Also, the goal of these studies should be to increase efficiency of family business organizations which should in turn stimulate economy growth. The focus of this article is on the EU regional context of development of family businesses.[2] Family businesses were mentioned in different EU documents. However, they were in the focus of only a few of them. The first EU document which recognized specific challenges for family businesses and called for improvements in EU Member States is the Commission's Recommendations on the transfer of small and medium-sized enterprises from 1994 [further in text: Recommendations 1994].[3] The latest EU document focusing on family business is the European Parliament resolution of 8 September 2015 on family businesses in Europe [further in text: Resolution on family business 2015].[4] Author shall discuss recommended measures on the EU level for the Member States together with the relevant studies which analyze the progress and challenges present in the Member States. Development of Croatian businesses, as the newest EU Member State, can be traced from 1990's after the adoption of Companies Act[5] which introduced modern types of commercial companies. Many Croatian (family) businesses are currently facing the challenge of transfer. The goal is to analyze whether the current state is satisfactory, and to discuss new possible measures which could contribute to the successful transfer of family businesses on both EU and Croatian level.

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1 See generally in Fayolle, A.; Kyrö, P.; Ulijn, J.M. (eds.), *Entrepreneurship Research in Europe: Outcomes and Perspectives*, Edward Elgar Publishing, Cheltenham, 2005

2 Geographical dimension is one of the recognized classifications in studying the entrepreneurship. Zahra, S.A.; Wright, M., *Entrepreneurship's Next Act*, Academy of Management Perspectives, *vol*. 25, no. 4, 2011, pp. 67-83, p. 75

3 94/1069/EC: Commission Recommendation of 7 December 1994 on the transfer of small and medium-sized enterprises, Official Journal L 385, p. 14-17

4 2014/2210(INI)

5 Official Gazette, No. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19

2. OVERVIEW OVER THE KEY DOCUMENTS ON THE EU LEVEL REGARDING THE FAMILY BUSINESSES

It is undisputed that family business is an important factor in EU economy. Despite the obstacles in defining the parameters for family business,[6] the figures show that at least 60% of businesses of various sizes in EU are family businesses.[7] Estimated date shows that family businesses contribute around 50% of GDP in the EU.[8] Thus, it is of no surprise that family businesses are an increasing topic in academic research.[9]

As family businesses operate in various company types and sizes,[10] it can generally be said that they benefit from all policies and actions made by EU bodies which strive to enhance business environment in the EU. Strength of the EU single market and free trade on global and EU level is of high importance for family businesses.[11] However, family businesses and the specific challenge of transfer of these companies between generations was a focused topic of only a few documents from EU bodies.

We can freely designate the 1990's as the time when the EU bodies recognized the family businesses as a special type of companies with specific challenges. We can mark the Commission's Recommendations 1994 as the beginning of this work. Author shall further analyze this and other EU documents of higher relevance for the EU family businesses.

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6 There is still no common definition on the EU level for family businesses, which is a serious obstacle for further development and research of this field. See European Commission, *Final report of the expert Group, Overview of Family-Business-Relevant Issues: Research, networks, policy measures and existing studies*, November 2009, [further in text: Overview of family businesses study 2009], [https://ec.europa.eu/docsroom/documents/10388/attachments/1/translations/en/renditions/native], accessed 06. April 2020, p. 9

7 *Ibid.,* p. 8. Some claim that this percentage is in fact 70-80%. European Family Businesses (EFB), *Family Business Succession and Transfers: Challenges and Opportunities*, 2016, [https://ec.europa.eu/transparency/regexpert/?do=groupDetail.groupMeetingDoc&docid=29616], accessed 20. February 2020

8 European Family Businesses (EFB), [http://www.europeanfamilybusinesses.eu/], accessed 19. February 2020

9 For an overview see in Botero, I. C. *et al., Family business research in the European context*, European Journal of International Management, *vol.* 9, no. 2, 2015, pp. 139-159

10 Koeberle-Schmid, A.; Kenyon-Rouvinez, D.; Poza, E. J., *Governance in Family Enterprises, Maximizing Economic and Emotional Success*, Palgrave Macmillan, New York, 2014., p. 8

11 KPMG&EFB: *European family business barometer*, 2019, [http://www.europeanfamilybusinesses.eu/uploads/Modules/Publications/gm-tl-01172-european-family-barometer-2019_v11_web.pdf], accessed 06. April 2020, p. 39

2.1. Commission's Recommendations 1994

Recommendations 1994 focus on transfer of SME which includes family businesses within this category as well.[12] It was stressed out that a high number of businesses cease to trade every year because of the obstacles in transfer of the business, where the critical areas are company law, inheritance law and fiscal law of the Member States.[13] These recommendations put a significant accent on enhancing company law in EU Member states, including all types of companies, from public limited liability companies to partnerships without legal personality. The first set of recommendations for improving company law focuses on availability of public limited liability companies to SME in the process of transfer of the company. The reason behind promoting public limited liability companies is that it is easier to transfer the business from legal aspects within the structure of this company type in comparison to transfer of business within partnerships.[14] Thus, the Recommendations 1994 request that Member States provide for the transformation of the companies without the need to wind up the firm and to allow for establishment of simplified public limited companies including the possibility that this company has one member only.[15] The second set of recommendations regards the partnerships and their greatest obstacle for successful transfer: discontinuity due to the death of one of the partners. Thus, the Recommendations 1994 request that Member States provide for a continuity of partnerships in the event of the death of one of the partners, that partnerships agreement have precedence over the terms of the will or a gift of one of the partner and to ensure that after the death of the partner the inheritance law invoking the unanimity for making decisions (consequence of successors becoming joint owners of the shares of the company) do not hamper the continuity of business.[16]

As for the inheritance and tax law, Member States are invited to reduce taxes for inheritance and gifts in the process of transfer of the company,[17] and to introduce favorable measures for transfer of the company to third persons outside of the family, which includes the employees (e.g. by delaying the necessary fiscal payments in case of a transfer).[18]

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12 Successful transfer of family business is set as one of the goals in the Article 1 of Recommendations 1994

13 See Preamble of the Recommendations 1994

14 *Loc. cit.*

15 Subparagraphs a), b) and c) of article 4 of the Recommendations 1994

16 See Article 5 of the Recommendations 1994

17 See Article 6 of Recommendations 1994

18 See Article 7 of Recommendations 1994

Besides these recommendations, European Commission called for some soft law measures as well. For example, Member States are encouraged to raise awareness of business transfer problem to entrepreneurs so that they start with the preparations on time.[19] Also, they are encouraged to provide a supporting financial environment for business transfer.[20]

Although this document was drafted 26 years ago, in author's opinion, its recommendations are contemporary and applicable nowadays as well. In fact, it demonstrates that the needs of these companies remained the same, and EU Member States should continue acting in the directions set forth in this document.

Notably, Member States were obligated to report on the measures adopted in order to adhere to the Recommendations 1994.[21] Since then there were several reports which also contributed to the discussion of how to further enhance the transfer of family businesses in EU.

2.1.1. *1998 – First Report after the Commission's Recommendations 1994*

The Commission issued the report in 1998 in a new document called Communication from the Commission on the transfer of small and medium-sized enterprises [further in text: First Report 1998].[22] The main conclusion was that there are still significant differences in Member States regarding the transfer of the business, and that the Recommendations 1994 were not sufficiently followed. However, it was stated that most of the measures introduced by the Member States concerned the civil and company law issues, while less so for the fiscal and inheritance law.[23] In the report, there are comparative tables which show for each Member State which measures recommended by the Recommendation 1994 were accepted and which was not.[24]

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19 See Article 1 of Recommendations 1994

20 See Article 3 of Recommendations 1994

21 This report was eagerly awaited. There were two written questions (from the same person) to the Commission demanding the answer of whether the EU Member States reported on the progress of their legislation in line with the Recommendations 1994. See Written Question No. 235/96 by Concepció FERRER to the Commission, *Transfer of enterprises*, OJ C 137, 8.5.1996, p. 50; Written question No. 2016/96 by Concepció FERRER to the Commission, *Transfer of small and medium-sized enterprises*, OJ C 385, 19.12.1996, p. 78

22 Communication from the Commission on the transfer of small and medium-sized enterprises, OJ C 93, 28.3.1998, p. 2–12

23 See First Report 1998, p.3

24 See First Report 1998, p. 13 – 21

There are laso improvements of the Recommendations 1994, partially based on examples of good experience from the practice in various Member States. Regarding the continuity of the company, Member States are encouraged to consider following measures: pre-emption right of the heir working in the business to buy the shares from other heirs not working in the business, use of family constitutions (family protocol, Familienverfassung)[25] to avoid possible conflicts in transfer of the business between generations, simplification of administrative procedures for the transfer of business, tax neutrality for the conversion of the company in preparation of transfer and other.[26]

Special focus is put on "support measures" by the work of consultants and financial institutions for transfer of the business. Consultants should offer varying services to the companies in transfer of business, providing the professional advice before, during and after the transfer of the business. The experiences from the successful transfers clearly show that transferor must be aware of the need to arrange the transfer plenty time before the actual transfer and that the transferee must be familiarized with the company on time (transferor could even help the transferee for a certain time period after the actual transfer).[27] As for the financing part, the acquisition of the existing company is more expensive, could be even around 60% higher then starting the company from the beginning. Thus, examples of good practice are preferential interest rates for loans facilitating business transfers, schemes providing guarantees for business acquisition and other.[28] Lastly, we would like to emphasize the report recognized the existence of the databases - networks for potential buyers and sellers as a helpful instrument in transfer of business when such a transfer is not possible within the family or towards the employees.[29]

It can be concluded that the goal of the First Report 1998 was to encourage the Member Statfurther implement the Recommendations 1994, by also providing some examples of good practice to serve as an inspiration.

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25 See more about family constitution in Braut Filipović, M., *Obiteljski ustav – instrument za stvaranje obiteljske i poslovne strategije u obiteljskim društvima*, in: Slakoper, Z.; Bukovac Puvača, M.; Mihelčić, G. (eds.), Liber Amicorum Aldo Radolović, Sveučilište u Rijeci, Pravni fakultet, Rijeka, 2018, str. 529-550

26 See First Report 1998, p. 5 – 7

27 See First Report 1998, p. 9 – 10

28 See First Report 1998, p. 8 – 9

29 See First Report 1998, p. 10

2.1.2. *2002 – Second Report after the Commission's Recommendations 1994*

The second report after Recommendations 1994 came from the European Commission in 2002 in the form of the Final report of the Expert Group on the Transfer of Small and Medium-sized Enterprises [further in text: Second Report 2002].[30] The report concludes that the overall result in implementing Recommendations 1994 is still not satisfying, although each Member State adopted certain measures. Still, no measures had been taken regarding more that half of the recommendations.[31]

Among other, special attention in the report is put on the presentation and analysis of the databases for connecting potential buyers and sellers in the Member States.[32] It is considered as a good example of creating the transfer market for those who don't have obvious successor of their business. Although the data had changed from the time this report was written, we find nowadays examples of these databases as well. For example in Austria[33] and in Germany.[34]

Considering the report's assessment that current state in Member States regarding the transfer of the business should be improved, it proposed six additional measures to facilitate this goal: creation of a "European Business Transfer Centre", Creation of European sellers and buyers database/market place, organization of regular European seminars/meetings, development of additional training and management tools, public initiated support programs and research, and achieving equal attention to start-ups and transfers.[35] Till this day, the first two measures are not fulfilled, while the others are at the best fragmented achievements by mostly private initiatives, as shall be further discussed in the article.

2.1.3. *2003 – Third Report after the Commission's Recommendations 1994*

Just a year after the Second report 2002, European Commission issued a new report within the follow-up project in the document called Transfer of businesses

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30 [https://ec.europa.eu/docsroom/documents/2158/attachments/1/translations/en/renditions/native], accessed 22. March 2020

31 Second Report 2002, p. 6

32 Second Report 2002, p. 25. In 2006 there was a research on the existence and how to enhance these databases. See European Commission, *Fostering Transparent Marketplaces for the Transfer of Businesses in Europe*, Report of the Expert Group, 2006

33 Nachfolgebörse, [www.nachfolgeboerse.at], accessed 22. March 2020

34 Nexxt-Change Unternehmensbörse, [www.nexxt-change.org], accessed 22. March 2020

35 Second Report 2002, p. 44-45

– continuity through a new beginning in 2003.[36] This report agreed with all the findings of the previous reports. Its main goal was to further encourage the Member States to changes in line with the Recommendations 1994.

2.1.4. *2006 – Fourth Report after the Commission's Recommendations 1994*

In 2006 the European Commission issued yet another and the last report which reflects the state of measures adopted in Member States following the Recommendations 1994.[37] Fourth Report 2006 starts with a general conclusion that only in about 55% of the proposed measures are adopted in Member States.[38] However, there are certain improvements across the Member States, in particular regarding the possibility to establish small businesses in the form of the limited liability companies (with just one member), continuity of partnerships after the death of one of the partners if the possibility is drafted in the partnership agreement, possibility to change the legal form to ease the transfer of the business and inheritance taxes are abolished or reduced for the transfer of the business between the family members in many countries. Areas which are still insufficiently developed are primarily financial support to businesses in the process of transfer and introduction of favorable taxes for transfer of the business to third person (outside of the family) and to employees.[39]

This report focuses on the recommendations for Member States to give equal political attention to business transfers as to start-ups, to provide adequate financial support, to raise awareness for the timely preparation of the business transfer, to organize markets for potential buyers and sellers of the businesses, to introduce more favorable tax rules for the business transfers and to create appropriate structures on national, regional and local level to support the administration of the business transfers.[40]

This report, which came twelve years after the Recommendations 1994, was the last report regarding the implementation of the Recommendations 1994. Further documents regarding the transfer of the business, including family businesses, do not longer analyze the effect of Recommendations 1994 on national legislations and other measures of Member States.

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36 European Commission, *Final report of the MAP 2002 project*, August 2003, [https://www.cbs.dk/files/cbs.dk/best_report-08-2003_3667.pdf], accessed 26. March 2020

37 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Implementing the Lisbon Community Programme for Growth and Jobs, Transfer of Businesses – Continuity through a new beginning, COM (2006) 177 final, Brussels, 2006 [further in text: Fourt report 2006]

38 Fourth Report 2006, p. 5

39 Fourth Report 2006, p. 6-8

40 Fourth Report 2006, p. 9-10

2.2. Small Business Act from 2008

The Small Business Act from 2008[41] represents an initiative by the Commission to improve the position of SME in the EU internal market.[42] It introduces a "think small first" policy, which means that legislators should bear in mind the special needs of SMEs when shaping their policy.[43] The Small Business Act consists of the set of principles which should be turned into policy action on both EU and national levels. Family businesses are often considered to fall within the category of SMEs. Thus, it is not surprising that in the very first principle the Commission encouraged the creation of "environment in which entrepreneurs and family businesses can thrive",[44] together with some sort of guidelines how to achieve this goal. The biggest accent is put on education and mentoring of the future and current entrepreneurs followed by ensuring favorable taxes for the business transfers and introducing databases for connecting buyers and sellers of businesses.[45] Besides these guidelines which are in line with the Recommendations 1994, this time the Commission added two new goals and that would be the support for female entrepreneurs and for immigrants who wish to become entrepreneurs.

The Small Business Act was eagerly awaited and the crucial benefit from it should have been the legislative proposals on both EU and national levels which would implement the principles encouraged in the act.[46] The successful example of the adopted legislation would be the Late Payment Directive.[47] On the opposite side, the Proposal for a European Private Company was revoked.[48] Interestingly, regarding the improvement of tax system for SMEs it was not until 2018 that there was

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41 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - "Think Small First" - A "Small Business Act" for Europe, COM/2008/0394 final

42 It was followed up by the European Parliament resolution of 10 March 2009 on the Small Business Act, OJ C 87E , 1.4.2010, p. 48–59

43 About the „think small first" principle see an overview with the suggestions how to implement it in EU legislations in European Commission, *Report of the Expert Group, Thinks Small First – Considering SME interests in policy-making including the application of an „SME Test"*, March 2009, [https://ec.europa.eu/docsroom/documents/2664/attachments/1/translations/en/renditions/native], accessed 26. March 2020

44 Small Business Act, p. 4

45 Small Business Act, p. 6

46 See the list of legislative proposals connected with the achievement of the goals set in principles in Small Business Act, p. 4

47 Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, OJ L 48, 23.2.2011, p. 1–10

48 Proposal for a Council Regulation on the statute for a European private company, COM/2008/0396 final

a proposal for introducing special scheme for SMEs.[49] The European Parliament issued many resolutions connected with the fulfillment of the goals set in the Small Business Act.[50]

However, ten years after, the Small Business Act failed to achieve the high goals set in it. Thus, there are calls to make the principles legally binding in order to provoke coordinated action on EU and national level.[51]

2.3. Overview of family-business-relevant issues study from 2009

A new project funded by the European Commission resulted in a Overview of family businesses study 2009. The major contribution of this study is the proposal of definition of family business which should serve as a starting point in recognizing specific needs and in shaping any policies towards family businesses on EU and on national level. Family businesses are defined as those where majority of decision-making rights (indirect or direct) belong to person who established the company or his family, and where at least one family member is involved in the governance of the business/company.[52] However, the proposed definition is not legally binding but rather influential for further legislative proposals.

This study is also the first one on the EU level which reflects upon unique challenges of corporate governance in the family businesses.[53] The balance between the family and business, especially in the transfer of business between the generations, is the test of survival for these businesses. Thus, the study emphasizes the good examples of soft law tools which could help with the challenges in the corporate governance of family businesses, which is in the scholarly writings described as the "family governance".[54] The level of recognition of the family governance instruments and their application is high in some Member States, while practically

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49 Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards the special scheme for small enterprises, COM/2018/021 final

50 See for example European Parliament resolution of 5 February 2013 on improving access to finance for SMEs, OJ C 24, 22.1.2016, p. 2–7

51 See Opinion of the European Economic and Social Committee on 'Promoting SMEs in Europe with a special focus on a horizontal legislative SME approach and respect of the SBA's "think small first"' (exploratory opinion), OJ C 197, 8.6.2018, p. 1–9

52 Overview of family businesses study 2009, p. 10

53 Overview of family businesses study 2009, p.16. For an academic overview see for example Groth, T. *et al., Familienunternehmen, Erfolgsstrategien zur Unternehmenssicherung*, Feutscher Fachverlag, Frankfurt am Main, 2012.; Kormann, H., *Governance des Familienunternehmens*, Springer, eBooks, Wiesbaden, 2017

54 Koeberle-Schmid; Kenyon-Rouvinez; Poza, *op. cit.*, note 10, p. 11

nonexistent in others.[55] This study provided for some good examples in order to inspire national governments and private-sector organizations in representing and advocating these tools to family businesses.

Pertaining to the challenges of the family businesses is also a lack of skilled workforce, due to the negative image of family businesses in the labor market.[56] The negative picture stems from the notion that non-family members don't have the same opportunity as the family members. Other challenges recognized in this study are the ones already elaborated in the previous EU documents analyzed in this article.

The overall conclusion of the study is that further positive development depends heavily on the awareness of the policy makers of the specific need and challenges of the family businesses on both the EU and national level.[57]

2.4. Entrepreneurship 2020 Action Plan

European Commission's Entrepreneurship 2020 Action Plan for the period 2013-2020,[58] proposes policy initiatives for improving conditions for operating successful business in Member States. The goal of this article is not to analyze all presented measures. It suffices to be said that challenges of transfer of the family business were appropriately recognized,[59] and that Member States are once again called to reconsider tax policy for business transfers.[60] Regarding the SMEs, and thus the majority of family businesses, it reinforces the objectives set in the Small Business Act.

2.5. European Parliament Resolution on family businesses in Europe from 2015

The last document on the EU level regarding the challenges of transfer of family businesses is the European Parliament Resolution of family business 2015. In its resolution the European Parliament stated that even after more than five years from the Overview of family businesses study 2009, there is no new initiative on the EU level regarding the transfer of family businesses.[61] There is even no common definition of what the family business is on the EU level till today.

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55 Overview of family businesses study 2009, p.16

56 Overview of family businesses study 2009, p.17

57 Overview of family businesses study 2009, p. 24

58 Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Entrepreneurship 2020 Action Plan Reigniting the entrepreneurial spirit in Europe, COM/2012/0795 final

59 Entrepreneurship 2020 Action Plan, p. 15

60 Entrepreneurship 2020 Action Plan, p. 17

61 Preamble, no. J of Resolution of family business 2015

The resolution starts with the explanation of how the family businesses contribute to economy and employment in the Member States. It calls again for ensuring more favorable funding conditions regarding taxes and various sources of funding either through EU or national programs for support of these businesses or through alternative sources of financing. The resolution also points to the need of internationalization and innovation of family businesses, calling for incentives to take risks for business growth together with staff training and use of professionals outside of the family.[62] Among other, it also calls for ensuring education on business transfer and family governance.[63] The general motive of the resolution is to call the European Commission on issuing new measures which would fulfill the goals already set by previous EU documents and eagerly reinforced by this resolution.

2.6. Concluding remarks

Importance of family businesses and their challenges, primarily concerning the business transfer, are definitely recognized in various documents on the EU level. These documents offered possible answers for enhancing the position of family businesses. However, what they all have in common is that they are not legally binding. They represent soft law instruments, primarily recommendations and examples of good practices which should have positive influence and encourage the Member States for their implementation. The crucial document so far is the Recommendations 1994. However, it remains an open issue whether these recommendations are adopted in Member States, and if they are, to what degree.

3. CROATIAN FAMILY BUSINESSES – CURRENT STATE AND SPECIFIC CHALLENGES

Croatian family businesses face the same challenges as family businesses in other countries.[64] There are no official statistics regarding the number of the family business in Croatia.[65] In the literature we find that it is presumed that 50% of

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62 No. 18 of Resolution of family business 2015

63 No. 21 of Resolution of family business 2015

64 For some reflections on legal challenges of business transfers between the generations see an overview in Cikać, V., *Pravni aspekti nasljeđivanja obiteljskih poduzeća u Hrvatskoj*, CEPOR, 2012, [http://www.cepor.hr/news/obiteljska-poduzeca/CEPOR_policy%20osvrt_Pravni%20aspekti%20nasljedjivanja%20obiteljskih%20poduzeca%20u%20Hrvatskoj.pdf], accessed 08. April 2020

65 According to one study, at least 38% of businesses whose owners are 55 years old or more fall within the frame of family businesses, with the tendency to increase these numbers. Alpeza, M.; Grubišić, N.; Mikrut, M., *Business Transfer Barometar Hrvatska*, Centar za politiku razvoja malih i srednjih poduzeća i poduzetništva (CEPOR), Zagreb, 2015., str. 21

employees are employed in family businesses in Croatia,[66] which is in line with the numbers on the EU level. However, there is at least one defining factor which puts them apart from others. It is the fact that Croatian companies, including family businesses, were mostly established in 1990's, and the first owners are now for the first time facing the challenge of transfer of family business.[67] Thus, Croatian companies face the challenge of managing and transferring the family businesses and there is no or few domestic practice to guide them.[68]

In the EU documents regarding the analysis of family businesses, Croatia was first included in the Overview of family businesses study 2009, as a candidate country. Thus, there are no official data on the status of Croatia regarding the Commission Recommendations 1994. In fact, there are a very small number of studies on family businesses in Croatia. Practically all studies belong to private initiatives. We shall use the results of those which are publicly available in order to provide a more accurate assessment of family businesses in Croatian economy. As to the academic literature, the interest regarding the family businesses is present for about fifteen years, but it is rather sporadic and mostly engaged by economic scholars.

The general conclusion we find in literature is that there is no systematic policy to support Croatian family businesses.[69] The goal in this article is to present some initiatives and current legal and fiscal regulations in order to provide a more coherent picture of the existing environment for family businesses in Croatia.

3.1. Is there a definition of family business in Croatia?

There is no definition of family business in Croatia.[70] Croatian Companies Act does not recognize family business as a special type of company. On the other hand, family businesses are mentioned in the Crafts Act,[71] but only in the context that members of the family household can support the craftsman in carrying out

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66 CEPOR, *Razvoj i održivost obiteljskih poduzeća u Hrvatskoj*, 2012 [http://www.cepor.hr/news/obiteljska-poduzeca/FB_policy%20brief_CEPOR.pdf], accessed 06. April 2020, p. 5

67 It's the same for other ex-Yugoslavia countries. For example, see for Slovenia in Duh, M., *Family Businesses: The Extensiveness of Succession Problems and Possible solutions,* in: Burger-Helmchen, T. (ed), Entrepreneurship – Gender, Geographies and Social Context, IntechOpen, 2012, pp. 209-234, p. 211

68 Senegović, I.; Bublić, V.; Ćorić, G., *Family Business Succession Risks: the Croatian Context,* in: Dana, L-P.; Ramadani, V. (ed.), Family Businesses in Transition Economies, Management, succession and Internationalization, Springer, 2015, pp. 175-199, p. 181

69 See for example Crnković Pozaić, S., *Overview of Family Business Relevant Issues, Country Fiche – Croatia*, CEPOR, 2008, [http://www.cepor.hr/cepra/wp-content/uploads/2015/07/Family-Busines_country_fiche_Croatia_en.pdf], accessed 02. April 2020, p. 1

70 See: Alpeza; Grubišić; Mikrut, *op. cit.*, note 65, p. 14

71 Official Gazette, No. 143/13, 127/19

crafts activities without the need of concluding the employment contract.[72] The same exception is allowed for family members of the holder of the family farms in Croatian Family Farms Act.[73] These favorable measures speak of recognition of the importance of family context in these types of economic activities. In fact, in Croatian literature it is generally considered that family businesses are the most represented in agricultural sector, tourism and crafts.[74]

However, they represent fragmented examples and are not a part of a structured policy towards family businesses.[75] The Overview of family businesses study 2009 clearly pointed out that the definition of what constitutes the family business is a crucial step for developing appropriate policy on national level.[76] The same was concluded in Croatian study *Business Transfer Barometar Hrvatska* 2015, and most importantly, this study proposed adopting the same definition as drafted on the EU level by the Overview of family businesses study 2009.[77] It is a good example of how private initiatives put an effort to guide the Croatian legislatures in the direction set by the EU for further development of family businesses. However, even eleven years after the definition was proposed on the EU level and five years after the same was done in Croatia, no results can be seen in relevant documents of the policy makers.

3.2. Public and private initiatives for increasing awareness, information and training of entrepreneurs from family business

Raising awareness of the challenges which family businesses face is in the core of all the EU documents relevant for this topic. It is necessary to raise awareness of their needs to both entrepreneurs who fit in the category of family businesses and to public bodies which can introduce policies to support these businesses.

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72 Article 30 of the Crafts Act. For analysis of such an exception see Senčur Peček, D.; Laleta, S., *Ugovor o radu i ugovor o djelu: područje primjene radnoga zakonodavstva*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 2018, *vol*. 39. no. 1, pp. 411-456, p. 424

73 Article 25 of the Family Farms Act, Official Gazette, Nos. 29/18, 32/19

74 In a study conducted in 2007 among the entrepreneurs who applied for financing from the Croatian Bank for Reconstruction and Development – HBOR, the leading sector for family businesses was agricultural sector (47,33%) followed by tourism (38,87%). See Renko, N.; Kuvačić, D.; Renko, S., *Analiza empirijskog istraživanja o obiteljskom poduzetništvu u Republici Hrvatskoj*, Ekonomski pregled, *vol*. 58. no. 1-2, 2007, pp. 72-90, p. 84. See also Crnković Pozaić, *op. cit*., note 69, p. 3

75 See Senegović; Bublić; Ćorić, *op. cit*., note 68, p. 181

76 Overview of family businesses study 2009, p. 10

77 See Alpeza; Grubišić; Mikrut, *op. cit*., note 65, p. 9

As to the education of entrepreneurs, there are a few courses focused exclusively on family businesses in faculties of economics, though not in all.[78] They are not considered at all in the faculties of law,[79] except by the individual professors as a fragmentary topic within other courses. If not within the faculty, future entrepreneurs can obtain knowledge through other form of education, as for example various workshops and conferences on the topic of family businesses. In Croatia, such events are organized by private initiations. Further, EU documents emphasize that consultancy services can also contribute to raising awareness to entrepreneurs and to provide the knowledge to successfully overcome the challenges of family businesses. There are more consultancy firms who provide the services to family businesses on the Croatian market.[80] Thus, we can conclude that there are certain sources of transfer of knowledge through education. However, it is mostly done through private initiatives and services while public sources should encourage this topic at least throughout public faculties, especially on faculties of economics and law.

The most active organization in Croatia which supports the family businesses is *SMEs and Entrepreneurship Policy Center* - CEPOR.[81] CEPOR is a non-profit organization which is founded in 2001 by cooperation between academic and entrepreneurships institutions. Its main goal is to promote the needs and importance of SMEs in the Croatian economy, thus influencing the policy makers. Within CEPOR, a special body was constituted, the so-called *Center for Family Businesses and Business Transfer* – CEPRA,[82] as an educational and informative center for the business transfer and other challenges of family businesses. Their work resulted in important studies, such as *Business Transfer Barometar Hrvatska* from 2015 and *Izazovi prijenosa poslovanja u malim i srednjim poduzećima* from 2017[83] which results are used in this article. Additionally, there are brochures/guides[84] and many workshops organized in order to raise awareness of the challenges of family busi-

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78 See for example the course "Obiteljsko poduzetništvo" in the Faculty of Economics in Osijek, [http://www.efos.unios.hr/obiteljsko-poduzetnistvo/opis-kolegija/], accessed 09. April 2020

79 The exception is the Postgraduate specialist study programme in Corporate Finance Law at the University of Rijeka, Faculty of Law, [https://pravri.uniri.hr/en/study-programmes/corporate-finance-law.html], accessed 09. April 2020

80 The example which should be brought forward is a consultant who recently wrote a book about challenges of family businesses in the countries of ex-Yugoslavia, with many interesting suggestions and personal finding on this matter. See Vukić, B., *Osnivači, nasljednici, menadžeri*, Beletra, Zagreb, 2019

81 The official webpage is CEPOR, [https://www.cepor.hr/], accessed 02. April 2020

82 The official webpage is CEPRA, [http://www.cepor.hr/cepra], accessed 02. April 2020

83 Mezulić Juric, P.; Alpeza, M., *Izazovi prijenosa poslovanja u malim i srednjim poduzećima*, CEPOR, Zagreb, 2017

84 The newest one from 2019 is written in a form of a guide with a lot of valuable counsels for family businesses in the process of business transfer. See CEPOR, *Minivodič za poduzetnike, Prijenos poslovan-*

nesses and to provide counsel to these entrepreneurs within the CEPOR.[85] The importance of family businesses is recognized in a few other private initiatives.[86]

The importance of family businesses is recognized on the government level through various rather informal activities.[87] However, there is no clear policy in its strategic documents, as some recognize the family businesses with their importance and specific challenges,[88] while others remain completely mute on the matter.[89] There were also some funding programmes available to entrepreneurs which were certainly of the interest to family businesses as well, which we shall elaborate further in text. Still, the public policy towards family businesses remains sporadic, although it seems that their importance for Croatian economy is recognized.

3.3. Supportive financial environments for successful business transfers

In Croatian practice, there were more financial programmes which provided access to finance under favorable terms for entrepreneurs. The main national organizations providing these programmes are the HBOR (Croatian Bank for Reconstruction and Development) and HAMAG-BICRO (Croatian Agency for Small Business, Innovation and Investments). These organizations work closely with other banks in Croatia in order to successfully realize such programmes. Some of the available financial schemes are funded directly by the EU financial programmes such as COSME[90] and different projects from the European Investment Bank.[91] The focus is on providing the entrepreneurs with favorable loans or providing a guarantee which is necessary for obtaining bank loans. However,

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ja, 2019., [https://www.mingo.hr/public/Minivodic_CEPOR_web%202019.pdf], accessed 04. April 2020

85 For list of workshops see in webpage: Radionice za obiteljska poduzeća, CEPOR, [https://www.cepor.hr/edukacije/radionice-za-obiteljska-poduzeca/], accessed 03. April 2020

86 See for example the list of conferences on the topic of family business organized throughout the years by LIDER – business journal, [https://lider.events/obiteljske/arhiva/], accessed 04. April 2020

87 See for example participation of the Ministry of the Economy, Entrepreneurship and Crafts in conferences with the aim to stress out the importance of family businesses for the Croatian economy, [https://www.mingo.hr/], accessed 04. April 2020

88 See for example Ministarstvo poduzetništva i obrta, *Akcijski plan za provedbu Strategije razvoja poduzetništva žena u Republici Hrvatskoj 2014.-2020.*, [https://www.mingo.hr/public/Poduzetnistvo/Akcijski_plan_provedbe_Strategije_razvoja_poduzetnistva_zena_RH12117.pdf], accessed 09. April 2020

89 See for example Ministarstvo poduzetništva i obrta, *Strategija razvoja poduzetništva u Republici Hrvatskoj 2013.-2020.,* [http://www.europski-fondovi.eu/sites/default/files/dokumenti/Strategy-HR-Final.pdf], accessed 09. April 2020

90 For an overview see COSME, [https://ec.europa.eu/growth/smes/cosme_hr], accessed 10. April 2020

91 For an overview see European Investment Bank, [https://www.eib.org/en/projects/regions/european-union/croatia/index.htm], accessed 10. April 2020

these programmes were not aimed to family businesses exclusively, but to groups of entrepreneurs as are SMEs and other. Croatian family businesses can thus use this programmes if they fall within categories of entrepreneurs as defined by the programmes.

As to the transfer of the business, the first financial scheme with the exclusive goal to support the successful business transfer in cases when the business is being sold to a third person became available in the first half of 2019. The new PLUS Guarantee Program for Croatian Entrepreneurs was introduced by HAMAG-BICRO.[92] The guarantee scheme functions in a way that the HAMAG-BICRO gives a guarantee to entrepreneurs for the purchase of 100% equity of the business in transfer in the amount up to 60% or 80% of the purchase price. This guarantee is of crucial importance to the entrepreneurs who seek the bank loan for buying the business. Its creation was influenced by the work of CEPOR, which shows how important are the work of such organizations on development of national policy towards challenges of business transfers. Again, this financial scheme was not created for family businesses exclusively, but it is clear that owners of Croatian family businesses could benefit from it.

3.4. Measures inserted in company law which support the continuity of business after the transfer

Croatian company law is relatively young, as the current types of companies are introduced in 1995 by the Companies Act. The advantage is that Croatian legislature inserted modern solutions, without going through tedious processes of change as much older comparative legislations. The initial presumption is that this means that Croatian solutions are more in line with the Recommendations 1994 as it could show more flexible solutions due to its youth.

Croatian family businesses can be formed in any legal forms available to entrepreneurs. Interestingly, in a research conducted in 2007 on the sample of family businesses who applied for funding projects within the HBOR, most family businesses were in the legal form of a craft (38,57%), followed by limited liability companies (19,87%).[93] Generally, Croatian entrepreneurs often choose crafts as their type of business.[94]

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92 Jamstveni program PLUS, [https://hamagbicro.hr/financijski-instrumenti/kako-do-jamstva/msp/nacionalna-jamstva/plus/], accessed 04. April 2020

93 Renko; Kuvačić; Renko, *op. cit.*, note 74, p. 82

94 In 2019 the official statistic shows that from all the businesses, the crafts were represented by 38,8% and commercial companies by 61,2%. See Trgovačka društva i obrti, [https://www.hok.hr/gospodarstvo-i-savjetovanje/statistika/trgovacka-drustva-i-obrti], accessed 10. April 2020

In Croatian law, we can distinguish between the partnerships without legal personality (ortaštvo),[95] partnerships with legal personality (general and limited partnerships),[96] companies (joint-stock and limited liability companies)[97] and crafts.

Partnerships are significantly more sensitive regarding any change concerning partners. For both partnerships with and without legal personality, the main rule is that the transfer of the share to third person is not possible unless other partners unanimously agree.[98] However, Croatian Obligations Act and Companies Act provided for different default solutions regarding the continuity of business, where the common part is that parties are free to provide for different outcomes in their partnership agreements. For the partnership without legal personality (ortaštvo), after the death of the partner, the Obligations Act provides that the partnership continues with other partners (unless it was a two-member partnership).[99] In other words, the presumption is that the partnership (ortaštvo) shall continue to exist if one of the partners dies or ceases to exist. The heirs can inherit the share only if provided so by the partnership agreement.[100] On the other hand, for the partnerships with legal personality, if a partner dies or ceases to exist or exits the partnership, the consequence is that the partnership ceases to exist as well, unless partners insert in their articles of association that the partnership shall continue to exist with remaining partners in such cases.[101] What is very important, even if there is no such a provision originally, after the death of one partner the others can bring a decision to continue the business.[102] Thus, there are options for both transfer and continuity of business for partnerships, although partners should be aware of the described specific legal solutions for each type.

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95 They are called "Ortaštvo". See articles 637-660 of the Obligations Act, Official Gazette, No. 35/05, 41/08, 125/11, 78/15, 29/18

96 General partnerships are called „Javno trgovačko društvo" (articles 68-130 of Companies Act), and limited partnerships are called „Komanditno društvo" (articles 131-147 of Companies Act). Besides these two types of partnerships, another company was introduced under the influence of EU legislation, the Economic Interest Grouping (Gospodarsko interesno udruženje) which shares some basic features with partnerships (see articles 583-609 of Companies Act)

97 Joint-stock companies are called „Dioničko društvo" (articles 159-384.c of Companies Act) and limited-liability companies are called „Društvo s ograničenom odgovornošću" (articles 385-472.h of Companies Act)

98 Article 641 (5) of the Obligations Act. See also Barbić, J., *Pravo društava, Društva osoba*, Organizator, Zagreb, 2019, p. 65. See also Article 90 of the Companies Act

99 Article 655 of the Obligations Act. See also Barbić, *ibid.*, p. 68

100 Article 656 of the Obligations Act

101 Article 104 of the Companies Act

102 Barbić, *op. cit.*, note 98, p. 541

Joint-stock and limited liability companies allow for free transfer of shares to third persons, unless otherwise provided in the articles of association,[103] and the change of shareholders (death or exit from the company) has no impact on the existence of the company.

The transfer of the craft is more complicated. In fact, the Crafts Act does not even provide for an option of the sale of the crafts to the third person.[104] So, for the actual transfer, the craftsman must firstly enter into a partnership agreement with a new partner,[105] which will allow them to run the business together. After that the original craftsman can exit the craft, and the craft shall continue with the remaining partner.[106] So, the transfer is rather complicated, but it is possible. After the retirement or death of the craftsman, the members of the family have the choice to inherit the craft and continue the business. However, the heirs must obtain the necessary qualifications through education degrees or master craftsman's examination. The other option for heirs is to hire an employee which fulfills the requested criteria by the Crafts Act.[107]

Thus, family business in Croatia enjoys a good legal framework for ensuring the continuity of their businesses. Joint-stock and limited liability companies offer the simplest solutions for transfer and continuity of business, but with careful legal drafting it is possible to ensure the same with partnerships and crafts.

As to the flexibility of the company law to adjust to the needs of the family businesses, we shall point to two main findings: availability of joint-stock and limited liability companies for all sizes of family businesses regardless of the number of shareholders, and possibility to transform between the legal forms of the companies.

Both joint-stock and limited liability companies can have more or just one shareholder.[108] By far the most popular company type in Croatia is the limited liability company (over 98%).[109] Additionally, from 2012 entrepreneurs can opt for a simplified limited liability company with the share capital of only 10 KN (cca 1,3 Euro) which in comparison to regular limited liability companies is more simple

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103 Article 227 and article 412 of the Companies Act

104 See also CEPOR, *op. cit.,* note 84, p. 35

105 Article 33 of the Crafts Act

106 Article 35(2) of the Crafts Act

107 Articles 37 – 40 of the Crafts Act. For the criteria which must be fulfilled by the heirs see articles 8-9 of the Crafts Act

108 Article 159 (2) and article 386 of the Companies Act

109 Croatian Bureau of Statistics, *Number and structure of business entities,* September 2019, [https://www.dzs.hr/], accessed 13. April 2020

for establishing.[110] The limited liability company is considered to be so popular due to more reasons. But one of the most commonly suggested is the high autonomy of the parties to arrange their internal relations due to many dispositive provisions,[111] less formality in the functioning of the company and other.

As to the transformation of the companies, the procedure for transformation of the partnerships with legal personality (general and limited partnership) to joint-stock and limited liability companies and *vice versa* is provided for in the Companies Act. The companies in transformation don't go into liquidation and the transformed company remains the same legal person, just a different type of the company.[112] However, there is no such procedure for partnerships without legal personality (ortaštvo) and for crafts. This means that their transformation is left to contractual drafting and that these businesses must cease to exist. The founders must establish a new business or transfer the business by contract to the already existing company, where legal consequences and continuity of obligations between the old and the new business is left entirely to obligations law and drafting of the contract between the interested parties. Also, these transfers can cause some serious tax consequences for the parties. Thus, the transformation of the partnerships without legal personality (ortaštvo) and crafts poses more legal and financial challenges then for other types of businesses in Croatia.

To conclude, the Croatian company law has many modern and flexible solutions for functioning of family businesses and for business transfers. Still, family businesses should seek the professional advice and use to the maximum possibilities to arrange the relations within the partnership/company/craft to the best of their interest. We believe that the awareness of the family of the fact of what they can do is currently more important then changing already existing legal forms for doing business in Croatia.

3.5. Favorable tax treatment for business transfers

When considering the tax aspects of transfer of Croatian family businesses, we must distinguish two situations: when the transfer occurs among the family members and when the business is transferred to third persons.[113]

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110 Article 390.a of the Companies Act. See also Jurić, D., *Pravo društava*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2020, p. 402

111 Barbić, J., *Pravo društava, Društva kapitala*, *Svezak II.: društvo s ograničenom odgovornošću, društvo za uzajamno osiguranje, kreditna unija*, Organizator, Zagreb, 2010, p. 18

112 Articles 555 (1) and 556 of the Companies Act

113 For tax aspects of business transfers see an overview in CEPOR, *op. cit.,* note 84, p. 17

Croatian tax law recognizes that spouses, as well as children and parents are excluded from the inheritance and gift taxes.[114] Also, the transfer of goods and property rights to one or more heirs in case of continuation of economic activity is not subject to value added taxation.[115] Further, inheritance and gifts are not considered personal income for the purposes of establishing the personal income taxes.[116] Thus, if the business is transferred among the family members as defined by the article 9 of the Local Taxes Act, the heirs are not obliged to pay any taxes at all. Such a solution is completely in line with the Commission's Recommendation 1994, and provide for a very favorable framework for transferring the family business among the family members.

On the other hand, the consequences are different if the business is transferred to third person, either as a gift or through a sale. The inheritance and gift tax is payable at the rate of 4%.[117] For the sale of the business, there is a difference if a seller is a natural person or it has a legal personality. If the seller is a natural person, the tax rate of 12% applies, plus surtax on income tax introduced by local governments.[118] If the seller is a legal person, than the tax rates are 18% or 12% depending on the revenues of the legal person in the tax period.[119] The potential buyers and sellers shall most certainly take into account these taxes when structuring the sale, especially when deciding on asset or share transactions for business transfers.

4. WHAT SHOULD BE THE NEXT STEPS?

It is clear that the EU took mostly the soft law approach when dealing with the challenges of family businesses. It seems that it was partly working well while there was some level of scrutiny over the Member States, especially in twelve years

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114 Article 9 of the Local Taxes Act, Official Gazette, No. 115/2016, 101/2017. See also Friganović, M., *Oporezivanje darovanja u Republici Hrvatskoj*, Računovodstvo i porezi u praksi, no. 6, 2011, pp. 82-98, p. 84

115 Article 22 of the Regulation on value added tax, Official Gazette, No. 79/2013, 85/2013, 160/2013, 35/2014, 157/2014, 130/2015, 115/2016, 1/2017, 41/2017, 128/2017, 106/2018, 1/2019, 1/2020

116 Article 8 (2) of the Pesonal Income Tax Law, Official Gazette, No. 115/2016, 106/2018, 121/2019, 32/2020

117 Article 8 of the Local Taxes Act. However, it is not clear whether all types of business shares fall within the scope of this provision. While the article 4 of the Local Taxes Act includes securities such as shares of the joint-stock companies, it remains silent on shares of all other company types, partnerships and crafts in Croatia. This leaves the space for interpretation that business shares which are not securities do not fall under the obligation to pay inheritance and gift taxes. See also Friganović, *op. cit.*, note 114, p. 83

118 Article 67 and article 70 of the Pesonal Income Tax Law. Interestingly, the taxes on capital gains are introduced recently, at the beginning of 2016

119 Article 28 of the Corporate profit tax Act, Official Gazette, No. 177/04, 90/05, 57/06, 146/08, 80/10, 22/12, 148/13, 143/14, 50/16, 115/16, 106/18, 121/19, 32/20

following the Recommendations 1994 through four reports on the progress made by the Member States. These reports were conducive to Member States to continue with their efforts together with further recommendations and examples of good practices found in Member States. After that period to date we practically no longer have an overview of what is going on in the national legislations and practices of Member States. Thus, we can hardly evade the conclusion that the efforts made on the EU level regarding the family businesses came to a standstill. Thus, we believe that new comparative studies and recommendations should be introduced on the EU level primarily to maintain the communication between the Members States on this issue, and to steadily remind them to strive towards more active policy towards family businesses and their challenges.

In author's opinion, soft law approach remains the best for introducing additional instruments in corporate governance of the family businesses. Irrespective of the company type in which the family business is established, there are available instruments, such as family constitution, family council, family office and other which already produced good results in companies which introduced them.[120] Their main purpose is to conciliate the roles which members simultaneously have in family and in the business, especially when more generations are present in the business. A further good example is transferring the shares to foundations as a neutral party which can carry on the business strategy of the founders, and in the same time financially support the family members of the founders.[121] To the best knowledge of the author, these corporate governance instruments are not implemented in Croatian family businesses, and we wholeheartedly call for introduction of such practices, as is the case in the practice of comparative Member States.

The issue of awareness of the special needs of the family businesses and what could legal, economic and fiscal experts contribute to enhance the internal strengths of family business is a constant goal. The focus should be on education of entrepreneurs in the faculties, as well as through short courses and workshops. Taking good examples from comparative practice as guidance for Member States is not a perfect tool, but it can serve as an inspiration to both public and private initiatives in enhancing the national market for family businesses.

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120 For an overview see Braut Filipović, M., *Specifičnosti upravljanja u obiteljskim društvima*, Zbornik Pravnog fakulteta u Zagrebu, *vol*. 67, no. 6, 2018., pp. 935-962

121 For the role of foundations in ensuring the continuity of businesses see for example Hepperle, T., *Stiftungen als Instrumente zur Lösung von Schnittstellenkonflikten, Eine empirische Untersuchung*, Josef EUL Verlag, Lohmar-Köln, 2011. See also Thomsen, S.; Rose, C., *Foundation Ownership and Financial Performance: Do Companies Need Owners?*, European Journal of Law nad Economics, *vol*. 18, 2004, pp. 343-364

5. CONCLUSION

The importance of family businesses for the economy of Member States is recognized on the EU level. Their challenges, primarily regarding the business transfer, were a topic of a few EU documents, where the first and the most important is the Commission's Recommendations 1994. However, the recommendations were never fully implemented in the Member States. The last document dealing with the family business was the European Parliament's Resolution on family businesses in Europe from 2015 which called for further development of the policy on both the EU and national levels for supporting the family businesses. However, no further action was commenced and it seems that the efforts for supporting family businesses came to a standstill on the EU level. However, the challenges which family businesses experience did not disappear. When looking closer to Croatian economy, family businesses are seen as an important factor. However, there is only a sporadic and fragmented policy towards supporting the family businesses. Regardless, the Croatian company law provides a good framework for building a successful family business. There is no obstacle for introducing any soft law instrument such as family constitution, family council and other. Also, shareholders can easily ensure for the continuity of the business after the transfer. Fiscal policy for transfer of family businesses is also among the most favorable in the Member States. Still, the general awareness of the soft law instruments that can be introduced in order to enhance the internal relations and plans for business transfers is seriously lacking. This article, thus, aims to further share the awareness of the family businesses and to remind that there is still a lot of work to be done on both EU and national levels in order to adequately address and to create a level playing field for one of the most important market player in the EU – the family businesses.

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UDK 339.92(4-67EU:497.11)
Original scientific paper

INSTITUTIONAL ASPECTS OF EUROPEAN ECONOMIC POLICY COORDINATION MECHANISMS: THE IMPLICATION FOR SERBIA*

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ABSTRACT

The subject of analysis in this paper is to review the institutional aspects of coordination mechanisms for economic policy in the European Union. In this context, the first part of the article defines the concept of coordination, the benefits versus the competition, the goals and the principles on which mechanisms are placed. In the second part of paper points to the impact of the mechanism for coordination of economic policy in Serbia, costs and benefits of the coordination process, i.e. primarily in the light of the new wave of coordination which started with the new model of economic governance during the global crisis embodied in the provisions of the European semester, the European Stabilisation Mechanism and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. The central hypothesis is based on the fact that Serbia its economic policy must shape according to European coordination mechanisms in the broadest sense, and not only in the field of monetary and fiscal policy, but also other segments of structural macroeconomic policies (labour market, as well as in the new areas such as environmental policy and cohesion policy) to achieve sustainable economic development. Although the domestic economic policymakers have done a lot on that plan, there is still a practical and logical need for the harmonisation of specific segments of economic policy and reducing the time lag in the implementation of the actions of economic policy.

Keywords: *Coordination, Economic Policy, EU, New Economic Governance, Serbia*

* The paper is a result of funding from the Ministry of Science, Education and Technological Development of the RS under contract number 451-03-68/2020-14/200120

1. INTRODUCTION

The success or failure of the European economic and monetary union in achieving macroeconomic objectives of the Community is conditioned by the fact that the Member States centralised monetary policy. In contrast, the differences in the concept of managing fiscal policy of labour are continued to be very strong. The reason why the Member States did not want to limit its fiscal and financial sovereignty (subjective budgetary law) is reflected in the fact that as "supreme power over the money," a constitutive element of political sovereignty of each country. In the economic literature, it points out that the institutional framework of monetary union relatively successfully installed, and the main problem of relative success in achieving price stabilisation and economic growth is the decentralised economic policy.[1] The existence of a single monetary policy that is governed by the provisions of communitarian law and decentralised fiscal and structural policies regulated by the rules of national law makes the question of coordination significant for both, in theory, and the practice of European Union law. Although the need for coordination of economic policies of member states took a special place in the Rome Treaty, only by the adoption of the Maastricht Treaty the process of coordination at a higher level is institutionalised (art. 99). Also, this legal act establishes a duty to make guidelines for economic policy coordination by the Commission. It is interesting to point out that despite the frequent use of the term coordination in the provisions of the primary and secondary law of the European Union, there is no generally accepted definition of this concept. EU institution had played very important role in EMU, but that had changed over time by intergovernmental action as an important principle in economic policy coordination.[2]

2. THE CONCEPT OF ECONOMIC POLICY COORDINATION

The concept of coordination of economic policy in its meaning can be multifaceted. The classic definition of which has spoken Wallich coordination sees as "a form of significant restrictions on national policies to recognise the state of global economic interaction between countries".[3] Although this understanding of coordination often used in the literature, its main drawback is that it does not make a distinction between the limitations that arise as a result of interstate agreements

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1 Lastra, M. R. *et al.*, *European Economic and Monetary Union: History, Trends and Prospects,* Year Book of European Law, 2013, pp. 1-15

2 Amtenbrink, F.; Hermann, C., *The Law of EU Economic and Monetary Union*, Oxford University Press, 2020, pp. 787-811

3 Mooslechner, P.; Schuerz, M., *International Macroeconomic Policy Coordination: Any Lessons from EMU?, A Selective Survey on Literature*, in: Hughes, A. *et al.* (eds.), Challenges for Economic Policy Coordination within the European Monetary Union, Kluwer Academic Publisher, 2011, pp. 65-90

from those restrictions are the results of decisions subjects of national law in terms of the functioning of the international factors. To correct such deficiencies of classical definitions, (Web) coordination sees as a "vision of harmonization of national policies in terms of the conduct of multilateral negotiations between states which means that on that occasion, adopted a concept that is significantly different from that concept, which would be the result of independent decisions of contracting parties".[4] Perhaps the most widely used definition of coordination gives Kenen, who had defined coordination as "the most rigorous forms of economic cooperation among the countries, which mean the exchange of explicit and operational (applicable) obligations in terms of functioning monetary and fiscal policy." As a form of economic cooperation between the states, coordination can have many new ways. In the simplest case, coordination will be reduced to the exchange of information. At the same time, in conditions of economic crisis, it can have an ad hoc character and indicate the measures which are taken to overcome the economic disturbances.

According to the comprehensiveness of the subsystem of economic policy, coordination can occur as a part if it relates to only some of the objectives of economic policy or completes if it comprehensively regulates all the constituent elements of a common economic policy. On the coordination of economic policy can be spoken and in the constitutional, i.e. allocative terms and political terms.[5] The constitutional (allocative) sense of coordination process is reflected in the single monetary policy as well as the consequences of the single market, to market economies and competition law as well as the fundamental economic framework of the EU. Firm rules of coordination involve a constant search for the elements and regions that will complete the framework of fiscal and financial control in various segments of economic policy in the planning, decision-making, implementation and monitoring of the results. The political aspect of coordination relates to the use of so-called "open method of coordination", which involves labelling the rapper, conducting constructive polemics, dissemination of good practices and exchange of information on different legal mechanisms. These distinctions arise from the difference between economic and financial arrangement. Economic governance is based on principles of a market economy with financially oriented incentives, while the financial management focuses on financial equity and government accountability. By synchronised using, both aspects of coordination at the same time

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4 Webb, M. C., *The Political Economy of Policy Coordination-International Adjustments Since 1945*, Cornell University Press, 1995, p. 40

5 Henke, K. D., *Managing Subsidiarity from an Economic Point of View, Soft Co-ordination and Hard Rules in European Economic Policy,* Technische Universitat Berlin, Discussion Paper No. 2, 2006, p. 11

overcome the disadvantages of failure of markets and governments in approaching the various economic practices of Member States.

Based on the above, we can notice that the very notion of coordination multidisciplinary, since it contains the meaning of the legal, economic and political nature. Coordination is necessary (*in our opinion*), to observe in the light of supranational norms, accepted by all (most of) the member states, while leaving the competence for managing economic policy at the national level, but with a separate set clear limits by independent (discretionary) decision-making. The objectives which supposed to be pursued through the joint action of the economic policy of the Member States are motivated by political interests. Effective mechanisms for achieving these goals provide national and communitarian legal system, both preventive and repressive way (by sanctions of different nature) arising from the legal acts of different strengths to meet the agreed behaviour of the subjects of economic policy. It is for the reasons above, the question of coordination of economic policy is increasingly attracting the attention of economists and lawyers constitutionalist who are aware of its importance for the achievement of general social well-being.

2.1. Coordination versus Competition

Ratio legis of establishing legal mechanisms for coordination of economic policy in the European Union is reflected in the protection of public goods and internalisation of negative external effects. In the conditions of existence of the monetary union led to the emergence of public goods that are in terms of their nature international and transcend the geographic boundaries of one member state. With the development of economic and monetary union, the number of these properties is continuously increasing. These "new" public goods are derived from the existence of the Union's objectives and relate to the better integration of the market, reducing the economic costs, the free movement of capital, people, goods, services, the single market and the existence of the customs union.[6] Taking into account the fact that all countries are not the members of Union, at the same time and the members of the eurozone, there is a real danger that these countries act as so-called "free riders". In the absence of legal mechanisms for coordination of the entire member states which establishing clear obligations, the countries "non-members" of monetary union, hypothetically speaking, can enjoy the benefits arising from the public properties such as the single monetary policy, i.e. monetary stability without paying their costs. About the theory of public finance as the main characteristics of public properties cited the absence of rivalry and non-excludability

[6] Collignon, S., *Economic Policy Coordination in EMU: Institutional and Political Requirements*, Harvard University Center for European Studies, 2001, p. 37

in use, and the question is how to regulate the position of non-member states of the monetary union?

The external effects in terms of its nature and consequences caused in practice can be very diverse. Depending on what you designate as *criterium divisions* (lat.), in theory, it can make different classifications. So it can make a distinction between internal and external spill-over effects.[7] External spill-over effects occur in the relations of the eurozone with the rest of the world. So, for example, changes in world trade and economy of the United States affecting economic ties in the European Union and the ratio of the exchange rate of the euro and the dollar. Oil prices in other raw materials are determined on the international market beyond the control of the eurozone but have a substantial impact on the economies of member countries. Internal effects of spill-over occur as a result of uncoordinated structural reforms of the Member States. When reforms (which are aimed at increasing competitiveness) are not implementing the synchronised legal tools and instruments in all Member States (but only in one or a few countries) may be called "race to the bottom".[8] Depending on whether these effects are in a function of acceleration or deceleration of economic activity, it can make the difference between positive and negative effects. Positive effects are, as we have already pointed out, the preferred because they encourage the development of the economies of other countries. Negative effects, on the other hand, are the result of inconsistent and mutually conflicting actions of economic policies of member states. In the case of negative effects, there is a real and logical need for monitoring of the situation, by the formation of corrective mechanisms (which determines the legal remedies for the violation of economic equilibrium) and sanctions for non-compliance the rules of conduct. We must note that such a clear distinction between the external effects can be made only in theory. In practice, the characteristics of these effects are often intertwined with each other. Still, they cannot always be determined with certainty what form belongs to the external effect in a concrete case. Interconnection effects and their complexity can mean overestimation or the underestimation of concrete effect. Therefore, coordination mechanisms are not perfect and often have gaps that must be solved subsequently. At the level of the European Union, the effects become negative if the individual countries formed the concept of economic policy contrary to the principles of credibility, not taking into account the consequences of their measures and instruments on the situation in the economies of other countries. For this reason, we believe that national entities of economic

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7 Aarle, V.B.; Weierstrass, K.; Schoors, K., *Economic Spillovers, Structural Reforms and Policy Coordination in the Euro Area,* Springer, Munich, 2006, pp. 39-41

8 A typical example of such behaviour is unfair (harmful) tax competition which the only purpose is the deliberate diversion of investments in one country

policy must treat *bona fides* (lat.). Following the legal standard of "good businessman" when creating and managing a programme of economic policy, otherwise, it can lead to severe macroeconomic imbalances which are due to the effects of the multiplication of EMU challenging to solve.

Some authors point out that public properties that are created by the creation of European monetary union have the character of specific categories of public properties, the so-called "club properties" on which users have rights only states which accept certain rules of conduct.[9] These rules include the implementation of legal and economic convergence criteria that must be met for accession to the euro-zone. In terms of the monetary union, macroeconomic variables such as exchange rates, interest rates and the amount of the price gain are getting much greater importance than in the conditions of the independent monetary policy. In the literature, as the classic examples of negative external effects allegations are cited implications of aggressive wages policy and nonconforming fiscal policy. The process of coordination for sure gets its justification in situations where high public debt in a country seen as a threat to price stability in the euro-zone, making the exchange rate may rise due to higher risk premiums (which mean a depreciation of the euro). In the area of wage policies, lack of coordination could mean that if wages rise in one country, there is an increase in inflation and a potential reduction in the value of the euro, which is why the European Central Bank must decide on increasing the interest rates.

In the case of irresponsible conduct of their economic policies, Member States may produce costs to other countries, which are reflected in the cost of inflation, in the amount of income and changes in public spending, as the question of coordination of economic policy makes necessary.[10] By the coordination of economic policy, it can prevent the occurrence of adverse effects or at least minimize their legal-economic and political impact on the economy of the countries of the Union. Off course, the condition is that there are legal mechanisms which apply *erga omnes* (lat.) to all members, regardless of whether they belong to a group of economically and politically most influential states or not. If the coordination mechanism set up in the function of "pareto efficiency", it becomes an instrument for achieving general social well-being.[11]

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9 Schiede, J., *Macroeconomic Policy Coordination in Europe-An Agnostic View*, Kiel Institute for World Economics, Kiel Working Papers, No. 1174, 2003, pp. 10-11

10 Wyplosz, C.; Baldwin, R., *Economics of European Integration*, McGraw-Hill Higher Education, 2012, p. 111.

11 Colignon, *op.cit*, note 6, p. 12

2.2. The Objectives of Economic Policy Coordination

The main objective of economic policy coordination is the harmonisation of macroeconomic policies within the European Union. This objective seeks to achieve a variety of instruments and measures that should the conduct of fiscal and other policies of the Union make complementary and consistent with the objectives of the European Central Bank. To fulfil this mentioned goal, it is necessary to point out the two biggest dilemmas in this area: the problem of social cost and the problem of collective action.[12] The problem of social cost is conditioning the effects of the objectives of coordination. Thus, suggests that if the conditions of the open economy, there is a free exchange rate, the government budget deficit can cause crowding out domestic private investors by increasing the height of the exchange rate of the domestic currency. The consequences are reflected in the reduction in aggregate demand caused by the depreciation of the domestic currency for monetary tightening. In terms of the existence of a free exchange rate, fiscal policy coordination becomes unnecessary about the level of EMU there is no single established a fixed exchange rate. In such circumstances, the state which is facing a budget deficit will not have a problem with a high exchange rate, because the effect of crowding out is transferred to the entire eurozone and occurs in the form of higher interest rates. The problem of collective actions in the general coordination of economic policy relates to the credibility of monetary policy which in EMU receives the characteristics of public properties. When credibility is establishing in the full sense of the word none of the Member States of the Union will not be able to exclude other from the benefit, such as price stability and lower costs of inflation. However, there is a fear of a large number of countries that behave like free-riders may cause the collapse of the credibility of the work of the European Central Bank. The behaviour of free riders is reflected in the utilisation of benefits arising from the prudent management of public finances conscientious member states, which respect the rules of fiscal and financial convergence established by the Treaty of Maastricht. In terms of the existence of the global economic and financial crisis, it seems that the credibility is threatened more than ever since the establishment of EMU, as the European Central Bank is under a lot of pressure member states. Relativisation of provisions of non-funding the public debt of the Member States (*no-bailout clause*), the formation of the European Stability Mechanism and the decisions of the European Court of Justice on (not)violation of the basic principles of monetary union in favour of this fact.

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[12] Begg, I.; Hodson, D.; Maher, I., *Economic Policy Coordination In the European Union*, National Institute Economic Review, no. 183, 2003, pp. 66-77

3. THE BENEFITS AND COSTS OF ECONOMIC POLICY COORDINATION

Before you begin any research on the topic of preferences and the lack of the concept itself, format and coordination mechanisms are necessary to determine whether the object itself of coordination can be better achieved through market processes that are far from political influences (see Henke 2006). Thus, points out that the market provides a kind of strong coordination through the market rules and the application of the principle of subsidiary. Although the market economy remains the most optimal coordination principle, it is in initiatives of the Commission's for the strengthening of the process often neglected. Supporters of principle claim that the reason for such Commission behaviour is in the postulates of the theory of bureaucracy. Namely, in contrast to economic integration in which there is a control, and political integration in which such a mechanism is missing,principal-agent problem provides the agents(the Commission) to use the process to strengthen their authority against the interests principals (states). We believe that such a radical observation of the role and importance of the work of the Commission in the coordination process is unacceptable because it is the efforts of the Commission that process of coordination in economic policy became a matter of public interest when due to market imperfections the harmonisation of national policies cannot be achieved. The application of the mechanisms of coordination of economic policy in the European Union is not free. It produces certain effects in practice, which can be characterised as positive (benefits) and as negative (costs). By comparing the costs and benefits, we can identify elements of the optimal concept of coordination in terms of its objectives, instruments, the scope of coverage, the field of application, the institutional framework and legal justification. The benefits of economic policy coordination mechanisms are primarily reflected in the realisation of the idea of a single Union market in the full sense of the word, in accelerating technical progress and deepening the values of economic and monetary union. Although it seems that in terms of the benefits of coordination mechanisms, no significant concerns, Feldstein in his recent works, examine their actual dimension. In this light, he considers that one cannot speak about the benefits of coordination of economic policy in the euro-zone when it does not exist. Particularly emphasised that the introduction of the single currency, in an area where there is no adequate geographical mobility of capital and fiscal structure, economically is an inefficient solution. Also, he argues that the issue of coordination cannot be identified with the delegation of monetary sovereignty to

the level of communitarian law because it is just a transfer of economic policy, not its coordination.[13]

When designing the concept of coordination, in our opinion, it is essential that entities are set up in the role of the legislator and to act with due care, so that they provide a higher degree of all the circumstances that there is the coordination instruments include a need in the coming periods. The concept of coordination at the time of preparation cannot cover all aspects of economic policy (which is necessary to regulate the legal norm due to the dynamism of legal-economic relations and limited rationality of economic policy subjects). Because of that, some minor or major revisions are necessary. Circumstances that affect the success of coordination are conditioned by the existence of invariability and uncertainty, which should be limited as much as possible.[14]

Variability can reduce the degree of success of coordination if the subjects of economic policy do not comply with pre-agreed rules and standards, which implies that the programmes must be created to achieve not only national interests but also to achieve the common interests of the Union. If behind the concept of coordination are not supranational entity law, the concept itself will be counterproductive and will not generate the said benefits to the Member States. Deviations of the State members in advance of the agreed objectives and instruments determined by institutional arrangements of coordination without adequate sanctions from the norms of communitarian law, imposing the need for stricter rules. If such regulations were in a function of price stabilisation and stable interest rates, we believe that the rules in it in addition to the disposition which explains the specific obligation of the State Union must necessarily contain an effective legal sanction. All countries which participate in the coordination process must inevitably work to create an institutional environment in which there are real conditions for the imposition and implementation of credible sanctions.

Uncertainties about determining and measuring the effects of externalities and spillover effects may also thwart the benefits of coordination. In this sense, macroeconomic models that identify external effects can be very different from each other. The degree of uncertainty (that is, in a certain sense always present) can be reduced in a socially tolerable level if design concept of coordination in addition to the governments of the Member States of the Union, participating as many independent experts and scientists who possess specialised knowledge in the field of

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13 Feldstein, M., *Coordination in the European Union,* Working Paper No 18672, The National Bureau of Economic Research, 2013, pp. 1-10

14 Mooslechner; Schuerz, *op.cit*, note 3, p. 49

legal and economic sciences. Once again, we note that it is essential that they act according to the rules of the profession (*de lege artis*) and not guided by national political interests of their governments. How, in our opinion, this requirement is difficult to achieve in bureaucratic world "key to success" of coordination is conditioned by intensive engagement of scientists and experts in the said process.

In examining the benefits of coordination, an important determinant represents the circumstances that are related to the existence of uncertainty and variability, provided that their resolution is a necessary but not sufficient condition to generate significant benefits in the euro-zone. In support of the aforesaid, Webb in his polemics about the coordination benefits asserted that its success is mainly caused by the allocation burden method that adjusting the national legislation to the Union. That existence of the fear for the application of sanctions for non-compliance with commitments remains only just a secondary factor of nature.[15] The costs of coordination of economic policy were the subject of discussion of many economists. It is believed that the highest cost of coordination in reducing the level of competitiveness between countries. Also, the literature points out that the costs are deepened in terms of economic policy coordination because it is an action which in the case of the EU are determined to communitarian level with the sign of supremacy over the domestic law. As the objectives and measures of coordination can be identified practically, is likely to define and wrong, but the member countries will have to no matter that to imply inevitably. Such potential mistakes lead to the sort of cascade effect that threatens to significantly slow down the process of coordination or repudiate the results achieved, if not timely detected and correct deficiencies. The impediments that increase the costs of coordination are relating to the number of entities that access to monetary union and the existence of certain legal restrictions. Coordination costs are directly conditioned by negotiating of Member States. Taking into account the tendency of membership increasing, which is inevitable due to the expansion of the EU, the question is whether such compromises possible? If possible, we rephrase the question in a way, how much time is required to elapse before the completion of the agreement begins to produce the desired legal effect? The synchronisation of different preferences works particularly challenging in some segments of fiscal policy. For example, in Germany, the central bank does not have the authority to decide on changes in the conduct of fiscal policy independently. Experiences show that even in circumstances where it is clear that such changes lead to increased social welfare (e.g. the elimination of subsidies), is challenging to conclude agreements, which

[15] Webb, *op. cit.,* note 40

may discourage attempts to coordinate tax policies.[16] This problem becomes more complicated if it is added to the issue of coordinating the wages policy.

Legal restrictions are theoretically related to the role of the European Central Bank out of coordination of monetary policy, in the area of fiscal policy and other macro-economic policies. As the jurisdiction of the ECB clearly defined by the provisions of primary law, the question is whether the implicit city expansion of jurisdiction. As the European Central Bank must maintain relations with other subjects of the Union, it is crucial to determine the legal effect of agreements and joint statements. In official documents of the EU is taken a stance that all agreements of ECB and other institutions, legally optional and cannot, under any circumstances take the form of *ex-ante* coordination.[17] In terms of the global economic and financial crisis, this problem becomes especially important, because it raises the question of whether the scope of the jurisdiction of the leading EU institutions should be reviewed. In this regard, it seems that in a crisis can get to a justified deviation from the principle of *non leges potens pertinent* (no more than allocated rights), if it is warranted to achieve the common good, and in the preservation of order in the monetary sphere.

In considering the costs and benefits of coordination, we must take into account the effect of the time lag in the implementation of measures and instruments of economic policy, which under conditions of economic and monetary union obtaining a complex dimension. In this regard, a distinction is made between the inner and outer lag.[18] Domestic delay covers the period from the moment when it is necessary to take action until the moment of enforcement measures. Outer lag is a period which elapses between the moment of action taken and the moment of its effects in the economy. The inner lag occurs in recognition lag, deciding what action (decision lag), and in the course of the action (action lag). The lagging in recognising the disorder at the Community level is a significant challenge, because, as a rule, it takes the most time, regardless of whether it comes to disturbances in the monetary and fiscal sphere. When it comes to decision-making lag in the field of monetary policy, it must be borne in mind that the European Central Bank makes all decisions. In contrast, in the area of fiscal policy, the decisions are made by the national fiscal authorities. The European Central Bank, in many cases, the decisions are made quickly and efficiently. At the same time, the process of decision-making by governments can be prolonged (especially when it

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16 Schiede, *op. cit.,* note 9

17 European Central Bank, The ECB's Relation with Institutions and Bodies of the European Community, Monthly Bulletin, 2004

18 Vukadin, E., *Economic Policy*, Faculty of Law, Belgrade, 2009, pp. 38-39

comes to adopting new or amending existing budget laws, tax laws and the law on public debt). Lagging in terms of applications is a challenge that needs to be systematically addressed, because the effects of the use of monetary policy measures are quickly noticed, but not from the implementation of fiscal policy in which at that time is potentially longer. How effective coordination mechanism prejudge the simultaneous use of measures of centralised monetary policy and decentralised fiscal policy, the time delay may affect the final result of the coordination process, due to which the subjects of economic policy must make further efforts to shorten the time horizon of the mentioned periods.

4. THE PRINCIPLES OF COORDINATION MECHANISMS

The ratio of internal and communitarian law is a decisive factor in shaping a transparent, efficient and legally justifiable concept of the economic policy of coordination in the EU. By the Maastricht Treaty is introduced the principle of subsidiarity, which is the proper understanding and application *condition sine qua non (lat.)* of political and financial stability in the Union. As we have previously noted, this principle has been established that "Community operating in areas which do not fall within its exclusive competence only to the extent and only if the Member States are not efficient enough to achieve the goals that need to be implemented based on the proposed measures and, therefore, based on the arguments which are concerning the scope and intensity of the impact of the proposed measures, can better be achieved at a Community level " (Maastricht Treaty, art. 5). The Treaty of Amsterdam supplements this principle by the principle of proportionality, which stipulates that" the Community will not go beyond the steps that are necessary to realise the objectives. "We note that the principle of speciality and proportionality limits the application of the principle of subsidiarity. According to the principle of speciality follows that the Community acts within its jurisdiction. In contrast, the principle of proportionality restricts that its actions will not go beyond the necessary framework to achieve an objective. The formulation of subsidiarity is a crucial concept because it is interpreted in analogy with economies of scale and externalities.[19]

In the broadest sense, this principle means that decisions should be made at the level closest to the citizens. So, the Union should not take any action if it does not mean that such an operation to be more effective and that measures should be taken at the national, regional or local level. The principle of subsidiarity can be considered an element of the principle of fiscal federalism. Under this jurisdiction, the country should not be delegated to lower levels of government or to raise

[19] Prokopijević, M., *The European Union- Introduction*, Belgrade, 2009, pp.110-111

to a higher level, compared to the one on which jurisdiction can be efficiently carried out. The problem with its interpretation depending on the preferences of interpreters under its content may fall within intensive interpretation or can get a pervasive interpretation. According to the broadest interpretation of the principle of subsidiarity, its application can include everything that is on the level of the Community that can be effectively implemented. The rule is that the burden of proof borne by the person who proposes actions to be taken at the Community level (*actori in cumbit probatio*). In this role could be found, Member States or EU bodies. Of course, in practice, it is mentioned that proving is difficult to implement because it determines the domain of political agreements, the terms and conditions of application of the principle itself. The problem with its interpretation, according to some understandings, reflected in the fact that the principle hiding his true nature, and the ability for continuous expansion and centralisation of power of the EU institutions. However, the legislative intention was that the level of communitarian law does not exercise too much influence. History Integration, in this sense, clearly shows the continuous expansion of jurisdiction, which reached its top in the creation of the single currency and the establishment of the European Central Bank.

The application of this principle in practice further complicates its substantive ambiguity, both legal and in economic terms. Economically speaking, this principle is often identified with the institutional manifestation of the general principle of comparative advantage.[20] That would mean that its use is characteristic of countries where there is a clear division of labour and specialisation, which means that within the community for exercising specific goals are competent those units that make them in the most effective way to be achieved concerning other units. As such, the principle becomes a characteristic of the countries with open economies, which include member countries of the EMU. At this point, we cannot, and do not ask the question whether is insufficient precisely a legally-economic meaning of the term, one of the factors of contradictory results so far in the general coordination of monetary and fiscal policy in the euro-zone, because it is the correct interpretation of legal norms (principles) of the same condition for the effective implementation of the legal communication? The existence of different "standards and techniques" of interpretations which are based on different economic positions of the Member States and political influence, impose the need to establish uniformity in the application of the principles of subsidiarity. The legal doctrine is advocating the application of different mechanisms through which it can improve the implementation of the principle of subsidiarity in the field of economic policy.

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[20] Schäfer, W., Harmonization and Centralization Versus Subsidiarity: Which Should Apply Where?, *Intereconomics*, *vol*. 45, no. 1, 2006, pp. 246-249

The rhetorical questioning in connection with the distribution of competences in the field of monetary and fiscal policy can be reduced by applying the so-called "functional subsidiarity test.[21] The application of this test involves the application of four successive steps. The first step involves the identification of areas in which the measures and the instruments have not been satisfactory. If it is an area which falls under the exclusive competence of the Community, the test is abandoned, but it should be noted that this step. However, an initial may be required for the application because the Maastricht Treaty is very complex. The second step means the application of criteria externalities, economies of scale or other principles. If the Member States voluntarily cooperate on solving a specific problem, there is no need for the intervention of supranational levels of government, provided that the cooperation is authentic. In the third step, it is necessary to check whether there are conditions that such cooperation remains an authentic *pro future (lat.)* or not, due to exposure to different political interests and turmoil. In the fourth step, if we conclude that the first and second step is met, and the third did not, the competence belonging to the Community. If there are a sufficient number of conditions for credible cross-country coordination, the Community does not have to intervene. Therefore the competence remains at the national level of government. Alternative ways of solving the application lack imply the creation of specific mechanisms of so-called "early warning subsidiarity mechanism".[22] This mechanism takes the form of a new legislative procedure, which foresees the participation of national parliaments in the creation of EU primary law for the first time. More specifically, the national parliaments would symbolically speak, put in the role of principle "watchdog". Such a procedure would allow the representative bodies of the Member States to present all remarks related to the European legislation for which they believe that violates the subsidiarity rule and before the same shall approve or implement.

In considering the principles of coordination, it is necessary that the Court of Justice can determine whether the character of the measures taken at the supranational level justifies its consequences in the legal-economic system of Member States. Indeed, here the proportionality does not occur as a component of subsidiarity. It represents an independent jurisdiction of the Court, in violation of national measurement values to achieve communitarian goals. That seems hard to apply in practice because the Court cannot accept that the Council (or rather representatives of the country of which it is composed) voted on the application

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[21] Pelkmans, J., *An EU Subsidiarity Test is Indispensable*, Intereconomics, *vol.* 41, no. 5, 2006, pp. 249-254

[22] Cooper, I., *The Subsidiarity Early Mechanism: Make it Work,* Intereconomics*, vol.* 45, no. 5, 2006, pp. 254-257

of the communitarian dimensions oblivious to the fact that this undermines the supranational value. For this reason, it is difficult to accept that the violation of national values (in terms of economic policy, monetary, fiscal and financial sovereignty) is disproportionate to supranational one. In the coordination process, Member States are required the certain compromises, which some national operators provide, i.e. consuming more or fewer benefits, it is justified for the sake of establishing a functional institutional mechanism that contributes to achieving macroeconomic stability.

Due to the frequent inconsistencies in principle application, theoreticians such as Schafer (2006) proposed the institutionalisation (legalisation) exit from the Member States of those segments of the common policies where there is a severe and frequent breach of the principle. We believe that in an extreme form, leaving the legalisation of values and objectives of the common policies can permanently and irreversibly threaten the already fragile fiscal policy coordination mechanism. Also, it can produce the indisputable collapse achievements of the common monetary policy.

5. NEW WAVE OF ECONOMIC POLICY COORDINATION: NEW ECONOMIC GOVERNANCE

The rigidity of the norms of the Treaties and complicated audit process can slow the pace of economic policy coordination. Subjects of economic policy can adopt legal norms validity clause with the termination period to prevent difficulties that can arise from different interests.[23] This legislation does not constitute a qualitative novelty in EU law, as was once the Paris agreement establishing the European communities for coal and steel was concluded for fifty years. Sunset clauses allow abrogation of regulations that are outdated from the legal system unless it reaches their express or tacit extension. The Commission in 2013 presented a plan for the simplification of the legislative process, which is based on the use of the said clause to remove amortisation of regulations and easier adaption to emerging economic circumstances. Such clauses in the field of monetary rights and EU economic policy can facilitate the adoption of much-needed agreement in the moments of crisis, deleting obsolete solutions listed.

The problems observed in the European Union law in the conditions of global economic and financial crisis imposes the need to reform the institutional framework of governance in EMU. Institutional structures of the new economic governance

[23] Oosterwijk, J. W., *Subsidiarity and Economic Policy*, in: Gelauff, G.; Grilo, I.; Arjan, L. (eds.) Subsidiarity and Economic Reform in Europe, Springer, 2008, pp. 59-64

were created outside the scope of primary law and acts of secondary legislation and shaped by the provisions of the European semester, the Agreement on the constitution of the European Stability Mechanism and the Treaty on Stabilization, Management and Coordination in EMU.[24] This is complementary with the new tasks of ECB in implementation of forward guidance and nonstandard monetary policy measures in preventing future market risks .[25] The global debt crisis has exposed the weaknesses of the entire "international financial architecture" as a loathsome concept for the application of financial standards to avoid the effects of large-scale recession (elimination of systemic risk) and the constitution of the special body in national legislation designed to encourage compliance with these standards.[26] The setting at which for preserving the stability of the euro is enough to provide the general conditions for the coordination of economic policies proved to be insufficient. The failure in the area of coordination, the EU has tried to amend certain legal precedents which provided financial assistance to Greece, Portugal and Ireland in 2010, which directly violated the provisions of primary law which explicitly prohibits collective public debt financing. Although such acts were justified by preserving monetary stability, legal consequences cannot be ignored. The first significant step towards the establishment of new institutional mechanisms, representing the Commission Report issued after negotiations with the Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions, which strengthens the process of coordination.[27] Concrete measures which should be taken to make the process of coordination in line with the economic goals of the founding documents include the reform of the Stability and Growth and deepened coordination of fiscal policy, control of macroeconomic disturbances and the development of competitiveness, the establishment of the European semester and management for the exit of the crisis. [28] Timely identification of the causes and forms of macroeco-

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[24] Burger, C. *et al.*, *Governance of EU Coordination,* in: Visions for Economic Policy Coordination in Europe, Vienna Federal Ministry of Economy, Family and Youth, 2013, pp. 108-117

[25] Conti-Brown, P.; Lastra, M. R., *Research Handbook on Central Banking*, Edward Elgar Publishing, London, 2018, pp. 187-188

[26] Giovanoli, M., *The International Monetary Law: Issues for the New Millenium,* Oxford University Press, 2001, pp. 2-3

[27] Communication from the Commission to the European Parliament, the European Council, The Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions: Reinforcing Economic Policy Coordination, COM (2010) 250 final

[28] The central place in the reform takes strengthens the preventive part of the Pact and verification functions of fiscal rules. In connection with the preparation and submission of convergence and stability programmes, the Commission has proposed amendment of secondary law to establish a legal basis for taking the interest of the deposit by States which did not lead adequately its fiscal policy (which would have been returned when the "correct" coordination). In managing of fiscal policy special attention

nomic disorders is the primary condition for the effective action of the subject of economic policy. For this reason, it is necessary to incorporate the methods into existing fine pressure control mechanisms based on Art. 136. of the Treaty on the Functioning of the EU. It is required to develop quantitative indicators based on which will facilitate their control in case of crossing the critical values and the formulation of specific guidelines to the Member States which are the most affected by the consequences of the crisis. An important step in establishing a new system of economic governance represents the Commission's proposal on the definition of clear and credible rules of procedures which the Union and the Member States should start in the case of the crisis. Bankruptcy that some members of the EMU suffered confirms the need for such rules which preserve macroeconomic stability and prevent the occurrence of the effects of moral hazard. It is interesting that in this Report, the Commission for the first time expressed the opinion on the admissibility of financial support to countries in times of crisis under the condition that it is necessary for the survival of EMU. It is this attitude of the Commission on "bypassing" art.125 of the founding act in extraordinary circumstances, later became the subject of controversial actions of the European Court of Justice in the case of European Stability Mechanism. On the new architecture of EMU, we can speak in material and formal terms.[29] Material dimension encompasses actions taken to provide financial support to members of the Euro-zone and the measures taken in the field of supervision of national budgetary policies. Formal dimension includes measures which are incurred as a result of the adjustments and acting the norms of primary law and secondary legislation. The material aspect of the new management concept is embodied in "a secular triptych in which the first two wings aimed at supporting the Member States, while the third wing connects the first two specific current and future incentives." Material aspects are determined with the provisions of the Agreement on the European Stability Mechanism and with the Fiscal Agreement, while the formal aspects of the regulated set of legislative measures as part of Six Pack and Package two. In practice, the formal dimension intersects the material dimension of the new architecture of EMU what is quite expected.

should be paid to the use of funds of the EU budget and cohesion policy to help the country to be able to overcome the weakness of structural policy and other challenges

[29] Craig, P., *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, in: Adams, M. *et al.* (eds.), The Constitutionalization of European Budgetary Constraints, Oxford Hart Publishing, 2014, pp. 1-45

6. THE INFLUENCE OF EUROPEAN UNION ECONOMIC POLICY COORDINATION MECHANISMS ON SERBIAN ECONOMIC POLICY

On Serbia's road to joining the European Union, the harmonisation of domestic legislation with the *acquis communutaire* receives a special character. While it is clearly understood for monetary law scholars that monetary regimes must be effective, the fact is that the concept of efficiency today still remains a little bit abstract, as it is primarily determined by the mechanics of designing legal solutions, which include a careful selection of doctrinal and legal concepts, form, language, style, and "luck" in regaining the right of certain views[30] An optimal programme of longterm economic policy is possible only with the determination of the essential elements of coordination mechanisms of communitarian economic policy. Based on the survey results can be seen at certain recommendations *de lege ferenda*, which the national economic policymakers should comply it to achieve a higher level of consistency of the constituent elements and different segments of economic policy.

In the first place, a precondition for successful harmonisation of the national economic system with the provisions of the *acquis communautaire* is formulating of consistent, realistic, transparent, quantified programme, as stabilisation, and economic development policy. In this regard, it is important that the government completely takes responsibility for the implementation of stated objectives from the concept of economic policy during its mandate. In the case of its insufficient successful realisation, that means the application of sanctions in the form of mandate termination and new elections. Thus strict penalties are necessary because the question of European integration requires the full commitment of the main subjects of economic policy or the government, parliament, central bank and establishing their coherent cooperation with other entities. It is necessary to cooperate with trade unions and chambers of commerce, companies in the public sector and various associations of citizens such as associations of taxpayers, associations for the protection of the environment, consumer associations and the others.

If the concept of domestic economic policy does not meet all of these mentioned requirements and does not enjoy the confidence of citizens, the process of coordination will remain a dead letter, which loses on its justification and expediency. Serious intentions towards economic recovery and progress, local entities have shown by adopting the Fiscal Strategy for 2015 with two-year projections, which is mostly in line with the objectives of general guidelines for coordination.

[30] Mousmoti, M., *Designing Effective Legislation*, Edward Elgar, London, 2019, pp. 18-19

Thus, in the framework of the objectives and economic policy guidelines insist on achieving macroeconomic stability by implementing fiscal consolidation and elimination of obstacles to the growth of economic competitiveness of the comprehensive structural reforms. However, taking into account the failures in the implementation of the objectives of the previous fiscal strategy, the implementation of the established measures and instruments becomes imperative that the strategy itself does not become a *tabula rasa*. After formulating the concept of effective economic policy can be taken the steps on the harmonisation of monetary-credit and fiscal policy as well as its two most important subsystems. In the sphere of monetary policy, successful monetary integration requires to fulfil legal and economic system of convergence established by the Treaty of Maastricht and the Stability and Growth Pact. How monetary policy at European Union level fully centralised, the subjects of economic policy must make the necessary modifications in the field of monetary law that will facilitate future accession to EMU. That requires a change of normative regulation of the applicable exchange rate regime from a managed flexible exchange rate regime must be transformed into euroisation. Operationalization of such a goal may be associated with numerous difficulties, which are reflected in the fact that the introduction of the euro as the official currency, the central bank loses the ability to use the instruments of foreign exchange policy in limiting the consequences of annulling the economic and financial crisis. On the other hand, a domestic economic policy that could achieve the benefits of which are reflected in deeper and energetic market integration and in reducing transaction costs after accession to EMU. The realisation of these conditions open dilemmas that were present during the accession of all Member States to the single currency area, where the decision on selection is always determined by the establishment of a specific trade (off), i.e. sharing of costs for benefits. Taking into account the possibility of accession to the EU single market and all the advantages it brings, local subjects of economic policy should respect the experiences of other member countries and follow their path of monetary integration.

In the area of fiscal policy can be noted the existence of legislative solutions that are created based on those that exist in communitarian law. As the harmonisation of national fiscal policy cannot be imagined without the introduction of fiscal rules, it is noted that this requirement has already been met formally in the field of domestic economic policy. The fiscal rules introduced by the Law on Budget System (2015) and related to the regulation of the amount of the budget deficit and clear the debt to achieve fiscal responsibility and fiscal discipline of the government. The reference values of fiscal rules are close to those of the convergence criteria required in the EU, which confirms that the rules in the content are quite well set. Problem with the poor implementation of the fiscal rule requires that

domestic economic policy entities determine the sanctions for non-compliance in a higher amount, should not be that way to reduce the probability of their violation. If more violations of the same rule to come, they must create the conditions for real implementation of already imposed the sanctions. An important role in the process of approaching solutions in domestic fiscal policy could potentially carry out the national courts and special state bodies that are dealing with the issue of execution and control of budgetary funds spending. The role of national courts to assess compliance with the fiscal rules is conditional on the existence of professional knowledge and skills that do not currently exist in the domestic judicial system but does not mean that efforts to institutionalise of such jurisdiction should not continue. A positive example in this aspect presents a notice legislator in the formation of the specialised court departments that will deal with the issue of financial crime, which indirectly may achieve the influence on the overall tightening of fiscal discipline. The big drawback in domestic law is the lack of specialised courts of the audit, to deal with the issue of accountability accountants and commanders for disposal and spending the budgetary funds. Pendant to such control represents the jurisdiction of the State Audit Institutions (State Auditor), which initiates the procedure for determining responsibility for spending funds and publicises the results of supervision.

The main problem is that in most initiated cases have been no clear determination of responsibility for the spending of budgetary funds, as well as the unspecified legal effect of its opinions, recommendations and guidelines about compulsory treatment. In the field of tax policy as an important segment of fiscal policy, local entities much respect the experiences of member states in the field of harmonisation of indirect taxes provided that special attention should be paid to the use of tax incentives to attract foreign investments, incentives for employment and for environmental protection, which the Member States of the European Union practice to attain the objectives of the Europe 2020 strategy aimed at a stable, sustainable and inclusive growth. When it comes to public debt management policy, economic policy actors have established the principle of non-soft budgeting in Law on the National Bank of Serbia (2015), where article 44 explicitly prohibit all forms of debt monetisation or loans to the government (covering the budget deficit). Considering that all EU Member States before the outbreak of the global financial crisis had trouble in maintaining the stability of public debt, the task of domestic subjects of economic policy in this field is the most complex. It demands solutions that have established with the new measures of economic management in the Euro-zone such as introduction of the debt-brakes and "golden rule" budget.

Taking into account and the fact that Serbia as the successor of the former state has inherited the largest part of public debt must be taken constructive measures to reduce its height to 60% of GDP per Law on Public Debt (2011). The main measures on this path must be taken not only may include austerity plan set forth by the current economic recovery but require an increase in the volume and structure of production and inflow of foreign investments, as a precondition for economic growth and development. That can be achieved by the application of certain incentives for the foreign capital investment in underdeveloped areas (thereby realising the objectives of regional development policy). At the same time that should not be discriminated against local businessmen giving the disproportionate privilege of foreign business companies. When it comes to structural policy in the market segment earnings, notes the serious lack of constructive use of macroeconomic dialogue, which must be corrected in the shortest possible time. That is particularly evident in the area of labour and employment policy, where the need to create conditions for strengthening trust between the representatives of trade unions, chambers of commerce and the state after collective labour agreements. How are the guidelines of the Economic Council on the coordination of economic policies except for the sustainable macroeconomic policies and keeping healthy finances, special attention is given to the investment in human capital, local entities must provide the conditions for lifelong learning and training of workers? In particular, it must fulfil the conditions for reducing the overall rates of unemployment (particular rates of young people unemployment). That requires solutions established by the Lisbon strategy and launching initiatives that have been implemented by all EU member states. As domestic economic policy has not spared the functioning of modern factors of coordination which are no longer linked only to the problem of spillover effects and the resolution of the issue of free users but also include climate change and the challenge of an ageing population, harmonisation is necessary not only in the field of monetary and fiscal policy but and in the sphere of social policy, environmental policy and policy of technical-technological and scientific development. The high degree of compliance has been achieved in the field of environmental policy, where the existing legal regimentation includes the latest solutions to European laws in terms of environmental protection. Still, there is a severe deficiency in their application, failure to act distorting the decisions of citizens due to the lack of sanctions or their inadequate level. The objectives of the European semester which relate to the creation of a society based on knowledge and require the use of tax incentives for production, products and technological innovation in a broader range. The success of the harmonisation of national solutions with European standards is conditioned and with the time-delay of the action of economic policy, which must be reduced to a level that is economically and socially acceptable.

7. CONCLUSION

The conclusion is that before the national economic policymakers on the path of European integration continues to face significant challenges that even although complex to solve, they are not invincible and if between competent state institutions and citizens' associations establish a credible relationship with clearly defined responsibilities to achieve economic and legal advantages that EU membership brings. Although the process of economic integration requires and limitation of some components of the monetary, fiscal and financial sovereignty, this should not mean that the country is on the path of European integration entirely subordinate national interests to supranational demands, taking into account the recent experience of Member States during the debt crisis and the failure to maintain stability eurozone. The convergence of national economic policies with the values specified with the general and specific coordination mechanisms, cannot take the form of *sui generis*, because the same route had to go all the smaller Member States of the Union, leaving aside the experience of leading countries such as France and Germany in the field of coordination of fiscal policies. That does not mean that the domestic path needs ultimately to be deprived of respecting and protecting the national interests and values. We believe that local economic policymakers on the way of economic and monetary integration enjoying, conditionally speaking, a certain "qualitative advantages" that other members did not have, and are reflected in the possibility of a comprehensive and critical analysis of the results of many decades of the process of coordination of economic policy (starting from the foundation of the European economic integration through the establishment of EMU to considering the idea of introducing the concept of banking and fiscal union), whereby learning from others' mistakes and best practices selection process of harmonization of economic systems can be implemented in a way that is not only economically efficient and effective but legitimate and legally and politically justified.

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UDK 346.546(4-67EU):004.9
339.137(4-67EU)
Review article

EU COMPETITION LAW IN THE DIGITAL ERA: ALGORITHMIC COLLUSION AS A REGULATORY CHALLENGE*

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ABSTRACT

Guaranteeing fair competition has been a guiding principle of Union action since the beginnings of the European Economic Community. Anti-competitive activities in the internal market, such as agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition, or abuse by one or more undertakings of a dominant position are prohibited as incompatible with the internal market. Over the years, a vast body of regulatory and soft law instruments, as well as the Commission's decisions and the case law of the Court of Justice of the European Union have built up to handle a variety of complex issues associated with creating a level-playing field for undertakings in the internal market.

* This work has been fully supported by the University of Rijeka under the project uniri-drustv-18-252 "Legal aspects of the digital transformation of society"

As more and more businesses are using smart solutions, predictive analytics and algorithms for optimisation of their business processes, new business models and decision-making processes emerge. The development and use of self-learning machines, capable of intelligent behaviour in the market are changing the competitive landscape and market structure, thus generating many new and complex legal issues.

This paper aims to address the regulatory challenges associated with algorithmic collusion, as a form of anti-competitive behaviour among competing undertakings which is rarely manifested in explicit or even implied agreements. The issue of recognising and proving, and eventually, sanctioning tacit collusion practices becomes even more complicated when innovative digital technologies, such as implementation of price programming or self-learning algorithms enter the scene and rearrange the market structure. It is extremely difficult to differentiate between the situations in which undertakings adapt their strategies in response to the behaviour of their competitors from those where they change the interaction patterns altogether, by facilitating either conscious or unconscious parallel behaviour.

Is such behaviour caught by Article 101 of the Treaty on the Functioning of the European Union? What kind of regulatory response, if any, is needed? The authors will analyse the existing practice on tacit collusions, developed in the era of 'brick and mortar' economy and evaluate whether a new framework is needed in the digital era. Is hard regulation suitable, or desirable at all, or could these challenges be addressed through a set of guidelines or soft law instruments? The technology is evolving faster than any legal framework. Without first knowing and understanding how algorithms work, it is impossible to develop an appropriate response to these issues. The authors offer their contribution to this on-going debate.

***Keywords**: EU competition law, pricing algorithms, tacit collusion, parallel behaviour*

1. INTRODUCTORY REMARKS

Businesses rely on different tools to increase their efficiency and competitiveness. Advanced technologies and the use of complex algorithms enable processing of enormous amounts of data, their analysis and recognition of new trends at an incredible speed, allowing for immediate reaction and faster adaptation to changing market conditions.[1] Predictive analytics and optimisation of business processes as legitimate market strategies have taken a whole new dimension in the digital age and the algorithm-driven business world. Algorithmic business implies the use of complex algorithms to improve business decisions and automatise processes for competitive differentiation.[2] Pricing algorithms are especially important tools for monitoring and adapting to competition. Two-thirds of online retailers in the EU use pricing software programmes that autonomously adjust their prices based on

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1 Krausová, A., *EU Competition Law and Artificial Intelligence: Reflections on Antitrust and Consumer Protection Issues*, The Lawyer Quarterly, *vol.* 9, no. 1/19, p. 79

2 Ezrachi, A.; Stucke, M. E., *Virtual Competition: The Promise and the Perils of the Algorithm-Driven Economy*, Harvard University Press, Harvard, 2016. See also OECD, *Algorithms and Collusion: Competition Policy in the Digital Age*, 2017, p. 11 [http://www.oecd.org/daf/competition/Algorithms-and-colllusion-competition-policy-in-the-digital-age.pdf], accessed 02. May 2020

the observed prices of competitors.[3] Although pricing algorithms are not novel,[4] with improved technological solutions they have become increasingly sophisticated, providing for real-time automated pricing decisions. Their wide scale use may lead to price coordination and anticompetitive effects.[5]

The risk of tacit collusion increases with the growing number of competitors using sophisticated pricing algorithms.[6] Algorithms can bring us closer to the perfect competition model.[7] There is less need for mutual communication.[8] Algorithms provide the possibility to coordinate strategic decisions and future market practices, even without human intervention.

At what point can legitimate algorithmic business become algorithmic collusion? Is algorithmic collusion even possible, and if it is, how can it be recognised, proven and sanctioned?

The usual metaphor for collusion is that of CEOs meeting in smoke-filled rooms to discuss market conditions for their products and services or just to exchange commercially sensitive information which they will later use to adapt their business strategies. This may result in price-fixing, market-sharing and/or customer allocation, or any other example of creating artificial market conditions to increase profitability and facilitate company gains, which would otherwise not be possible or would not be possible in such extent. These types of activities were always around, and the competition law has developed efficient mechanisms to sanction

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3 European Commission, Final Report on the E-Commerce Sector Inquiry, COM(2017) 229 final, Brussels, 10.5.2017, p. 5

4 British Airways seems to have been the first company to use pricing algorithms in the 1970s. See Calvano, E. *et al.*, *Algorithmic Pricing: What Implications for Competition Policy?*, Review of Industrial Organization, *vol*. 55, no. 1, 2019, pp. 155–171, p. 155; McAfee, R.P.; te Velde, V., *Dynamic Pricing in the Airline Industry*, [https://mcafee.cc/Papers/PDF/DynamicPriceDiscrimination.pdf], accessed 02. May 2020. For an account of algorithm pricing and trading in the financial industry, see Mehra, S. K., *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, Minnesota Law Review, *vol*. 100, 2016, pp. 1323-1375

5 "With pricing software, detecting deviations from 'recommended' retail prices takes a matter of seconds and manufacturers are increasingly able to monitor and influence retailers' price setting. The availability of real-time pricing information may also trigger automatised price coordination. The wide-scale use of such software may in some situations, depending on the market conditions, raise competition concerns." European Commission, *Final Report on the E-Commerce Sector Inquiry*, note 3, p. 5

6 Ezrachi, A.; Stucke, M. E., *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, University of Illinois Law Review, *vol*. 2017, no. 5, 2017, pp. 1775 – 1810, p. 1778

7 See more on this issue in Pošćić, A., *Europsko pravo tržišnog natjecanja i interesi potrošača*, Narodne Novine, Zagreb, 2014, pp. 47 and 48

8 Baker, J., *The Antitrust Paradigm, Restoring a Competitive Economy*, Harvard University Press, Cambridge, London, 2019, p. 99

them. However, this metaphor for collusion has become obsolete, not just due to the smoking ban. Why meet in person, when the meeting can take place in the virtual world? Actually, why meet at all? The digital environment provides ample opportunities to achieve the same anticompetitive effects, through tacit collusive practices or "conscious parallelism".[9] Many of such practices remain undetected or unsanctioned by the existing mechanisms for the protection of competition, because they are currently outside of their scope.

In order to decide whether additional regulatory action is needed, it is necessary to have at least a basic understanding of how algorithms work.

2. THE ROLE AND IMPACT OF ALGORITHMS IN COMPETITION

What role and impact do algorithms have in competition policy? The answer depends on the type and features of algorithms. Not all algorithms operate in the same manner.

In the most general terms, algorithms refer to an unambiguous and precise list of logic instructions applied systematically and mechanically to carry out a certain task, i.e. generate an output from a given input.[10] Digital algorithms represent a sequence of computational steps that transform the input into output.[11] They are usually differed according to the tasks they perform (e.g. monitoring and data collection algorithms, pricing algorithms, price tracking algorithms, algorithms for personalisation, ranking, etc.), input parameters (i.e. technical variables such as data size, type or level of detail), methods of learning they rely on (fixed and machine learning[12] algorithms) or their interpretability (e.g. white box or descriptive and black box algorithms).[13]

Pricing algorithms can be implemented through more or less complex systems which apply one or more algorithms simultaneously, where input – output values

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9 Ezrachi, A.; Stucke, M. E., *Sustainable and Unchallenged Algorithmic Tacit Collusion*, Northwestern Journal of Technology and Intellectual Property, *vol*. 17, issue 2, 2020, pp. 217-260, pp. 218, 224

10 OECD, *op. cit*., note 2, p. 8, citing Wilson, R. A.; Keil, F. C., *The MIT Encyclopedia of Cognitive Sciences*, MIT Press, 1999. There is no single universally accepted definition, but algorithms are applicable in all spheres of human existence

11 Cormen, T. H. *et al*., *Introduction to Algorithms*, 3rd Ed., The MIT Press, Cambridge, London, 2009, p. 9; Bundeskartellamt, Autorité de la Concurrence, Algorithms and Competition, 2019, p. 3, [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf?__blob=publicationFile&v=5], accessed 02. May 2020

12 Also known as self-learning

13 For an overview of typology of algorithms see Bundeskartellamt, Autorité de la Concurrence, *op. cit.*, note 11, p. 4 and further. According to the roles of algorithms in implementing collusion, there are monitoring, parallel, signalling and self-learning algorithms. See OECD, *op. cit.*, note 2, pp. 25-32

can be programmed in a deterministic or probabilistic manner.[14] The increased use of self-learning or machine learning algorithms is the most challenging from the competition law perspective. Depending on the learning patterns applied, machine learning includes supervised, unsupervised and reinforcement learning.[15] Not just the pattern, but also the frequency of learning is important: whether it involves a continuous exercise or just initial training.[16] In addition, the degree of interpretability cannot be overestimated. Traditional machine learning algorithms are linear and descriptive. On the other hand, deep learning algorithms are structured in a hierarchy of increasing complexity and abstraction.[17] They rely on neural networks, mimicking the human brain.[18]

The use of self-learning algorithms is the basis of artificial intelligence. Artificial intelligence (AI) is usually explained as the art of "making intelligent machines".[19] AI is actually a collection of technologies that combine data, algorithms and computing power.[20] For algorithms to work, they need to be fed with enormous amounts of data. Sometimes, raw data has to be "engineered" to extract the relevant input features, which the algorithm will be able to process to make sense out of.[21] When deep learning is used for feature extraction, there is a risk of obfuscation, i.e. there is no way of recognizing or recreating how the machine really reached its decision.[22] Self-learning algorithms internalize that data, and are able to make dynamic decisions "experientially or intuitively like humans", finding "solutions to problems based on patterns in data that humans may not even be

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14 Monopolkommission, Wettbewerb 2018. XXII. Hauptgutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 1 GWB, para. 169 and further, [https://www.monopolkommission.de/images/HG22/HGXXII_Gesamt.pdf], accessed 02. May 2020

15 These are typical categories, with many subcategories. In brief, supervised learning involves typical input-output pairs; unsupervised learning involves identification of anomalies and hidden structures from unlabelled data, while reinforcement learning means that an algorithm performs a task in a dynamic environment and learns through trial and error. See OECD, *op. cit.*, note 2, p. 9; Bundeskartellamt, Autorité de la Concurrence, *op. cit.*, note 11, p. 10

16 Bundeskartellamt, Autorité de la Concurrence, *ibid.*, p. 11

17 OECD, *op. cit.*, note 2, p. 11

18 Bundeskartellamt, Autorité de la Concurrence, *op. cit.*, note 11, p. 12

19 OECD, *op. cit.*, note 2, p. 9

20 European Commission, White Paper on Artificial Intelligence – A European approach to excellence and trust, COM(2020) 65 final, Brussels, 19.2.2020., p. 2. AI systems, whether they are purely software-based or embedded in hardware devices, display intelligent behaviour by analysing their environment and taking actions, with some degree of autonomy, to achieve specific goals. See European Commission, Artificial Intelligence for Europe, COM(2018) 237 final, Brussels, 25.4.2018, p. 1

21 OECD, *op. cit.*, note 2, p. 9

22 *Ibid.*, p. 11

able to perceive".[23] Self-learning algorithms based on deep learning are often referred to as the so-called "black box" algorithms,[24] as their operation may be incomprehensible, inexplicable and impossible to interpret, even to their creators.[25] This could serve as convenient argument for economic operators to "hide behind the computer program".[26] It also reminds us that, although there are humans behind the algorithms, legal doctrines which are focused on human conduct, such as intent, may have a very limited effect on AI self-learning algorithms.[27]

Dynamic pricing based on complex algorithms has been around for decades, especially in passenger air transport and accommodation.[28] It is the typical example of algorithmic business.[29] However, with the development of artificial intelligence, machine learning and deep learning models, dynamic pricing is taken to the next level of tacit collusion and price-fixing with potentially harmful effects on competition. Take the example of surge pricing in the business model of Uber. The base rate of ride is calculated by an algorithm, based on the time and distance of a trip (a flat fee might be added in certain areas to "support operational, regulatory, and safety costs").[30] However, the algorithm monitors the level of demand, so that

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23 Bathaee, Y., *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, Harvard Journal of Law & Technology, *vol.* 31, no. 2, 2018, pp. 890-938, p. 891. For a further explanation of the problems associated with understanding how artificial neural networks reach their decisions see Castelvecchi, D., *The Black Box of AI*, Nature, *vol.* 538, 2016, pp. 20-23

24 "The black box metaphor dates back to the early days of cybernetics and behaviourism, and typically refers to a system for which we can only observe the inputs and outputs, but not the internal workings." Card, Dallas, *The "Black Box" Metaphor in Machine Learning*, 2017, [https://towardsdatascience.com/the-black-box-metaphor-in-machine-learning-4e57a3a1d2b0], accessed 02. May 2020

25 Bathaee, *op. cit.*, note 23, p. 891 *ff.*

26 Vestager, M., *Algorithms and competition*, speech, Bundeskartellamt 18th Conference on Competition, Berlin, 16 March 2017 [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en], accessed 20. June 2020

27 Bathaee, *op. cit.*, note 23, p. 890 *ff.*

28 McAfee; te Velde, *op. cit.*, note 4

29 Pricing decisions may depend on the input and output of many complex algorithms. For example, all airlines rely on dynamic demand forecasting as part of their pricing strategies, which implies tactical balancing of supply, demand and pricing, as well as updating forecast ticket sales for each flight. Accurate forecasts depend on availability of data, as well as on the improvement in probabilistic programming and application of machine learning techniques. For an explanation how this works in practice, see for example the information on the UK's Alan Turing Institute collaboration with the British Airways in developing a dynamic demand forecasting algorithm, with input including data on daily ticket sales for approximately one million flights from the previous three years (six billion rows of data, with a complex time-series structure), but also other "existing knowledge, recent trends and new data when available", [https://www.turing.ac.uk/research/impact-stories/dynamic-forecasting-british-airways], accessed 02. May 2020. Advances in data science and artificial intelligence should not be overlooked or underestimated when competition law aspects are at stake

30 Uber [https://www.uber.com/us/en/price-estimate/], accessed 02. May 2020

when there are more riders than available drivers, prices may temporarily increase "until the marketplace is rebalanced".[31] The algorithm, therefore, automatically eliminates any price competition among drivers and has negative effects on demand.[32] Still, similar algorithms are essential part of a business model of many companies in the platform economy.

According to Ezrachi and Stucke, pricing algorithms raise particular competition concerns, as they can either help competitors elude detection for their price-fixing, or can act as agents of collusion themselves, with or without human intervention.[33] In the latter case, especially where there is no human intervention, it is hard to accept that algorithms themselves can tacitly collude. This is why some authors refer to it as a "legal sci-fi".[34] The concept of tacit collusion or conscious parallelism is well known in competition law. It may occur under certain market circumstances (oligopolistic concentrated markets) in which competitors rationally adjust their market behaviour without any communications.[35] Given that conscious parallelism between undertakings is not unlawful by itself, but nevertheless may result in collusive outcomes, it is not surprising that the implication of algorithms brings additional challenges.

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31 *Loc. cit.*

32 Uber's surge pricing was challenged in the United States in 2016 by a customer, who filed a civil antitrust suit against the Uber's CEO and founder Travis Kalanick for organising a horizontal price-fixing arrangement, which was explicitly recognised as a plausible allegation of a "hub and spoke" cartel in the Judge Rakoff's Opinion denying the defendant's motion to dismiss. See Spencer Meyer v. Travis Kalanick, 15 Civ. 9796, US District Court, Southern District of New York, Opinion and Order of 31 March 2016. This case was eventually compelled to arbitration and did not proceed to trial. See, Spencer Meyer v. Travis Kalanick and Uber Technologies Inc., 15 Civ. 9796, Opinion and Order of 5 March 2018

33 Ezrachi; Stucke, *op. cit*. note 9, p. 218

34 Schwalbe offers an overview of computer science and economic literature in support of this view. See Schwalbe, U., *Algorithms, Machine Learning, and Collusion*, Journal of Competition Law & Economics, *vol.* 14, issue 4, 2018, pp. 568–607, available at SSRN [https://ssrn.com/abstract=3232631] or [http://dx.doi.org/10.2139/ssrn.3232631], accessed 25. June 2020

35 *Ibid*., p. 232, citing one US Supreme Court decision: „Tacit collusion, sometimes galled oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993)

3. AI, ALGORITHMS AND COLLUSION

3.1. From parallel behaviour to algorithmic collusion

Competition policy and law may not be designed or ready to deal with all the challenges associated with algorithmic business. That does not stop the AI and self-learning algorithms from transforming competition. Economic theory suggests that there is a considerable risk that algorithms, by improving market transparency and enabling high-frequency trading, increase the likelihood of collusion in market structures that would traditionally be characterised by fierce competition.[36] Especially in the context of price-fixing, intelligent systems have an ability to learn from their surrounding and develop response strategies to achieve their goals in unpredictable ways. These types of algorithms are deep learning or second-generation pricing algorithms.[37] They facilitate parallel behaviour of competitors and thus increase a risk of achieving collusive results,[38] without being caught by competition rules as they currently stand.

In other words, collusion has relocated to digital surroundings. Now, it is facilitated by technology: algorithms and artificial intelligence. Machines are far better and faster at collecting, processing and exchanging information. Exchange of information is vital for collusion. As is the existence of some form of conscious behaviour in the form of direct or indirect contact. The problem is, that with the use of new advanced information technologies and machine learning techniques, economic operators may not have been consciously involved in some kind of collusion, or at least that is what they claim. The algorithm may replace the competitors' intent and facilitate collusive parallel behaviour, which makes the conclusion of cartel agreements or concerted practices superfluous.[39] With tacit collusion or conscious parallelism competitors unilaterally raise prices above competitive level in response to the behaviour of their rivals, but without "any illegal agreement or even any contact or communication among the competitors".[40] This type of paral-

36 OECD, *op. cit*., note 2, p. 7

37 Calvano *et al*., *op. cit*., note 4, p. 331

38 Ezrachi; Stucke, *op. cit*., note 9, p. 242 – 244

39 The German Monopolkommission has analysed the impact of pricing algorithms on collusion and has warned that their increased use in the future will lead to more pronounced negative effects on consumers, as it will be easier to achieve the same collusive effects even without actual agreements or concerted practices. Moreover, in the case of self-learning algorithms, the relevant business decision is already made at the time of the decision regarding the price algorithm and is not made in the price-setting process. See Monopolkommission, *op. cit*, note 14, para. 228 and 230

40 Ezrachi; Stucke, *op. cit*., note 9, p. 218, 224

lel behaviour may lead to anticompetitive outcomes, which cannot be challenged or sanctioned.[41]

3.2. Communicating by algorithms: theoretical and practical underpinnings

Despite the interest of the European Commission[42] and national competition authorities,[43] potential cases of algorithmic collusion are very rare. In the United States, the most prominent cases to date involve rather obscure algorithmic collusion for the sale of posters on Amazon. In the first case,[44] an online retailer selling classic cinema posters on Amazon pleaded guilty for orchestrating a collusion through the use of price-fixing algorithm which kept the prices artificially high. A similar collusive price-fixing scheme was at stake in the second case before the U.S. District Court of Northern California,[45] where the defendants were sentenced for using commercially available algorithm-based pricing software to set the prices of agreed-upon posters sold on Amazon Marketplace. This software operated by collecting competitor pricing information for a specific product sold on Amazon Marketplace and applying pricing rules set by the seller. However, both of these cases involved contacts or some sort of communication between competitors, and the algorithm was a tool for implementing that agreement. This is known as the "Messenger" scenario, where computers are used as tools which facilitate illicit agreements.[46] From antitrust perspective, it should not be too demanding to prove the existence of a cartel in such situations, since it implies some sort of communication between competitors, not least because they are the ones who control computers and manners of their use.[47] Algorithms are just a tool in executing the will of their creators,[48] whether they are used to implement the existing agreement or to monitor and sanction deviant behaviour.[49] Another scenario where algo-

41 "The courts and agencies accept that tacit collusion is not only legal, but likely and sustainable in concentrated industries. Absent proof of an agreement, the plaintiff cannot challenge the anticompetitive conduct." Ezrachi; Stucke, *ibid.*, p. 236, see also Kaplow, L., *Competition Policy and Price Fixing*, Princeton University Press, 2013

42 See, e.g. European Commission, Competition policy for the digital era, A Report by Crémer, J., de Montjoye, Y. – A., Schweitzer, H., 2019, [https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf], accessed 02. May 2020

43 See Monopolkommission, *op. cit*, note 14; Bundeskartellamt, Autorité de la Concurrence, *op. cit*., note 11

44 U.S. v. David Topkins, U.S. District Court, Northern District of California, No. 15-cr-00201

45 U.S. v. Daniel William Aston and TROD Ltd., CR 15 419, US District Court, Northern District of California

46 Ezrachi; Stucke, *op. cit*., note 2; Ezrachi; Stucke, *op. cit*., note 9, p. 219

47 Ezrachi; Stucke, *op. cit*., note 2, p. 39

48 *Ibid*., p. 45

49 See Monopolkommission, *op. cit*, note 14, para. 186

rithms are used as tools and can significantly facilitate collusion is the so-called "Signalling", where competitors raise their prices as a signal for other competitors to follow.[50]

Collusion is also possible through the parallel use of the same algorithm, in markets where many competitors use similar or same algorithms.[51] Ezrachi and Stucke refer to the "Hub and Spoke" scenario, which implies that one central algorithm is determining the price applied by many competitors, which generates market changes.[52] Competitors use the common algorithm which may lead to horizontal concertation i.e. mutual dependence and awareness of the fact that the overall results will depend on the joint success of the hub. Regulators will have to determine, if it is possible, whether the algorithm is programmed in the manner which will facilitate the implementation of the agreement. Thus, algorithm is used to stabilise prices and decrease the usual insecurities in the market. It is important to show whether there is an intent to achieve prohibited conduct, i.e. if competitors act with knowledge about the potential prohibited conduct. If algorithm is used to facilitate collusion, the situation is identical to the first scenario.

In order to establish the existence of a cartel under the "Hub and Spoke" scenario, the authorities will have to show that competitors willingly entered into such arrangements, or that the possible anticompetitive effects are known to them. This scenario clearly shows the challenges faced by the regulators. The Commission considers that concerted practice is manifested in the moment of exchange of information among competitors. Cartels can occur in markets where computers organise and control the exchange of information about prices, although there was no initial intent of the competitor to enter into prohibited agreements. Subjective concepts, such as intent, are very difficult to export and bring into the digital surrounding. Thomas suggests that instead of relying on intent, consumer harm should be used as a reliable and workable external standard for distinguishing between illicit collusion and legitimate oligopoly conduct where algorithms and machine learning is involved.[53] This would imply integrating the economic effects analysis into the notion of concerted practices.[54]

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50 *Ibid*., para. 187-188

51 *Ibid*., para. 189-190. Ezrachi; Stucke, *op. cit*., note 6, p. 1788

52 Ezrachi; Stucke, *op. cit*., note 2, p. 46. It is named after a bicycle wheel with strong central hub and many spokes

53 Thomas, S., *Harmful Signals - Cartel Prohibition and Oligopoly Theory in the Age of Machine Learning*, Journal of Competition Law & Economics, *vol.* 15, issue 2-3, June/September 2019, pp. 159–203; available also at SSRN [https://ssrn.com/abstract=3392860] or [http://dx.doi.org/10.2139/ssrn.3392860], p. 22 *et seq.*, accessed 25. June 2020

54 Ibid., p. 27

3.2.1. *The Eturas case: business as usual?*

There is a long way from theory to practice, as illustrated by the current approach of the Court of Justice of the EU (hereinafter: CJEU). Case *Eturas*[55] was the first one in which the CJEU examined the application of automated systems in competition. It concerned 30 travel agencies in Lithuania, which used an on-line booking system for organised tours (E-TURAS), owned by the agency Eturas. Eturas has programmed the 3 % upper limit of discount to automatically apply for organised tours booked through the system and informed all of its business partners (30 travel agencies) about it. The CJEU determined that the on-line booking system enabled concertation without the need for direct contact between Eturas and other agencies. They have never publicly expressed their reservation or distanced themselves from such practice, which suffices to establish the existence of a strong presumption of their tacit consent to such conduct in the relevant market.[56] The agencies have argued that the conduct of Eturas was unilateral, as there was neither will nor intent on their part to conclude such agreement. The CJEU stressed that the concentration cannot be inferred from the existence of a technical restriction imposed by the platform unless it is established on the basis of other objective evidence that it tacitly assented to anticompetitive practice.[57] It means that only those agencies that were aware of the practice could be held liable of infringement. The CJEU established a presumption of concertation applying the standard criteria developed in its settled case law, but has nevertheless allowed the possibility for competitors to rebut that presumption, in accordance with the national rules relating to the assessment of evidence and the standard of proof.[58] Apart from public distancing or reporting to the authorities, the CJEU confirmed the possibility of offering "other evidence" by competitors with a view to rebutting that presump-

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55 Case C-74/14 *Eturas UAB and Others v. Lietuvos Respublikos konkurencijos taryba*, EU:C:2016:42

56 *Ibid*., para. 15

57 *Ibid*., para. 45

58 "Article 101(1) TFEU must be interpreted as meaning that, where the administrator of an information system, intended to enable travel agencies to sell travel packages on their websites using a uniform booking method, sends to those economic operators, via a personal electronic mailbox, a message informing them that the discounts on products sold through that system will henceforth be capped and, following the dissemination of that message, the system in question undergoes the technical modifications necessary to implement that measure, those economic operators may — if they were aware of that message — be presumed to have participated in a concerted practice within the meaning of that provision, unless they publicly distanced themselves from that practice, reported it to the administrative authorities or adduce other evidence to rebut that presumption, such as evidence of the systematic application of a discount exceeding the cap in question." (C-74/14, Judgment, Operative part, para. 1). For a case commentary see also Heinemann, A.; Gebicka, A., *Can Computers Form Cartels? About the Need for European Institutions to Reverse the Concertation Doctrine in the Information Age*, Journal of European Competition Law & Practice, *vol*. 7, no. 7/16, p. 434 *ff.*

tion.[59] It did not, however, explain what that other evidence may be, taking into account the specific circumstances involving the use of new technology.

What the Court probably wanted to highlight is that the technology by itself is not capable of infringing competition. A certain communication and consent of participants needs to be established. This situation clearly points to the need to adapt competition law to new circumstances. As Gal rightly points out, advances in machine learning allow algorithms to automatically discover and create the communication protocols needed to coordinate their behaviour.[60] Despite such theoretical possibility, the CJEU has followed its settled case law here, without giving special consideration to the fact that in this case, the use of computer programmes might have obviated the need to participate at meetings or it has at least made the collusion substantially easier. It should be kept in mind that the use of algorithms, in cases like this, can have certain advantages, for example, because it increases consumer welfare by improving the quality of services and decreasing the prices.[61] From this perspective, algorithms are capable of stabilising the markets.[62]

3.2.2. *Fast forward: algorithms take the wheel*

What these two scenarios have in common is the proven presence of some human interaction in the collusion. More complicated are the 'real' cases of algorithmic tacit collusion, where no human interaction is needed.[63] Ezrachi and Stucke identify two additional scenarios where algorithms meet competition law, which are much more controversial in terms of developing novel policy and regulatory approaches: the so-called "Tacit collusion on steroids" (or "Predictable Agent"[64] scenario) and "AI and the Digital Eye".[65] In these two scenarios, no human interaction is needed: "the self-learning algorithms may independently arrive at tacit

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59 Case C-74/14 *Eturas UAB and Others v. Lietuvos Respublikos konkurencijos taryba*, EU:C:2016:42, para. 46

60 See Gal, M., *Algorithms as Illegal Agreements*, Berkeley Technology Law Journal *vol.* 34, 2019, pp. 67-118 [https://btlj.org/data/articles2019/34_1/02_Gal_Web.pdf], p. 87 and especially literature referred in fn. 95, accessed 25. June 2020. As Gal succinctly puts it, "The algorithm can communicate much more than price choice: it communicates a business strategy"

61 On pro-competitive algorithmic efficiencies see more in OECD, *op. cit.*, note 2, pp. 15 – 18; Lee, K., *Algorithmic Collusion & Its Implication for Competition Law and Policy*, 2018, pp. 15 – 16, [https://ssrn.com/abstract=3213296], accessed 02. May 2020

62 See, e.g. Mehra, *op. cit.*, note 4, p. 1373

63 Mehra discusses about the anti-trust law's "*randezvous* with the robo-seller" and the question "Can robo-sellers really rase prices?" *ibid.*, pp. 1323-1375

64 Ezrachi; Stucke, *op. cit.*, note 6, p. 1789

65 Ezrachi, Stucke, *op. cit.*, note 9, p. 220

collusion, without the knowledge or intent of their human programmers".[66] In the scenario of "Tacit collusion on steroids" the competitors use algorithms capable of predicting future behaviour and promptly reacting in accordance with changed market conditions. Each operator develops its own programme, knowing that other developers are developing their own algorithms individually.[67] There is no agreement here,[68] neither horizontal nor vertical. Predictability and market transparency are crucial. Thanks to available information, parallel conduct by competitors is facilitated, which is not prohibited because it represents adjustment to changed market conditions. The use of sophisticated model changes market dynamic and stimulates conscious parallel behaviour. Similar to the previous two scenarios, none of the competitors has taken part in some sort of an arrangement. The competitor is just encouraged to achieve its economic interest. It is still debated in theory whether these situations should fall under conscious parallel behaviour. Parallel behaviour is not prohibited, even if it is questionable whether it should be acceptable. Regulators might encounter situations in which the increase in prices is not part of express agreement, but an immediate reaction to market circumstances.[69] Sanctioning illicit agreements requires certain evidence, which are impossible to establish in this case. It seems that this could be the right way forward, because condemning every progress and use of super technology can diminish the motivation to develop new innovative models and future investment.[70]

The last scenario, "AI and the Digital Eye" [71] is the most complex one, probably more in the realm of science fiction at this moment, but given the rapid development of new technologies, it will not be long before it becomes a reality.

Machines are programmed to accomplish certain objectives, mostly in the form of profit maximisation. It is impossible to speak about intent or certain form of agreement here.[72] They apply algorithms to achieve programmed objectives. They

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66 *Ibid.*

67 Ezrachi; Stucke, *op. cit.*, note 6, p. 1783

68 *Ibid.*, p. 1790

69 As highlighted by Mehra "Robo-sellers should be more effective than humans at sussing out the right choice of quantity or price in the absence of explicit agreement or communications". See Mehra, *op. cit.*, note 4, p. 1346

70 Lawyers compare punishing companies for designing such technology with sentencing "a gun manufacturer for someone else committing a murder with a gun the manufacturer produced". See Zdzieborska, M., *Brave New World of 'Robot' Cartels?*, Kluwer Competition Law Blog, March 7, 2017, [http://competitionlawblog.kluwercompetitionlaw.com/2017/03/07/brave-new-world-of-robot-cartels/], accessed 02. May 2020. Perhaps this comparison is overexaggerated, but it succinctly explains the regulation dilemma

71 Ezrachi; Stucke, *op. cit.,* note 2, p. 71 *ff*

72 Ezrachi; Stucke, *op. cit.*, note 6, p. 1783

adapt to the data gathered and according to feedback received adapt their strategy. Mutual communication can lead to a certain form of collusion.[73] Competition law regulates and controls mutual communication among competitors. It is questionable who is responsible in this case or whether machines can be controlled in the first place. These types of self-learning machines "are functionally black boxes to humans".[74]

3.3. Regulatory challenges

The crucial element for determining the existence of an agreement is missing. The persons developing the algorithms have no motive whatsoever to enter into a prohibited agreement. Competitors base their decisions on predictions provided by the self-learning machines, in this case, artificial intelligence. The machine has a purpose and acts autonomously to achieve it. One of its goals may be to increase transparency in the market and to maintain concealed parallel conduct. In this example, coordination is the result of development, self-learning and autonomous behaviour by the machine.[75] Regulators should potentially examine whether prices enacted by smart machines in the digital surrounding should automatically be declared as prohibited conduct. With machines which adapt to new input and competitive scenarios very fast, users and developers may predict whether prices will be increased, but cannot predict when, for how long and in what ratio.[76] It is easier for them to adapt to changed market conditions. If machines have no order to start a cartel, a legitimate question is whether they are able to enter into prohibited agreements. Lack of proof concerning anticompetitive intent can result in machines using artificial intelligence, i.e. their developers to avoid questions about the legality of agreements. The use of artificial neural networks can make examining previous pricing strategies even harder. The question is, whether the operation of machine can be discerned from the actions of its developer. In artificial intelligence, the machine is learning by itself and makes autonomous decisions based on the data it collected.[77]

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73 Ezrachi; Stucke, *op. cit.,* note 2, p. 74. See also Gal, *op. cit.*, note 60, p. 106 *et seq.*; Ittoo, A.; Petit, N., *Algorithmic Pricing Agents and Tacit Collusion: A Technological Perspective*, in: Jacquemin, H.; De Streel, A. (eds.), L'intelligence artificielle et le droit, Bruxelles: Larcier, 2017, pp. 241-256. Available also at SSRN [https://ssrn.com/abstract=3046405] or [http://dx.doi.org/10.2139/ssrn.3046405], accessed 25. June 2020

74 Bathaee, *op. cit.*, note 23, p. 938.

75 Ezrachi; Stucke, *op. cit.,* note 2, p. 78

76 *Loc. cit.*

77 As noted by Beneke and Mackenrodt, artificial neural networks can perform this task well if there is enough data. Given the reliance on past data, tacit coordination by algorithms will be disrupted with radical industry changes, such as the introduction of new technologies or entry of new competitors.

The German Monopolkommission has already proposed some possible solutions for these issues, which require legislative intervention, but are built on the presumption that these types of anticompetitive behaviour are better caught under Article 102 TFEU, because they imply unilateral behaviour by the economic operator.[78] Such approach has its limits, primarily because it presupposes the existence of a dominant position in the relevant market, and its abuse. Another option for competition law to tackle these challenges is through merger control. Mergers may foster tacit collusion in general, because it does not require any communication or agreement between competitors.[79]

One of the first and foremost issues associated with the use of pricing algorithms is to properly identify suspicion of collusive behaviour. This entails identifying anomalies i.e. patterns which deviate from normal conditions in a relevant market in a certain time period. But what are normal conditions? Pricing algorithms are being used for a long time, but they are becoming more sophisticated in adapting or even creating artificial conditions to achieve their programmed objectives in extremely short periods of time. This means that competition authorities and other entities will have to use algorithms themselves to understand and detect potential collusive effects. Whistle-blowing incentives may work on humans, but not of algorithms.[80] But what is normal, if markets are already changed? Are we comparing anomalies with other anomalies, which have become the "new" normal as they have replaced normal market conditions long ago?

Another problem with algorithmic collusion is that it necessarily involves a third party – the creator or maker of algorithm, used within an application or a platform. This entails various issues regarding their liability for participation in a cartel.

How do these particularities fit into the existing regulatory framework?

See Beneke, F.; Mackenrodt, M., *Artificial Intelligence and Collusion*, International Review of Intellectual Property and Competition Law - IIC *vol.* 50, 2019, pp. 109–134, p. 127

78 Monopolkommission, *op. cit.*, note 14, para. 217 – 224. See also Bundeskartellamt, Autorité de la Concurrence, *op. cit.*, note 11, p. 25

79 Ezrachi, Stucke, *op. cit.*, note 9, p. 233

80 Oxera, Algorithmic Competition, 2018, [https://ec.europa.eu/competition/information/digitisation_2018/contributions/oxera/oxera_algorithmic_competition.pdf], accessed 02. May 2020

4. IS THE EXISTING REGULATORY FRAMEWORK SUFFICIENT TO DEAL WITH ALGORITHMIC COLLUSION?

4.1. Revisiting the established concepts

The law and principles of competition prescribed in Articles 101 and 102 of the Treaty on the Functioning of the EU[81] (hereinafter: TFEU) and the case law arising therefrom is our main reference point for assessing the applicability and adaptability of the existing regulatory framework to the challenges arising from algorithm-driven markets.

Freedom of contract is the cornerstone of free markets. However, this freedom has its limits. Entering into agreements to artificially change conditions of free competition, by decreasing available products and increasing prices, is prohibited.[82] Pursuant to Article 101(1) TFEU, all agreements between undertakings, decisions by associations of undertakings and concerted practices 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 are prohibited as incompatible with the internal market.[83] The objective of Article 101 TFEU is to prohibit all forms of collusion among competitors, that could limit competition and affect trade between Member States. The definitions of 'agreement', 'decisions by associations of undertakings' and 'concerted practice' are intended, from a subjective point of view, to catch all forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves.[84] The prohibition is broad: it covers formal agreements, as well as informal communication, decisions and concerted practices.

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81 Treaty on the Functioning of the European Union (consolidated version 2016), OJ C 202, 7.6.2016

82 Van Bael, I.; Bellis, J. – F., *Competition Law of the European Community*, Kluwer Law International, Hague, 2005, p. 27

83 Article 101(1) TFEU. This particularly refers to agreements which
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts

84 Case C-49/92 P, *Commission v. Anic Partecipazioni*, EU:C:1999:356, para. 131. See also Opinion of AG Szpunar in Case C-74/14, *Eturas UAB and Others v. Lietuvos Respublikos konkurencijos taryba*, EU:C:2015:493, para. 30

Article 101 TFEU prohibits common conduct by competitors that infringe the existing or potential competition, and in the end, consumers. Collusive agreements and practices are very attractive, because they potentially bring more profit than any competitor would be able to gain through individual conduct. They primarily aim at excluding other competitors from the market, thus opening the possibility for price increase and additional profit.[85]

A meeting of minds is necessary to form an agreement:

> "[t]he concept of an agreement within the meaning of Article [101(1)] of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention".[86]

It is irrelevant if agreement is considered legally binding under national law,[87] or if it is in writing or oral.[88]

The important thing is to discover the parties' true intent.[89] Proving the existence of a will to collude may be one of the biggest obstacles in establishing new forms of collusion, where the use of advanced digital tools is involved.[90] It has to be shown that there was a meeting of minds between competitors at some point.

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85 Pošćić, A., *Zabranjeni sporazumi u europskom pravu tržišnog natjecanja*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, *vol*. 32, no. 1, 2011, pp. 319-347, p. 321

86 Case T-41/96 *Bayer AG v. Commission of the European Communities*, EU:T:2000:242, para. 69

87 Joined Cases 209 - 215 and 218/78 *Heintz van Landewyck SARL and others v. Commission of the European Communities,* EU:C:1980:248, para. 85 – 86; Case 123/83 *Bureau national interprofessionnel du cognac v. Guy Clair*, EU:C:1985:33, para 22; Case C-277/87 *Sandoz prodotti farmaceutici SpA v. Commission of the European Communities*, EU:C:1990:6

88 *See, e.g.* 77/129/EEC: Commission Decision of 21 December 1976 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.812 Theal/Watts), OJ *L 39, 10.02.1977, p. 19-27 and case* 28/77 Tepea BV v. Commission of the European Communities, EU:C:1978:133, para. 41. See also Bailey, David, *Article 101(1)*, in: David Bailey, Laura Elizabeth John (eds.), Bellamy & Child, European Union Law of Competition, 8th Ed., Oxford University Press, Oxford, 2018, p. 108 *ff*.

89 See Joined Cases 209 - 215 and 218/78 *Heintz van Landewyck SARL and others v. Commission of the European Communities*, EU:C:1980:248, para. 86

90 Participation at meetings where anti-competitive positions were expressed was usually considered sufficient proof of collusive intent, but undertakings could have attempted to prove that they did not have anti-competitive intentions if their position was clearly made known to other participants. See C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 *Aalborg Portland A/S et al. v. Commission of the European Communities*, EU:C:2004:6, para. 81 and further. Given that algorithms are making participation at meetings redundant, there will have to be some other proof of communication or tacit acquiescence to establish intent. This will be especially difficult in cases of parallel use of identical algorithms which are commercially available on the market

Concerted practice differs from agreement in the manner in which the mutual intent is manifested, and later, proved. There is no proof of mutual contacts, but the conduct of competitors deviates from the usual conditions in the market.[91]

The category of concerted practice aims to catch all anticompetitive practices which cannot be subsumed under the definition of agreement or decisions of association of undertakings. Common intent is the element which exists both in agreements and concerted practices. However, in agreements, intent is realized through legally binding form, whereas in concerted practices the latter is missing.[92] It is sometimes difficult to find a clear distinction between an agreement and a concerted practice, but apart from the difficulties associated with providing proof, it is not important whether an agreement or some form of tacit concerted practice exists. All these "agreements" are anticompetitive and they can hardly be justified by exceptions contained in Article 101(3) TFEU.

A concerted practice comprises three constituent elements: first, concertation between undertakings, secondly, conduct on the market and, thirdly, a causal link between the two.[93] Coordination and cooperation are constituent elements of a concerted practice within the meaning of Article 101(1) TFEU.[94]

It is well known and established in case law that

> "[…] the concept of a concerted practice refers to a form of coordination between undertakings which, without being taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them."[95]

Textbook examples of concerted practices include exchange of information about prices, discounts, sale and other data[96] concerning conditions and methods of sale, which facilitate concertation and create market conditions which deviate from

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91 Vaughan, D. *et al.*, *EU Competition Law: General Principles*, Richmond Law & Tax Ltd., Richmond, 2006, p. 62

92 Odudu, O., *The Boundaries of EC Competition Law. The Scope of Article 81*, Oxford University Press, Oxford, 2006, p. 72

93 Opinion of AG Szpunar in Case C-74/14, *Eturas UAB and Others v. Lietuvos Respublikos konkurencijos taryba*, EU:C:2015:493, para. 39

94 Case C-194/14 P, *AC Treuhand AG v. European Commission*, EU:C:2015:717, para. 32

95 Case 48/69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, ECLI:EU:C:1972:70, para. 64

96 See more in Butorac Malnar, V.; Pecotić Kaufman H.; Petrović, A., *Pravo tržišnog natjecanja*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2013, p. 143 *ff.*

normal circumstances and present risk for competition. In this manner, competitors can consolidate their positions in the market.[97]

It is difficult to differentiate between situations in which undertakings intelligently adapt to the behaviour of their competitors and those where they act with the knowledge about their competitors' conduct. Economic operators have the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, as long as they independently determine the policy which they tend to adopt in the internal market.[98] This means that there should not be

> "[…] any direct or indirect contact between such operators, which is such as either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which the operator concerned himself has decided to adopt on the market or which he contemplates adopting, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market."[99]

In other words, every competitor is free to change his prices, taking into account the present or foreseeable conduct of his competitors. However, in so doing, competitors are prohibited from cooperating to determine a coordinated course of action in relation to price increase.[100]

Both legal doctrine and case law consider that intent, or some kind of conscious behaviour, is essential for the collusion to exist.[101] It will have to be established that the participating undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of

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97 Joined Cases 40 - 48, 50, 54 - 56, 111, 113 and 114/73 *Coöperatieve Vereniging "Suiker Unie" UA and others v. Commission of the European Communities*, EU:C:1975:174, para. 26-27

98 Case C-609/13 P, *Duravit AG and Others v European Commission*, EU:C:2017:46, para. 71; Case C-194/14 P, *AC-Treuhand AG v European Commission*, EU:C:2015:717, para. 32

99 Case C-609/13 P, *Duravit AG and Others v European Commission*, EU:C:2017:46, para. 72; Case C-49/92 P, *Commission* v *Anic Partecipazioni*, EU:C:1999:356, para. 117

100 Case 48/69, *Imperial Chemical Industries Ltd. v. Commission of the European Communities*, EU:C:1972:70, para. 118

101 Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 89/85, *A. Ahlström Osakeyhtiö and others v. Commission of the European Communities*, EU:C:1993:120, para. 71; Case 48/69, *Imperial Chemical Industries Ltd. v. European Commission of the European* Communities, EU:C:1972:70; Ezrachi; Stucke, *op. cit.*, note 9, p. 234

the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.[102] Passive participation may also constitute infringement.[103]

4.2. Parallel behaviour and the use of pricing algorithms

Parallel behaviour is legitimate and may occur without any element of even tacit coordination. However, even though parallel behaviour should not be identified with concerted practice, it can be a strong evidence pointing to the existence of a concerted practice or collusive parallel behaviour, if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the specific features of the market in question: the nature of the products, the size and number of the undertakings, and the volume of the market.[104] In conducting market analysis, it is examined whether there are certain deviations from predictable conduct and the one which is under review. Establishing parallel conduct by itself is not sufficient, and further economic analyses are needed, whereby the predictability of future conduct of a competitor is especially important.[105] Crucial element is some form of mental consensus, but also some form of reciprocity. Parallel behaviour which leads to stabilisation of prices which would otherwise not be possible and to consolidation of the existing positions to the detriment of other competitors and consumers may be evidence of concertation.

This is exactly what could happen with the use of pricing algorithms. Application of new technologies, however, has made it more difficult to prove collusive parallel behaviour. Pricing algorithms are developed by third parties, such as IT developers. Other service providers, such as consultants may be involved and facilitate concertation, even though competitors on a relevant market may never meet or exchange communication. Third parties, especially IT developers, are not competitors on the relevant market. In its judgment in case AC-Treuhand,[106] the court found that a consultancy firm played an essential role in infringements of

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102 Case C-194/14 P, *AC-Treuhand AG v European Commission*, EU:C:2015:717, para 30; Case C-49/92 P, *Commission v. Anic Partecipazioni*, EU:C:1999:356, para. 86 and 87; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v. European Commission*, , EU:C:2004:6, para. 83

103 Case C-194/14 P, *AC-Treuhand AG v European Commission*, EU:C:2015:717, para. 31; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others v. European Commission*, EU:C:2005:408, para. 142 and 143

104 Case 48/69, *Imperial Chemical Industries Ltd. v. Commission of the European Communities*, EU:C:1972:70, para. 66

105 Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 89/85, *A. Ahlström Osakeyhtiö and others v. Commission of the European Communities*, EU:C:1993:120, para. 64 and 65

106 Case C-194/14 P, *AC-Treuhand AG v European Commission*, EU:C:2015:717

competition by organising and participating at a number of meetings, collecting and supplying to the producers of heat stabilisers data on sales on the relevant markets, offering to act as a moderator in the event of tensions between those producers and encouraging the latter to find compromises, for which it received remuneration. Even though there was no direct interaction between competitors, horizontal collusion may still be found to exist under two conditions: indirect communication via third party and absence of explicit response. The context of interaction must be such that the addressee may be deemed to appreciate that the illicit initiative comes from a competitor or at least is also communicated to a competitor, who will rely on mutual action, even in the absence of response.[107]

This case law does not resolve the concertation issues in 'real' algorithmic collusion cases. If self-learning algorithms themselves control prices and facilitate swift adaptation to changed market conditions, can algorithmic collusion occur and be proven even without explicit human intervention or influence? Ezrachi and Stucke warn of the risks associated with downplaying the effects of algorithmic tacit collusion and the negative impact it may have on consumers and competition.[108]

5. POSSIBLE DEVELOPMENTS

More empirical evidence is needed to show the impact of algorithms on price-fixing and competition under actual market conditions.[109] The use of algorithms has the potential to significantly alter the structure of the markets. In order to neutralise that potential, it is necessary to revise competition rules, and amend them if required, most notably concerning the burden of proof and liability of third parties for cartels. However, the risks associated with premature regulation should not be underestimated, as it may compromise market development.

We are living in the world of virtual competition. It should be examined from a wider perspective, which entails numerous ethical and social dilemmas involving relations between humans and machines. The question is, can law ascribe responsibility to competitors for operation of machines?[110] Setting the boundaries of legitimate actions is a challenge for regulators and legislators. Many factors will have to be taken into account, from machine programming, over the levels of protection to their objectives. The issue that is relevant for the future is the degree

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107 Case C-194/14 P, *AC-Treuhand AG v European Commission*, EU:C:2015:717, para. 51

108 Ezrachi, Stucke, *op. cit.*, note 9, p. 217 *ff.*

109 Ezrachi; Stucke, *op. cit.,* note 2, p. 25

110 *Loc. cit.*

of control humans exercise over artificial intelligence. Humans are programming initial algorithms, independently set the moment from which they will apply and are able to turn off the machine. However, during that time, the machine can operate and adapt its behaviour in various ways. It can alter market structure and decrease competition. The question is, from which moment the algorithm's author is responsible for the operation of the machine? It is an unpredictable surrounding, that may ultimately result in the decrease of welfare, but only as a consequence of the machine's operation and its aim to achieve efficiency. Is collusion among machines possible?[111] In the present, these situations are within the boundaries of legality. However, that does not mean that *status quo* should be preserved. It is time to bring collusive algorithmic price coordination practices out of the "black-letter law's blind spot"[112] in plain sight, before they irreversibly alter market structures.

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111 Harrington, Jr, J. E., *Developing Competition Law for Collusion by Autonomous Artificial Agents*, Journal of Competition Law & Economics, *vol.* 14, no. 3/18, p. 333

112 See Mehra, *op. cit.*, note 4, p. 1351: "Black-letter law's blind spot when it comes to independent price coordination—that is, without overt acts such as communication or the adoption of facilitating practices—may become a cloaking device behind which algorithmic price coordination can readily hide."

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UDK 339.7(4-67EU:497.5)]:343.53
Original scientific paper

PROTECTION OF THE FINANCIAL INTERESTS OF EUROPEAN UNION IN CROATIA: RECENT DEVELOPMENTS AND OLD QUESTIONS

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ABSTRACT

A significant phase in the protection of the financial interests of European Union has been completed within adoption of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, as well as the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"). The purpose of this paper is to determine the extent to which national criminal law is harmonized with the recent European legislation in the field of the protection of the Union's financial interests and to detect what steps should be taken in order to accomplish effective protection of EU financial interests. The establishment of the European Public Prosecutor's Office and its material competences is burdened with some important issues: vagueness in prescribing criminal offences affecting the financial interests of the Union, problems with interpretation of the terms inextricably linked offences and offences regarding participation in a criminal organization if the focus of the criminal activity of such a criminal organization is to commit any of the offences affecting the financial interests of the Union.

Keywords: *financial interests of EU, fraud, active and passive corruption, misappropriation, public official, European Public Prosecutor's Office*

1. INTRODUCTION

On 1 July 2013, Croatia became the twenty-eighth member of the European Union. The journey to full membership after the experience of bloody and devastating war in nineties started in 2001 by signing the Stabilization and Association Agreement and continued by applying for membership in 2003. The candidate status was granted to Croatia in 2004, and in December 2011 the Treaty of Ac-

cession was signed. On the state referendum in January 2012, 66% of citizens declared themselves in favor of Croatian membership of the European Union.[1]

In 2007, quite far before accession, the protection of the European Union's financial interests was integrated into Croatian Criminal Code for the first time by two new incriminations: *Special cases of fraud to the detriment of the European Union's financial interests* (Article 224b) and *Abuse of Authority relating the resources of the European Union* (Article 292a).[2] Within the fast and ambitious legislative reaction on the challenge of a new incrimination and the need to protect Union's financial interests, Croatia has presented the strong willingness to be an equal partner in EU.[3] In 2008 the incriminations were an object of legislative changes, as well as in 2011, in the course of the great reform of Croatian Criminal Law. The purpose of this paper is to determine the extent to which national criminal law is harmonized with the recent European legislation in the field of the protection of the Union's financial interests and to detect what steps should be taken in order to accomplish effective protection of EU financial interests. In order to do so, strong critical evaluation of both, national and European legislation is the essential purport of the paper. Protection of the financial interests of European Union is indivisible linked to the work of the European Public Prosecutor's Office. So, the issue of effective protection of EU financial interests is further considered through the material competences of EPPO.

2. WHAT ARE FINANCIAL INTERESTS OF THE EUROPEAN UNION?

Financial interests of the Union means all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them. The definition from Article 2 (1)(a) of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law[4] is the same as in Article 2 (3) of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment

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1 Presidency and Croatia, [https://eu2020.hr/Home/Custom?code=CroatiaEU], accessed 15. May 2020

2 See Novoselec, P., *Der EU-Betrug und das kroatische Strafrecht* in: Đurđević, Z. (ed.), Current Issues in European Criminal Law and the Protection of EU Financial Interests, Zagreb, 2006, p. 20

3 Sokanović, L., *Subsidy Fraud in Protection of Financial Interests of European Union: Achievements and Challenges*, Journal of Eastern European Criminal Law, *vol.* 2, 2015, p. 150

4 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017 (PIF Directive)

of the European Public Prosecutor's Office ('the EPPO').[5] It is significantly improved comparing the previous from the Convention encompassing only general budget of the European Communities or budgets managed by, or on behalf of, the European Communities.[6] Inclusion of financial operations such as borrowing and lending activities as an object of protection resulted from the Position of the European Parliament adopted at first reading on 16 April 2014.[7] Namely, the position of the European Parliament was that the protection of the Union's financial interests calls for a common definition of fraud covering fraudulent conduct with respect to expenditure and, revenues, assets and liabilities at the expense of the Union budget, including borrowing and lending activities.[8]

Consideration on EU financial interests includes two important issues: multiannual financial framework and EU budget. The multiannual financial framework (MFF) lays down the maximum annual amounts or ceilings which the EU may spend in different political fields or headings over a period of at least 5 years. The current MFF covers seven years: from 2014 to 2020. For this period the MFF enabled the European Union to spend up to EUR 1 087 billion in commitments and EUR 1 026 billion in payments.[9] On 2 May 2018, the Commission presented a package of legislative proposals on the 2021-2027 MFF, on own resources to finance the EU budget and on linking the EU budget with the rule of law.[10] Following the May 2019 European elections, the Parliament reestablished its MFF negotiating team, confirmed its determination to reach an agreement as soon as possible, and urged the Council to immediately intensify the interinstitutional talks.[11] What has been done so far lists Sapala as follows: In December 2019,

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5 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017 (EPPO Regulation)

6 Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, *OJ C 316, 27.11.1995, pp. 49–57 (PIF Convention)*

7 Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Directive 2014/.../EU of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, [https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0427+0+DOC+XML+V0//EN], accessed 18. May 2020

8 See Am. 3

9 European Commission, *EU Budget 2018, Financial Report*, European Union 2019, [https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/financial_report_web.pdf], p. 13, accessed 18. May 2020

10 Sapala, M., *Multiannual Financial Framework for the years 2021-2027 and the New Own Resources*, [https://ec.europa.eu/commission/publications/factsheets-long-term-budget-proposals_en], accessed 18. May 2020

11 *Ibid*. See European Parliament resolution of 10 October 2019 on the 2021-2027 multiannual financial framework and own resources: time to meet citizens' expectations (2019/2833(RSP))

the Finnish Presidency presented a negotiating box (document including issues, which need to be addressed during the negotiations and require political guidance from EU leaders) the first time, including figures. On 20 February 2020, President Charles Michel organized a special European Council to discuss the next long-term budget.[12] The starting point for negotiations was a new version of the negotiating box. However, the two-day negotiations ended without an agreement and without determining the calendar for the next steps or meetings. Given the lack of progress in the MFF negotiating process, the European Parliament political group leaders decided to freeze negotiations on sectorial legislation related to the new MFF until the Council agrees a full negotiating mandate. Moreover, in March 2020, the Members called on the Commission to prepare, by 15 June, a contingency plan with a view to providing a safety net to protect the beneficiaries of Union programmes by ensuring continuity of funding and implementation, should agreement on the 2021-2027 MFF not be reached in time to enter into force on 1 January 2021. This possibility is provided for in Article 312(4) TFEU. The work on new MFF must be seen through the wider specter on consideration the future of Europe. The UK's decision to withdraw from the EU, as well as the challenges created by the consequences of the economic crisis, the migration crisis and terrorist threats, have prompted debate on the EU's role.[13] While new needs are emerging, existing budgetary priorities, such as support for young people, education, employment, research and innovation and combating climate change, remain relevant or have even grown in importance.[14]

When looking into figures of the EU budget 2019, the expenditure totals EUR 165 605 645 322 in commitment appropriations and EUR 148 198 939 744 in payment appropriations, representing a variation rate of + 3,05 % and of + 2,37 % respectively by comparison with the 2018 budget.[15] Smart and inclusive growth amounts to 67 556 947 173, Sustainable growth: natural resources 57 399 857 331, Security and citizenship 3 527 434 894, Global Europe 9 358 295 603, Administration 9 944 904 743, Special instruments 411 500 000. Budgetary revenue totals EUR 148 198 939 744. The uniform rate of call for the VAT resource is 0,0 % (except for Germany, Netherlands and Sweden for which the rate of call for the period 2014-2020 has been fixed at 0,15 %) whilst that for the GNI resource is 0,6512 %. Traditional own resources account for 14,49 % of the financing of the

12 *Ibid.*

13 Parry, M.; Sapala, M., *Post-2020 MFF and own resources, Ahead of the Commission's proposal*, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620240/EPRS_BRI(2018)620240_EN.pdf], accessed 18. May 2020

14 *Ibid.*

15 Definitive adoption (EU, Euratom) 2019/333 of the European Union's general budget for the financial year 2019, OJ L 67/1, 7.3.2019

budget for 2019. The VAT resource accounts for 11,97 % and the GNI resource for 72,26 %. Other revenue for this financial year is estimated at EUR 1 894 392 136.[16]

The prerequisite for the proper transposition of the PIF Directive is precisely determined object of fraud.[17] The Croatian Criminal Code does not prescribe in that sense definition of EU financial interests.[18] Why is this definition not necessary? Because, it is prescribed in the EPPO Regulation in the same manner as in PIF Directive, and according Article 288 of the TFEU, a regulation has general application, it is binding in its entirety and directly applicable in all Member States.[19] Though, it would be fair to say that in Republic of Croatia, the protection of EU's financial interests is stipulated in Article 114a of the Budget Act[20] and within Government Regulation on the institutional framework of the system for combating irregularities and fraud (AFCOS).[21]

3. CRIMINAL OFFENCES WITH REGARD TO FRAUD AFFECTING THE UNION'S FINANCIAL INTERESTS

The PIF Directive lays down two groups of criminal offences with regard to fraud affecting the financial interests of the European Union (Title II): (1) Fraud affecting the Union's financial interests and (2) other criminal offences affecting the Union's financial interests.[22]

3.1. Fraud affecting the Union's financial interests

Fraud affecting the financial interests of the European Union differs according to the object of the offence and the modalities of commission. With regard to

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16 All data are taken from previously quoted Definitive adoption. See also, Report on Budgetary and Financial Managment of the European Commission, Section III of the Budget, Report pursuant to Art 249 of the financial Regulation for the financial year 2019, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620240/EPRS_BRI(2018)620240_EN.pdf], accessed 20. May 2020

17 Sokanović, L., *Materijalna nadležnost Ureda europskog javnog tužitelja – hrvatska perspektiva*, Hrvatski ljetopis za kaznene znanosti i praksu, Zagreb, *vol.* 26, no. 2, 2019, p. 674

18 Criminal Code, Official Gazette 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19 (CC)

19 Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C202/1, 7.6.2016 (TFEU)

20 Official Gazette 87/2008, 136/12

21 Official Gazette 144/13. AFCOS is a system through which the coordination of legislative, administrative and operative activities is implemented with the purpose of protecting the financial interests of the European Union and direct cooperation with the European Antifraud Office (OLAF)

22 The paper in this part is based on the author's previously published paper from the note 15

the object of the offence, there are fraud affecting the Union's financial interests in respect of (a) non-procurement-related expenditure; (b) procurement-related expenditure; (c) revenue other than revenue arising from VAT own sources referred to in point (d) and (d) revenue arising from VAT own resources. In this sense, the original division from the PIF Convention based on fraud in relation to expenditures and revenues is specified. With regard to modalities of commission, the Directive makes it clear that this fraud can be committed by any act or omission, so it can be *delicta comissiva* as well as *delicta omissiva*. However, in further determining, the modality of the commission and the effect are combined: (1) the use or presentation of false, incorrect or incomplete statements or documents; (2) non-disclosure of information, thereby violating a particular obligation; (3) misapplication of funds or assets for purposes other than those for which they were originally granted; (4) misapplication of a legally obtained benefit; (5) presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of the rights to VAT refunds. When it comes to fraud in respect of non-procurement-related expenditure from Article 3 (2)(a), as well as to fraud in respect of procurement related expenditures from Article 3 (2)(b), the prescribed effects are misappropriation or wrongful retention of funds or assets. Prescribed effect for fraud in respect of revenue other than revenue arising from VAT own resources in Article 3 (2)(c) is an illegal diminution of the resources. The prescribed effect of fraud in respect of revenue arising from VAT own resources is the diminution (not illegal!) of the resources. It is clear that these frauds are material criminal offences with the exceptions of Article 3 (2)(a) iii and Article 3 (2)(d) iii.[23]

The Draft Act to Amend the CC states that the analysis of the PIF Directive "show that national criminal legislation is already in line with the requirements set by the Directive. In this regard, the criminal offences under Article 3 PIF Directive which protect the financial interests of the European Union according to their legal description correspond to the following criminal offences: Tax or Customs Evasion (Article 256 of the CC), Subsidy fraud (Article 258 of the CC) and Fraud in Business Operations Article 247 of the CC)."[24] Before the compliance analysis itself, two important issues should be pointed out: first, the PIF Directive established minimum rules regarding the definitions of criminal offences and sanc-

[23] Material criminal offences require the occurrence of a certain change in the external world, which may be spatially and temporally separate from the act of committing. These criminal offences are completed only when the stated consequence occurres. Kurtović Mišić, A.; Krstulović Dragičević, A., *Kazneno pravo (Temeljni pojmovi i instituti)*, Faculty of Law, University of Split, 2014, p. 104

[24] *The Draft Act to Amend the Criminal Code*, 2018, p. 2, [https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=7635], accessed 25. May 2020

tions; secondly, the identity of the nomenclature and the nature of the offenses is not necessary - criminal conduct under the Directive may be classified in national law as another type of criminal offence.[25] Therefore, the analysis of the offence should be substantive and concrete, not superficial.

3.1.1. *Fraud in respect of non-procurement-related expenditure*

Fraud in respect of non-procurement-related expenditure corresponds in relation to the modalities of commission to the Convention fraud (Article 1 (1)(a). The Subsidy fraud from Article 258 (1) of the Croatian CC, in comparison with the aforementioned offences, contains an additional subjective feature: acting of the perpetrator with the aim of obtaining state aid for himself or another, which results in a narrowing of the criminal liability. However, in relation to the modalities of the offence from Article 1 (a)(i), (ii) of the PIF Directive, it does not contain the objective feature of the offence consisting in misappropriation or wrongful retention of funds or assets or damage. The Subsidy fraud from Art 258 of the CC encompasses in this way a wider scope of legal protection in relation to the PIF Directive.

3.1.2. *Fraud in respect of procurement-related expenditure*

Every year public authorities in the EU spend around 14% of GDP on public procurement that amounts to more than EUR 1.9 trillion.[26] The Public Sector Directive defines procurement as the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.[27] In Croatia, a public procurement contract is a payment contract concluded in writing between one or more economic operators and one or more contracting authorities, the subject of

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[25] The draft Directive has been criticised because it was expected to introduce a „very minimalistic degree of minimum harmonisation", so there was a fear that the European panorama of substantive criminal law would remain fragmented. Vervaele, J. A. E., *The material scope of competence of the Eueopean Public Prosecutor's Office: Lex uncerta and unpraevia*?, ERA Forum, 2014, p. 97. See Sicurella, R., *The Material Scope of the EPPO. A Critical Overview of Treaty Provisions and Draft Proposals,* in: Nowak, C. (ed.), *The European Public Prosecutor's Office and National Authorities*, Wolters Kluwer-CEDAM, Milan, 2016, pp. 109-137

[26] European Commission, *Public Procurement*, [https://ec.europa.eu/info/sites/info/files/file_import/european-semester_thematic-factsheet_public-procurement_en_0.pdf], accessed 25. May 2020

[27] Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014, OJ L 094, 28.3.2014, amended by Commission Delegated Regulation (EU) 2015/2170 of 27 November 2015, Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017, Commission Delegated Regulation (EU) 2019/1828 of 30 October 2019

which is the performance of works, delivery of goods or provision of services.[28] Why has public procurement expenditure become the focus of the PIF Directive? The explanation can be found in the OLAF data, which support the claim that public procurement is particularly vulnerable to fraud and irregularities: 20% of all reported irregularities in the period 2011-2016 were associated with violations of public procurement rules, as well as 30% of all reported (irregular) financial amounts.[29] The reasons were numerous: unclear or complicated applicable national public procurement laws that are difficult to apply, lack of administrative capacity and expertise of authorities who are to implement the rules in a coherent and consistent way, insufficiently qualified members of the evaluation committees (especially in complex infrastructure tenders), inadequate level of audits, controls and checks conducted by the regulatory authorities, corruption with an increasing trend to use off-shore accounts in order to hide the proceeds of such crimes.[30]

The criminal offence in Croatian CC directly related to public procurement is Misuse of Public Procurement Procedures under Article 254. However, this offence covers a very narrow sphere of criminal conduct; the perpetrator is a person who submits as part of a public procurement procedure a bid based on a prohibited agreement between economic entities, the aim of which is that the contracting authority accepts a certain bid.[31] Can the criminal offence of Subsidy fraud be applied to that conduct? While the first two forms of the offence from Article 3 (2)(b)(i)(ii) essentially coincide with the Subsidy fraud referred to in Article 258 (1) of the CC,[32] it is clear that the third modality of the offence under the PIF Directive presents a narrowing of the criminal liability compared to the third modality of the Subsidy fraud. Namely, the misapplication of the funds or assets for purposes other than those for which they were originally granted must be of that kind that damages the Union's financial interests. Does this mean, given

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28 Public Procurement Act, Official Gazette 120/16. Article 3 paragraph 32

29 European Commission, OLAF, *Fraud in Public Procurement; A collection of Red Flags and Best Practices*, Ref. Ares(2017)6254403 - 20/12/2017, p. 3. [https://ec.europa.eu/sfc/sites/sfc2014/files/sfc-files/Fraud%20in%20Public%20Procurement_final%2020.12.2017%20ARES%282017%296254403.pdf], accessed 25. May 2020.

30 *Ibid.*

31 Criminal offence of Unlawful Favoritism from Article 292 is of great significance as well. Offence is committed by a public official or responsible person who on the basis of an agreement demonstrates favoritism towards an economic entity by adapting public procurement terrns and conditions or who awards a contract to a tenderer whose tender is contrary to the terms and conditions set out in the bid documentation. The same offence exists when a public official or responsible person who abuses his or her position or authority by demonstrating favoritism in the award of contracts or in taking on or negotiating deals toward his or her activity or the activity of persons with whom he or she is linked in terms of vested interests

32 With exception to the prescribed effect

that the Directive establishes minimum rules, that national legislation needs to be changed in direction of reducing criminal liability? Such a solution in the PIF Directive abandoned the previous Convention solution, which did not contain the feature of causing damage to the Union's budget, while finding the protective good of this form of fraud in the Union's freedom to dispose of its own resources.[33] Furthermore, although the offence from Article 258 of the CC contains a special subjective feature – "the aim that he or she or another person receives a state subsidy", the PIF Directive now introduces a special subjective feature when it comes to fraud in respect of procurement-related expenditure: "at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests". All the above points to the conclusion that in order to transpose the PIF Directive, it is necessary to introduce into Croatian criminal legislation a new offence of Fraud in public procurement which would criminalize the conduct referred to in (3)(b). The use of the term "at least" refers to the freedom of the Republic of Croatia as a Member State to independently decide whether to incorporate the special subjective feature into the essence of the offence.

3.1.3. *Fraud in respect of revenue other than revenue arising from VAT own resources*

Fraud from Article 3 (2)(c) of the PIF Directive in relation to the modalities of commission corresponds to the Convention fraud referred to in Article 1 (1)(b). When comparing this offence to Tax or Customs evasion under Article 256 of the CC, it can be concluded that national offence covers all forms of criminal conduct under the PIF Directive, with the exception of the term "illegal" reduction of budget funds in prescribing the consequences of the offence.

3.1.4. *Fraud in respect of revenue arising from VAT own resources*

PIF Directive differentiates fraud in respect of revenue other than revenue arising from VAT own resources and fraud in respect of revenue arising from VAT own resources. Where does this change in relation to the PIF Convention come from? The EU budget is financed from the Union's own resources in accordance with Article 211 TFEU, and own resources are as follows: traditional own resources: resulting mainly from customs duties and sugar levies, VAT-based own resources: resulting from a uniform rate of 0.3% applied to the value added tax base of each member state, with the taxable VAT base being

[33] See Đurđević, Z., *Konvencija o zaštiti financijskih interesa Europskih zajednica – nastanak, sadržaj i implementacija*, Hrvatski ljetopis za kazneno pravo i praksu, *vol.* 14, no. 2, 2007, p. 8

capped at 50% of GNI for each country, GNI-based own resources : resulting from a uniform rate applied to the gross national income of member states; this rate is adjusted every year in order to balance revenue and expenditure.[34] Therefore, VAT-based funds should represent the financial interests of the EU as they are an integral part of the Union budget (revenue). However, it was precisely the question of whether the PIF Convention covers VAT fraud that has become one of the most controversial in the process of negotiating and adopting the PIF Directive.[35] Namely, the Commission and the Parliament strongly advocated the inclusion of VAT fraud, unlike the Council, which justified its opposition by stating that VAT is an exclusively national matter and that VAT fraud damages occur only in the Member States where they are committed.[36] Just when the negotiations were at a standstill, the European Court of Justice contributed to the clarification of this issue with the so-called *Taricco's decision*.[37] In the Case Åklagaren v. Hans Åkerberg Fransson, the Court has previously held that VAT presents the Union's own resources and that there is a direct link between the collection of VAT by Member States and the availability of corresponding VAT resources to the EU budget.[38] In the *Taricco decision*, the Court equated VAT revenue with the Union's financial interests, stating: "Although the Member States have freedom to choose the applicable penalties - which may take the form of administrative penalties, criminal penalties or a combination of the two - in order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected in accordance with the provisions of Directive 2006/112 and Article 325 TFEU, criminal penalties may nevertheless be essential to combat

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34 European Council, *Own resources for 2014-2020*, [https://www.consilium.europa.eu/en/policies/eu-budgetary-system/eu-revenue-own-resources/2014-2020/], accessed 26. May 2020

35 Juszczak, A.; Sason, E., *The Directive in the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law (PFI Directive): Laying Down the Foundation for a Better Protection of the Union's Financial Interests?* Eurcrim *vol.* 2, 2017, p. 82

36 *Ibid.* See, Ballegooij van, W., *European Public Prosecutor's Office – A View on the State of Play and Perspectives from the European Parliament*, in: Geelhoed, W. *et al.* (eds.), *Shifting Perspectives on the European Public Prosecutor's Office*, Springer, 2017, p. 32

37 *Ibid*. Case C-105/14, *Ivo Taricco et al*. [2015] ECR, Judgement of the Court (Grand Chamber) of 8 September 2015. See Staffler, L., *Towards a New Chapter of the Taricco Saga*, EuCLR, *vol*. 9, no. 1, 2019, pp. 59-81; Pinelli, C., *Are Courts Engaged in a „Dialogue" on financial matters?*, in: Belov, M. (ed.), *Judicial Dialogue*, Elven International Publishing, 2019, pp. 111-126; Ferro, M.S., *ECJ on Taricco II: a game changer? The primacy and effectiveness of EU law take a serious hit*, 2017, [https://www.linkedin.com/pulse/ecj-taricco-ii-game-changer-primacy-effectiveness-eu-law-sousa-ferro/], accessed 27. May 2020

38 Case C-617/10, *Åklagaren v Hans Åkerberg Fransson* [2013] ECR, § 26. As well as Case C-539/09, *European Commission v Federal Republic of Germany*, [2011], ECR, § 72. Vilas Álvarez, D., *The Material Competence of the European Public Prosecutor's Office*, in: Bachmaier Winter, L. (ed.), The European Public Prosecutor's Office: The Challenges Ahead, Legal Studies in International; European and Comparative Criminal Law 1, Springer, 2018, p. 34

certain serious cases of VAT evasion in an effective and dissuasive manner."[39] The position is even more explicitly stated in paragraph 41:

„The concept of 'fraud' is defined in Article 1 of the PFI Convention as 'any intentional act or omission relating to … the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European [Union] or budgets managed by, or on behalf of, the European [Union]'. The concept therefore covers revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules. That conclusion cannot be called into question by the fact that VAT is not collected directly for the account of the European Union, since Article 1 of the PFI Convention specifically does not lay down such a condition, which would be contrary to that convention's objective of vigorously combatting fraud affecting the European Union's financial interests."

The compromise of the previously stated opposing views was realized by the fourth form of fraud from the PIF Directive in Article 3 (2)(d) in connection with Article 2 (2), i.e. by instructing to criminalize only serious criminal offences against the common VAT system. This involves fraud in respect of revenue arising from VAT own resources committed in cross-border fraudulent schemes, connected with the territory of two or more Member States of the Union, and if damage of at least EUR 10 million has been caused.[40] In doing so, the notion of total damage refers to the estimated damage resulting from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding interest and sanctions.[41] It should be emphasized here that the assessment of the adequacy of the EUR 10 million threshold will be the subject of a report to be submitted by the Commission by 6 July 2022 to the European Parliament and the Council.[42] Furthermore, the notion of serious criminal offences against the common system of VAT refers in particular to carrousel fraud, VAT fraud through missing traders and VAT fraud committed within a criminal organization, which create serious threats to the common VAT system and thus to the Union budget.[43]

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39 § 39. On the European Court of Justice and the principle of legality, see Timmerman, M., *Legality in Europe: On the principle nullum crimen, nulla poena sine lege in EU law and under the ECHR*, Intersentia, 2018, p. 254-255

40 The Commission and Parliament considered the EUR 10 million threshold too high and advocated a reduction to EUR 5 million. See, Giuffrida, *op. cit.*, note 55, p. 9

41 Recital 4 of the PIF Directive

42 See Art 18

43 Recital 4 of the PIF Directive.

Given the notion of offence from Article 256 of the CC and the finding that Croatia has transposed the PIF Directive, the question raises of whether we have thus left the European Public Prosecutor's Office the power to prosecute VAT evasion regardless of the amount of damage caused or the involvement of the territory of two or more Member States? As national law does not provide for a restriction on serious offences against the common system of VAT, the EPPO could indeed prosecute any tax or customs evasion.[44] Furthermore, tax or customs evasion under Article 256 of the CC does not cover the third modality of VAT fraud committed in cross-border fraudulent schemes: presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds. In this regard, it would be necessary to make appropriate amendments to the CC.

3.2. Other criminal offences affecting the financial interests of the Union

The Directive prescribes other criminal offences affecting the financial interests of the Union: money laundering, passive and active corruption and misappropriation. Before analyzing these criminal offences, it is necessary to define the term of public official who, according to the PIF Directive, is a perpetrator of passive corruption and misappropriation.[45]

A public official may be: a Union official, a national official or any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries (Article 4 of the PIF Directive). In researching the reasons for introducing private persons into the concept of public officials, it was established that the European Parliament legislative resolution of 16 April 2014 on the proposal for a Directive stated that private persons are increasingly involved in the management of Union funds.[46] The 2012 PIF Proposal also stated the need to include a defi-

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44 In amount more than KN 20 000

45 On the issue of interpreting the term official person, see Đurđević, Z., *Insufficient and Irrelevant Constitutional Reasons for the Revocation of the Criminal Courts' Judgments in the INA MOL Case upon the Constitutional Complaint of the Ex-Prime Minister of Croatia*, HLJKPP, *vol*. 25, no. 2, 2018, pp. 261-302

46 European Parliament legislative resolution of 16 April 2014 on the proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (COM(2012)0363 — C7-0192/2012 — 2012/0193(COD)), OJ C 443, 22.12.2017, p. 984 (Am. 5): „In order to adequately protect Union funds from corruption and misappropriation, the definition of 'public official' for the purposes of this Directive therefore needs to cover also persons who do not hold a formal office, but who are none the less assigned, and who exercise, in a similar manner, a public-service function in relation to Union funds, such as contractors involved in the management of such funds."

nition of public officials covering all relevant officials, whether appointed, elected or employed on the basis of a contract, holding a formal office, as well as persons exercising the function of providing service from government and other public bodies to citizens, or for the public interest in general, without holding a formal office, such as contractors involved in the management of EU funds.[47] In line with the 5th Amendment to the previously cited 2014 legislative resolution, the 10th recital of the PIF Directive states: "In order to protect Union funds adequately from corruption and misappropriation, the definition of 'public official' therefore needs to cover persons who do not hold formal office but who are nonetheless assigned and exercise, in a similar manner, a public service function in relation to Union funds, such as contractors involved in the management of such funds."

Insight into the provision of Article 87 (3) of the CC, makes it clear that an official person, in addition to the itemized, is also considered a "person who in the European Union ... performs duties entrusted to persons from the previous sentence." What is doubtful in relation to the Republic of Croatia is whether the notion of "duty" from the previously cited legal provision also implies tasks,[48] i.e. functions, in relation to Union funds entrusted to a (private) person, or whether the use of the notion of "duty" exclusively implies the application of the definition of public servant from Article 3 (1) of the Civil Servants Act.[49] Since in the Republic of Croatia civil servants are also persons who perform IT tasks, general and administrative tasks, planning, material-financial and accounting and similar tasks in state bodies (Article 3(2), the term official person from Article 87 (3) of the CC could also be applied to private persons involved in the management of EU funds, as they perform tasks entrusted to officials in the European Union. Namely, the authorization to perform tasks of official duties should be correlated with equal (criminal) responsibility. But does such an interpretation constitute a forbidden analogy? Perhaps, however, in the interests of clarity and avoidance of doubt in practice, the term official person should be extended to any person entrusted with a public function and performing a public function involving the management of

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47 Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, Brussels, 11. 7. 2012. COM(2012) 363 final 2012/0193 (COD), p. 13

48 Thus, we reduce the problem of subsuming these persons under the notion of an official person to a choice between restrictive and extensive interpretation. Novoselec, P., *Opći dio kaznenog prava*, PRAVOS, Osijek, 2016, pp. 70-72

49 Civil servants are persons who perform tasks as their regular vocation in State bodies under the jurisdiction of said bodies as specified in the Constitution, laws, or other regulations enacted pursuant to the Constitution and laws. Art 3 of the Civil Servants Act, Official Gazette 92/05, 140/05, 142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12, 49/12, 37/13, 38/13, 01/15, 138/15, 61/17, 70/19

or decisions concerning the Union's financial interests in Member States or third countries.

3.2.1. *Money laundering*

In the case of money laundering, the definition from Article 1 (3) of Directive (EU) 2015/849 is invocated, including property derived from the criminal offences covered by the Directive.[50] Money laundering in accordance with that provision includes the following activities when carried out intentionally: (a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action; (b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such an acitivity; (c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity; (d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c). The Draft Act to Amend the CC correctly states that money laundering from the Directive corresponds to money laundering from the provision of Art 265 of the CC.[51] However, the following amendments were made to implement the recommendations of MONEYVAL from the Report on the 4th Round of Evaluation of the Republic of Croatia on the Prevention of Money Laundering and Terrorist Financing.

3.2.2. *Active and passive corruption*

Passive corruption is for the purposes of the Directive the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage in order to act or refrain from acting in accordance with his duty or in the exercise of

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50 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, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, p. 73-117

51 *The Draft Act, op. cit.,* note 24

his functions in a way which damages or is likely to damage the Union's financial interests. Active corruption means the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests. Comparing active and passive corruption from the PIF Directive with Taking and Giving a Bribe as official criminal offences from Articles 293 and 294 of the CC, brings to conclusion that national offences lack the link between commission and the consequence: "... in order to act or refrain from acting ... in a way that harms or could harm the financial interests of the Union".

3.2.3. *Misappropriation*

The last offence in this group is misappropriation. For the purposes of the PIF Directive, misappropriation is the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests. Embezzlement at work from Article 233 of the CC is a classical property criminal offence committed by a perpetrator who unlawfully appropriates another person's movable property or property right that was entrusted to him or her at work. A qualified form of the offence is realized if the value of the embezzled property or property right is high, and a privileged form if their value is small and the perpetrator acted with the aim of appropriating property of such value. Therefore, in comparison of the offence from the PIF Directive with the Embezzlement in the CC, the definition of the perpetrator as a public official who is directly or indirectly entrusted with the management of funds or property is missing; in the act of commission - the commission or disbursement of funds, the use of funds contrary to the purpose for which they were intended in any way, and finally linking the commission to the consequence, which manifests itself in damaging the financial interests of the Union. The Draft Act, in the context of the harmonization of the CC with the Directive, also mentions the Embezzlement from Article 232.[52] Given that the basic form of Embezzlement is committed by whoever unlawfully appropriates another person's movable property or property right that was entrusted to him or her, it is obvious that there is no transposition here either. Namely, even if the interpretation were accepted that the perpetrator could be a public official and thus embezzlement would become *delicta propria* instead of *delicta communia*, the

[52] *Ibid.*, p. 2

modality of the appropriation action lacks the effect prescribed by the Directive and consists in damaging the financial interests of the Union. Accordingly, the provision on this offence has not been transposed into national criminal law at all.

4. OFFENCES REGARDING PARTICIPATION IN A CRIMINAL ORGANISATION

Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') prescribes in Article 22 material competences of EPPO. EPPO is competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371, as implemented by national law, irrespective of whether the same criminal conduct could be classified as another type of offence under national law. As regards offences referred to in point (d) of Article 3(2) of Directive (EU) 2017/1371, as implemented by national law, the EPPO is only competent when the intentional acts or omissions defined in that provision are connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million. But, the EPPO is also competent for offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA, as implemented in national law, if the focus of the criminal activity of such a criminal organisation is to commit any of the offences referred to in Article 22 (1). The Regulation directs to „participation in a criminal organisation" as implemented in national law. As for Croatia, there is no problem, because Criminal association from Article 328 CC is harmonized with Framework decision.[53] But, it's not so simple and clear at least regarding two issues. As first, the Commission points out that the Framework Decision did not achieve the necessary minimum degree of approximation as regards directing or participating in a criminal organisation on the basis of a single concept of such an organisation.[54] „An overview of the Framework Decision's transposition in the Member States points to a number of divergences, which can to a large extent be attributed to differences in the Member States' legal traditions. As such, the Commission considers that the Framework Decision enables the Member States not to introduce the concept of criminal organisation but to continue to apply existing national criminal law by having recourse to general rules on participation in and

[53] Turković, K. *et al*., *Komentar Kaznenog zakona*, Narodne novine, Zagreb, 2013, pp. 5, 493. See also, Pavlović, Š., *Kazneni zakon*, Libertin naklada, Rijeka, 2015, p. 1351

[54] Report from the Commission to the European Parliament and the Council based on Article 10 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, p.11., [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0448&from=HR], accessed 27. May 2020

preparation of specific offences. This may have the effect of creating additional divergences in the Framework Decision's practical implementation."[55] The second problem may be assessment of the concept of the „focus of the criminal activity".[56]

5. INEXTRICABLY LINKED OFFENCES

The EPPO is competent for any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of Article 22 (1) of the Regulation with restrictions prescribed in Article 25(3). The notion of 'inextricably linked offences' should be considered in light of the relevant case-law which, for the application of the *ne bis in idem* principle, retains as a relevant criterion the identity of the material facts (or facts which are substantially the same), understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time and space.[57] If one compares definitions of inextricably linked offences from the Preamble of the EPPO Regulation and related criminal offences from Article 3 (2) of the Europol Regulation, it is obvious that the later is more precize and much clearer.[58] Namely, related criminal offences are: (a) criminal offences committed in order to procure the means of perpetrating acts in respect of which Europol is competent; (b) committed in order to facilitate or perpetrate acts in respect of which Europol is competent; (c) committed in order to ensure the impunity of those committing acts in respect of which Europol is competent. The explanation from the Recital 55 does not contribute to the clarity of the determination of inextricably linked criminal offenses: "…and the offence affecting the Union's financial interests is preponderant, in terms of the seriousness of the offence concerned, as reflected in the maximum sanctions that could be imposed." Formulation „should have the right to exercise competence" is applied in this case as well as „in the case of inextricably linked offences where the offence affecting the financial interests of the Union is not preponderant in terms of sanctions levels, but where the inextricably linked other offence is deemed to be ancillary in nature because it is merely instrumental to the offence affecting the financial interests of the Union, in particular where such other offence has been committed for the main purpose of creating the conditions to commit the offence

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55 *Ibid*.

56 Giuffrida, F., *The European Public Prosecutor's Office: King without kingdom?*, CEPS, *vol.* 3, 2017, p. 10

57 Recital 54 of the EPPO Regulation. For the notion of cross-border offences, see Gless, S.; Vervaele, J. A. E., *Law Should Govern: Aspiring General Principles for Transnational Criminal Justice*, Utrecht Law Review, *vol*. 9, no. 4, 2013, p. 2

58 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA*, OJ L 135, 24.5.2016, p. 53–114.* Giuffrida, *op. cit.* note 55, p. 11

affecting the financial interests of the Union, such as an offence strictly aimed at ensuring the material or legal means to commit the offence affecting the financial interests of the Union, or to ensure the profit or product thereof."[59] Based on the presented information, it can be concluded that the interpretation of the offences, and thus work of the EPPO will be apparently significantly affected by national law. It is not difficult to predict the difficulties in the work of the EPPO due to differences in national systems.[60]

6. CONCLUSION

The academic work that preceded the adoption of the EPPO Regulation was dominated by procedural aspects.[61] Protection of Union's financial interests is provided by PIF criminal offences: fraud affecting the Union's financial interests and other criminal offences affecting the financial interests of the Union, offences regarding participation in a criminal organisation if the focus of the criminal activity of such a criminal organisation is to commit offences affecting the Union's financial interests and inextricably linked offences. Those offences compose material competences of the EPPO. If we observe them through the spectre of appropriate legislation, we can say that material competence of the EPPO is determinated by the EPPO Regulation and national criminal law of Member States by transposing PIF Directive. The analysis of these offences shows that the requirements of substantive legality, which consist in the perpetrator having the right to know for which criminal offences he may be liable and which punishment may be imposed on him, have not been fully met. It cannot be considered unequivocally clear what criminal offences present material competence of the EPPO, what is indeed the content of criminal conduct, that is contrary to the principle of *nullum crimen, nulla poena sine lege praevia et certa*. The ambiguities in the determination of material competence are further supported by the fact that conflicts of jurisdiction between the EPPO and national competent authorities are resolved by national authorities (competent to decide on the attribution of competences concerning prosecution at national level). Such a solution has been strongly criticized by the European Parliament for advocating that the conflict be decided by an independent tribunal.

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59 Recital 56. See Luchtmann, M.J.J.P., *Towards a Transnational Application of the Legality Principle in the EU's Area of Freedom, Security and Justice?* Utrecht Law Review, *vol.* 9, no. 4, 2013, pp. 11-33

60 Giuffrida, *op. cit.* note 55, p. 11; Vilas Álvarez, *op. cit.* note 37, p. 36

61 Ligeti, K. (ed.), *Toward a prosecutor for the European union. A comparative analysis*, Volume I, Oxford, 2013; Ruggieri, F., *Eurojust and the European Public Presecutor's Office: Introduction to a Historic Reform*, in: Rafaraci, T.; Belfiore, R. (eds.), *EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office*, Springer, 2019, p. 185. For the critique, see Verveale, *op. cit*. note 25, p. 86

That the Republic of Croatia has transposed the PIF Directive is undoubtedly established by the provision of Article 36 of the Draft Act to Amend the CC of 2018, which states that the CC contains provisions that are in line with the Directive (item 13). But, the analysis showed that the serious and meticulous work is ahead. The superficiality that has affected all segments of modern society has no place in the field of criminal law. The possible consequences of failures to transpose the PIF Directive are far more dangerous now than those potentially faced by Member States in implementing the PIF Convention. Namely, given that the material competence of the EPPO is based on transposition because it applies national criminal law, failures in transposition can lead to unequal treatment of EU citizens and thus jeopardize legal certainty.

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Topic 6

EU New trends

UDK 3.072.23(497.5:497.4:4-67EU)
347.956.6(497.5:497.4:4EU)
Original scientific paper

COMPARATIVE ANALYSIS OF AN ADMINISTRATIVE APPEAL IN CROATIAN, SLOVENIAN, AND EU LAW

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ABSTRACT

In administrative matters, parties enforce their rights and legal interests against obligations before the administrative authority of first instance; furthermore, they can file an appeal to the second instance if they deem decisions as illegal or as an injustice done. Exhaustion of the appeal is in most legal systems as well as according to Croatian (2009) and Slovenian (1999) General Administrative Procedure Acts ((G)APA) as a procedural prerequisite to file further courts action, also in a situation of administrative silence with a negative act fiction. Besides said national GAPAs, the paper addresses draft EU Regulation (2016) as an EU APA too, in order to provide a comparative analysis of various acts. The right to good administration requires that administrative acts be taken by EU administration among others pursuant to timeliness and efficient legal protection. Based on normative national law analysis and case study focus of this paper is put on the administrative appeal, including through the lenses of an access to court. Paper provides an insight in Croatian, Slovenian, and EU APAs in prominent matter since it addresses constitutional and international principles of sound public governance. Authors establish that Croatian and Slovenian GAPAs provide an appropriate legal ground to achieve common European standards, yet they seem too detailed and fragmented in several dimensions; hence, EU APA can serve as a role model of their modernisation.

***Keywords**: administrative appeal, administrative procedural law, Croatia, Slovenia, EU, good administration*

1. INTRODUCTION

Appeal against authoritative decisions presents the key legal means of questioning lawfulness in addition to being one of the most frequently used instruments of public protection of the citizens. The right to an appeal is an integral element of basic human and citizens` rights while representing one of the main institutes in protection of human rights. The appeal is, in almost all legal proceedings, perceived as fundamental and comprehensive legal remedy. Along with the proscribed limitations, the right to file an appeal against the decisions of the first instance administrative authorities is present in most of the European countries and it usually poses a rule in the comparative law.

As a regular legal remedy, in the Republic of Croatia and the Republic of Slovenia, the aapeal was riesed to the rank of constitutional guarantee in both constitutions from 1991, and then at the same time elaborated legally withinnumerous administrative fields, yet mostly directly by national GAPAs (ZUP) from 2009 and 1999, respectively. Based on the fact that Croatia and Slovenia have a similar geo-political position and historical backround as parts of Austria and former Yugoslavia, their respective laws regrading administrative procedure and related Administrative Dispute Acts (ADA) are very similar despite the fact that the Croatian GAPA was enforced a decade after the Slovenian one.[1] The significance of the appeal and its purpose in the administrative process law are particularly evident within the regular processes of legal protection of the citizens while handling administrative matters by public law authorities. This clearly refers to administrative procedures in which the appeal regulation is very widely positioned. It is, therefore, extremely important to approach the matter of forming and elaborating the legal remedy systems with caution and consideration in order to ensure the quality of the functioning of competent authorities while at the same time contributing to respecting the legitimacy and equality and preserving the lawfulness and legal security. The more developed the legal systems are, the more legal means there are for the legal subjects to protect their legal authorisations (subjective rights) in the case they have been disrespected by the state or any other authority.

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[1] See Zakon o općem upravnom postupku (Official Gazette of the Republic of Croatia No. 47/09), and Zakon o splošnem upravnem postopku *(*ZUP, Official Gazette of the Republic of Slovenia No. 80/99 and amendments). Moreover, Croatia and Slovenia have rather comparable regulation of judicial review regarding individual administrative acts via administrative dispute before special courts; see Zakon o upravnim sporovima (Official Gazette of the Republic of Croatia No. 20/10, 143/12, 152/14, 94/16, 29/17), and Zakon o upravnem sporu *(*ZUS-1, Offcial Gazette of the Republic of Slovenia No. 105/06 and amendments). See also Koprić, I., *Administrative Procedures on the Territory of Former Yugoslavia*, Brussels, OECD, SIGMA, 2005, pp. 1-4, [http://www.sigmaweb.org/publications/36366473.pdf], accessed 25. March 2020

An effective remedy is one of the fundamental principles of European administrative procedural law and European administrative procedures, that is, a general principle which should govern EU administration. The right to effective remedy is a key component to a legal system under the rule of law. As far as the right to effective remedy is concerned; this notion is to be understood in a broader sense, namely as administrative or judicial way to protect or challenge a disputable administrative act. As seen in the CJEU case law,[2] it is necessary to focus on the "effectiveness" of legal remedy, namely legal (judicial, but also administrative) protection, which not only offers a more or less *pro forma* defence, but actually protects the party in a given legal situation, which is often not the case if the appeal is non-devolutive or non-suspensive and/or is handled for an unreasonably long period of time. In such regard, Art. 13 of the ECHR explicitly underline the effectiveness of legal remedy already at the level of national authorities.

Since many European countries have procedural rules under which they act in administrative matters, this is not a rule at EU level. Member States are required to adapt national legislation and to apply EU law adequately and uniformly, which entails knowledge, application and interpretation of material and procedural law provisions. The lack of codified rules of procedure found in the various sources of EU law and the sectoral nature of European administrative procedural law affects unequal treatment, fragmentation, unsystematic, incoherence, etc.

On the EU level, the first attempt to design supranational general procedural regulations was the European Code of Good Administrative Behavior, adopted by the EU Ombudsman in 2001 and revised in 2004 and 2012. A further formal landmark in the direction of an APA for the EU was the European Parliament Resolution of 2013 with recommendations to the Commission on a Law of Administrative Procedure of the EU and further Resolution of 2016, including draft Regulation for an Open, Efficient and Independent European Union Administration.[3]

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2 See Galetta, D.-U. *et al. The General Principles of EU Administrative Procedural Law,* Brussels, European Parliament, 2015, pp. 18: "*The right is enshrined in Art. 47 of the Charter, in Art. 6 & 13 ECHR and recognised as a general principle of EU law is a key component to a legal system under the rule of law. According to this principle, neither the EU nor MS can render virtually impossible or excessively difficult the exercise of rights conferred by EU law, are obliged to guarantee real & effective judicial protection (C14/83) and are barred from applying any rule or applying any procedure which might prevent, even temporarily, EU rules from having full force & effect (C-213/89).,* [https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA%282015%29519224_EN.pdf], accessed 25. March 2020

3 European Parliament Resolution of 15 January 2013 with Recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)) and Resolution of 9 June 2016 for an Open, Efficient and Independent European Union Administration (2016/2610(RSP)) with Proposal for Regulation of the EP and of the Council. Available in all official EU languages at [http://www.

The aim of this paper is to point out the compliance of the Croatian and Slovenian GAPA solutions with the EU APA Proposal in relation to legal remedies and legal protection in the administrative procedure. The main research questions are therefore two. Firstly, we analyse what are the main similarities and differences of the Croatian, Slovenia, and EU (G)APAs on administrative appeal. Secondly, we evaluate, which of respective regulations seems the most efficient in terms of good administration and sound public governance principles.[4] The necessity of the principle of the two instances in administrative procedure (as a rule) is also being discussed, whereby emphasizing the principle of efficacy and the duration of the administrative procedure. The authors are, therefore, through normative analysis and comparative methods describing the procedure regarding the appeal in Croatian and Slovenian administrative procedure while specifying specific exceptions to constitutional and legal rights to an appeal. The right to an appeal is a constitutional guarantee, fundamental human, conventional and legal right, which can exceptionally be excluded, that is, regulated by special laws which then do not allow an appeal against the decision of the first instance authority to be made. Moreover, the appeal is a suspensive legal remedy, which means that it postpones the legal effects. With regard to that, on the basis of normative analysis of special laws, certain examples of special administrative areas have been emphasized, where the appeal does not postpone the execution of the decision reached by the first instance administrative authority. In this part of the paper, there is also a short overview of the influence and implications of the European administrative procedural law on national administrative procedures, that is norming of the national administrative procedure in particular, under the influence of the processes of Europeanization,

europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0004&language=EN#top] and [http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0279+0+DOC+XML+V0//EN], accessed 25. March 2020. See specifically the formal and social grounds for its adoption

4 About these concepts see more in Venice Commission, *Stocktaking on the Notion of Good Governance and Good Administration.* Study 470/2008, 2011, pp. 1-30,[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)009-e], accessed 25. March 2020; Hofmann, H. C. H.; Schneider, J.-P.; Ziller, J. *The ReNEUAL Model Rules*, 2014, [http://www.reneual.eu/images/Home/ReNEUAL-Model_Rules-Compilation_BooksI_VI_2014-09-03.pdf], accessed 25. March 2020; Auby, J.-B., *Codification of Administrative Procedure*, Brussels, Bruylant, 2014; Koprić, I.; Kovač, P. (eds.), *European Administrative Space: Spreading Standards, Building Capacities*, Bratislava, NISPAcee, 2017, [http://www.nispa.org/files/publications/proceedings/NISPAcee-Proceedings-2016-Zagreb.pdf], accessed 25. March 2020; Koprić, I. *et al*., *Legal Remedies in Administrative Procedures in Western Balkans,* Danilovgrad, ReSPA, 2016; Kovač, P., *The requirements and limits of the codification of administrative procedures in Slovenia according to European trends*, Review of central and east European law, *vol*. 41, no. 3/4, 2016, pp. 427-461; Kovač, P., *Principles of administrative procedure in selected CEE countries: between national legacies and European trends*, Public Administration in a Democratic Society: Thirty Years of Democratic Transition in Europe, International Conference, Dubrovnik, Croatia, 3-6 October 2019. [https://iju.hr/ipsa/2019/papers/ip19p2.pdf], accessed 25. March 2020

harmonisation and coordination with the *acquis communautaire*. The issues of national legal traditions of the member states in this particular administrative area, which is specific and on EU level and national process autonomy have also been emphasized. In the end, the authors provide conclusions, establishing that Slovenian and Croatian GAPAs are compliant to EU standards, both generally and as regards legal remedies regulation, yet there are further possibilities in both national laws to strive for more concise, principles based and hence efficient codification within the good administration context.

2. ON THE IMPACT OF EU PROCEDURAL LAW ON THE REGULATION OF CROATIAN AND SLOVENIAN ADMINISTRATIVE PROCEDURE

2.1. The Europeanization and the position of National Administrative Procedures in relation to the existence of European Administrative Procedural Law

Different directions of influences and "pressures" lead to remodelling of the administrative law by abandoning traditional concepts. Emphasis is, in the process, put on administrative and judicial capacities necessary for adequate transposition of the European law and its effect on national legislation.[5] National administrations find themselves in complex situations in which they need to balance between various influences since they are simultaneously exposed to streams demanding redefining of their administrative traditions. Ruffert highlights that despite the importance of national traditions, the term is rather vague which influences the relationship of national traditions towards common principles.[6] In accordance with that, it is necessary to be aware of the attempts of creating an area in which standards and principles are to be followed and applied with the aim of achieving efficacy of national administrative systems and complete legal protection of its citizens.

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5 Đanić, A.; Lachner, V., *Utjecaj pojave globaliziranog upravnog prava na nacionalne upravne sustave s naglaskom na hrvatsko upravno postupovno pravo*, in: Belaj, V. (ed.), Conference proceedings 2nd international conference Public administration development, Vukovar, Croatia, 11-12May, 2012, pp. 163-179

6 See more Ruffert, M., *Common Principles and National Traditions: Which Perspective for European Administrative Legal Scholarship?*, in: Ruffert, M. (ed.), Administrative Law in Europe: Between Common Principles and National Traditions, Europa Law Publishing, Groningen, 2013, pp. 215. About national traditions see more Schmidt-Aßmann, E., *Administrative Law in Europe: between Common Principles and National Traditions*, in: Ruffert, M. (ed.), Administrative Law in Europe: Between Common Principles and National Traditions, Europe Law Publishing, Groningen, 2013, pp. 34-35

When discussing the EU administrative law,[7] implementation[8] and application of EU rights through cooperation between the institutions and the EU bodies and national level are implied. The European influence on national administrative law is closely related with the concept of shared government.[9] Many European proceedings are regulated by various administrative areas (market competition, government supports, environment protection, medication sales, technology, food safety etc.). In these instances, roles are being mixed and cooperation between the EU institutions and national administrations is being realised as a part of procedural frameworks in horizontal and vertical dimensions. National bodies can be facing a dilemma whether domestic or/and EU law should be applied in particular cases considering there are different rules and practice.[10]If the EU law does not contain any specific provision, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy.[11]The only restriction to the national procedural autonomy is that in each case, the application of national procedural law in the absence of EU procedural rules has to meet two conditions: principle of non-discrimination or equivalence and the principle of effectiveness.[12]

The application of the mentioned principles regarding the administrative procedure is considered as duty in order for the EU law to be applied effectively with its full effectiveness ensured (effectiveness (process equality) and effective legal protection (*Effet utile*)). Even after having been enlisted in the national law, the norms of the EU law are still applicable and can be called upon in every national judicial

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7 About the evolution of European Administrative Law see more Schwarze, J., *European Administrative Law*, Sweet and Maxwell, Luxembourg, 1992, p. 1433-145

8 Schwarzedraws a distinction between direct and indirect administrative implementation of European law, emphasizing that administrative procedure in indirect administration lacks uniformity due to the principle of procedural autonomy. See Schwarze, J., *Judicial Review of European Administrative Procedure*, Law and Contemporary Problems, *vol*. 68, no. 1, 2004, pp. 86

9 Widdershoven, R., *European Administrative Law*, in: Seerden, J. G. H. R. (ed.), Administrative Law of the European Union, its Member States and the United States, A Comparative Analysis (third edition), Intersentia, Ius Commune Europaeum, Book 109, 2012, pp. 245-246

10 The only request for a preliminary ruling from the High Administrative Court of the Republic of Croatia lodged on 8 February 2018-*Hrvatska banka za obnovu i razvitak (HBOR) v Povjerenik za informiranje Republike Hrvatske*, Case C-90/18, ECLI:EU:C:2018:685. See more on Decision of the Court from 6 September 2018,[http://curia.europa.eu/juris/document/document.jsf?text=&docid=205742&pageIndex=0&doclang=HR&mode=lst&dir=&occ=first&part=1&cid=1947276#Footnote*], accessed 29. March 2020

11 SeeCaseC3/16, *Aquino v. BelgischeStaat*, ECLI:EU:C:2017:209; CaseC161/15, *BensadaBenallal v Étatbelge*, EU:C:2016:175; CaseC74/14, *Eturas and Others v Lietuvos Respublikoskonkurencijostaryba*, EU:C:2016:42

12 Verhoeven, M., *The Costanzo Obligation*, Intersentia, Ius Commune Europaeum, Book 93 2011, p. 49

and administrative proceeding. Regardless the national procedural autonomy, the demands for equality and effectiveness has led to considerate European strivings and has influenced national administrative systems and procedures.

The solution lies in codification of fundamental process rules applicable in every country, which is the result of convergence of the administrative procedural law. EU has established that in some areas it is important to set the minimum of standards to satisfy and apply the common procedural demands. Supporting that is also the removal of different proceedings which negatively affect the functioning of the unique market. Conclusively, it is to be emphasized that the Europeanization process has had influence on changing the Croatian and Slovenian GAPA, which will shortly be presented in the paper.

2.2. Influence of draft EU APA on Croatian GAPA

When the Republic of Croatia became a member of the European Union, the process was based on transposition and adequate implementation of *acquis communautaire*. On the way to "opening the European door" numerous challenges were set regarding the demands under the influence of the European administrative procedural law. The European administrative procedural law, within which the European administrative procedure was established, has a great influence on application of general administrative procedure. Modernisation of administrative proceedings in Croatian law was also greatly influenced by the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market(hereinafter: Directive).[13]The implication which the Directive has on the procedural law refers to demands for administrative simplification, establishing both cooperation and points of single contact. The regulation of a single administrative place[14] has been reduced to only one legal article and the institute does sadly not function in practice, as it should referring to content and organisation.[15] Some of the attempts have been reduced on functioning for the business sector (how to start and establish a business; how to start an entrepreneurial initiative) within the framework of the Financial Agency and Croatian

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13 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ L 376, 27.12.2006, p. 36–68,* [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0123], accessed 14. March 2020

14 Art. 22 of.the GAPA

15 See more Đanić Čeko, A., *Has the Implementation of the One-Stop-Shop (Point of Single Contact) enabled simplification of the Croatian Administrative Procedure to increase the efficiency of Public Administration?*, in: Cingula, M.; Rhein, D.; Machrafi, M. (eds.), 31st International Scientific Conference on Economic and Social Development -"Legal Challenges of Modern World", Split, 2018, pp. 580-588, [http://www.esd-conference.com/past-conferences], accessed 24. March 2020

Chamber of Economy (START system).[16] The Point of Single Contact has been established through the framework for the free market, which is horizontally regulated under the Croatian Services Act.[17]Croatian public administration has to make numerous improvements in this area following the examples set by Austria, Hungary, Slovenia, and Germany. The emphasis is put on the system for providing electronic services by using the e-citizens system.[18]The number of e- services is constantly growing within the e-citizens system, which is definitely a positive thing causing the simplification of the administrative procedure and enabling prompt communication with citizens and public sector.

Furthermore, the demands have been set for providing and easily accessing information, ensuring remote procedures and formalities by electronic services. The Directive has introduced and formalised certain procedural solutions in the Croatian administrative procedure, which are incorporated within the principles, electronic communication provisions, and legal protection expansion both against the proceedings or missing the proceedings by public-legal bodies and public services providers. The important step has been made by legally norming the institute of legal contract, which has not been specified in the draft EU APA. Regarding this, new regular legal remedy, the appeal, has been introduced and the number of extraordinary legal remedies has been lowered from seven to three, which has been more than necessary. The Croatian legislator has modernised the system of legal protection in accordance with the European standards.[19] There is, however, the issue of two instance administrative authority. Regarding the jurisdiction of the second instance authority in the appeal, one should emphasise the legislator´s intention to avoid the repetition of the procedure by providing the authority to solve the issue based on the merits. The principle of legal hearing[20] of the party as one of the fundamental procedural parties´ rights has not encountered its place among the principles of the administrative procedure, as was the case with the old GAPA.[21] When referring to its principles, the Croatian administrative procedure could be enriched with more European principles following the example of the draft EU APA. More attention should be focused on achieving the content reali-

16 [http://psc.hr/en/point-of-single-contact/], accessed 28. March 2020

17 See Art. 6 of the Croatian Services Act, Official Gazette No. 80/11

18 [https://pretinac.gov.hr/KorisnickiPretinac/eGradani.html], accessed 28. March 2020

19 Đanić, A.; Lachner, V., *Modernizacija sustava pravne zaštite građana s naglaskom na upravne reforme*, in: Katalinić, B. (ed.), Proceedings/2nd International Conference "Vallis Aurea"-focus on: Regional Development, 2010, pp. 0281-0289

20 See Art 14 of the EU APA

21 General Administrative Procedure Act, Official Gazette No. 53/91, 103/96. The party's right to be heard, although not among the principles of administrative procedure, found its place in Art. 30 of the GAPA (party statements, declaration of the parties)

sation of the right to good government, which simultaneously contains the right regarding formalism and too detailed regulation. When it comes to discussing the ways in which administrative procedure can be initiated, the possibility to submit an application or notification to the citizens due to public interest protection as one of the constitutional rights of every citizen. One of the goals of the Strategy for the development of public administration (2015-2020)[22] refers to the administrative system reform in accordance with the best practice and experiences of good governance according to the European standards. Is the Croatian GAPA, therefore, a traditional law and is it valid to claim that EU APA is a modern European codification? Regarding the fact that the Republic of Croatia was obligated to harmonise its legislation with the EU laws and conduct a comprehensive reform of the public administration and administrative adjudication. There is always room for improvement, which should be set as one of the priorities, primarily to enhance and simplify the system of administrative proceedings and decision-making, better communication and cooperation with citizens and business sector as well as more quality in providing public services.

2.3. Influence of draft EU APA on Slovenian GAPA

In Europe, especially Central Europe, the emphasis of (G)APAsis predominantly on the codification of single-case administrative decision-making, aimed at protecting the public interest under substantive law while also, and in particular, protecting the rights of the parties. Dual regulation on general and specific procedures is characteristic for Slovenia as in the most other CEE countries. However, sector specific fields are often regulated differently from the GAPA, so that the normative procedural status under *leges speciales* is often more problematic as it may be under the GAPA.[23] Moreover, it is characteristic for Slovenia that the *mutatis mutandis* application of the GAPA is pursued by Art. 4, i.e. fundamental principles' (like the right to be heard, the right to obtain a reasoned decision and to file legal remedies)

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22 [https://www.sabor.hr/hr/prijedlog-strategije-razvoja-javne-uprave-za-razdoblje-od-2015-do-2020-godine], accessed 26. March 2020

23 Examples for Slovenia in Avbelj, M, *Komentar Ustave RS [Commentary to the Constitution],* Nova Gorica, New University, 2019. (comments to Art. 22, 23, 25). For example, sector-specific laws partially extend ordinary serving or abbreviated fact-finding procedure, contrary to the general solutions under the GAPA. Similarly in Croatia (See Koprić, I.; Đulabić, V. (eds.), *Modernizacija općeg upravnog postupka i javne uprave u Hrvatskoj [Modernisation of Administrative Procedure and Administration in Croatia*], Institute for Public Administration, Zagreb, 2009) where, despite constitutionally equal protection of rights, entire special administrative procedures are introduced by over 60 laws. However, one needs to consider which rules belong to the general and which ones to sectoral procedural law; any new rules, typical of or necessary for a particular field, belong only to the latter (Kovač, *op. cit*, note 4). For instance, the one-stop-shop system (in Slovenian: VEM) is one of Slovenia's reform successes, awarded by the UN and integrated into the more comprehensive Slovenian Business Point (SPOT).

application in non-administrative yet still public law matters where the procedure is not regulated by sectoral laws. Thus, even after two decades, this provision means that unlike other national APAs, there is no need to extend the scope of the GAPA to other administrative acts.

Hence, GAPA's and sectoral legislation amendments in Slovenia have been relatively minor compared to the changes in most European countries over the last decades.[24] We assume this being an expression of conservatism and established tradition in GAPA use; that is in Slovenia similarly to the Croatian and other CEE countries' social and legal systems. Additionally, one can observe rather detailed codification of Slovenian GAPA. While the number of provisions *per se* is not necessarily an indication of obsolescence, we need to understand that comparisons show 5% to one half of the Slovenian volume, which is a problem since users cannot distinguish between more important and rather operational rules and norms.[25]

Nevertheless, under the influence of globalisation and EU guidelines, also the Slovenian GAPA from 1999, and even more the procedural regulation in sector-specific laws, such as on the field of entrepreneurs' actions (referring to Directive2006/123/EC), has been revised in several GAPA's amendment. These changes have been directed towards of simplification and red tape reduction (e.g. possibility of waiving an appeal to achieve instant enforceability in 2008), introducing joint procedures (e.g. joining up visas for living and working in Slovenia), deregulations, digitalisation, *et simile*. Thus, for example, institutions such as a one-stop-shop or positive fiction in case of administrative silence in the area of entrepreneurship and social benefits; or alternative dispute resolution in inspections, tax collection, etc. are defined in sectoral laws although not found in the GAPA (as in Croatia). Hereby, an analysis of changes over time in Slovenian GAPA shows that politics and specific economic interests have often taken priority over professional arguments and comparative good practices.[26]

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[24] This applies not only to several Western countries, e.g. through changes towards greater efficiency and participation in Germany or the Netherlands, or through the adoption of a completely new codification in France in 2015, but also to CEE and the Western Balkans, where nearly all the countries revised their APAs under the influence of SIGMA. Koprić, *et al.*, *op. cit.*, note 4; Kovač, *op. cit.*, note 4

[25] Report on the following number of articles in national GAPAs: US (1946) has 16 articles, Sweden (1986) 33, Finland (2003) 71, Austria (1991) and Germany (1976) just over 100 articles, Croatian APA (2009) 171 articles. Slovenia (1999) with 325 articles. See Koprić; Đulabić, *op. cit.,* note 23

[26] Already the adoption of the Slovenian GAPA in 1999, as an almost uncritically filtered and rather only editorially revised codification of the Yugoslav law of 1956, suggests that the then politicians lacked the courage or the ability to modernize the law in the sense of a break with socialism and related social phenomena. On the other hand, one of the reasons for continuity is probably a considerable degree of modernity of the Yugoslav APA, so no major reforms were required, albeit one can emphasize at least rather detailed formalization of the codification

Regarding fundamental principles as well legal remedies, Slovenian GAPA has reduced their number since 1999. Instead of 13 principles as before, the Slovenian GAPA comprises nine principles; however, these are classical principles, not modern ones such as good administration.[27] The same applies to the number of legal remedies: there are currently six, although European trends suggest that for the sake of legal certainty, their number should be lower yet still guaranteeing a balance between protection of the public interest and protection of the rights of the parties.

2.4. Conclusions on the joint EU APA and MS autonomy

In sum, if one compares the characteristics of the Croatian and Slovenian GAPAs to the EU level in terms of modern principles and innovative aspects, there are still many options ahead of us, like introducing alternative dispute resolution and more collaborative relations. Particularly, regarding legal remedies, we can observe that national codifications in question still pursue many remedies and even an appeal is rather formally prescribed, inter alia as an obligatory step before access to courts despite often excessive length of proceedings in both countries, especially Croatia. Neither balance nor consistency in legal remedies' regulation is ideal in both national laws, as seen through various comparative studies.[28]

When compared to the EU level, in order to achieve systematically adjusted and standardised administrative proceedings, it is considered that there should be a general procedural law proscribing the minimum of fundamental principles and standards of the proceedings which are mutual for all the systems.[29] Administrative procedure demands a common regulation within the European administration as well as reassignment of tasks within the executive integration. The same European procedural law would not be directly applied in national administrations since most of the countries have their own regulations regarding the administrative procedure, however, its influence would be evident in every aspect of the activities led by European law (this has already been achieved in numerous sectors such as market competition, public procurement, right to asylum, environment protection etc.).

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27 More in detail see Kovač, (2019) *op. cit.*, note 4, Venice Commisssion (2011), Galetta, *et al.*, *op. cit.*, note 4

28 For instance, see Koprić *et al.*, *op. cit.*, note 4; Kovač 2019, *op. cit.*, note 4; *Cf.* Auby*et al.*, *op. cit.*, note 4

29 See also Đerđa, D., *Upravni postupci u europskom pravu*, Hrvatska pravna revija, *vol.* IX, no. 4, 2009, pp. 62; Franchini, C., *European Principles Governing National Administrative Proceedings*, Law and Contemporary Problems, *vol.* 68, no. 1, 2004, pp. 196

In EU, most important are Art. 6 and 13 of the European Convention on Human Right on ensuring a fair trial and the right to an effective remedy, respectively, and Art.41[30] in conjunction with Art. 42 and 47 of the EU Charter on the rights to the fair administration of procedures (2009). These principles are binding on all administrative authorities, while the regulation of procedural law is left to the discretion of the Member States even though draft EU APA will be adopted. The procedural autonomy of the Member States has been pursued specifically by the case law of the CJEU, as developed over time. At first, such autonomy was seen as unlimited, but recently the CJEU has acknowledged the main common principles in several cases.[31] However, despite the acknowledgment of the procedural autonomy and national peculiarities of the EU Member States, it is important to emphasize that the so-called 'import-export' convergence based on the EU principles of equivalence and effectiveness has been overcome. Also important in such regard is the creation of a common identity or the relevant legal culture by spilling over to the national level.[32]

Therefore although the EP Resolutions and the ReNEUAL Model Rules explicitly stress that such codification will apply only to EU authorities and not to Member States, we expect that the principles and rules – when adopted – will be transposed to the national level as well. This is further supported by the *de minimis* rule, whereby general provisions, despite the regulation being *lex generalis*, at least in terms of fundamental standards, represent a minimum standard to which a special regulation would be only very exceptionally subordinate. One should, however, bear in mind that it is dangerous to assume equal or similar principles of public procedures will be applied in every member state and its administration. Uniformity might be illusory, because, although there might be a rule which is "the same" for a certain number of countries, it might not be interpreted equally, or applied equally. A certain compromise solution can be found in the creation of codifica-

[30] „*..In the title of article 41 it was clearly expressed that it is a right, but the interpretation of the article 52 para. 2-4 of the Charter leads to the conclusion that the rights ensured by the Charter were interpreted from the Treaties, European Convention on Human Rights or common constitutional traditions of the EU Member States. The problem is that the right to good administration was ensured by the constitutional norms only in Finland…*" See more Siuciński, R., *Convergence of Law-Examples from European Administrative Procedure*, Vilnius, 2013, pp. 305-306, [http://www.tf.vu.lt/dokumentai/naujienos/Renginiai/tarptautine_studentu_konferencija_2013.pdf], accessed 17. March 2020

[31] With regard to cases referred tothe CJEU, see Case C-453/00, *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*, ECLI:EU:C:2004:17; Case C-234/04, *Rosmarie Kapferer v. Schlank & Schick GmbH*, ECLI:EU:C:2006:178; Case C-507/08, *EC v. Slovakia*, ECLI:EU:C:2010:802; Case C-603/10, *Pelati d.o.o. v. Slovenia*, ECLI:EU:C:2012:639

[32] With regard to the spill-over effect, see Hofmann; Schneider; Ziller, *op. cit.,* note 4; Kovač, *op. cit.*, note 4

tion of European administrative procedural rules, especially in areas where there are significant differences between national rules for implementation of EU law.

3. ADMINISTRATIVE APPEAL IN THE CROATIAN AND SLOVENIAN GAPAS

3.1. Analysis of Croatian GAPA on an appeal

One of the aims of administrative procedures is legitimate proceedings and dealing with administrative matters as well as reaching legitimate and righteous decisions within proscribed deadlines. It is, therefore, necessary to ensure adequate and systematic mechanisms of hierarchy control which would eliminate possible mistakes in proceedings of the public law authorities. As a key legal means of questioning lawfulness and one of the most frequently used instruments of public protection of the citizens, an appeal, is accordingly emphasized. Along with certain proscribed limitations, the right for filing an appeal against the decisions of the first instance public law authorities in the administrative procedure is found in most of the European countries and it usually presents the rule in the comparative law.

The guarantee of the right to appeal against individual legal acts made in first-instance proceedings by authorised bodies is contained in the Art. 18(1) of the Constitution of the Republic of Croatia.[33] As an exception, appeal may be denied in cases specified by law if other forms of legal protection are ensured. Therefore, the basic conditions for the exclusion of the appeal against administrative acts of the first instance public law authorities are set in the Art. 18(2)of the Constitution of the Republic of Croatia. Specific conditions and rules of derogation from the right to appeal in administrative procedure are regulated in the Art. 3(1) of the GAPA. Only individual issues of administrative procedure may be regulated otherwise by a special law, when this is necessary for proceeding in individual administrative areas, and if this is not in violation of the basic provisions and the purpose of this GAPA.

Right to appeal is one of the fundamental principles of any legal protection proceeding, and thus the administrative. Legal protection of parties to administrative proceedings through an appeal is also regulated within one of the basic principles of administrative procedure, the principle of a party's eight to legal remedy. As a general rule, in administrative matters parties firstly need to enforce their rights before the administrative authority of first instance, furthermore they can file an

[33] Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14

appeal to the second instance. Appeal procedure is intermediate stage before access to court. Interested parties are required to follow a preliminary administrative procedure. This preliminary procedure has two objectives: extended decision-making and legal protection. Administrative appeal may only complement judicial legal protection by establishing an opportunity of self-review to be optionally and mandatorily passed through before a court action.[34] This self-review is only effective if it is taken seriously by the administrative authorities. So, we can conclude that exhaustion of the appeal is in most legal systems procedural prerequisite to file court action. Mandatory administrative appeal is regulated in Germany, Netherlands,[35] Belgium, Spain, Denmark etc, while optional one in France and Italy.

According to Croatian GAPA (IV part) from 2010 there are two regular (ordinary) legal remedies in administrative procedure as a mechanism of legal protection: 1) appeal (Art. 105-121)[36] and 2) objection (Art. 122). In administrative procedure party has always the right to appeal against a first instance body decision and in the cases of the so called "*administrative silence*" when first instance body did not made its decision in the law defined deadline.[37] Only specific laws may provide that in specific administrative matters an appeal is not allowed, provided that the protection of rights and lawfulness is ensured in some other way.

First of all, appeal is regular, universal, devolutionary, bilateral and suspensive legal remedy.[38]An appeal, almost inevitably, postpones the legal effects of the decisions until the solution to an appeal is delivered to the party (unless proscribed differently by the law). It can be, however, exceptionally decided, for the reasons prescribed by law (Art. 112(3)), that the appeal does not possess a suspensive effect.[39]

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[34] See Stelkens, U., *Administrative Appeals in Germany*, in: Dragos, D. C.; Neamtu, B. (eds.), Alternative Dispute Resolution in European Administrative Law, Springer, 2014, pp. 3-55

[35] For example see the system in Netherlands Barkhuysen, T.; Ouden den, W.; Schuurman, Y.E., *The Law on Administrative Procedures in the Netherlands*, NALL 2012, april-juni, pp. 6-7, [https://openaccess.leidenuniv.nl/bitstream/handle/1887/19406/NALL-D-12-00004.Law%20on%20admp.pdf?sequence=2], accessed 22. March 2020

[36] About reform of the system of legal remedies in the administrative procedure see Đerđa, D., *Reforma sustava pravnih lijekova prema novom Zakonu o općem upravnom postupku*, in: Koprić, I.; Đulabić, V. (eds.), Modernizacija općeg upravnog postupka i javne uprave u Hrvatskoj, Suvremena javna uprava, Zagreb, 2009, pp. 162-169

[37] If a party applies for a certificate (a fact for which official records are kept) and the public body refuses to issue a certificate to it or does not issue it within 15 days, an appeal may be lodged

[38] Dragos distinguishes types of appeal: 1) hierarchical appeal or recourse and 2) so-called quasi-hierarchical appeal, external appeal, or sometimes *recours de tutelle*. See Dragos, C.D., *Administrative Appeal*, In: Farazmand, A. (ed.) Global Encyclopaedia of Public Administration, Public Policy and Governance, Springer, Chma, 2016, pp. 1-2

[39] Some examples of specific laws that provide for the regulation of the non-suspensory nature of an appeal are: GAPA (Art. 36 (2), Temporary Alimony Act (Art. 20 (3)), Social Welfare Act (Art. 100 a (4),

Specificity related to suspensive effects of legal remedies refers to the protection of their applicant from the execution of the effects of the refuted decision. It is, therefore, possible that the applicant might act this way in order to stall the proceedings and while doing so not respecting the proscribed procedural discipline.

Furthermore, when it comes to ensuring adequate and efficient legal protection during an appeal in the administrative procedure, it is definitely important to mention the principle of effectiveness and decision-making within a reasonable deadline, as well as process guarantees such as the right for an effective legal remedy and right for accessing (an independent and unbiased) court. The issues regarding the length of the procedure when solving administrative matters and reaching a decision based on merits are closely connected to the issue regarding the necessity of the two instance administrative decision-making authorities in the appeal. In scientific circles, dilemmas about the necessity of the presence of the administrative decision-making of the second instance, that is, the exclusion of the appeal from the administrative procedure, have been frequently emphasized. The parties have, in the process, the possibility to initiate an administrative dispute by filing a lawsuit against the decision of the appeal to a competent first instance administrative court. The decision-making and handling the legal matters are, typically, conducted in two instances in the administrative procedure and two instances in administrative adjudication (four instances). Another possibility is the three instance model (decision of the second instance authority - administrative procedure + lawsuit + appeal – administrative dispute) when the decision is reached by the competent ministry or any other competent second instance authority against which an appeal is not permitted, but an administrative dispute can still be initiated as well as the possibility for an appeal against the decision of the administrative court (if permitted).[40] There are, however, certain exceptions in specific special administrative areas. The exception when the party is allowed, after receiving the decision of the administrative procedure, to acquire administrative – judicial protection from the High Administrative Court of the Republic of Croatia in one instance administrative dispute (the two instance model).[41] The

Art. 114 (5)), Law on Building Inspection (Art. 50 (2)), Law on Customs Service (Art. 75 (7)), Law on Civil Servants (Art. 80 a), *et simile*

40 For example Art. 38(3), Art. 39(5) Act on *International and Temporary Protection*, Official Gazette No. 70/15, 127/17, Art. 12(5), Art. 15(6), Art. 18(2), Art. 29(12) Forest Act, Official Gazette No. 68/18, 115/18, 98/19, Art. 46(3) Law on Foreigners, Official Gazette No. 130/11, 74/1369/17, 46/18

41 Đanić Čeko, A., Žalba u upravnom sporu u hrvatskom i poredbenom *pravu*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, doctoral thesis, p. 278-328.; Đanić Čeko, A., *Specifičnosti uloge Visokog upravnog suda Republike Hrvatske u jednostupanjskom upravnom sporu na osnovi posebnih zakona (lex specialis),*Harmonius Journal of Legal and Social Studies in Southand East Europe, *vol*. VII**,** 2018, pp. 17-45

example of such specific administrative – judicial protection is prescribed by the Art. 39(4), Art. 51(4), Art. 67-69 of the Competition Act.[42]

A comparative example of excluding the right to an appeal in the administrative procedure is set by Austrian GAPA,[43] in which one instance administrative procedure has been introduced (with certain exceptions). Moreover, in the French administrative law, the parties have the possibility to choose, it is therefore not necessary to follow the regular rules of appeal in order to initiate the administrative dispute. When the law allows it, the appeal in administrative procedure *(recours administratif préalable)* can be a mandatory prerequisite for initiating an administrative dispute.[44]Supporting this, we point out that Dragos mentions two major systems of administrative appeals – mandatory and optional.[45] One might conclude that the system of appeal in the administrative procedure is a rule in most of the countries while at the same time providing the example of administrative tradition, one from which it is difficult to detach or even completely abandon. Regardless the propositions of normative solutions about the possibilities for filing an appeal in administrative dispute, it is only in specific, legally proscribed cases, where it is possible to overburden the administrative adjudication.

Conclusively, it is to be stated, that the appeal in administrative procedure is to be enforced in accordance with the fundamental legal standards which need to be objectively applied and interpreted by the second instance public law authorities in order to achieve adequate balance between the ambition for effectiveness and legal protection of the rights and legal interest of the parties. Moreover, it is necessary to harmonise and standardise, which is currently still a large number of special laws, regarding the deviations from the GAPA in relation to proscribing the appeal deadlines (shortening the deadline) or unclear defining of the deadlines, failing to define the appeal authority, exceptions from effects of the appeal and exclusion of the appeal in specific administrative areas. Special emphasis is to be put on the important jurisdiction of the decisions based on merits reached by the second instance authorities in the administrative appeal (to independently deal with the entire administrative matter), so without nullifying the first instance decisions

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42 Official Gazette No. 79/09, 80/13

43 IV. Teil: Rechtsschutz, Berufung (§ 63-67) Allgemeines Verwaltungsverfahrensgesetz 1991-AVG, StF: BGBI. Nr. 51/91 (WV)with an amendmentBGBI. I Nr. 58/18, [https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005768&FassungVom=1992-12-31], accessed 20. March 2020

44 Gjidara, M; Britvić Vetma B., *Francusko-hrvatski pojmovnik*, Split/Paris, 2016, p. 96

45 Dragos, *op. cit*. note 38, pp. 2

and reinitiating the procedure.[46] By applying the authority to reach the decisions based on merits, there are no prolongations of the administrative procedure and no contributions to creating the so-called *"ping-pong"* effect. It is acted in accordance with the principle of effectiveness and faster realisation of rights. Everything mentioned should be systematically questioned and discussed about with the aim of unburdening the system of administrative procedure from ineffectiveness, too long duration of the procedure, overly exaggerated formalism in some particular procedures, comprehensive legal protection and establishing of the system of efficient control over regulation and application of means of legal protection.

3.2. Analysis of Slovenian GAPA rules on the appeal

A legal remedy in the Slovenian administrative appeal system is a specific procedural action that initiates, before the competent body, the procedure to review and establish the compliance of a specific administrative act with an abstract legal norm. Pursuant to Articles 25, 157, and 158 of the Slovenian Constitution, the legal remedies provided by law (the GAPA or a sector-specific law), the administrative appeal and court remedies are the only way to modify, annul *ab initio*, or annul an administrative act. The appeal is the only legal remedy applied prior to the act becoming final, even though the Slovenian GAPA recognises a further five extraordinary legal remedies. The right to administrative appeal is provided for by Art.13, which operationalises the constitutional and international right to an effective remedy. Thus, the effectiveness of legal remedies is part of the principle of the rule of law (Art. 2 of the Slovenian Constitution) and is directly related to equality before the law, the protection of personality and human dignity, the equal protection of rights, the right to judicial protection, legality, an administrative dispute, and finality (*res iudicata*). The constitutional arrangement allows an exception, namely the exclusion of appeals based on a sound reason, which is aimed at distinguishing a specific administrative area from the general rule. Especially the non-suspensiveness of a legal remedy is incompatible with the requirement of the effectiveness of a remedy, as derived from the provisions of the Constitutional Court in cases U-I-297/95 and U-I- 339/98. The exclusion of the suspensory effect of an appeal must be reasonably grounded otherwise it implies a violation of the equal protection of parties' rights (Art. 22 of the Slovenian Constitution).[47]

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[46] Art. 117(1) and Art. 119(3).The adoption of a new decision by the incomplete resolution of the first instance body should only be necessary. Therefore, reference to the nature of an administrative matter which is not defined should be avoided, but evaluated on a case-by-case basis by the appeal body (2nd instance administrative body/authority)

[47] As analyzed in detail by Avbelj, *op. cit*, note 23 and Kovač, 2016 and 2019, *op. cit*, note 4. More also about empirical data in Dragos, Neamtu, *op. cit*., note 4

In Slovenia, an administrative appeal is a mandatory (i.e. before court action can be taken), always devolutionary, and in principle suspensory remedy. The GAPA furthermore lists seven procedural errors (*errores in procedendo*) which are considered to be severe violations infringing upon formal legality.[48]. An appeal may be filed pursuant to the GAPA (Art. 222 and 256) also if the administrative body fails to act, i.e. if the act concerning the party's request has not been issued within the prescribed time limit.[49]Based on the GAPA and ADA, the legal path in asserting administrative rights and interests in Slovenia comprises the following stages:

- Administrative proceedings, initiated upon request from one of the parties or *ex officio* in order to protect public interest;
- Administrative appeal proceedings, conducted usually by the line ministry and at the initiative of a party, within 15 days from the notification of the administrative act; afterwards the decision is complete and enforceable;
- Further, a court action may be initiated within 30 days from the notification of the decision in administrative appeal by any party or by a government representative to protect public interest; there is a further option of an appeal to Supreme Court; upon court decision, the matter becomes final;
- Should the administrative authority or the court in deciding on the constitutional rights or obligations of the party violate such rights, the party may also file a constitutional appeal before the Constitutional Court; if the court denies the appeal, party may invoke the protection based on European Convention.

In the Slovenian legal order, the appeal thus has a fourfold purpose. Firstly, due to its dispositive nature and devolutionary and suspensory effects, the appeal is an instrument of protection for the rights of the parties. Secondly, since the right of appeal is also guaranteed to representatives of the public interest (i.e. the state attorney), the appeal also protects legality. Pursuant to the GAPA, the *reformatio in peius* for the appellant is restricted, as it applies only in the event of reasons justifying certain extraordinary legal remedies or in the event of the most severe violations. The appeal body *ex officio* examines only violations of substantive law

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48 Art. 237(2). These can be classed into three groups: (1) issues relating to unlawfulness (illegality) linked to the administrative body (jurisdiction, the impartiality of officials), (2) issues relating to the party (legal interest, proper representation, the right to be heard, communication in an official language), and (3) issues relating to the administrative act as a prescribed form (such as the fact that it must be in writing and contain the prescribed elements)

49 According to the ADA (Article 28/3), in force since 2007, also a failure to act in an appeal procedure may constitute grounds for an appeal in an administrative dispute or even a special appeal if within three years from the start of the administrative procedure a decision on the merits has not been concluded (referring to the right to a decision within a reasonable time). This prevents a 'yo-yo effect'

and significant procedural errors (Art. 247). Thirdly, particularly with the appeal body's power to assess *ex officio* absolute and significant procedural errors and the misapplication of substantive law, the appeal aims at the coherence of the administrative system in a specific field and at the equality of the parties. However, in Slovenia, an appeal is never optional; therefore, an appeal is also a measure to reduce courts' workload.

Pursuant to the GAPA, the appeal is the only regular legal remedy in Slovenia with a devolutionary nature[50] and belongs to the group of hierarchical appeals (*recours hiérarchique, widerspruch*). These elements include the admissibility and the devolutionary and suspensory effects of the appeal. The appeal is a basic GAPA principle for all administrative matters but can be excluded by law since from the viewpoint of constitutionality the appeal is not necessary if the law provides a different possibility to challenge an administrative act, particularly when administrative act making is not aimed at uniformity of legal practice. In such case, direct judicial review (court action) is an admissible alternative to the administrative appeal. In this context, the Constitutional Court has already developed constitutionally acceptable exceptions as to when an appeal in administrative proceedings can be fully excluded. In addition to the need for speed in decision making in order to ensure early completeness and enforceability for the protection of public interest or the rights of the parties, or when the body deciding at first instance is an otherwise appeal body.

Given the constitutionally provided responsibility of ministers and ministries for the state of affairs in their respective areas of work, the appeal body according to the GAPA and nearly all sector-specific laws as well as the body supervising the powers of local government is otherwise the line ministry. According to the GAPA, for most parties the purpose of (effective) appeal is in delaying the execution. The suspensory effect is given in principle *de iure* (Art. 236) to all administrative appeals in order to temporary delay the execution of the administrative act as a consequence of the administrative appeal to avoid irreparable damage resulting from the execution of the contested administrative act if the decision is to be amended afterwards as illegal. Exceptions are possible directly pursuant to the GAPA and ADA in individual cases if public interest could be jeopardised or if the field law provides otherwise.

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[50] There are also some cases of what is known as *de facto* non-devolution (or quasi-hierarchical or improper appeal), owing to the internal organization, vertical and centralized decision making of the competent authorities like municipalities or social insurance institutes, and personal links because of poor staffing capacities (e.g. in municipalities); thus, the appeal is naturally losing its efficiency More in Dragos, *op. cit*, note 4

As a rule, an appeal is filed to the body of first instance within 15 days from the serving of the administrative act. The body of first instance is obliged to examine the appeal (whether it is allowed and filed in due time and by an entitled person) and, if it establishes that the appellant is right, the possibility of issuing a new administrative act (Art. 240-243). If the appeal is formally suitable, it must be within 15 days from receipt sent to the appeal body to examine the justification of appeal in terms of subject matter. If the appeal is justified, the appeal body issues within two months a new administrative act whereby it declares the first administrative act null or *ex tunc* replaces the contested administrative act, or annuls the contested administrative act *ab initio* and remands the case to the body of first instance for renewed proceedings with the deadline of an additional month (Art. 251).In order for an appeal to be effective, the appeal body must decide in two months at the latest, or a court action can be filed pursuant to the ADA (negative fiction). In practice, some appeal bodies take a very long time to decide, mainly on the social field. With the serving of the appeal administrative act dismissing, rejecting or granting the appeal, the administrative act becomes complete; the parties have 30 days at maximum to file a court action.

To sum up, the regulation of the (internal) administrative appeal in Slovenia by the Constitution, the GAPA, and the ADA is rather traditional and pursues primarily legality. Such regulation is still (over)detailed and lacks the stimulating elements of a modern participative and consensual definition of administrative relations.

4. COMPARISON OF CROATIAN AND SLOVENIAN GAPA VS.DRAFTEU APA ON THE RIGHT TO ADMINISTRATIVE APPEAL

4.1. Croatian vs. Draft EU APA

Since administrative process is no longer only a part of the national law, it is being developed as a core of administrative procedural law of the EU. It is therefore crucial to be familiarized with the European administrative procedural rules. Klučka claims that precisely that manner of development of this aspect of law is not "a one-way street", but it, however, offers the possibility for every legal system of the member states to be transferred along with their own traditions and principles into the European administrative law.[51] In a well-organized administrative structure one of the most important values is adequate and reliable application of such

[51] Klučka, J., The General Trends of EU Administrative Law, The International Lawyer, vol. 41, no. 4, 2007, pp. 1048

rules.[52] The EU law is implemented in national courts, but also in other bodies of public authorities including administrative authorities.[53] A member state needs to harmonise its process norms to enable the protection of subjective rights based on the EU right, while at the same time not proscribing the form of the national procedural law.[54]EU law and national administrative law are increasingly intertwined and they are tied closely together forming a coherent whole. Because of this, they are sometimes referred to as an integrated or composite order.[55]

On the European level, large number of proceeding are related to sectoral administrative procedures. Only a few areas of the Union's administrative activities are subject to a systematic approach and there are many gaps and uncertainties. The absence of standardisation across sectors and the general variety of EU administrative law procedure allows a deeply variegated system to which the access of the ignorant public is restricted.[56]The first step toward efficient administrative decision-making processes of the European administration is to ensure consistent EU administrative procedures systematically (formal codification) in one legal

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52 The first GAPA was regulated in 1889 in Spain and in Austria 1925, standardization of which affected the European-continental system of administrative law (Germany-1976, Italy-1990, Hungary-1957, Poland-1960). Rusch, W., *Administrative Procedures in EU Member States*, OECD/SIGMA, „Conference on Public Administration Reform and European Integration-Budva, Montenegro", 2009, pp. 6-8

53 This obligation was incorporated into the Constitution of the Republic of Croatia (OG No. 56 / 90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05 / 14), and is regulated by Art. 145 (4). It follows from this constitutional provision that administrative bodies are obliged, as well as the courts, to apply a European law which has priority and is superior to national law, that is, not to apply national law if it is contrary or the provisions of national law are duplicated / coincide with European. This obligation was established in Case C-103/88 *Fratelli Constanzo S.p.A. v Commune di Milano*, (1989) ECR 1839, §§ 30 and 31 of the judgment. More about Constanzo obligation see in: Livioara Goga, G., *The Obligation of the National Administrative Organs to Reexamine their own Decisions in the Context of the Recent Jurisprudence of the Court of Justice of the European Union,* Acta Universitatis Danubius Juridica, *vol*. 16, no. 3, 2010, pp. 162-169, [http://journals.univ-danubius.ro/index.php/juridica/article/view/677/634], accessed 15. March 2020. The same applies to the obligation to adopt an interpretation which makes the national standard harmonized with the European one

54 See more Ćapeta, T.; Rodin, S., *Osnove prava Europske unije na temelju Lisabonskog ugovora*, Narodne novine, Zagreb, 2011, p. 143-153. The position of EU administrations in relation to the legal system as a whole and the interaction between EU law and national law *amplius* Borchardt, K.-D., *The ABC of European Union Law*, Publications Office of the European Union, Luxembourg, 2010, p. 113-123

55 Prechal, S.; Widdershoven, R.J. G.M.; Jans, J.H., *Introduction*, in: Prechal, S.; Widdershoven, R.J. G.M.; Jans, J.H., (eds.), Europeanization of Public Law (second edition), Europa Law Publishing, Groningen, 2015, pp. 7-9.

56 Cărăuşan M., *Towards an Administrative Procedure of the European Union: Issues and Prospects*, Acta Universitatis Danubius, *vol*. 8, no. 2, 2016, pp. 89, [https://www.researchgate.net/publication/331089750_Towards_an_Administrative_Procedure_of_the_European_Union_Issues_and_Prospects], accessed 17. March 2020

text (common procedural framework).[57] Adequate system of administrative procedures, well-developed administrative procedures is imperative. Proposal for a regulation of the EU APA from 2016presentstheunificationoftheproceduralrules-referring to administrative activities of the EU administration. These procedural rules aim at assuring both an open, efficient and independent administration and a proper enforcement of the right to good administration.[58]

We would say it is a type of a general procedural law (*lex generalis*) since it does not question other legal EU acts regulating special administrative procedural rules. It is only used to complete such legal acts, while being interpreted in accordance with its relevant provisions. In addition, in order to ensure adequate and further development of the established procedural rights[59] and obligations, while guaranteeing content application on good administration (Art. 41).[60]Supporting this is an excerpt from the Preamble of the Regulation proposition: *„Properly structured and consistent administrative procedures support both an efficient administration and a proper enforcement of the right to good administration guaranteed as a general principle of Union law and under Article 41 of the Charter"*[61]Considering there are many institutions and EU bodies that form the Union administration, in numerous administrative areas the number of administrative proceedings and decisions is being increased. It is therefore necessary to ensure adequate protection of procedural rights of the EU citizens. Hence, the application of the EU APA is obligatory when by handling an administrative matter the EU law is being applied (EU administrative activities).

The analysis of Section 4 Art. 20 of the EU APA (Conclusion of the Administrative Procedure) with respect to the remedies, provisions will be presented as it follows. The chosen procedural institutes and relevant provisions from the both

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57 See more Đerđa, D., *Towards the Codification of the EU Administrative Procedural Law*, in: Koevski, G. (ed.) EU Administrative Law and its Impact on the Process of Public Administration Reform and Integration into the European Administrative Space of South East European Countries, Skopje, Macedonia: Centre for SEELS, 2014, pp.79-83; ĐanićČeko, A.;Petrašević, T., *Procedural Rights of the Parties in Croatian and European Administrative Procedure–lack of one common Administrative Procedure? Is Regulation on Administrative Procedure necessary in the EU*?, Draft paper, International Conference: "Public Administration in a Democratic Society:Thirty Years of Democratic Transition in Europe", 3-6 October 2019, Dubrovnik, Croatia, Ipsa Conference 2019, pp. 1-19,[https://iju.hr/ipsa/2019/papers/ip19p27.pdf], accessed 22. March 2020; Đerđa, D., Jerčinović, A., *Upravni postupak u pravu Europske unije: kodifikacijski izazov*, Zbornik radova Pravnog fakulteta u Splitu, *vol*. 57, no. 1, 2020, pp. 88-97

58 Point 14 of the Preamble of the EU APA. See also Art 1 (2) of the EU APA

59 The procedural rights of parties are contained in the Art. 8 of the EU APA

60 Charter of Fundamental Rights of the European Union (2016/C 202/02), Official Journal of the European Union, C 202/389, 2016, p. 13, [https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:12016P/TXT&from=FR], accessed 23. March 2020

61 Point 12 of the Preamble of the EU APA

legal sources are shown in the table.[62] In order to simplify the realisation of rights to an effective legal remedy, the Union administration should in legal acts clearly state the legal remedies available to parties. Apart from the possibility to initiate a court procedure or file an appeal to the European Ombudsman,[63] the party should have the right to ask for an administrative questioning, along with receiving notification regarding the procedure and the time limit available for filing such a request. According to Art. 20 of the EU APA, parties are allowed to an administrative review of the administrative acts. The procedure of the irregularities oversight refers to the administrative acts which have an unfavourable effect on their rights and legal interests. Furthermore, it is pointed out that the request is to be submitted to a hierarchically higher authority, in case there is no such authority, then to the authority who has reached the act. The parts that need to be contained in an administrative act are proscribed, as well as a three-month time limit in which it is necessary to reach a legal act, whereby respecting the timeliness in handling administrative matters. Supporting that, the introductory part of the Section 30 of the Preamble of the Regulation proposition proscribes, that in case of overstepping the allowed time limit when reaching an administrative act, the party in the administrative procedure should receive a just explanation in form of a timely notification proscribing at the same time the possible date of the expected decision. Moreover, the emphasis is also put on the decision-making process, execution of the administration and reaching administrative acts within a reasonable time frame. If a party fails to submit a request for administrative questioning within a proscribed deadline, the administrative act becomes final. The mentioned feature of the administrative act was stated by the former APA.[64] The deadline is thus preclusive. Section 34 of the Preamble is also to be emphasized, since it enables the request for administrative questioning not to question the party`s right to a judicial legal remedy. Due to specific features, it is a combination of an appeal and a complaint, considering the fact that the appeal is a devolutive legal remedy and is filed against the decision, while a complaint is a remonstrative legal remedy and is filed against the actions or proceedings. The Croatian administrative procedure acknowledges a complaint as a regular legal remedy, usually remonstrative, however in one of four cases it becomes a devolutive legal remedy (in administrative contracts).[65]

From the analysis of the Art. 20 of the EU APA, it is to be concluded that the provisions regarding legal remedies have been sub-normed. There are no explicit

[62] See Table 1

[63] See Art. 20 (4) of the EU APA

[64] See Art. 11a, Official Gazette No. 53/91, 103/96

[65] Art. 154 (2). Other cases of submitting objection: Art. 42(4), Art. 155(4), Art. 157(2)

references of names of legal remedies as it is stated in Chapter 4, but only the mentioning of administrative questioning. The question which arises is what does the administrative questioning refer to in terms of content? Is the control of lawfulness and regularities of administrative acts implied? From the interpretations in Art. 20(3) of the EU APA one can conclude that it is a regular legal remedy, since it becomes final after a certain deadline. Another thing to point out is the fact that the official translation of the Regulation into Croatian language is quite uncoordinated with the Croatian administrative procedure terminology whereby using certain legal terms unfamiliar to the Croatian system.

Table 1 Comparison of the relevant procedural institutes: Croatian GAPA vs. Draft EU APA

Institute	Croatian GAPA	Draft EU APA
Scope of the law	-general and special administrative procedures -administrative contracts, action of public law authorities and public services providers	-administrative activities of the Union's administration (Art. 1(1)) -shall not apply to the administration of the Member States (Art. 2(3))
Fundamental principles	-10principles (Art. 5-14) -partially applied European principles (compound of tradition and effect of process of Europeanization and the reform of AP and PA) -principle of proportionality, principle of access to data and data protection	-5 (Art. 14-17) -procedural rights (Art. 8) -emphasized right to good administration - rule of law, right to be treated impartially, transparency and administrative efficiency, legal certainty, right to be heard (preamble)
Deadline for decision-making	-1st instance decision-without delay and no later than within 30 days -2nd instance decision-render the decision and deliver it to the party within 60 days - in case of administrative silence fiction of negative act (exceptionally positive (Art. 102) and special laws)	-3 months (Art. 17(1, 3)) -reasonable time-limit and without undue delay (Art. 17)
Legal remedies	-two regular legal remedies: appeal and objection; -three extraordinary legal remedies: the reopening of proceedings, pronouncing decisions null and void, annulment and repeal of decisions	-administrative review (Art. 20) -rectification and withdrawal of acts (Chapter V) (which adversely affect a party (Art. 23) and which are beneficial to a party (Art. 24))

Source: authors' work

4.2. Slovenian vs. Draft EU APA

Slovenia has been a full member of the EU since 2004, which implies the direct application of a considerable amount of EU law. However, as far as procedural law is concerned, Member States are in principle autonomous insofar as they ensure respect for the principles of equivalence, efficiency, and good administration. This stems in particular from the case law of the European Court of Justice dealing with various procedural institutions, such as presenting evidence in proceedings, use of language, legal remedies and time limits, interference with final decisions, etc. (see, for example, Kühne & Heitz,Tillack, Pelati, GrauelRüffer, H. N.). These cases serve as an important starting point for the basic solutions of the EU APA, or the two European Parliament resolutions of 2013 and 2016 and the draft EU Regulation itself. The latter has been publicly debated for many years for various professional (e.g. unclear relation between sectoral EU law and the EU Regulation, and a presumably overly academic approach to drafting provisions) and even more political reasons, such as the blockade by the Commission and other EU bodies whose powers the EU Regulation will restrict. Nevertheless, the EU Regulation is indeed important because it offers a set of good practices and a balanced codification that should give more weight to important principles and rules.

Below (Table 2) is a comparison between the Slovenian GAPA as a national traditional law, and the modern European codification. Concerning individual institutions, particularly the analysis regarding the possibilities of interfering with a decision through legal remedies, we can establish that in modern codifications, are less in number because of greater legal certainty and trust in the authorities.

Table 2 Comparison of the Slovenian GAPA and the draft EU APA on legal remedies

Institutions	**Slovenian GAPA**	**Draft EU APA**
Scope of the law	Single-case administrative decision-making& real and other acts via *mutatis mutandis* use of GAPA	For EU bodies and individual administrative matters only, prevalence of general principles of EU law and spill-over effect
Fundamental principles	Nine principles: legality, protection of their rights of parties and protection of public benefits and independence in deciding, Art. 6, 7, 12; substantive truth with obligation to tell truth and free assessment of evidence, Art. 8, 10, 11; right to be heard, Art. 9; appeal, Art. 13; economy and timeliness, Art. 14	As above (see Table 1)

Time limits	Two months, one month in shortened proceedings; in case of administrative silence fiction of negative act and devolution	Three months and potential extension, afterwards negative fictions act; yet mostly about reasonable rather than prescribed deadlines
Legal remedies	Rather many, appeal as precondition for judicial review, and five more extraordinary remedies, partially duplicated reasons	2x 2 structure of actions that are beneficial to or adversely affect, also retroactively, the party (Art. 23 and 24)

Source: authors' work

4.3. Summary of analysis and proposals on improving national GAPAs vs. EU law

We can confirm that the benefits of a general codification of administrative procedure are clear. However, a strategic framework as a driving force of administrative development it only makes sense insofar as it contributes to ensuring international and constitutional principles of good administration, has an integrative and anti-fragmentary role by connecting different administrative areas and authorities at various levels of governance.

On the other hand, there seems to be more than enough arguments for a systematic revision of the Croatian and Slovenian GAPAs in terms of good administration as a constant weighing between protected interests. This means that it would be necessary to provide an entirely new codification of the general administrative procedure. In terms of content, new law should capture the majority of the spirit of the current GAPA, but would expose important principles such as effective legal remedy, distinguishing these provisions from others of minor weight.[66] The latter would be either deleted or moved to implementing or organisational rules. The regulatory framework alone cannot suffice, even if highly detailed, as it always requires administrative and judicial review and academic explanations, which is another argument for a looser and more value-based codification. Furthermore, the protected interests should be constantly weighed to ensure a more efficient process.

Our analysis shows that a more consistent and not only declaratory respect is needed for the common values and principles of the EU, for a modern public administration and administrative law, and for the consequent development of the European Administrative Space – even at the national level, namely in (especially new) EU Member States. Therefore, administrative procedure should not consti-

[66] See more about this in Kovač 2019, *op. cit.,* note 4. *Cf.* Koprić, *et al.* (2016), for the Western Balkans countries

tute a tool for the authorities to ensure the dominance of the governing forces; authority should restrict itself by introducing into the administrative procedure the participation of the parties and ensuring an optimal enforcement of their rights and interests.

As regards legal remedies in particular, the EU trend is to have less of them or limited interventions are in place in order to guarantee legal certainty. Hereby, Slovenian and Croatian GAPAs still do not follow this main guideline, which is evident through (too) rather numerous legal remedies codified. And even more importantly, legal protection in administrative procedure and before the (administrative and constitutional) courts should be integrated into a coherent whole, so that one procedure is not just the other procedure's maid, but each has its own *ratio* and complements the other in the relation with the parties. Consequently, national GAPAs as Croatian and Slovenian could be improved to follow draft EU APA especially in two directions. Firstly, remedies shall not be defined by type of interest, but based on a trade-off between the degree of unlawfulness and favourable/aggravating consequences for the parties. Secondly, there is a need to connect and co-shape GAPAs and ADAs.

Regarding our initial research questions, we can establish that Croatian and Slovenian GAPAs share more similarities than differences despite the fact that Croatian law is ten years younger than Slovenian and has already taken into account some of the modern European trends. Very similar is also the relation between the GAPA and sectoral laws. Therefore, critical analysis as a result of comparison between national laws and Draft EU APA stands for both respective acts. In terms of good administration, provisions of Croatian as well as Slovenian GAPAs, could and should be consequently redefined to achieve more efficient yet democratic authority and administrative relations in the society. This will outline the advantages and disadvantages of the EU APA Proposal and suggest possible improvements in the analysed countries.

5. CONCLUSION

Although no uniformity of "procedural philosophy" has emerged, and the legal systems of European states and EU law differ in their assessment of the importance of procedural law, an idea is emerging that forms the basis for the creation of a common European procedural law. The authors point out that the administrative procedure requires joint regulation within the European administration, as well as the allocation of tasks in executive integration. Although such European administrative procedural act would not be directly applicable to national administrations (since most states have their own APAs), its effect would be clearly

visible in every area of activity governed by EU (administrative procedural) law. However, it should be borne in mind that it's difficult to assume that the same or similar principles of administrative actions will exist in any national public administration, although this is sought. It is interesting to emphasize the importance of introducing the right to good administration, which sought to introduce minimum standards focused on the quality of administrations, while providing an information catalogue and a source of special rights for citizens. There is debate and interpretation about the guaranteed right to good administration, is it fundamental human right, principle or standard?

Although the European administration has grown significantly over the last few decades, the EU does not have a comprehensive law regulating citizens' procedural rights over European administrative procedure. We believe that the standardization contributes, particularly in the sectoral areas, to rationalization and simplification of procedures. EU legislation should ensure the adoption of regulation relating to the codification of administrative procedure by the Union′s administration. Regarding a (mandatory) appeal should not be understood in a narrow sense and intended only to prevent the courts from having an excessive workload. The appeal – as in the case of Croatia and Slovenia following the Austrian model – should serve as a procedural precondition for court reviews or as an alternative together with mediation and other procedures for adjudicating and resolving a dispute between the parties to the case. Merely old patterns of administrative conduct, considering the radical social changes, no longer suffice. Therefore, the guiding principle of the two crucial legal sources of protection and promotion of fundamental rights and freedoms (European Convention and Charter of Fundamental Rights of the European Union) should not be forgotten, and ideas about the need to strengthen that protection by making those rights more visible.

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UDK 347.471:342.9(497.5)
Original scientific paper

ADMINISTRATIVE ADJUDICATION IN THE PROCESS OF THE ASSOCIATION REGISTRATION IN THE REPUBLIC OF CROATIA

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ABSTRACT

This paper aims to analyze the legal regulation of association registration in the Republic of Croatia and to determine whether the provisions on association registration in the Registry Book of Associations and the acquisition of legal personality of associations have achieved proportionality in the protection of parties' rights and protection of the public interest. For this purpose, the concept and role of associations in the Republic of Croatia is first considered. Next, the process of establishing and registering associations in the Registry Book of Associations, as a constitutive element of an association acquiring legal personality, is analyzed. Particular attention is thereby paid to the statutory presumption of registration when the competent authority does not issue a decision rejecting the request for association registration within the prescribed period. It probes the justification of such a normative approach and compares it with the legal solutions present in German, French, Italian, Slovenian, and Serbian law. Finally, in conclusion, the authors evaluate the quality of Croatia's approach to the association registration into the Registry Book of Associations.

Keywords*: association, registration, administrative procedure, statutory presumption of registration, Croatia*

1. INTRODUCTION

The right to freedom of association is one of the fundamental human rights guaranteed by regulations at the international and national level. It provides the foundation for accomplishing a number of goals and tasks of interest to the daily lives of individuals. Recently, states have comprised within their jurisdictions only those activities related to the direct exercise of public authority while a number of activities of importance to individuals, such as the provision of utilities, health and education services, care for children, the elderly and infirm, etc., tasked institutions and companies that perform them as public services.[1] The pursuit of citizens' other interests, which national, regional, or local regulations do not define as being of public interest, is left to the citizens themselves and, as a rule, they engage in them by establishing different formal and informal organizational structures. Moreover, today, through the many structures of civil society unity, efforts are made to respond to the increasingly complex and demanding needs of everyday life.

Associations are a very common organizational form of achieving the non-political goals of individuals. An association is considered to be any form of free and voluntary association of several natural or legal persons for the purpose of protecting their interests or standing up for certain values without the intention of obtaining profit or other economically estimable benefits. Their activities promote the protection of human rights and freedoms, environmental protection and sustainable development, humanitarian, social, cultural, educational, scientific, sports, health care, technical, information, professional or other beliefs and goals of individuals.[2] Thus, associations represent one of the fundamental forms of realization of the right to freedom of association and are considered an important segment of civil society and the non-profit sector. Precisely its volunteerism, non-profit nature, independence, and the pursuit of the general interest are the distinctive characteristics of this organizational form founded with the aim of involving its members in public life. Through this platform, members of associations are free to participate in the development, monitoring, implementation, and evaluation of public policies, in shaping public opinion, expressing their views and opinions, and taking initiatives to achieve their goals.[3]

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1 See more on the public services in Blažević, R., *Upravna znanost*, Faculty of Law, University of Rijeka, Rijeka, 2007, pp. 217 - 218. See more on the development of the public services in Koprić, I., *Razvoj i problemi agencijskog modela s posebnim osvrtom na nezavisne regulatore*, in: Koprić, I.; Musa, A.; Đulabić, V. (eds.), Agencije u Hrvatskoj: Regulacija i privatizacija javnih službi na državnoj, lokalnoj i regionalnoj razini, Institute for Public Administration, Zagreb, 2013, pp. 2-3

2 See Article 4 of the Law on Associations, Official Gazette, no. 74/2014, 70/2017, and 98/2019

3 See Article 10 of the Law on Associations

The importance of freedom of association in Europe has been recognized as a particular value that Member States should strive for. With its European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Council has recognized the right of every person to freedom of association with others, including the right to form or join trade unions for the protection of their interests.[4] The European Union has done the same, establishing with the Charter of Fundamental Rights of the European Union the right of every individual to freedom of association at any level, especially when it comes to political, trade union, and civil matters, which also implies the right of everyone to form and join these organizations in order to protect their interests.[5]

In the Republic of Croatia, freedom of association has been established by the Constitution as one of the fundamental rights of its citizens. Each person is guaranteed free association for the protection of interests or the pursuit of social, economic, political, national, cultural, or other beliefs and goals and, for this purpose, everyone is entitled to form, join, or withdraw from trade unions and other associations in accordance with the law.[6] Freedom of association is elaborated in more detail in the Law on Associations, which regulates the establishment, legal status, operation, registration, financing, property, liability, status changes, supervision, termination of the existence of an association with legal personality, and registration and termination of activity of foreign associations in the Republic of Croatia, unless a special law stipulates otherwise.[7]

Despite its importance, the right to freedom of association is not, however, an absolute right and may be restricted in certain circumstances. The European Convention for the Protection of Human Rights and Fundamental Freedoms legally prohibits the restriction of this freedom unless such restriction in a democratic society is necessary for the interests of national security or public order and peace, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others.[8] The Charter of Fundamental Rights of the European Union sets out the general reasons for restricting the rights

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4 Article 11, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette – International agreements, no. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, and 2/2010

5 Article 12, paragraph 1 of the EU Charter of Fundamental Rights, (2016) OJ C 202/389-405

6 Article 43, paragraph 1 of the Constitution of the Republic of Croatia, Official Gazette, no. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, and 05/2014

7 Law on Associations, Official Gazette, no. 74/2014, 70/2017, and 98/2019

8 Article 11, paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

guaranteed therein, which then apply to freedom of association. Any restriction of the exercise of the rights and freedoms recognized by this Charter must always be prescribed by law and must respect the essence of those rights and freedoms. In accordance with the principle of proportionality, restrictions are only permissible if they are necessary and in accordance with the general interest objectives recognized by the Union or the need to protect the rights and freedoms of others.[9] It is clear from supranational regulations binding in all EU Member States, including Croatia, that the right to freedom of association can be restricted only if the following three conditions have been cumulatively fulfilled: such a restriction must be prescribed by law, it must have a legitimate aim and, finally, it must be necessary in a democratic society. [10]

In the Republic of Croatia, the Constitution restricts the freedom of association. The Constitution stipulates that rights and freedoms in Croatia can be restricted only by law in order to protect the rights and freedoms of other people and the legal order, public morals, and health. It also provides that any restriction of rights and freedoms must be proportionate to the nature of the need for restriction in each individual case. In addition to this general provision on the restriction of rights and freedoms, the Croatian Constitution also stipulates specific restrictions relating exclusively to the freedom of association. Consequently, the right of free association in Croatia may be further restricted because of the threat of violent danger to the democratic constitutional order, independence, uniqueness, and territorial integrity of the Republic of Croatia.[11] Thus, it may be concluded that freedom of association is, in principle, allowed, with particular restrictions which the public authority must take into consideration, so that the exercise of this freedom does not endanger the democratic constitutional order, independence, uniqueness, and territorial integrity of the Republic of Croatia. In doing so, it is important to emphasize that, in the view of the European Court of Human Rights, the reasons for limiting freedom of association to protect this right should be interpreted restrictively, and this freedom can only be restricted for compelling and justified reasons prescribed by law, whereby any restriction to the freedom of association must be proportionate to the legitimate goals that it should serve in a

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9 Article 52, paragraphs 1, 3, and 4 of the EU Charter of Fundamental Rights (2016) OJ C 202/389-405

10 Radin, M., *Pravo na slobodu okupljanja i udruživanja u praksi Europskog suda za ljudska prava i Ustavnog suda Republike Hrvatske,* Hrvatska pravna revija, *vol.* 10, n. 10, 2010, pp. 4-5

11 Article 16 and article 43, paragraph 2 of the Constitution of the Republic of Croatia. See also Trgovac, S., *Pravo na slobodu udruživanja u praksi Ustavnog suda Republike Hrvatske,* Hrvatska pravna revija, *vol.* 10., n. 6, 2010, pp. 8-9

democratic society.[12] Thus, the legal system of the Republic of Croatia faithfully reflects the restrictions on freedom of association laid down at the European level.

This paper aims to analyze the legal regulation of association registration in the Republic of Croatia and to determine whether the provisions on the association registration in the Registry Book of Associations and the acquisition of legal personality of associations have achieved proportionality in the protection of parties' rights and protection of public interest. For this purpose, the concept and role of associations in the Republic of Croatia is first considered. Next, the process of establishing and registering associations in the Registry Book of Associations, as a constitutive element of an association acquiring the legal personality, is analyzed. Particular attention is thereby paid to the statutory presumption of registration when the competent authority fails to make a decision within the prescribed period to reject the application for association registration. It probes the justification of such a normative approach and compares it with the legal solutions present in German, French, Italian, Slovenian, and Serbian law. Finally, in conclusion, the authors evaluate the quality of Croatia's approach to association registration into the Registry Book of Associations.

2. THE CONCEPT AND ROLE OF ASSOCIATIONS IN THE CROATIAN LEGAL SYSTEM

In the Republic of Croatia, an association is understood as any form of free and voluntary association of natural or legal persons who, in order to protect their interests or to promote the protection of human rights and freedoms, environmental protection and sustainable development, humanitarian, social, cultural, educational, scientific, sports, health care, technical, information, professional or other beliefs and goals that are not contrary to the Constitution and law, without the intention of making profit or other economically estimable benefit, submit themselves to the rules that regulate the organization and activities of this form of association. [13]

An important characteristic of an association is certainly its legal personality, which makes it an entity that can take legal actions and be the holder of rights and obligations. An association acquires legal personality on the day of its entry in the Registry Book of Associations of the Republic of Croatia. Thus, the registration of an association in the Registry Book is considered to be a constitutive moment of

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[12] See Judgment *Sidiropoulos v Greece (1999)* 27 EHRR 633, See also Kotlo, R., *Pravo na udruživanje, političke partije i nevladine organizacije u savremenom pravno-političkom sistemu, uporednom i međunarodnom pravu,* University Press, Sarajevo, 2017, p. 50

[13] Article 4 of the Law on Associations

its establishment in connection with the possibility of acquiring rights and obligations.[14] However, in accordance with the Law on Associations, any other form of free and voluntary association of several natural or legal persons is considered an association, even when such an association is not entered in the Registry Book of Associations of the Republic of Croatia. Therefore, in Croatia, associations should be distinguished depending on whether or not an association has legal personality. The association registration in the Registry Book of Associations of the Republic of Croatia creates a new legal entity that can fully operate and acquire rights and obligations in the legal system. If the association is not registered in the Registry Book of Associations, it has no legal personality. As such, it may operate within the Croatian legal system, but in accordance with the regulations applicable to partnerships, not associations. [15]

Therefore, in Croatian law, no distinction is drawn between associations depending on the activity they perform, but rather depending on whether the association has legal personality or not. This is also a matter of differentiation on the basis of which the relevant law applicable to a particular association is established.[16] An association registered in the Registry Book of Associations may participate in legal transactions, acquire rights, and assume obligations, be the owner of property, and participate as an actively or passively legitimized party in proceedings before the courts and administrative bodies, and the members of such association are not liable for the assets of the association with their private assets. Associations without legal personality do not enjoy rights and benefits such as those registered in the Registry Book of Associations. For example, such associations cannot be financed by public funds, they do not enjoy some financial privileges, and the status of the members of these associations is different given their liability for the association's obligations. Members of an unregistered association are independently liable for the obligations of such an association. [17]

It is undisputed that the association registration in the Registry Book of Associations represents a significant advantage for the association as well as its members, in comparison with the legal regime of associations not registered in this Register. Therefore, it seems that particular attention should be paid to the legality of the

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14 See Article 5 of the Law on Associations

15 Article 2, paragraph 3 of the Law on Associations. See also Article 637, paragraphs 1 and 2 of the Civil Obligations Act, Official Gazette, no. 35/2005, 41/2008, 125/2011, 78/2015, and 29/2018

16 See also Brnabić, R., *Odgovornost za obveze udruga s pravnom osobnošću*, Pravo u gospodarstvu, *vol.* 51, n. 6, 2012, p. 1515

17 Barbić, J., *Pravo društava – knjiga druga, Društva kapitala,* Organizator, Zagreb, 1999, p. 7, and Zlatović, D., *Neformalne udruge prema Zakonu o udrugama i Zakonu o obveznim odnosima,* Komore i udruge, Lexpera d.o.o.-Ius info, 2019, pp. 1 and 3

founding of associations as soon as they are registered and have acquired legal personality, and that the work of those associations that are not founded in accordance with Croatian legislation or perform any activity contrary to constitutional values in the Republic of Croatia would not be allowed. [18] This, of course, does not preclude the monitoring of the association's activities during its existence, which is focused on the activities undertaken by the association itself and its compliance with legal regulations.

3. ASSOCIATION REGISTRATION IN THE REGISTRY BOOK OF ASSOCIATIONS

As already emphasized, the fundamental distinction between associations in Croatia depends on whether or not an association is registered in the Registry Book of Associations and, consequently, if it has acquired legal personality or not. Whether the association will be registered in the Registry Book depends on the will of its founder. Registration is voluntary and is carried out at the request of the association's founder. The Registry Book of Associations and the Registry Book of Foreign Associations are central electronic databases kept with the competent administrative body, uniformly for all associations, i.e., foreign associations in the Republic of Croatia. The associations are registered in the Registry Book of Associations kept by the counties' offices, i.e., the City of Zagreb, according to the seat of the association.[19]

An association is founded by at least three founders. Any natural or legal person may become a member of the association, in accordance with the law and the statute of the association.[20] For the purpose of founding an association, it is necessary to hold a founding assembly. Minutes on the decisions of the founding assembly are recorded. Although there is no prescribed course how the founding assembly is held, it is common to determine the number of persons present at the beginning of the session and whether these persons are also its founders. The list of founders of the association shall be attached to the minute of the founding assembly and is considered its integral part. At the founding assembly, a decision is first made to establish the association, then the statute of the association is adopted, and the election of the association body is initiated. At the same time, the persons empowered to represent the association are named and its liquidator is appointed. Finally, a decision is made to initiate the process of registering the association in the Registry Book of Associations.

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18 See Judgment *Refah Partisi and others v Turkey* (2003) 37 EHRR 1

19 Article 22, paragraphs 1, 3, and 4 of the Law on Associations

20 Article 11, paragraph 1 and Article 12, paragraph 1 of the Law on Associations

The application for entry in the Registry Book of Associations, on behalf of the founder, is submitted by the person empowered to represent the association. The application for registration shall be accompanied by a record of the activities and decisions of the founding assembly, the decision of the assembly to initiate the procedure for registration in the Registry Book of Associations, if such decision was not made at the founding assembly, two copies of the statute, the list of founders and persons empowered to represent the association, a copy of the identity cards or passports of the founders, liquidators, and persons empowered to represent the association, an extract from the court or another Registry Book for a foreign legal person of the founder of the association, and a copy of the identity card or passport of its representative in the association, the consent or approval of the competent authority to perform a specific activity, when prescribed by a special law as a condition for registration of an association, certified consent of a legal representative or guardian if the founder of the association is a minor who has reached the age of 14 or an adult deprived of legal capacity in the part of concluding legal transactions, if the name or part of the name of the person is entered into the name of the association, certified statement from that person, i.e., the consent of his successors, and the certified consent of the international organization, if the name or logo of the association is entered into its name. [21]

The registration of an association in the Registry Book of Associations is decided in the administrative procedure. If the official conducting the proceeding determines that the statute of the association is not in accordance with the law or if the application is not accompanied by the prescribed annexes, it shall notify the applicant by an act to that effect and shall invite the applicant for registration into the Registry Book to harmonize the statute, or submit evidence, within a period for compliance which cannot be shorter than 15 days. The authority decides on the application for registration in the Registry Book by a decision. The law stipulates that this decision should be made within 30 days from the day of submitting a duly filed application for registration. The decision on the registration in the Registry Book of Associations must include title, seat and date of the entry, the registry number of the entry, basic aims of association's activities, economic activities, if prescribed by the statute, statement that the association acquires its legal personality upon registration, and that the registration in the Registry Book of Associations shall be carried out on the date of enforcement of the decision, the name of the liquidator of the association and the names of the persons empowered to represent the association. The competent authority shall reject the application

[21] Article 23 of the Law on Associations and Article 7 of the Regulation on the forms and manner of keeping the Registry book of associations and the Registry book of foreign associations in the Republic of Croatia, Official Gazette no. 4/2015 and 14/2020

for entry in the Registry Book of Associations if the statutory goals and activities are prohibited in the Constitution or law, and when the applicant fails to act on the conclusion inviting the applicant to align the statute of the association with the law or fails to submit the legally prescribed documents within the deadline set by the competent authority, which may not be within less than 15 days.

It is important to note here that, when establishing an association, the competent authority pays particular attention to the goals and activities of the association, which must be clearly stated in its statutes. In this way, this body monitors whether the association will violate the legal order, public morals, and human health in the Republic of Croatia through its activities, and whether it violently endangers the democratic constitutional order and the independence, uniqueness, and territorial integrity of the Republic of Croatia. If it assesses the existence of such danger, the competent authority shall issue a decision which rejects the request for the association to be entered in the Registry Book of Associations. Such a decision may be appealed; however, it shall not delay the execution of the decision. The registration in the Registry Book of Associations is carried out after the enforcement of the decision on registration. [22]

Such legal regulation of the administrative adjudication is commonplace and is fully aligned with the provisions of the General Administrative Procedure Act.[23] However, the provision of the Law on Associations, as a separate law, stipulates that in the case when the competent authority does not make a decision on registration in the Registry Book of Associations within 30 days from the submission of a duly filed application, it should be considered that the association is entered into the Registry Book of Associations on the first day following that deadline.[24] In the case of failure to pass a decision on the registration in the Registry Book of Associations within the legally prescribed deadline, in Croatia, the positive, i.e., affirmative statutory presumption of registration has been adopted in case of the silence of the administrative body. Such a case in the Croatian legal system is an exception to the fundamental rule contained in the General Administrative Procedure Act, which stipulates that a failure to settle an administrative matter is the foundation for protecting a party's rights by filing an appeal in an administrative procedure or by initiating an administrative dispute.[25] Therefore, in order for a

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22 Article 25, paragraphs 1 through 4 and 6 of the Law on Associations

23 See General Administrative Procedure Act, Official Gazette, no. 47/2009

24 Article 25, paragraph 8 of the Law on Associations

25 Article 12, paragraph 1 and Article 105, paragraph 2 of the General Administrative Procedure Act, and Article 3, paragraph 1, subparagraph 3 of the Law on Administrative Disputes, Official Gazette, no. 20 /2010, 143/2012, 152/2014, 94/2016, and 29/2017

party to be able to protect its rights and legal interests, in Croatia, it has the opportunity to use appropriate legal remedies.

In Croatia, instances of the statutory presumption of registration generally constitute an exception to the legal regulation.[26] In principle, the statutory presumption of registration is not inadmissible from the point of view of the legislator; however, it should not be taken as a rule. The General Administrative Procedure Act identifies such a possibility in a particular administrative area, but, at the same time it ties it to a more cumulatively fulfilled assumption. This Act prescribes that a party's request shall be deemed to have been approved if a public law authority, in a procedure initiated at the orderly request of the party in which it is authorized to directly resolve an administrative matter, fails to issue a decision within the prescribed time limit, but only if so explicitly prescribed by law which regulates an individual administrative area. In such a case, the party shall have the right to request that the public law authority issue a decision establishing that the party's request has been accepted, and the public law authority shall issue such a decision within eight days of the party's request.[27]

Affirmative interpretation of the silence of an administrative body and the so-called statutory presumption of registration are not accepted as a general rule in any Member State of the European Union or in the practice of the bodies of this supranational organization. In Italy, for example, in administrative proceedings, there is a wide range of options for approving a party's request, but with a number of protective and safeguarding measures against possible misuse and jeopardy to the public interest in such cases. Therefore, in practice, it is more often a negative statutory presumption, i.e., a statutory presumption that, in the event of a failure of the body to resolve the administrative matter within the prescribed time limit, the party's request is rejected rather than accepted. Most often, as in Croatia, it is prescribed that this constitutes a reason to use legal remedies for the purpose of protecting the party's rights from the untimely resolution of the governing body and does not relate to either a positive or negative statutory presumption. The legal

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[26] Article 102 of the General Administrative Procedure Act. Positive presumption in the Croatian legal system can be found in Article 142, paragraph 6 of the Nature Protection Act, Official Gazette no. 80/2013, 15/2018, 14/2019, and 127/2019, Article 42, paragraph 4 and Article 45, paragraph 3 of the Healthcare Act, Official Gazette no. 100/2018 and 125/2019, Article 178, paragraph 2 of the Labour Act, Official Gazette, no. 93/2014, 127/2017 and 98/2019, etc. See also Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (2006) OJ L376 / 36-68

[27] See Judgment of the High Administrative Court of the Republic of Croatia, file no. Usž-2162/15-2, of 9 December 2015, Judgment of the Administrative Court in Split, file no. 3 UsI-378/15-7, of February 22, 2017 and Judgment of the Administrative Court in Rijeka, file no. 4 UsI-1514/14-7, of October 24, 2016

doctrine emphasizes that the system of negative motives, i.e., the motives for rejecting a party's claim, is a "more cautious approach" that manages to reconcile the two conflicting requirements of the rule of law: the protection of the individual and the protection of the objective legal order and public interest. The aspiration of the system of positive statutory presumption is to discipline the administrative bodies, to contribute to the cost-effectiveness and efficiency of the procedure, and to relieve second-instance bodies and administrative courts of additional work. However, positive cases may sometimes violate the fundamental principles of procedural law, legal certainty, and equality of individuals before the law.[28]

The statutory presumption of registration regarding the association registration in the Registry Bookof the Croatian legal system has existed for years. The same statutory presumption was prescribed by the Associations Act of 1997, as well as the Associations Act of 2001.[29] The legislator thereby seeks to strengthen the party's position in the conduct of administrative proceedings,[30] whereby the process of acquiring the legal personality of associations in Croatia has been simplified and accelerated. This provision certainly contributes to the implementation of the principle of the efficiency of the administrative procedure, as well as the proportionality in the protection of the parties' rights.[31] Such an approach by the legislator can be very useful in the process of registering a number of associations active in the fields of culture, sports, or environmental protection, as it relieves the officials from making decisions in writing, thus saving public administration's working and time resources. However, such an approach may also generate difficulties that arise from commitments made by associations, whose organization and operation are not aligned with applicable regulations of the Republic of Croatia.

The statutory presumption of registration for the association registration in the Registry Book is not constitutionally disputed, but what can be challenged is the objective which such a formulated provision achieves. The Constitutional Court of the Republic of Croatia has already questioned the constitutionality of this provision and found no reason to repeal it.[32] It is undisputed that this type of legal

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28 See more on this in Šikić, M., *Pravna zaštita od šutnje uprave prema novom Zakonu o općem upravnom postupku, Novi Zakon o općem upravnom postupku i modernizacija hrvatske uprave,* Institute of Public Administration, Zagreb, 2009, pp. 198-201 and Šikić, M., *Pravna zaštita od nerješavanje upravne stvari u hrvatskom i poredbenom pravu*, doctoral dissertation, Zagreb, 2008, p. 157

29 Article 18, paragraph 1 of the Law on Associations, Offizial Gazette, no. 70/1997 and Article 17, paragraph 1 of the Law on Associations, Official Gazette, no. 88/2001

30 Ljubanović, B., *Novi Zakon o općem upravnom postupku i posebni upravni postupci,* Hrvatska javna uprava, *vol*. 10, no. 2, 2010, pp. 321-322

31 Articles 6 and 10 of the General Administrative Procedure Act

32 See Decision and Ruling of the Constitutional Court of the Republic of Croatia no. U-I-884/1997, U-I-920/1997, U-I-929/1997, U-I-956/1997, U-I-453/1998, U-I-149/1999

regulation is harmonized with the general administrative procedural law in the Republic of Croatia, i.e., the General Administrative Procedure Act. However, the question arises whether its application may in some cases result in the registration in the Registry Book of those associations established with the aim of promoting unconstitutional values in the Republic of Croatia or of organizations which do not meet the legal requirements for acquiring legal personality, solely due to the inefficient functioning of the competent authorities. It should not be forgotten that the right exercised on the basis of the statutory presumption of registration cannot be challenged with the legal remedies for substantive purposes, but can only be challenged for formal reasons. In the Croatian administrative practice, it is not uncommon to encounter efforts to registry in the Registry Book those associations whose activities are contrary to the positive legal regulations on the organization and activity of associations.[33] Therefore, the question arises whether such regulation of the association registration in the Registry Book has adequately ensured the implementation of the Law on Associations, as well as other laws governing the areas in which the associations operate.

4. LEGAL REGULATION OF ASSOCIATION REGISTRATION IN COMPARATIVE LAW

Since it is, in principle, allowed in administrative law to depart from the rules of general administrative procedural law in certain administrative areas, it is interesting to consider whether, in comparative law, it is also common to prescribe the statutory presumption of registration in case of failure of the competent authority to decide on the association registration in the Register. Particular consideration is given to the laws of Germany, France, and Italy, as states whose legal systems strongly influence the development of Croatian administrative law in the normative sense, but also the law of Slovenia and Serbia, as neighbouring countries, with which Croatia shared the same legal order for 45 years.

International documents, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union, give States broad liberties to regulate the freedom of association. They do not impose any rules or restrictions on the exercise of oversight over the establishment and operation of the associations themselves, leaving these issues within the exclusive competence of each individual state. Therefore, the states differently regulate the control that is carried out at the moment of the

[33] See Judgment of the Administrative Court of the Republic of Croatia, no. Us-9296/2005-4, of October 14, 2009 and Judgment of the Administrative Court in Rijeka, no. 2 UsI-1371 / 14-12, of April 07, 2016

association registration, and with which the acquisition of legal personality of the association is regularly linked, as well as the subsequent supervision of the work and activities of the association.

In German law, as in Croatian law, there are associations with legal personality and those with no such personality. In order for an association to acquire legal personality, it must be registered in the Registry Book of Associations kept with the Municipal Court (Ger. *Amtsgericht*) based on the seat of the association. For the purpose of founding the association, the Assembly of the association is obliged to appoint the board of directors (Ger. *Vorstand*),[34] which is responsible for submitting all documents passed in the process of founding the association to the notary public. It is the task of the notary public to verify whether the documents required for the establishment of the association comply with the law.[35] Subsequently, the board of directors submits to the Court a request for the association to be registered. The Court specifically assesses the objective of establishing the association, which should not be directed to the pursuit of any commercial activity.[36] In case the prerequisites for establishing the association have been fulfilled, the Court shall enter the association in the Registry Book of Associations. If the prerequisites have not been met, the Court rejects the application for association registration, and the applicants have the right to challenge the appeal before the hierarchically higher court. Thus, in Germany, at the very foundation of the association, preventive supervision is carried out in two instances: by a notary public, who verifies the correctness of the documents passed at the founding assembly of the association, and then by the Court, which specifically considers the objectives of the association's establishment.[37] Associations that do not have legal personality are not subject to the registration procedure described here. It can be concluded that the founding of an association, which is a legal person in Germany, is subject to the judicial registration of such an association in the Registry Book of Associations and, in Germany, the statutory presumption of registration does not apply, all with the aim of verifying the prerequisites for the association's establishment and especially its activities prior to the beginning of its activities.

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34 Von Hippel, T., *Nonprofit Organizations in Germany,* in: Hopt, K. J.; Von Hippel, T. (eds.), Comparative Corporate Governance of Non-profit Organizations, Cambridge University Press, 2010, p. 201

35 Lester, S.M., *The International Guide to Nonprofit Law,* John Wiley & Sons, Inc., New Jersey, 1997, p. 121.

36 Von Hippel, *op. cit.* note 34, p. 201

37 Von Hippel, T., *Legal Aspects of Civil Society Organizations and Their Relation with Government: Germany,* in: Van der Ploeg, T. J.; Van Veen, W.J.M.; Versteegh, C.R.M., (eds.), Civil Society in Europe, Minimum Norms and Optimum Conditions of its Regulation, Cambridge University Press, 2017, p. 385

The distinction between associations with and without legal personality is also present in French law. Associations with legal personality in that country are further divided into two groups: associations that perform publicly beneficial activities (Fr. *association reconnue d`utilité publique*) and other associations. Namely, both of these groups of associations have legal personality, but in doing so, associations performing publicly beneficial activities have rights just like any other legal entity. They can own any form of property that serves their purpose, including land and forests. They are authorized to receive donations, regardless of the amount, with the obligation to report such donations to the competent governing body.[38] It is interesting that these associations have the power to sue in any case relating to the scope of such an association, which is an exception to the rule that no one may bring an action in cases relating to another person, which are generally applicable in France. However, the preconditions for acquiring such special status of these associations are more demanding. In addition to the decision on establishment, which must be published in the official gazette, the statute of such an association must contain specially prescribed provisions. As a rule, associations should have 200 members or more, must carry out an activity designated by law as an activity of particular interest to the state, be financially stable, act as a non-profit, and be independent. Before granting special status to such an association, it should be active for three years in the so-called trial period.[39] The state exercises significant influence over these associations, so that the President of the association is appointed by the Minister, while the business books, activities, and overall operations of these associations are supervised by the competent governing body.[40] Whether the association fulfills the special prerequisites for the purpose of recognizing the status of the association performing publicly beneficial activities is decided in the administrative procedure, and a person appointed by the general assembly of the association is authorized to submit the request for recognition of such status. The request is submitted to the Minister of the Interior (Fr. *Ministre de l'Intérieur*), who may request the opinion of the City Council of the city where the association is based and the opinion of the prefect (Fr. *préfet*) in connection with the request. The final opinion on eligibility for the special status of such an association is issued by the State Council (Fr. *Conseil d`État*). If this opinion is positive, the acquisition of the special status is decided by a decree signed by the Prime Minister and the Minister of the Interior.[41] Due to the importance of associations performing pub-

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38 Deckert, K., *Nonprofit Organizations in France*, in: Hopt, K. J.; Von Hippel, T. (eds.), Comparative Corporate Governance of Non-profit Organizations, Cambridge University Press, 2010, p. 275

39 *Ibid.,* pp. 277-278.

40 Lester, *op. cit.* note 35, p. 104

41 Deckert, *op. cit.* note 38, pp. 278-279

licly beneficial activities in France, the procedure for acquiring the special status of such associations is firmly state-related and no statutory presumptions apply.

In order for an association to acquire legal personality in France, it is sufficient for the founders of the association to submit to the prefect of the department, in which the association has its seat, a statement establishing the association and to have it published in the official gazette. Such a statement should include the statutory elements, i.e., an indication of the name and objectives of the association, the seat of the association and the names, address of residence, and nationality of the persons authorized to manage the association. Apart from these two conditions, no additional formalities are required for an association to acquire legal personality under French law, so whenever the statement contains all the prescribed parts, the competent national authority must not reject it.[42] Possible violations of the law and other regulations and illegalities in its work may be determined by the Court, but only subsequently, i.e., after the establishment and acquisition of legal personality. The reason for the relatively undemanding procedure for associations to acquire legal personality is reflected in the very limited rights they enjoy, despite their legal personality. Although they have the right to participate in judicial and other legal proceedings, their rights are limited in connection with the receipt of donations and the acquisition of goods. They have the ability to receive donations in goods and services, donations in gifts or inheritance; however, only up to a certain amount of money. They must report these donations to the competent governing body, which may then raise an objection, considering that the association must not benefit from such a donation given the purpose of its establishment.[43] In other words, these associations may only own property that serves the purpose of establishing the business.[44] Consequently, in France, with regards to associations which are legal entities but not established for the purpose of carrying out publicly beneficial activities, greater emphasis is placed on the subsequent supervision of their work than on the preventive supervision of their establishment and registration.

With regards to legal personality, associations also differ in Italian law. It is important to establish an association as a legal entity here as well, because it provides a number of benefits. Such an association can be funded by public law entities, receive donations, acquire real estate, etc. In Italy, an association acquires legal personality in a formal proceeding conducted by a competent authority in the

42 Lester, *op. cit.* note 35, p. 103

43 Deckert, *op. cit.* note 38, pp. 274-275

44 Lester, *op. cit.* note 35, p. 101

province or region.[45] This body shall determine whether the requirements laid down by law for the registration of an association as a legal person have been fulfilled, among which the objective of establishing the association has been specifically considered as well as whether it has sufficient financial resources to achieve this objective. The competent authority shall decide on the application for the association registration in the Registry Book of Associations within 120 days, or, within the same period, inform the applicants of the reasons preventing its registration. If the procedure determines that the requirements for the registration of the association have not been fulfilled, the applicant may supplement the documentation enclosed with the application within 30 days. However, if, within the next 30 days, the competent body does not notify the applicant of the reasons for the rejection, or decides on the registration of the association in the Register, it shall be presumed that the application for association registration in the Registry Book has been rejected.[46] It is interesting to note that, in Italy, there is a negative statutory presumption in the decision-making process of association registration in the Register. Consequently, if the competent authority does not decide within the prescribed period, it is considered that the application for association registration in the Registry Book has been rejected.

In Slovenia, the association registration is carried out by an administrative body (Slov. *enota*) competent in the seat of the association. The application for registration must be accompanied by the minutes of the founding assembly, the founding act of the association, the list of founders, and the decision issued by the legal entity's competent body. The seat of the association, information on the person authorized to represent it, and the powers of representation as well as the proposal of the association's activity are indicated.[47] The competent authority shall decide on the application for registration within 30 days of the receipt of the application. If the request is incomplete or the body determines that the founding act of the institution does not comply with the law, it shall inform the applicant thereof and invite him to modify the deficiencies within a period of not less than 15 days or more than three months. If the applicant fails to modify the identified deficiencies within the given deadline, the application for registration of the association shall be deemed to have been withdrawn. An appeal may be lodged against the

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45 See also Vaccario, C.; Barbetta, G.P., *Legal Aspects of Civil Society Organizations and Their Relation with Government: Italy,* in: Van der Ploeg, T. J.; Van Veen, W.J.M.; Versteegh, C.R.M, (eds.), Civil Society in Europe, Minimum Norms and Optimum Conditions of its Regulation, Cambridge University Press, 2017, pp. 454-455

46 Preite, F. *et al.*, *Atti notarili volontaria giurisdizione, Il procedimento, incapaci, scomparsa, assenza e dichiarazione di morte presunta,* UTET Giuridicha, Torino, 2012, pp. 299-300

47 Article 18, paragraph 1 of the Slovenian Societies Act, Official Gazette of the Republic of Slovenia, no. 64/2011

decision deciding to Registry Book the association with the Ministry responsible for internal affairs. The appeal against the decision on the registration of the association does not delay the registration of the association in the Registry Book of Associations.[48] It is interesting to note that, in Slovenia, there is no statutory presumption of registration, but rather on the withdrawal of an application for association registration in the event that such an application is irregular, and the applicant does not act upon the request of the competent administrative body within the set time limit.

Finally, in the Republic of Serbia, the Registry Book of Associations is kept by the Business Registers Agency, which also decides on the association registration in the Register.[49] If in the process of registering an association it is determined that the association is secret or paramilitary, or that the goals and activities of such association pose a violent danger to the constitutional order and violate the territorial integrity of the Republic of Serbia, violate human rights or rights of minorities, or aim to provoke and incite inequality, hatred, and intolerance based on racial, national, religious, or other grounds, as well as on the basis of sex, gender, physical, psychological, or other characteristics and abilities of a person, the conclusion against which no appeal is allowed shall terminate the association registration in the Register. In doing so, the Agency submits to the Constitutional Court a motion to ban such an association. Upon the adoption of the Constitutional Court's decision, and depending on its content, it shall by decision reject the application for the association registration in the Registry Book if the ban on work has been pronounced or it shall proceed with the association registration if the proposal for a ban on activities has been rejected by the Constitutional Court. [50]

Considering the presented comparative regulation of the acquisition of legal personality of associations, it is evident that the association in all observed legislations acquires legal personality in a particular procedure, and most often based on an administrative decision. However, it is certainly worth noting that none of the observed legislations prescribe the statutory presumption of registration to be registered in the relevant Registry Book in case of a lack of resolution within the deadline prescribed by law. Moreover, in such a case, the Italian law even prescribes a negative statutory presumption, i.e., the statutory presumption of registration rejection, whereas Slovenian law, if the applicant fails to act upon the request of the competent authority, prescribes the statutory presumption of re-

[48] Article 17, paragraphs 1 and 2, and Article 19, paragraphs 1 through 3 and 5 of the Slovenian Company Act

[49] Article 26 of the Serbian Law on Associations, Official Gazette of the Republic of Serbia, no. 51/2009, 99/2011 and 44/2018

[50] Article 31 of the Serbian Law on Associations

quest withdrawal. It is interesting to note that French law, in a very simple procedure, assigns legal personality to associations, while the recognition of the special status of associations established to carry out publicly beneficial business is strictly controlled by the State.

It is observable from the analyzed comparative experiences that States do not wish to deprive themselves of the possibility of legality control upon the establishment of an association or its acquisition of legal personality.[51] Preventive control over the activities of the association is an advantage in the context of respect for rights in general. However, the aim of such supervision should not be to prevent the establishment of an association or the acquisition of its legal personality, but to enable the activities of the association to be harmonized with the constitutional values and legal requirements. Moreover, in accordance with the case law of the European Court of Human Rights, a case in which a State prevents an association from harmonizing its activities with legal provisions by refusing it registration, instead of giving it the ability to comply with legal requirements, is contrary to the restrictions necessary in a democratic society.[52] Croatian law has granted this request by requiring the competent authority to invite the applicant for registration in the Registry Book of Associations to harmonize the statute, or submit evidence, within a period of not less than 15 days, whenever it finds that the statute of the association does not comply with the law or if the request was not accompanied by the evidence required by law. Therefore, it seems that unlike other discussed legislations, Croatian law is largely directed *in favorem* of the founders of associations in the process of registering them in the Registry Book of Associations and acquiring legal capacity.

5. CONCLUSION

In the Republic of Croatia, associations acquire legal personality by means of entry in the Registry Book of Associations and, consequently, all the benefits arising from such registration, including the right of financing by persons of public law, the right to acquire and dispose of real estate, the right to be holders of other rights and obligations, etc. Members of the association independently determine the goals and activities of the association, provided that such goals and activities are not unconstitutional or illegal. In order to ensure compliance with the law relating to the establishment of associations and the determination of their activities,

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[51] See Judgment *United Communist Party of Turkey and others v Turkey* (1998) 26 EHRR 121. See also Radin, M., *ibid.,* note 10, pp. 5-6

[52] See Judgment *Association of Victims of Romanian Judges and others v Romania*, no. 47732/06, 22 March 2016

they are required to be registered in order to acquire legal personality and thus to assume fully the rights and obligations in the community. It is precisely in view of the supervisory nature of the procedure of association registration in the Registry Book of Associations that the issue concerning the legitimacy of prescribing the statutory presumption of registration in the procedure of association registration in the Registry Book of Associations in Croatian law arises if the competent authority does not take a negative decision within the prescribed deadline. Such regulation, which is present in Croatian legislation and aims to accelerate the exercise of the rights of parties in administrative proceedings, directly contradicts the supervisory role of the competent county bodies in assessing whether an association should be entered in the Registry Book of Associations and thus recognize its legal personality.

Preventive control of the association's compliance with the law, much like the goals the association seeks to achieve, is widely accepted in comparative law. However, none of the comparative systems analyzed prescribe the statutory presumption of adopting a request for the association to be registered in the case of silence of the administrative body. Moreover, in the Italian and Slovenian law, there are examples of statutory presumption of rejecting a party's request or request withdrawal if the applicant fails to act upon the request of the competent authority within the time limit set.

This paper seeks to warn that the Law on Associations does not follow the logic of legal standardization in relation to the attainment of the goal and purpose of a particular legal institute, because if the state opts for the implementation of preventive control in allowing associations to participate fully in legal affairs, this aim should be consistently achieved, not limiting the governing bodies to formal restrictions, which result in the substantive rights of the parties. In other words, the competent authority in this case has the right and obligation to conduct the administrative procedure, to establish the facts, to apply the material regulations, and to make an administrative decision, while the timeliness of its decision-making should be guaranteed by other means. On the other hand, in the case of failing to prescribe preventive control in recognition of a legal personality association, a very effective subsequent control should be in place in the state, which would deal not only with the financial but also the substantive activity of the association, with all the powers necessary for the urgent restoration of the legal status. Whatever approach the legislature takes, it is important that it consistently pursues the set goals, with the mandatory observance of the constitutional guarantee of freedom of association, which must be freely implemented in accordance with the Constitution and laws.

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UDK 339.923(4-67EU): 342.724(497.6)
34(497.6:4-67 EU)(094.2)
Review article

CHALLENGES IN PRE-ACCESSION HARMONIZATION OF ANTI-DISCRIMINATION LAWS IN BOSNIA AND HERZEGOVINA

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ABSTRACT

The goal of this article is to assess the level of harmonization of the laws of Bosnia and Herzegovina with the acquis communautaire in the field of protection from discrimination, to underline the significance of the implementation of European standards even before formal membership in the Union, to identify challenges in interpretation of individual norms of the European law in the context of domestic legal culture and to exemplify or illustrate potential discord between national and European legislation. Having in mind that the enlargement is one of the most important policies of the European Union, scientific analysis can assist candidate countries to successfully harmonize their legislative framework in the field of protection from discrimination with acquis communautaire. Additionally, elaboration and exemplification of the foreign legal concepts can help formulate adequate anti-discrimination policies, containing measures aimed at promotion of principle of genuine equality between groups that enjoy special protection. In assessing the level and success of harmonization of Bosnian legislation with the anti-discrimination laws of the European Union, authors resorted to normative, comparative and analytical method related to the content and scope of application of the anti-discrimination clauses of founding treaties and anti-discrimination directives while using case studies of the Court of Justice of the European Union. It is demonstrated that the divided jurisdiction between different levels of government, plurality of legal systems and complex administrative structure established by the Dayton Peace Agreement represent some of the key procedural challenges in the process of European integration of Bosnia and Herzegovina. It can

equally be observed that no other country, candidate for membership in European Union, had to face such internal challenges, amplified by the fact that deep divisions persist after the armed conflict and still found their way into the current political constellation. Concrete substantive challenges Bosnia and Herzegovina is facing when transposing European law are identified in the field of the general exemptions from the principle of equal treatment, the definition of indirect discrimination, wording of the threshold for the burden of proof, exemptions from prohibition of unequal treatment for protection of family relations and awarding damages.

***Keywords**: harmonization of laws, acquis communautaire, discrimination, transposing legislation*

1. INTRODUCTION

On 16 June 2008, Bosnia and Herzegovina signed Association and Stabilization Agreement, which became effective on 1 June, 2015, which entails duty to harmonize domestic legislation with European Union *acquis communautaire*. Process of harmonization of laws is very complex, gradual, divided in chapters and it involves participation and contribution of large number of experts with comprehensive knowledge of domestic legislation, laws of the European Union and demonstrated lawmaking skills. In order to reach this objective, Council of Ministers of Bosnia and Herzegovina adopted Decision on process of harmonization of laws of Bosnia and Herzegovina with European Union *acquis communautaire*[1] on 28. July 2016. Mentioned decision clearly defines the duties of different institutions and administrative bodies to thoroughly follow the process of harmonization, from legislative drafting to the adoption the final text or amendments in legislative bodies. Copenhagen criteria defined at the meeting of the European Council in Copenhagen in 1993, represent conditions for the membership in the European Union. Those criteria are divided in political, which translate into stability of institutions tasked with ensuring democracy, rule of law, protection of human rights and minorities' rights, economic criteria entailing existence of functional market economy capable of sustaining competitive pressures and markets forces coming from the Union and legal criteria demanding capacity to assume the responsibilities of the membership, including dedication to the objectives of political, economic and monetary union. In addition to original principles, states have subsequently agreed upon Madrid Criteria which is also called administrative criteria because it requires strengthening administrative capacities and creating effective government services mandated with implementation of the *acquis communautaire* and other obligations stemming from the membership in the European Union, as well as convergence criteria which approximates preparedness of the member states for the participation in the third phase of economic and monetary union.

[1] "Official Gazzette of Bosnia and Herzegovina" number 75/16

Within the framework of political criteria, candidate countries are asked to harmonize their legislation with the anti-discrimination laws of the European Union, contained in the anti-discrimination clauses of founding treaties, anti-discrimination directives and relevant decisions of the Court of Justice of the European Union. When countries join European Union, implementation of EU laws is not conferred on EU institutions specifically founded for that purpose, but rather on national bodies of Member states.[2]

The goal of this article is to assess the level of harmonization of the laws of Bosnia and Herzegovina with the *acquis communautaire* in the field of protection from discrimination, to underline the significance of the implementation of European standards even before formal membership in the Union, to identify challenges in interpretation of individual norms of the European law in the context of domestic legal culture and to exemplify or illustrate potential discord between national and European legislation.

Divided jurisdiction between different levels of government, plurality of legal systems and complex administrative structure established by the Dayton Peace Agreement can be as quoted as some of the key challenges in the process of European integration of Bosnia and Herzegovina.

2. SIGNIFICANCE OF HARMONIZATION OF BH LEGISLATIVE FRAMEWORK WITH THE LAWS OF EU

Successful harmonization of legislation and implementation of amended regulations are the most important conditions any country has to fulfill in the process of accession to the European Union. By signing Stabilization and Association Agreement on June 16, 2008, Bosnia and Herzegovina committed to gradually harmonize the state legislation with the *acquis communautaire*, which is demanding task, requiring involvement of diverse group of experts with the knowledge of national legal framework, experience in legislative process and the laws of European Union. For example, when Slovenia was joining European Union, it had to adopt around 700 laws and around 3000 by-laws.[3] Prior to accession, the Czech Republic had to adopt and implement into national legislation more than 80,000 pages of EU rules and regulations.[4] In Bosnia and Herzegovina, three different institutions are mandated with the process of harmonization and cooperation with European

[2] Duić, D.; Petrašević, T., *Five Years of Application of EU Law: An Analysis of Cases Involving Breaches of EU Law Against the Republic of Croatia and References for Preliminary Ruling by Croatian Courts*, Godišnjak Akademije pravnih znanosti Hrvatske, *vol.* 10, no. 1, 2019, p. 66

[3] Furhstofer A.; Hein M. *Constitutional Politics in Eastern and Central Europe,* Springer VS, 2016, p. 210

[4] Marek D.; Baun M. *The Czech Republic and the European Union,* Routlegde, 2010, p. 75

Union: Direction for European Integrations, Ministry for economic relations and regional cooperation of Republika Srpska and Federal Legislative Bureau, while the only relevant assessment of the progress made in legislative harmonization can be found in the annual reports of the European Commission on the progress of Bosnia and Herzegovina and in the communiqués from the joint bodies mandates with following the Agreement's implementation. According to the relevant regulatory framework, institutions who are proponents of legal acts incorporating EU acquis communautaire are obligated to seek opinion on compatibility of such acts with the acquis. Opinions on the compatibility for the acts proposed by the ministries and other administrative bodies at the state level are formulated by the Direction for European Integrations. In the Government of Republika Srpska, such opinions are delivered by the Ministry for Economic Relations and Regional Cooperation, while the same duty is performed by the Government Bureau for Legislative Affairs and Harmonization of Law with the European Union, for the level of Federation of Bosnia and Herzegovina. Harmonization of laws with the acquis is the most demanding and most complex part of EU integrations which entails numerous challenges related to the number of EU acts in specific areas, financial implications required by implementation of transposed documents in different fields (such as environmental protection) or continuous evolution of the acquis. Harmonization of laws entails not only transposition of the parts of the acquis into national legal system, but also implementation of such norms in order to provide legal certainty to the citizens. In Bosnia and Herzegovina, one legal act from EU level can potentially be transposed by one or more different levels of Government. Namely, most of the EU legislation regulates matters that are under jurisdiction of Entities (according to some statistics around 70%) which places additional time and human sources constraints on Entity governments.[5] Institutions designated as responsible for harmonization process at the level of Federation of Bosnia and Herzegovina are competent ministries, within their regular jurisdiction. Those ministries are obliged to deliver correspondence tables along with each piece of legislation that is being harmonized to the Legislative Bureau, which in turn evaluates whether the text is in harmony with laws of the European Union and to what extent. On the other hand, there is no official database with precise number of laws transposing EU legislation in national legal system. According to the Constitution of Federation of Bosnia and Herzegovina, there are areas in which Federation has exclusive jurisdiction, while in others such jurisdiction is divided between federal and cantonal governments, or falls under exclusive competence of the cantons with coordinating role of the federal government. Equally, according to the Constitution of Federation of Bosnia and Herzegovina, cantons

[5] European Commission, *Bosnia and Herzegovina Analytical Report,* COM (2019), 261, p. 19, 28

have jurisdiction over matters not specifically assigned to the federal government.[6] Such constitutional arrangements add to the complexity of harmonization process at the level of Federation of Bosnia and Herzegovina.

Process of harmonization of laws of Republika Srpska with the *acquis communautaire* started in 2007 under the lead of the Ministry of economic relations and regional cooperation of Republika Srpska. At the same time, each ministry of Republika Srpska Government designated an official to act as a liaison with the coordinating Ministry. It is estimated that over 1500 laws and other regulations have undergone process of harmonization up to date.[7] The whole process is regulated in detail by the Decision of the Government on the process of harmonization of legislation of Republika Srpska with the *acquis communautaire* of the European Union and with regulations of the Council of Europe.[8] One of the integral parts of the Decision is the Methodology of harmonization, which can assist the officials responsible for proposing or transposing EU legislation to the national legal system and can serve as guidance for resolving any disputes arising from the harmonization process. Ministry for economic relations and regional cooperation monitors implementation of the Decision and reports to the Government and National Assembly of Republika Srpska presenting the most important advancements achieved in the process of transposition of EU legislation and Council of Europe acts and on all problems, challenges or issues identified in the process of harmonization. In order to be able to systematically track fulfillment of set benchmarks, Ministry for economic relations and regional cooperation develops while Government adopts Action plan for harmonization of legislation of Republika Srpska with European laws and acts of Council of Europe for each calendar year. Action plan is developed in cooperation with competent ministries, taking into consideration their legislative proposals plans as well as their realistic capacities for transposition of relevant *acquis* in the timeframe covered by the Plan. Furthermore, Ministry for economic relations and regional cooperation conducts activities of coordination of trainings in this field. In order to effectively carry out this task, Ministry relies on cooperation and support from international partners such as Regional School for Public Administration (ReSPA), Organization for International Development of Federal Republic of Germany (GIZ) and European

6 Constitution of Federation of Bosnia and Herzegovina, Art III. 4

7 Delić A.; Golijan D. *Harmonization of legal acts of Bosnia and Herzegovina with the European law,* International University Travnik, 2018, p. 50

8 "Official Gazzette of Republika Srpska" number 119/18

Commission Division for Technical Assistance - TAIEX (Technical Assistance and Information Exchange Instrument).[9]

3. PROHIBITION OF DISCRIMINATION IN EUROPEAN LAW

At the level of international law, virtually every human rights instrument includes a non-discrimination clause.[10] Primary sources of the European Law are founding agreements such as Treaty of Lisbon, Treaty on European Union and Treaty on the functioning of the European Union. From the perspective of prohibition of discrimination, primary sources also include EU Charter of Fundamental Rights as well as general principles of the EU Law. In principle, legal norms from the founding treaties have supremacy over national legislation. In case of disagreement between domestic legal norms and guarantees enshrined in EU treaties, national courts of the member states always have obligation to exempt domestic legal norm from application and apply relevant provision of the founding treaty if the former cannot be harmonized by the "friendly" interpretation.[11] It should be added, however, that Community law allows Member States to make exemptions 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.[12] Article 2 of the Treaty on European Union stipulates that the Union is founded on founded on the values of respect for human dignity, equality and respect for human rights, including the rights of persons belonging to minorities. Countries that violate those values are risking being sanctioned according to the Article 7 of the Treaty on European Union, which includes possibility of suspension of membership. It

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9 Government of Republika Srpska, *Information on obligations which Bosnia and Herzegovina and Republika Srpska acquired in the process of joining European Union with outline of the measures and activities realized during 2017, with achieved results in harmonization of laws of Republika Srpska with laws of the European Union*, p. 32, available at: [https://e-vijecenarodars.net/wp-content/uploads/2018/04/Informacija-o-obavezama-iz-procesa-EU-integracija-za-2017.pdf], accessed on 08 April 2020

10 Petričušić, A. *et al.*, *Course on Legal Protection against Discrimination in South East Europe, Joint Reader - Targeting Academic Teaching on Equality and Protection against Discrimination*, Ludwig Boltzmann Institute for Human Rights and South East European Law Schools Network, 2018, p. 24

11 Ioannis D. *Conflicts between EU law and National Constitutional Law in the Field of Fundamental Rights*, available at: [http://www.ejtn.eu/PageFiles/17318/DIMITRAKOPOULOS%20Conflicts%20between%20EU%20law%20and%20National%20Constitutional%20Law.pdf] accessed on 04 April 2020, p 1

12 Čaušević, M.; Gavrić, T., *Legal and economic aspects of integration of Bosnia and Herzegovina in the European union;* in: Petrašević, T.; Duić, D. (eds.), EU and Member states; Legal and Economic Issues, Osijek, University of Osijek, Faculty of Law Osijek, 2019, p. 9

is equally clear that candidate countries will not successfully complete negotiation process if they fail to fully harmonize their legal and constitutional system with the fundamental EU values. According to the Article 3 of the Treaty on EU, the Union shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.[13] Although these norms are not directly applicable by national courts, they can be used as guiding principles in interpretation of the directly applicable EU norms or national legislation by the Court of justice of the European Union in the field of equality in general, minorities' rights, discrimination and gender equality. Article 9 of the Treaty on the functioning of the European Union defines that in defining and implementing its policies and activities, the Union shall take into account requirements linked to the fight against social exclusion.[14] Proactive role of the European Union in combating discrimination follows from the reading of Article 3(3) of the Treaty on European Union in conjunction with Article 10 of the Treaty on the functioning of the European Union, according to which the Union has an objective to combat discrimination based on gender, racial or ethnic origin, religion or belief, disability or sexual orientation, in defining and implementing its policies and activities. Article 19 of the Treaty on the functioning of the European Union served as a basis for adoption of the key EU Directives: Race Equality Directive (2000/43/EC) and Directive (2000/78/EC) establishing a general framework for equal treatment in employment and occupation.

European Union Charter of Fundamental Rights contains several provisions directly related to promotion of equality between protected groups. Article 21 includes general prohibition of discrimination on several bases and this list is not conclusive. Article 23 contains particular norm guaranteeing equality between men and women specifically permitting possibility of affirmative action. Article 22 foresees that the Union shall respect cultural, religious and linguistic diversity, which would not be possible without differential treatment of various groups, while Article 24 guarantees the rights of child, Article 25 protects the rights of the elderly and Article 26 call for integration of persons with disabilities.[15]

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13 Treaty on European Union, available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF], accessed on 04 April 2020, p 5

14 Treaty on the functioning of the European Union, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN], accessed on 04 April 2020, p 7

15 EU Charter on Fundamental Rights, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT] accessed on 04 April 2020

Directive 2000/43/EC and Directive 2000/78/EC prohibit direct and indirect discrimination, incitement to discrimination and harassment. Application of both directives encompasses all physical and legal entities, in public and private sector. Both directives permit exemptions from principle of equal treatment and they do not call for affirmative action. Both directives require that the state provides protection through judicial or administrative proceedings, protection from victimization, possibility of third party interventions as a representative or support to the victim of discrimination, reversal of burden of proof and that the sanctions are effective, proportional and dissuasive. Differences between two mentioned directives are related to their scope of application especially since Directive 2000/43/EC only refers to racial or ethnic origin while the other one applies to access to employment, access to professional trainings and education, work and work-related conditions, and membership in workers associations or employers' associations. Racial Equality Directive applies to the field of social protection, including social security and health services, social benefits, education and access to goods and services. According to the provisions contained in Directive 2000/43, member states have a duty to establish bodies mandated with prohibition and elimination of racial/ethnic discrimination, while this is not the case with the Equality Framework Directive.[16]

Sometimes, anti-discrimination directives cannot be considered a sufficient tool in the fight against discrimination.[17] Consequently, case law of the Court of Justice of the European Union in Luxembourg is equally significant source of European law. While the EU Court is not hierarchically superior to the national courts, its main objective is ensuring adequate application and interpretation of EU law. In the case of *Attila Vajnai*,[18] the Court declared itself not competent to resolve the matter as the norm of domestic legislation was outside of the scope of the Directive 2000/43/EC, illustrating the fact that European law is not relevant in all cases that are brought under the Law on prohibition of discrimination. In the case *Centrum voor gelijkheid van kansen en voor racismebestrijding/Firma Feryn NV*[19] the Court had an opportunity to interpret the Directive 2000/43/EC and thereby has ruled that in order to establish the direct discrimination, there does not have to be a concrete victim. Court has reasoned that the mere fact that the employer

16 Simonovic Einwalter T.; Selanec G., *Alignment of the Law on Prohibition of Discrimination with the EU acquis,* Sarajevo, 2015, p. 17

17 Vasiljević, S., *Equality and non-discrimination principle in the context of the Croatian membership in the EU*, in: Barić, S. *et al.* (eds.), New Perspecttives of South East European Public, Skopje, SEELS, 2014, p. 52

18 Case C-328/04 *Attila Vajnai* [2005] ECR I-8577

19 Case C-54/07 Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV (2008) ECR 733

publicly stated that individuals of certain racial or ethnic background would not be employed is something that would most certainly dissuade certain candidates from even applying for such positions, which was limiting their access to the labor market, thereby constituting direct discrimination in the field of employment, in the sense of the Directive 2000/78/EC. Practical application of the reversal of burden of proof principle was considered in the cases *Enderby*,[20] *Brunnhofer*,[21] *Danfoss*,[22] *Feryn*[23] and *Steaua.*[24] In those cases the Court affirmed its previously established standing that the burden of proof generally lies with the plaintiff, but it emphasized that the discrimination is hard to prove taking into consideration numerous challenges faced by the victims related to the access to information and materials crucial for favorable outcome in evidentiary part of the proceedings. In that regard, the Court emphasized that plaintiffs cannot be penalized for not having meaningful access to the required evidentiary materials. Therefore, any indication of lack of transparency in the process of decision making or actions that could represent discrimination in principle, are sufficient to completely shift the burden of proof to the defendant. Arguments that have to be proved by the defendant depend on the facts of the case in question, predominantly on what the plaintiff could have proved or have proved in the first phase of the process. However, judging from the case law of the Court of Justice of the European Union, it is clear that plaintiff cannot be asked to prove discrimination with specific level of certainty if he is not in position to do so for objective reasons. Deciding on the question of the scope and content of the prohibition of discrimination based on sexual orientation, Court issued several verdicts, most notably in cases *K.B.*,[25] *Grant*,[26] *Maruko*,[27] *Hay*[28] and *Romer.*[29]

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20 Case C-127/92 Enderby (1993) ECR 5535

21 Case C-381/99 Susanna Brunnhofer v Bank der osterreichischen Postsparkasse AG. 2001 ECR I-04961

22 Case C-109/88 Danfoss (1989) ECR 3199

23 Supra at 14

24 Case C-431/12 Agenția Națională de Administrare Fiscală v SC Rafinăria *Steaua* Română SA (2013) ECR 686

25 Case C-117/01 K.B. v National Health Service Pensions Agency and Secretary of State for Health (2004) ECR I-00541

26 Case C-249/96 Lisa Jacqueline Grant v South-West Trains Ltd. (1998) ECR I-00621

27 Case C-267/06 Maruko v Versorgungsanstalt der Deutschen Buhnen (2008) 2 C.M.L.R. 32

28 Case C-267/12 Frederic Hay v Credit agricole mutuel de Charente-Maritime et des Deux-Sevres (2013) ECR 0000

29 Case C-147/08 Jurgen Romer v Freie und Hansestadt Hamburg (2011) ECR I-03591

4. PROHIBITION OF DISCRIMINATION IN BOSNIA AND HERZEGOVINA

By virtue of Article II/4 of the Constitution of Bosnia and Herzegovina, the enjoyment of rights and freedoms is guaranteed to everyone without discrimination, including the rights enumerated in international agreements from Annex I, such as those in Article 7 of the International Covenant on Civil and Political Rights and optional protocols. Constitution of Bosnia and Herzegovina as well as Constitutions of Republika Srpska and Federation of Bosnia and Herzegovina contain provisions that introduce fundamental freedoms protected by international documents in domestic legal system thereby acquiring the status of constitutional norms. At the same time, preferential constitutional protection is afforded to those basic rights in case of different regulation at the state or entity level.

Law on prohibition of discrimination[30] as a single code applicable throughout the country was adopted in August 2009 and it was further amended in September of 2016. According to the adopted text, prohibited practices include discrimination on the grounds of national origin, segregation in education and discrimination by association. Procedural improvements include prioritization of discrimination cases in courts, differentiated suits, security measures, shifting the burden of proof, third party interventions and class actions. Both Law on prohibition of discrimination and Law on gender equality foresee exemptions from the principle of equal treatment and define circumstances in which affirmative action is warranted. Some of the vulnerable groups that are permitted to benefit from the exemptions of the principle of equal treatment are persons with disabilities, members of national minorities, women, pregnant women, children, youth, elderly, refugees and asylum seekers. Equally, law allows exemptions in employment of clerical staff based on their religious affiliation, setting mandatory retirement age or prescribing citizenship as a mandatory requirement set by law, given that such exemptions are re-assessed on regular basis.

In addition to civil suit, breaches of anti-discrimination law can result in misdemeanor charges against physical or legal entities for the following infractions: ignoring Ombudsmen recommendation or request to deliver documents or for the act of victimization. Final court decision in such cases is published in media, while for the some forms of discrimination that entail criminal responsibility such as domestic violence or inciting religious or national hatred or intolerance criminal sanctions such as imprisonment, monetary fine or probation, can be ordered. Central institution mandated with implementation of the anti-discrimination

[30] "Official Gazzette of Bosnia and Herzegovina" no. 59/09 and 66/16

closes is Human Rights Ombudsmen of Bosnia and Herzegovina. Among other duties, Ombudsmen Institution is entitled to receive individual and group complaints, to inform public on occurrences of discrimination, to promote the Law on prohibition of discrimination, to raise awareness and conduct anti-discrimination campaigns. During the course of investigation, Ombudsmen must be allowed access to any governmental body in order to determine the facts of the case, conduct interviews or collect administrative acts or other documents related to the activities of the responsible party under investigation. No public institution may refuse access to documents or databases when such access is request by the Human Rights Ombudsmen. In addition to Ombudsmen Institution, Ministry of Human Rights and Refugees, Agency for Gender Equality of Bosnia and Herzegovina, Gender Centers of Republika Srpska and Federation of Bosnia and Herzegovina, as well as Council of National Minorities also deal with issues related to gender equality.

In the field of employment, education, health, social protection, housing and access to goods and services, victims of discrimination can directly address the courts of the both Entities and Brcko District of Bosnia and Herzegovina. In addition to general rules of determining court jurisdiction, in discrimination cases jurisdiction is established based on the residence of the plaintiff, in order to facilitate his/her position.

Finally, Law on prohibition of discrimination also covers indirect discrimination, harassment, sexual harassment and incitement to discrimination.

5. CONCLUSION

Some of the key challenges Bosnia and Herzegovina is facing are adoption of acts and regulations in due time, planning and adaptation of process to all actors affected by the legislation that is being transposed. At the same time, it is necessary to take into consideration the recommendations by the European Commission contained within the Progress Report for each year. This process is marked by specific political and administrative structure of Bosnia and Herzegovina, designed by the Dayton Peace Agreement. No other country, candidate for membership in European Union, had to face such internal challenges, amplified by the fact that deep divisions persist after the armed conflict and still found their way into the current political constellation. One of the best examples is the understanding at the level of Entities that establishment of any new institution at the level of central government represent transfer of authority contradictory to the Peace Agreement. This can understandably affect not only institution building or strengthening but also legislative or normative activities that require coordination at the state level.

Insisting on one-sided or simplified solutions to such challenges from European partners can only complicate the already delicate balance of power and cause further mistrust toward the process of integration itself. It is precisely for this reason that the responsibility of competent bodies and designated officials is even greater as they have to take into account not only requirements and standards set by the competent European authorities, but have to design the road map to implement novel policies in fractured, disharmonized and often antagonized internal political landscape.

Having in mind that the enlargement is one of the most important policies of the European Union, Article 10 of the Treaty on the functioning of the European Union carries important message to candidate countries that they have to fully harmonize their legislative framework in the field of protection from discrimination with *acquis communautaire.* Additionally, anti-discrimination legislation needs to be supported by relevant anti-discrimination policies, that contain measures aimed at promotion of principle of genuine equality between groups that enjoy special protection from the European Union (based on gender, sexual orientation, racial or ethnic origin, disability, religion or belief) and that are clearly benchmarked for the period of several years. Those policies could become part of government strategy promoting equal opportunities for historically marginalized groups allowing equal access to education, employment, private life and other areas of life; ensuring correction of legal norms inhibiting mentioned opportunities; implementing norms on prohibition of incitement to discrimination, harassment and victimization and formulating recommendations for change in legislation.[31] In order to reach those objectives, European Union countries largely established new institutions or widened the scope of authority of the existing ones.[32]

When it comes to the scope of protection from unequal treatment, Law on prohibition of discrimination will have to take into account the case law of the Court of Justice of the European Union, according to which the general exemptions from the principle of equal treatment contained in Article 5. Paragraph 1. of the Law are too broad and will have to be narrowed in line with the Directive 2006/54 and Directive 2000/43. Equally, affirmative actions aimed at improving position of certain protected groups such as persons with disabilities should not be considered (and treated) as exemptions from the principle of equal treatment, but should nonetheless enjoy the same status as the prohibition of discrimination itself.

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31 Vasiljević, S., S*imilar and different: Discrimination in the European Union and the Republic of Croatia*, Zagreb, Tim Press, 2011, p. 202

32 Horvat, A., *New standards of Croatian and European anti-discrimination legislation*, Zbornik Pravnog fakulteta u Zagrebu, *vol*. 58, no. 6, 2008, p. 1475

In terms of transposition of Directive 2000/43 and Directive 2000/78, it is important to note that both directives set minimum requirements when it comes to measures aimed at combating discrimination, while at the same time allowing the member states to introduce or keep more favorable normative solutions. According to the Articles 6 and 8 of the mentioned Directives, respectively, member states may introduce or maintain provisions which are more favorable to the protection of the principle of equal treatment than those laid down in this Directive. At the same time the implementation of the Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

Judging from the relevant provisions of the founding treaties, anti-discrimination directives and the case law of the European Court, it seems that the definition of indirect discrimination contained in Article 3 of the Law on prohibition of discrimination should be amended, so that the disparate treatment of seemingly neutral provision can be justified as necessary or proportional to the significance of the legitimate aim that neutral provision seeks to achieve. Furthermore, the definition of the harassment from Article 4 paragraph 1 of the Law on prohibition of discrimination should be amended so that the behavior must be defined „undesirable" by the perpetrator.

Wording of the Article 15 of the Law on prohibition of discrimination which deals with the burden of proof is not completely harmonized with the view of the European Court of Justice as it does not set any threshold for presumption of *prima facie* discrimination, based on which the burden of proof should transfer to the defendant. Instead, it states that after the plaintiff states the facts argumenting the allegations that the prohibition of discrimination has been breached, defendant has to prove the opposite. Such broad wording allows for generally wide discretion of the courts to set the threshold of proof themselves for the plaintiffs, which could eventually be set higher than the mere facts based on which it is possible to suppose that discrimination might have occurred, or even lower, if for example, the burden of proof shifts to the defendant even if plaintiff did not invest any reasonable effort to prove *prima facie* discrimination.

Currently, Member states of the European Union are debating whetheher national legistaltion should introduce legal norms allowing same sex marriages, and it is precisely same sex marriage which is considered as ultimate goal of same sex couples.[33]

[33] Petrašević, T.; Duić, D.; Buljan, E., *The rights of same-sex couples in the European Union with special emphasis on the Republic of Croatia,* Strani pravni život, *vol.* 3, no. 3, 2017, p. 145

When it comes to application of anti-discrimination laws to the same sex marriages, it is important to take notice of two Curt rulings in cases *Maruko* and *Hay*. According to those rulings, exemption from Article 5 point (g) of the Law on prohibition of discrimination set in order to protect family relations cannot result in differential treatment of same sex marriages in access to rights, benefits and privileges, guaranteed by EU law in comparison to heterosexual couples, despite the fact that member states have exclusive authority over regulation of family matters.

In case C-144/04 *Werner Mangold/Rüdiger Helm,* Court has ruled that age based discrimination should be considered community law, which is not literaly reflected in the Law on elimination of all forms of discrimination.

Furthermore, there are no legal provisions related to the damages that can be awarded by the courts in cases of gender based discrimination. Court decides on the amount of compensation according to the general rules of civil law, where the crucial criterion is the amount of suffered damage, which includes material and moral damages as well as forgone benefits.

Finally, at the time of writing this article, decisive efforts are being made at the European Union level aimed at adoption of separate directives prohibiting discrimination based on religion or belief, age, sexual orientation and disability, which means that the courts will have to take into consideration new directives when applying provisions of the Law on prohibition of discrimination.

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UDK 618.39(4):347.158
342.7-055.2(4):173.4
Original scientific paper

ABORTION IN EUROPE

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ABSTRACT

There is a high level of agreement in the EU Member States with respect to a woman's right to abortion. Poland and Malta are the only exceptions to the liberal abortion regime in Europe. Yet, this issue is still considered highly divisive. The balance between a woman's right to abortion and the foetal right to life is still the topic of numerous legal and ethical discussions, which is a result of the recent rise of populism and anti-gender movements. In Europe, interwoven by different legal orders, international, supranational and national ones, the issue of human rights is dealt with at several levels. The EU Member States have assigned some of their sovereign rights to EU level, which is not the case with the area of reproductive rights and hence the issue of abortion is still firmly bound to state sovereignty.

The first part of the paper elaborates the issue of abortion within the framework of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) and EU law. Both the ECHR and the Charter of Fundamental Rights of the European Union grant every one the right to life whereas the protection of a woman's bodily integrity is set forth in Article 8 of the ECHR. Provisions on human rights are often featured by their general nature and it is up to judges to provide them with a more precise meaning. When it comes to international or supranational judicial bodies, such formulations might lead to controversial situations.

The second part of the paper sheds light on the recent case-law of the European Court of Human Rights and the Court of Justice. Both courts have been invited to examine the current regulation of abortion in the EU Member States. Furthermore, that part of the paper explores the most relevant decisions of the above courts with respect to the conflict between the foetal

right to life and the woman's right to make autonomous decisions on her body and its influence on national abortion laws in the EU.

This is not the first paper that deals with this issue, so the third part of the paper investigates the relevant legal literature. What is challenged is the prevalent standpoint that the level of the protection of a woman's right to abortion is fairly low if judging by the case-law of the above courts since neither court has regarded a woman's right to abortion as a fundamental human right. The authors try to find an answer to the question whether abortion restrictions are contrary to the fundamental principle of gender equality.

***Key words**: abortion, Europe, supranational courts, Convention for the Protection of Human Rights and Fundamental Freedoms, Charter of Fundamental Rights of the European Union*

1. INTRODUCTION

Contemporary Europe is characterized by the existence of "a multilevel system for the protection of human rights", in which national, supranational (EU) and international legal standards intertwine (Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter ECHR).[1] The features of that multilevel constitutional regulation in the area of human rights[2] include legal pluralism and heterarchy[3] instead of legal monism and hierarchy. The issue of the influence of membership in the Council of Europe and European Union on a woman's right to access to a safe abortion has been gaining importance among legal scholars, primarily due to a growing number of cases handled by the European Court of Human Rights (hereinafter ECtHR) and the Court of Justice (hereinafter CJ) in this field in the last three decades.[4] By the 1990s, abortion had been believed to fall outside the supranational level[5] and there had been considerable differences in the approach to this issue between the Member States.[6]

As far as the European context is concerned, Fabbrini's paper *The European Court of Human Rights, the EU Charter of Fundamental Rights and the right to abortion: Roe v. Wade on the other side of the Atlantic?* deserves particular attention. Herein, his paper is both quoted and critically examined. According to him, although

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1 Fabbrini, F., *The European Court of Human Rights, the EU Charter of Fundamental Rights and the right to abortion: Roe v. Wade on the other side of the Atlantic*? Columbia Journal of European Law, *vol.* 18, no. 1, 2011, p. 1. Fabbrini uses the term "multilevel constitutional architecture" to describe this system. *Ibid.*, p. 5

2 *Ibid.*, p. 5

3 *Ibid.*, p. 6

4 *Ibid.*, p. 2; 22; Fabbrini, F., *The last holdout: Ireland, the right to abortion and the European federal human rights system* (September 13, 2018), iCourts Working Paper Series, No. 142, 2018 [https://ssrn.com/abstract=3249400], accessed 10. April 2020

5 Fabbrini, *op. cit.*, note 4; Fabrini, *op. cit.*, note 1, p. 34

6 Fabbrini, *op. cit.*, note 1, p. 34

abortion regulation is despite a noticeable transfer of sovereignty to international and supranational organizations still subject to national regimes,[7] supranational law exerts pressure on the national legal systems of the Member States which impose strict restrictions on the access to abortion.[8] The pressure has resulted in inconsistencies[9] that have enticed particular Member States which did not adhere to "the supranational minima"[10] to amend their conditions for termination of pregnancy.[11] Legal scholars conduct similar research within the framework of the United Nations. The impact of this organization on the liberalization of national abortion legislation is also significant.[12]

European courts define the scope of the human rights, the nature of which requires their formulation in a general way.[13] The legislator or in case of international treaties, the drafting states shape "a vaguely worded provision", but it is up to judges to precisely establish its meaning.[14] On such an occasion, the judges are obliged to provide proper reasoning.[15] The position of European courts is in that light far more complex than that of national courts. The latter act within a national legal system while the former should take account of, when making respective decisions, both the European legislative framework and a national framework concerned. Due to the multilevel context of their action, European courts need to provide reasoning equally convincing to the applicants and referring Member States and on such an occasion, argumentation plays the decisive role.[16]

Currently there is no "broad individual right" to abortion on demand at European level.[17] Hence, one needs to rely on precise legal terminology. Although it can often be heard that women should have the right to abortion, it needs to be noted that most states, when regulating abortion, do not regard that right as a right conceived by legal theoreticians or a right in its strict sense, implying a correlative

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7 *Ibid.,* p. 22

8 *Ibid.,* p. 2

9 *Ibid.*

10 Fabbrini, *op. cit.*, note 4

11 Fabbrini, *op. cit.*, note 1, p. 3

12 Hunt, K.; Gruszczynski, M., *The ratification of CEDAW and the liberalization of abortion laws*, Politics & Gender, *vol.* 15, no. 4, 2019, pp. 722-745; Zorzi, K., *The impact of the United Nations on national abortion laws*, Catholic University Law Review, *vol.* 65, no. 2, 2015, pp. 409-428

13 Senden, H., *Interpretation of the Fundamental Rights in a Multilevel Legal System*, Intersentia, 2011, p. 4

14 *Ibid.*

15 *Ibid.*, p. 5

16 *Ibid.*

17 Fabbrini, *op. cit.*, note 1, p. 3

duty of the other side in a legal relation.[18] In the context of abortion, women do not have absolute freedom to make choices. [19]

With respect to abortion, it is more convenient to speak about rights in the sense of liberties preventing all the other people in particular jurisdiction from, under the condition that all the requirements incorporated into the definition of this right have been met, contesting termination of pregnancy for being illegal.[20] States prescribe conditions under which abortion can be performed legally,[21] the deadline for its performance (generally in early stages of pregnancy) and similar. Likewise, it can be said that foetus has the "right to life" in the strict sense of the term right only if the women has a correlative duty to complete pregnancy.[22]

Most European states enforce liberal abortion laws,[23] pursuant to which abortion can be performed upon request of a pregnant woman in an early stage of pregnancy.[24] However, this issue remains controversial. A consensus on abortion is difficult to reach as one party to the conflict views abortion as murder while the other side views "it as a matter for the individual conscience".[25]

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18 Scott, R., *Risks, Reasons and Rights: The European Convention on Human Rights and English Abortion Law*, Medical Law Review, *vol.* 24, no. 1, 2015, pp. 1-2

19 *Ibid.*, pp. 1-2

20 Flathman, R., *Toward a liberalism*, Cornell University Press, Ithaca, London, 1989, p. 173

21 Scott, *op. cit.*, note 18, p. 2

22 Dixon, R.; Nussbaum, M. C., *Abortion, dignity, and a capabilities approach*, in: Baines, B.; D. Barak-Erez, D.; Kahana, T. (eds.), *Feminist constitutionalism: Global perspectives*, Cambridge University Press, 2012, p. 71

23 Fabbrini, *op. cit.*, note 1, p. 8.

24 *Ibid.*
Pursuant to the petition submitted to the Croatian Constitutional Court by the CESI – Centre for Education, Counselling and Research in the procedure for assessing the conformity of the Act on Health Measures for the Realization of the Right to Freely Decide on the Childbirth (Official Gazette no. 18/78.) with the Constitution of the Republic of Croatia, 22 countries (Austria, Bosnia and Herzegovina, Bulgaria, Czech Republic, Denmark, Estonia, France, Greece, Croatia, Latvia, Lithuania, Luxembourg, North Macedonia, Germany, Norway, Portugal, Rumania, Serbia, Slovakia, Slovenia, Spain and Sweden) do not require women to reveal their reasons for an abortion. Unlike them, three states (Belgium, the Netherlands and Rumania) require women to lay down their unfavourable living conditions as reasons for an abortion, one state (Italy) prescribes reference to unfavourable social, economic or family circumstances and one state (Hungary) obliges women to indicate their state of a severe crisis.
CESI – Centre for Education, Counselling and Research, Expert opinion to the Constitutional Court of the Republic of Croatia in reviewing the constitutionality of the Act on Health Measures for the Realization of the Right to Freely Decide on the Childbirth (Official Gazette no. 18/78), [http://stari.cesi.hr/attach/_e/expert_opinion_cc~5.pdf], accessed 01. February 2019

25 Williams, G., *The Fetus and the "Right to Life"* The Cambridge Law Journal, *vol.* 53, no, 1, 1994, p. 74

By the 1960s, abortion had been prohibited in most states. In Europe, legal rules kept track with religious ones for long[26] since abortion was contrary to the Christian beliefs on the sanctity of life.[27] Abortion was also deemed contrary to the fundamental principles of the medical profession. For instance, the Hippocratic Oath includes the following maxim: "I will not give a woman a pessary to cause an abortion".[28] Criminal law started regulating abortion in the 19th century.[29] Apart from the sanctity of life, prohibition of abortion resulted, as asserted by Williams, from the fact that abortion was an extremely risky medical intervention.[30] Indeed, the legislation of the 19th century was aimed, among other things, at protection of a woman's health and life. The advancement of medicine has diverted attention from the above medical reasons[31] to the protection of traditional moral values.[32]

The article is divided into three main parts. The first part of the paper elaborates the issue of abortion within the framework of the ECHR and EU law. The second part of the paper sheds light on the recent case-law of the ECtHR and the CJ. Both courts have been invited to examine the current regulation of abortion in the EU Member States. This is not the first paper that deals with this issue, so the third part of the paper investigates the relevant legal literature. What is challenged is the prevalent standpoint that the level of the protection of a woman's right to abortion is fairly low if judging by the case-law of the above courts since neither court has regarded a woman's right to abortion as a fundamental human right. The authors try to find an answer to the question whether abortion restrictions are contrary to the fundamental principle of gender equality. We will conclude with some thoughts on the challenges that lie ahead. The paper utilizes descriptive, comparative and method of analysis.

2. DOES FOETUS HAVE A RIGHT TO LIFE?

The discussion on the begging of "human personhood" has a long history.[33] This issue arouse great interest of the philosophers who explore the moral status of

26 *Ibid.*, p 72

27 *Ibid.*

28 The Hippocratic Oath, Translated by Michael North, National Library of Medicine, 2002, [https://www.nlm.nih.gov/hmd/greek/greek_oath.html], accessed 10. January 2020. Although, as Williams points out, Hippocrates's position is not coherent. He considered abortion permissible in the case of slave prostitutes. Williams, *op. cit.*, note 25, p. 72

29 Fabbrini, *op. cit.*, note 1, p. 9

30 Williams, *op. cit.*, note 25, p.72

31 *Ibid.*, p. 72

32 Fabbrini, *op. cit.*, note 1, p. 9

33 See Williams, *op. cit.*, note 25, p. 71

foetus and its possible difference from the status of a child.[34] For philosophers, this discussion is closely related to the issue of the meaning of the term of human life.[35] In the legal sense, this discussion intensified in the 1970s when states began to liberalize abortion laws and it came to the issue of the conformity of abortion with the constitution, which appeared in various cases handled by national or supreme courts. In the 1990s, such cases were no exception at the ECtHR and CJ either.[36]

Today the opponents of abortion mostly present their reasons in a secular way and their assertions are based on human rights and on the foetal right to life, and not on religious assumptions on the sanctity of life.[37] A subtle approach to this issue in contemporary states in which religion is separated from the state can be regarded as respect for the constitution, holds Williams, and thus the opponents of abortion can get support of non-religious person too.[38] Utilization of human rights is omnipresent nowadays.[39] Human rights represent the *lingua franca* of the contemporary pluralist world.[40] In this section of the paper, we will provide an overview of the constitutional provisions on the right to life, i.e. of the provisions of the most relevant European legal instruments containing it.

In doing so, we most frequently come across expressions like "everyone has the right to life" and "the right to life is guaranteed to every human being", without defining the terms "everyone" and "human being", and generally, but not completely, without explicitly stating a special right to life before birth. Very few states recognise in their constitutions – explicitly or implicitly – a special right to life before birth. In European countries, the right to life of the unborn was explicitly recognised by the constitution only in the Republic of Ireland.

Irish abortion laws have always been strict. Abortion was first considered a misdemeanour according to common law[41] and then it was prohibited pursuant to Section 58 of the Offences against the Person Act 1861,[42] which envisaged life imprisonment for both the pregnant woman and the doctor who performed the

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34 *Ibid.*, p. 73

35 *Ibid.,* p. 71

36 *Ibid.*

37 *Ibid.*, p. 73

38 *Ibid*, pp. 73-74

39 *Ibid.*, p. 74

40 Baldissone, R., *Human rights: a lingua franca for the multiverse*, The International Journal of Human Rights, *vol.* 14, no. 7, 2010, pp. 1117 –1137

41 Mulligan, A., *The right to travel for abortion services: A case study in Irish cross-border reproductive care*, European Journal of Health Law, *vol.* 22, no. 3, 2015, p. 250. See Case C-159/90, *The Society for The Protection of Unborn Children Ireland Ltd v. Stephen Grogan and Others* [1991] E.C.R. I-4685

42 Offences against the Person Act 1861, 24 & 25 Vict. 236, c. 100 (U.K.)

abortion.[43] The 1979 Health (Family Planning) Act embraced the formulation of the stated 19th century Act.[44] Based on the results of the 1983 referendum, the Irish Constitution was amended or more precisely, the Eight Amendment of the Constitution of Ireland established the right of the unborn to life with the same appreciation for foetus as for the life of mothers (Article 40.3.3 of the Constitution of Ireland).[45] Since the Eight Amendment, there have been a number of referring lawsuits, including litigation before the CJ and ECtHR.[46] The whole situation resulted in the adoption of two amendments to the Constitution of Ireland. The Thirteenth Amendment permitted women to travel outside Ireland to have their pregnancy terminated[47] and the Fourteenth Amendment introduced "the right to provide information about abortion services performed overseas".[48] Ultimately, it should be noted that in the referendum held in May 2018, an overwhelming majority of the Irish people voted to remove this amendment from the Constitution.[49] The Eighth Amendment has been substituted with a provision permitting the Irish Parliament (Oireachtas) to legally regulate the issue of abortion.[50] Thus, Poland and Malta became the member states of the European Union with the strictest abortion legislation. In terms of the rigidity of its post-communist abortion regime, Poland permits abortion only in three exceptional cases.[51] A failure to comply with the respective restrictions in this view may bring to 3-year

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43 Offences Against the Person Act 1861, §§ 58, 59. According to Mulligan, *op. cit.*, note 41, pp. 250-1, note 48; Fabbrini, *op. cit.*, note 1, pp. 18-9

44 Health (Family Planning) Act 1979 (Act No. 20/1979), § 10 (Ir.). According to Mulligan, *op. cit.*, note 41, pp. 250-1, note 48; Fabbrini, *op. cit.*, note 1, p. 18-19

45 Fabbrini, *op. cit.*, note 1, p. 19; Mulligan, *op. cit.*, note 41, p. 252

46 Fabbrini, *op. cit.*, note 1, pp. 19-20

47 IR. CONST., 1937, art. 40.3.3 (2), as amended by the Thirteenth Am. (1992). According to Fabbrini, *op. cit.*, note 1, p. 20; Mulligan, *op. cit.*, note 41, p. 254

48 IR. CONST., 1937, art. 40.3.3(3), as amended by the Fourteenth Am. (1992). According to Fabbrini, *op. cit.*, note 1, p. 20; Mulligan, *op. cit.*, note 41, p. 255
Prior to the approval of the Maastricht Treaty (1992), Ireland fought for an additional protocol stating that the Treaty would not affect the application of the Irish constitutional provision on abortion. Protocol Annexed to the Treaty on European Union and to the Treaties Establishing the European Communities, Feb. 7, 1992, 1992 O.J. (C 224/130). According to Fabbrini, *op. cit.*, note 1, p. 26

49 In the 2018 referendum, the Irish electorate voted by 1,429,981 (66.4%) votes to 723,632 (33.6%) in favour of removing the Eighth Amendment from the Constitution. The turnout nationally was 64.13%. Vedran Brkulj, *Za legalizaciju pobačaja u Irskoj glasalo je 66.4 posto građana*, [https://www.tportal.hr/vijesti/clanak/za-legalizaciju-pobacaja-u-irskoj-glasalo-je-66-4-posto-gradana-foto-20180526], accessed 31. January 2019

50 Constitution of the Republic of Ireland [http://www.irishstatutebook.ie/eli/cons/en#article40], accessed 31. January 2020

51 According to the Act on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, Jan. 7, 1993, par. 4(a), abortion is permitted in three exceptional cases:
"(1) a physician, other than the one which performs the abortion, certifies that the pregnancy is endangering the mother's life or health; (2) up to viability (i.e., up to the twenty-fourth week), if the fetus

imprisonment.[52] Malta is the only EU Member State where abortion is completely banned even if pregnancy represents a risk to the pregnant woman's life.[53]

Three East European constitutions (i.e. Hungarian, Czech[54] and Slovak[55]) contain provisions relating to pre-birth child protection, that is, stipulating that human life deserves to be protected before birth. However, the constitutional courts of these states have interpreted these provisions such that they do not recognise a special right to life of the unborn, but a constitutional value that enjoys special protection of the state.[56] In this context, the Hungarian example is instructive. While the Czech and Slovakian Constitution emerged in 1992, the Hungarian Constitution was adopted in January 2010. Article II of the Hungarian Constitution stipulates as follows:

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is seriously impaired; or (3) up to the twelfth week, if pregnancy resulted from rape". According to Fabbrini, *op. cit.*, note 1, pp. 17-18

52 Fabbrini, *op. cit.*, note 1, p. 18

53 Gravino, G.; Caruana-Finkel, L., *Abortion and methods of reproductive planning: the views of Malta's medical doctor cohort*, Sexual and Reproductive Health Matters, *vol*. 27, no. 1, 2019, p. 288

54 Pursuant to Article 6 of the Charter of Fundamental Rights and Freedoms of the Czech Republic, which is part of the constitutional order of the Czech Republic, everybody has the right to life, and human life deserves to be protected even before birth
Charter of Fundamental Rights and Freedoms - Resolution of the Presidium of the Czech National Council of 16 December 1992 on the Declaration of the Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic, [https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf], accessed 30. January 2019

55 Pursuant to Article 15 (1) of the Constitution of the Slovak Republic, everyone has the right to life and human life deserves to be protected even before birth. This provision is identical to the previously mentioned provision of the Czech Charter of Fundamental Rights and Freedoms. Constitution of the Slovak Republic [https://www.prezident.sk/upload-files/46422.pdf], accessed 30. January 2019

56 Ruling of the Constitutional Court of the Republic of Croatia no. U-I-60/1991 et al. of 21 February 2017 and the dissenting opinion (*Rješenje Ustavnog suda Republike Hrvatske, broj: U-I-60/1991. i dr. od 21. veljače 2017. i izdvojeno mišljenje),* Official Gazette, No. 25/17, par. 31, [https://sljeme.usud.hr/usud/praksaw.nsf/7114c25caa361e3ac1257f340032f11e/c12570d30061ce54c12580d100416faf/$FILE/U-I-60-1991%20i%20dr.pdf], accessed 30. January 2020. Unofficial abridged translation into English: [https://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/croatia_2017_constitutional.pdf], accessed 30. January 2020. See: Finding of the Constitutional Court of the Slovak Republic, Ref. No. I. ÚS 12/01 of 4 December 2007, published in the Collection of Laws of the Slovak Republic under no. 14/2008, volume 8, [https://www.ustavnysud.sk/documents/10182/992296/1_07a.pdf/88e635ba-300a-4cf3-a71b-99ecfe2c8e54], accessed 30. January 2020. Constitutional Court of Hungary, Decision 64/1991 on the Regulation of Abortion, [https://hunconcourt.hu/dontes/decision-64-1991-on-the-regulation-of-abortion], accessed 30 January 2020

> "Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception."[57]

In the same year, the Hungarian Parliament adopted a new Family Protection Act which protects foetus from the moment of conception. The abortion regime thus became stricter since it included mandatory counselling consisting of two meetings which shall be three days apart. These are indicators of the conservative trend in Hungary where the Fidesz and Christian Democratic Party (KDNP) coalition has held power since 2010.[58]

With respect of evaluation of the above constitutional provisions, it should be stressed that law requires "precise language" and in the legal context, the term "unborn child" cannot be identified with the term "child".[59] Those constitutional texts do not use scientific terminology either. They do not involve terms like embryo or foetus.[60]

The Croatian Constitution does not explicitly recognise the right to life before childbirth.[61] Article 21 (1) thereof governs that "Each human being has the right to life." It is interesting that its predecessor, the 1974 Constitution of the Socialist Federal Republic of Yugoslavia, or more precisely its Article 272 used the following formulation:

> "It is man's right to freely decide on childbirth.
>
> This right can be restrained only for the sake of man's health."

There is no such explicit provision in the applicable Croatian Constitution. On the other hand, although the Basic Law for the Federal Republic of Germany does not contain any provisions on life before birth, the German Federal Constitutional Court has interpreted the term "everyone" given in Article 2(2) of the Basic Law (i.e. "Everyone has the right to life and bodily integrity.") as a constitutional

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57 The Fundamental Law of Hungary, English translation of consolidated version [http://www.kormany.hu/download/f/3e/61000/TheFundamentalLawofHungary_20180629_FIN.pdf], accessed 30. January 2020

58 Vida, B., *New waves of anti-sexual and reproductive health and rights strategies in the European Union: the anti-gender discourse in Hungary*, Sexual and Reproductive Health Matters, *vol*. 27, no. 2, 2019, p. 14

59 Williams, *op. cit.*, note 25, p. 73

60 Mulligan, *op. cit.*, note 41, p. 252

61 The Constitution of the Republic of Croatia (Ustav Republike Hrvatske), Official Gazette, No. 56/90, 135/97, 8/98, 113/00, 124/00, 41/01, 55/01, 76/10 and 5/14

provision that also protects "the life developing in the mother's womb" as "an independent legal value".[62]

As a fundamental human right, the right to life is guaranteed by a number of international instruments adopted (primarily) by the United Nations and the Council of Europe. In the context of the Council of Europe, the basic document for the protection of human rights adopted by this organisation is the ECHR (1950),[63] whose creators also used the expression "everyone". Pursuant to Article 2 (1): "Everyone's right to life shall be protected by law".

The creators of the ECHR did not discuss the right to life before birth at all. [64] At the time of the ECHR preparation, criminal law prohibited abortion in all contracting parties.[65] In what follows, we will see that neither (first) the European Commission of Human Rights nor (subsequently) the ECtHR have found in their case law that the foetus falls under the term "everyone" within the meaning of Article 2 of the ECHR.

It is also necessary to mention the relevant provisions of the Convention on the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine: the Convention on Human Rights and Biomedicine (1997).[66] Pursuant to Article 1:

> "Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine."

The latter Convention is the only legally binding international instrument that regulates both the issue of human rights and the issue of biomedicine (bioethics). It is evident that even in this instrument, there is no definition of a human being. Instead, the Convention applies the term "everyone", accompanied with no defi-

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62 Decision of the German Federal Constitutional Court, BVerfGE 39, 1 c (Schwangerschaftsabbruch I), cited in the Ruling of the Constitutional Court of the Republic of Croatia, p. 50

63 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 14 to the Convention, Official Gazette - International Treaties, Nos. 18/97, 6/99 – consolidated text, 8/99 – correction

64 Copelon, R.; Zampas, C.; Brusie, E.; de Vore, J., *Human rights begin at birth*: *international law and the claim of fetal rights*, Reproductive Health Matters, *vol.* 13, no. 26, 2005, p. 123

65 Fabbrini, *op. cit.*, note 1, p. 27

66 Convention on the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine: the Convention on Human Rights and Biomedicine, Official Gazette - International Treaties, Nos. 13/03, 18/03 and 3/06

nition.[67] The Explanatory Report to the Convention emphasizes that due to a lack of a consensus on the definition of this notion among the contracting states, their national legislation should provide for clarification what is meant under a human being.[68] However, it should be noted that the Convention on Human Rights and Biomedicine does contain provisions on "the prenatal phase", particularly in its Chapter IV – Human Genome.[69] Furthermore, the ECtHR refers to this Convention in its case-law and one of its most interesting cases concerning this paper is the case of *Vo v. France* where the ECtHR had referred to this Convention even before France ratified it.[70]

It seems that the relevant conclusions of Council of Europe Parliamentary Assembly Resolution 1607 (2008) – "Access to safe and legal abortion in Europe" (2008) should be accentuated in this context as well despite their legally non-binding character.[71] In these conclusions, the Parliamentary "Assembly takes the view that abortion should not be banned within reasonable gestational limits", and that "a ban on abortion does not result in fewer abortions but mainly leads to" illegal abortions, that result in a number of adverse effects, such as increased maternal mortality, "abortion tourism", and social inequalities (conclusion 4).

The viewpoint that strict abortion laws have no impact on abortion rates is supported by numerous empirical studies. For example, Stašević and Ropac found in 2018 that states with a liberal abortion regime are featured by an abortion incidence of 34/1000 whereas states with numerous abortion restrictions, where abortion can be performed only in the event of a threat to the mother's life, have somewhat higher abortion incidence (37/1000).[72] A lack of access to a safe and lawful abortion threatens a woman's fundamental right to life, not just her social,

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67 Judgement *Vo v. France* (2004) 40 EHRR 12, par. 84

68 *Ibid.*, para 84. This also applies to the Additional Protocol on the Prohibition of Cloning Human Beings and the Additional Protocol on Biomedical Research. Nys, H., *Towards an international treaty on human rights and biomedicine*? *Some reflections inspired by UNESCO's Universal Declaration on Bioethics and Human Rights*, European Journal of Health Law, *vol.* 13, no. 1, pp. 7-8

69 *Vo v. France*. Dissenting opinion of judge Mularoni joined by judge Stražnicka

70 Nys, *op. cit.*, note 68, pp. 7-8. France ratified this Convention on 13 December 2011
Committee on Bioethics, Chart of signatures and ratifications of the Convention on Human Rights and Biomedicine, Strasbourg, 17 May 2019, [https://rm.coe.int/inf-2019-2-etat-sign-ratif-reserves-bil-002-/16809979a8], accessed 20. April 2020

71 Resolution 1607 (2008) – Access to safe and legal abortion in Europe, [http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638], accessed 20. April 2020

72 Stašević, I.; Ropac, D., *Statistički podaci o pobačajima u Hrvatskoj – neke osobitosti i usporedbe*, Društvena istraživanja, *vol.* 27, no. 2, 2018, p. 347

health and private interests. It is estimated that 68,000 women die annually as a consequence of an illegal abortion. [73]

Finally, an important document of the European Union - Charter of Fundamental Rights of the European Union (hereinafter CFR, 2010), also contains a relevant provision on the right to life. Pursuant to Article 2 (1): "Everyone has the right to life." As can be seen, the creators of the CFR also opted for a general expression "everyone" without defining the scope of this term. On 1 December 2000, when the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (hereinafter Lisbon Treaty)[74] entered into force, the CFR became legally binding according to its Article 6 (1) or in other words, it obtained the status of a treaty.[75]

3. CASE LAW OF THE EUROPEAN COURTS

Although a very sensitive subject, contemporary case law of the ECtHR in relation to the right to life and termination of pregnancy is relatively rich. On the other hand, the case law of the CJ on this matter is not so extensive. However, to date, neither of the two European courts has provided an affirmative answer to the question as to whether an unborn person can be considered a person in the sense of exercising the right to life.

3.1. Abortion and the European Court of Human Rights

The case-law of the ECtHR with regard to the obligations arising from the right to life has significantly evolved over the last thirty years. In doing so, the issues related to unborn humans have so far been largely examined by the ECtHR in the light of "life" as provided for in Article 2(1) and "private and family life" as provided for in Article 8 of the ECHR, and recently, within the framework of two cases initiated based on applications against Poland and appertaining violation of Article 3 prohibiting torture and inhuman or degrading treatment or punishment. When exploring the case-law of the ECtHR, it should be highlighted that until the enactment of the 11th additional Protocol to the ECHR, individual applications had been first considered by the European Human Rights Commission.[76] Since the case-law of the ECtHR in regard to abortion mostly refers to violation

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73 Hunt; Gruszczynski, *op. cit.*, note 12, pp. 730-1

74 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 3, 2007, 2007 O.J. (C 306) 30

75 Fabbrini, *op. cit.*, note 1, pp. 6, 7, 61

76 Fabbrini, *op. cit.*, note 1, p. 27

of Article 8 of the ECHR, which stipulates respect for private and family life, the following lines deal with the scope of this Article.

3.1.1. *Right to respect for private and family life*

Article 8 of the ECHR provides a broad notion of private life. The ECtHR has established that the protection of private life, laid down in Article 8:

> ”encompasses, *inter alia*, the right to personal autonomy and personal development (…). This concerns subjects such as gender identification, sexual orientation and sexual life (…), a person's physical and psychological integrity (..) as well as decisions both to have and not to have a child or to become genetic parents”.[77]

Article 8 envisages positive and negative obligations of the contracting states.[78] In terms of negative ones,[79] the ECtHR conducts triple analysis.[80] In order to be eligible, interference shall be “in accordance with the law”, shall result from “the legitimate aims” depicted in Article 8 (2) of the ECHR and shall be “necessary in a democratic society”.[81] When performing such analysis, the ECtHR regularly finds that the sued state has meet the first two requirements without thoroughly analysing them. It focuses on the third requirement and seek whether the interference was “necessary in a democratic society” or not.[82] ”Necessity” is the most delicate requirement for qualifying interference as acceptable. [83]

In order to be “in accordance with the law”, interference shall be based on national law which needs to be ”adequately accessible” and tailored ”with sufficient precision to enable the citizen to regulate his/her conduct”.[84] In compliance with Article 8 (2) of the ECHR, interference has a legitimate aim if it supports national

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77 Judgement *A., B. and C v. Ireland* (2011) 53 E.H.R.R 13, par. 212

78 Fenwick, D., *The Modern abortion jurisprudence under Article 8 of the European Convention on Human Rights*, Medical Law International, *vol.* 12, no. 3–4, 2013, p. 251

79 Scott, *op. cit.*, note 18, p.7.
In *Tysiąc v. Poland*, the ECtHR laid down fundamental principles with regard to Article 8.
Judgement *Tysiąc v. Poland* (2007) 45 EHRR 42, par. 109. For more detail, see Scott, *op. cit.*, note 18, p.7.

80 Scott, *op. cit.*, note 18, p. 7

81 *Tysiąc v. Poland*, par. 109. See also *A., B. and C. v. Ireland*, par. 218; Fabbrini, *op. cit.*, note 1, pp. 54-55

82 Weinstein, B., *Reproductive choice in the hands of the state: The right to abortion under the European Convention on Human Rights in light of A, B & C v. Ireland*, American University International Law Review, *vol.* 27, no. 2, 2012, p. 402. Weinstein paraphrases Letsas, G., *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, 2009

83 *Ibid*, p. 402

84 *A., B. and C. v. Ireland*, par. 220

security, public safety, the economic well-being, crime prevention, protection of health, morals or the rights and freedoms of others. According to well-established case law of the ECtHR, the necessity element "implies that the interference corresponds to a pressing social need and in particular that it is proportionate to one of the legitimate aims pursued by the authorities".[85]

On the other hand, "positive obligations inherent in an effective 'respect' for private life"[86] can encompass:

> "adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision on a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and implementation, where appropriate, of specific measures".[87]

For example, they may involve the obligation of a contracting state to amend its regulations in a way that a particular medical intervention is made available to people in need.[88] It may come to violation of Article 8 of the ECHR if a contracting stare fails, without a reasonable justification, to design an appropriate legal framework for autonomy in the private dimension of life.[89] The ECHR shall "guarantee not rights that are theoretical or illusory but rights that are practical and effective."[90] Let us mention that positive and negative obligations of the contracting states cannot be precisely defined and that the applicable principles are similar in both cases.[91]

> "In both the negative and positive contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts, the State enjoys a certain margin of appreciation". [92]

The margin of appreciation of the ECtHR resembles that of "the U.S. Supreme Court on the occasion of determining the proper level of scrutiny to apply when deciding if a state law is unconstitutional." The Supreme Court defines this margin depending on the nature and scope of a particular right. In European law, "a nar-

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85 *Tysiąc v. Poland*, par. 109; See also Scott, *op. cit.*, note 18, p. 7

86 *Tysiąc v. Poland*, par. 110; See also Fenwick, *op. cit.*, note 78, pp. 261-266

87 *Tysiąc v. Poland*, par. 110. See also Scott, *op. cit.*, note 18, p. 7

88 Fenwick, *op. cit.*, note 78, p. 251

89 *Ibid.*

90 *Tysiąc v. Poland*, par. 113; *A., B. and C. v. Ireland*, par. 267; See also Scott, *op. cit.*, note 18, p. 8

91 *Tysiąc v. Poland*, par. 111. See also Scott, *op. cit.*, note 18, p. 7

92 *Tysiąc v. Poland*, par. 111

row margin of appreciation" corresponds to "the U.S. Supreme Court's strict scrutiny standard" and "a wide margin of appreciation" to "the rational basis test".[93]

The ECtHR has observed that considering positive obligations of the contracting states, the term "respect" is vague and that due to different national practices, applications differ considerably from each other.[94] When assessing positive obligations of a state, its "rule of law" should be scrutinized since this concept is connected with every article of the ECHR.[95]

3.1.2. *Case-law of the European Court of Human Rights*

The first consideration of the question whether the right to life from Article 2 of the ECHR extends to foetal life was given by the European Commission on Human Rights in 1980 in the *Paton v. United Kingdom* case (sometimes cited as *X. v. United Kingdom*).[96] In this case the Commission considered the terms "everyone" and "life" in the context of the ECHR (especially its Article 2) and stated explicitly that the context in which the term "everyone" is employed "does not include the unborn" child.[97] Furthermore, when considering the relation between the right to "life" of the foetus and the right to life of the pregnant woman, the Commission reached the following conclusion:

> "The life of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman."[98]

This position was supported by the Commission twelve years later (1992) in the case *H. v. Norway*,[99] as well as by the ECtHR ten years later (2002) in the case

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93 Weinstein, *op. cit.*, note 82, pp. 402-3

94 *Tysiąc v. Poland*, par. 112; See also Scott, *op. cit.*, note 18, p. 8

95 *Ibid.*

96 Judgement *Paton v. United Kingdom* (1981) 3 EHRR 408 [https://www.globalhealthrights.org/wp-content/uploads/2013/10/EComHR-1980-Paton-v.-United-Kingdom-X.-v.-United-Kingdom.pdf]

97 *Ibid.*, par. 9; CESI, *op. cit.*, note 24, p. 5

98 *Ibid.*, par. 9; CESI, *op. cit.*, note 24, p. 5

99 Judgement *H. v. Norway* (1992) 73 DR 155; CESI, *op. cit.*, note 24, p. 5

Boso v. Italy.[100] It can be noticed that in all three cases the competent authority provided justification for the disputed national acts and rejected the claims lodged by applicants (potential fathers) on the grounds that the states shall have a wide margin of appreciation of this sensitive issue.[101]

In the case of *Vo v. France* (2004),[102] which concerns a pregnant female patient who underwent a therapeutic abortion due to medical negligence, the ECtHR consolidated the existing case-law on the right to life and termination of pregnancy and conducted (until then) the most thorough examination of the right to life of the unborn human.[103] On the basis of a review of case law up to that date, the ECtHR affirmed again that "the unborn child is not regarded as a 'person' directly protected by Article 2 of the ECHR and that if the unborn do have a 'right' to 'life', it is implicitly limited by the mother's rights and interests", noting that this does not mean that the ECHR authorities eliminated "the possibility" that under special circumstances protection could also "be extended to the unborn".[104]

The ECtHR finally concluded that the contracting states enjoy a margin of appreciation when it comes to the beginning of life.[105] It drew that conclusion irrespective of the fact that the ECHR is "a living instrument" which should be interpreted in line with current conditions ("an evaluative interpretation of the Convention").[106] The ECtHR reiterated that among member states "there is no consensus on the nature and status of the embryo" or foetus, although it can be seen that "they are beginning to receive some protection", primarily "in the light of scientific progress"- e.g. genetic engineering, medically assisted procreation and embryo experimentation.[107]

Senden mentions this case as a good example of comparative interpretation applied by the ECtHR for the sake of backing the viewpoint that "the issue is not ripe for the interpretation by the Court".[108] As to ascertain whether the term "everyone" stated in Article 2 of the ECHR comprises foetus, the ECtHR took

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100 Judgement *Boso v. Italy* (2002), App. No. 50490/99, Eur. Ct. H.R. 846; CESI, *op. cit.*, note 24, p. 5

101 "The Commission finds that in such a delicate area the Contracting States must have a certain discretion." *H. against Norway*, par. 1; CESI, *op. cit.*, note 24, p. 5

102 *Vo v. France*; CESI, *op. cit.*, note 24, p. 5. The applicant was pregnant and attended a hospital for a medical check-up, where she was mistaken for another woman and had an IUD placed inside the uterus, which caused the loss of amniotic fluid, and ultimately the foetal death

103 Ruling of the Constitutional Court of the Republic of Croatia, par. 15

104 *Vo v. France*, par. 80

105 *Ibid*., par. 82

106 *Ibid*.

107 *Ibid*., par. 84

108 Senden, *op. cit.*, note 13, p. 233

advantage of comparative interpretation and concluded that there is neither a legal nor a scientific consensus on the issue when life begins. The only ground common to all contracting states relates to the fact that foetus or embryo belongs to human race.[109] Senden emphasizes that the ECtHR used a margin of appreciation "in the interpretation phase" of this case, which is unusual, since this doctrine is in principle used "in the phase of application" when "justifying the interference".[110] Moreover, holds Senden, the ECtHR wanted to put emphasis on the lack of a consensus among contracting parties, which is not always the case.[111] The ECtHR concluded that:

> "the potentiality of that being and its capacity to become a person require (…) protection in the name of human dignity, without making it a 'person' with the 'right to life' for the purposes of Article 2".[112]

In view of the aforementioned, the ECtHR found that "it is neither desirable, nor even possible" to provide an abstract answer to the question whether the unborn is a person within the meaning of Article 2 of the ECHR.[113] The notion of human dignity appears here as a substitute for reference to human rights as human rights are possessed only by living people whereas dignity belongs to all mankind as such and foetus is undoubtedly part thereof.[114]

The ECtHR has not changed its legal views in any of its recent judgments related primarily to Article 8 of the ECHR. In the case of *A., B. and C. v. Ireland* (2011), which was initiated by three applicants, two Irish citizens and one Lithuanian citizen with residence in Ireland who had to travel outside Ireland in order to procure a safe abortion.[115] At that time, Ireland was still characterized by one of the most rigorous abortion regime in Europe. [116]

All the applicants complained about violation of Article 8 of the ECHR in regard to abortion prohibition. The first two applicants complained about the unavail-

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109 *Ibid.*, p. 233. *Vo v. France*, par. 84

110 Senden, *op. cit.*, note 13, p. 234

111 *Ibid.* Senden mentions the Judgement *Kimlya and Others v. Russia* (2009), App. No. 76836/01 and 32782/03

112 *Vo v. France*, par. 84

113 *Ibid.*, para 85

114 Andorno, R., *Human dignity and human rights as a common ground for a global bioethics*, The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine, *vol.* 34, no. 3, 2009, p. 228

115 See Fabbrini, *op. cit.*, note 1, pp. 49-50

116 Fabbrini, *op. cit.*, note 1, p. 4; Fenwick, D., *"Abortion Jurisprudence" at Strasbourg: Deferential, Avoidant and Normatively Neutral?* Legal Studies, *vol.* 34, no. 2, 2014, p. 217

ability of abortion "for health and well-being reasons" whereas the third one was not able to exercise her right to abortion despite the fact that the Irish legal system permitted this medical intervention when pregnancy was a threat to the woman's life.[117] The first applicant's pregnancy was unplanned and it happened when she was facing a series of difficult life situations. She was single and unemployed and had four small children who were, at that time, entrusted to foster care due to her problems with alcohol.[118] The second applicant stated that she was not capable of taking care of a child at that period of her life. At the beginning of pregnancy, she had some kind of health scare ("a risk of an ectopic pregnancy"), which in the end turned out to be a false alarm.[119] The third applicant went through chemotherapy due to rare cancer which was in remission at the time when her unplanned pregnancy happened. She was not aware of her pregnancy when she underwent a number of cancer screening tests which are in contradiction with pregnancy. She claimed that "as a result of the chilling effect of the Irish legal framework, she received insufficient information as to the impact of the pregnancy on her health and life".[120] All three applicants felt stigmatized because they had to go to Great Britain to undergo a medical intervention which was a felony in their country and implied "penal servitude for life".[121]

The Court held that there were substantial differences between the first two applicants who sought an abortion for health and/or well-being reasons and the third one who complained about "the inability to establish her eligibility for a lawful abortion in Ireland", so it made separate decisions on alleged violation of Article 8 of the ECHR.[122]

The ECtHR examined the complaints of the first two applicants in the context of the negative obligations set forth in Article 8 of the ECHR. The reason for such an approach is hidden in the fact that the main argument of the applicants was their assertion that the Irish prohibition of abortion "for health and/or well-being reasons disproportionately restricted their right to respect for their private lives"[123] In compliance with the well-established case-law of the Commission and its earlier case-law, the ECtHR reiterated that every abortion regulation does not interfere

117 *A., B. and C. v. Ireland*, par. 3
118 *Ibid.*, par. 14
119 *Ibid.*, par. 19
120 *Ibid.*, par. 24
121 *Ibid.*, par. 119; See also par. 126
122 *Ibid.*, par. 214
123 *Ibid.*, par. 216

with the right to respect for the private life of pregnant women.[124] Article 8 of the ECHR can be interpreted neither in a way that termination of pregnancy is deemed exclusively part of a woman's private life[125] nor as if it provided the right to abortion:[126]

> "whenever a woman is pregnant (…) her private life thus becomes closely connected with the developing foetus. A woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked, including those of the unborn child".[127]

It is apprehensible that a decision on abortion performance is not something that is meant under "conventional privacy".[128] Since that was violation of a negative obligation, the ECtHR carried out its tripartite test and hence established that the legality criterion had been met and that the abortion restrictions were accompanied with legitimate aims since they

> "were based on profound moral values concerning the nature of life, which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have changed significantly since then."[129]

When deciding on whether the interference with this right was "necessary in a democratic society", the ECtHR believed that there had been a consensus among the contracting states on the grounds for the permissibility of abortion, which were generally broader than those in Ireland.[130] Yet, in accordance with the *Vo v. France* case, where it was found that the question of when the right to life begins is a matter that falls within the states' margin of appreciation, the Court stated that the Irish State shall generally be allowed a wide margin of appreciation with respect to determining whether a fair balance has been established in relation to the protection of the right to life of the unborn under Irish law and the applicants' right to respect for their private life under Article 8 of the ECtHR.

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124 *Ibid*. The court referred to the cases *Bruggemann and Scheuten v Federal Republic of Germany* (1981) 3 EHRR 244, par. 59, and *Vo v. France*, par. 76. For more details, see Scott, *op. cit.*, note 18, p. 4; Fenwick, *op. cit.*, note 116, p. 216

125 *Ibid.*, par. 213; Fabbrini, *op. cit.*, note 1, pp. 51-2

126 *Ibid.*, par. 214; Fabbrini, *op. cit.*, note 1, pp. 51-2

127 *Ibid.*, par. 213

128 Sunstein, C. R., *Neutrality in constitutional law (with special reference to pornography, abortion, and surrogacy,* Columbia Law Review, *vol*. 92, 1992, p. 31

129 *A., B. and C. v. Ireland*, par. 226

130 *Ibid.*, par. 235

Therefore, in regard to the first two applicants, the ECtHR found that the prohibition of termination of the applicants' pregnancies sought for reasons of health and/or well-being amounted to an interference with their rights under Article 8 of the ECHR,[131] although this prohibition does not constitute an unjustified interference. The third application was interpreted differently by the ECtHR who found breach of the ECHR in the sense that Ireland had not provided for "an accessible and effective procedural mechanisms" for exercising her right to legal abortion when the expectant's life was in danger.[132]The ECtHR added that it came to violation of Article 8 since

> "the authorities failed to comply with their *positive obligation* (emphasis added) to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution."[133]

The applicants also complained about violation of Article 14 of the ECHR in conjunction with Article 8 thereof.[134] They claimed that the then applicable Irish abortion restrictions were discriminatory and imposed "an excessive burden on them as women and, in particular, on the first applicant as an impoverished woman".[135] The Court's reply was brief and was not accompanied with a thorough explanation. The ECtHR just asserted that "the Court does not consider it necessary to examine the applicants' complaints separately under Article 14 of the Convention".[136]

Beside violation of Article 14 in conjunction with Article 8 of the ECHR, the applicants as well complained about violation of the positive and negative obligations of the state, laid down in Article 3 of the ECHR, which was not taken into consideration by the ECtHR either.[137]

> "They maintained that the criminalisation of abortion was discriminatory (crude stereotyping and prejudice against women), caused an

131 *Ibid.*, par. 216

132 Fabbrini, *op. cit.*, note 1, pp. 4, 75

133 *A., B. and C. v. Ireland*, par. 267. Cf. Fabbrini, *op. cit.*, note 1, pp. 4, 75, 58

134 *Ibid.*, par. 269

135 *Ibid.*

136 *Ibid.*, par. 270. Cf. Fenwick, *op. cit.*, note 116, p. 234

137 *Ibid.*, par. 162

> affront to women's dignity and stigmatised women, increasing feelings of anxiety. The applicants argued that the two options open to women – overcoming taboos to seek an abortion abroad and aftercare at home or maintaining the pregnancy in their situations – were degrading and a deliberate affront to their dignity (...) Indeed, the applicants contended that the State was under a positive obligation to protect them from such hardship and degrading treatment."[138]

In the case *R. R. v. Poland* (2011), the applicant did not have sufficient information about the condition of her unborn child for six weeks, i.e. from the moment when the first ultrasound scan aroused suspicion of a congenital defect[139] to the moment when genetic testing (amniocentesis[140])[141] confirmed the presence of Turner syndrome.[142] Unfortunately, at that time, the legally prescribed deadline for making an informed choice of termination of pregnancy had already expired.[143]

However, beside violation of Article 8 (1) of the ECHR, the ECtHR made, according to some authors, "an unprecedented move"[144] and established that Poland breached Article 3 of the ECHR, which bans torture and inhuman or degrading treatment.[145] Unlike the right to respect for private and family life, laid down in Article 8 of the ECHR, the right not to be subject to inhuman or degrading treatment is regarded as an absolute right.[146]

According to the settled case-law of the ECtHR, ill treatment shall reach "a minimum level of severity" in order to fall within the stipulation in Article 3 of the ECHR.[147] An assessment if that was the case is relative and should be made taking account of all the referring circumstances, *inter alia*, "the duration of the treat-

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138 *Ibid.*, par. 162

139 Judgement *R. R. v. Poland* (2011) 53 EHRR 31. See Partly Dissenting Opinion of Judge Bratza, par. 2

140 *R. R. v. Poland*, Partly Dissenting Opinion of Judge Bratza, par. 2

141 Fabbrini, *op. cit.*, note 1, p. 60; *R.R. v. Poland*, par. 159

142 *R. R. v. Poland*, Partly Dissenting Opinion of Judge Bratza, par. 2

143 Fabbrini, *op. cit.*, note 1, p. 60; *R.R. v. Poland* (2011), App. No. 27617/04, par. 159

144 Fabbrini, *op. cit.*, note 1, p. 60. Fenwick describes this situation as "a very important breakthrough". Fenwick, *op. cit.*, note 116, pp. 233-4

145 Judgement *R.R. v. Poland* (2011), par. 161

146 It is not explicitly designated as such in the ECHR, this characterization originates from human rights discourse and from the case law of the ECtHR. Addo, M. K.; Grief, N., *Does Article 3 of The European Convention on Human Rights enshrine absolute rights?* European Journal of International Law, *vol.* 9, no. 3, 1998, pp. 512-3

147 *R.R. v. Poland*, par. 148. See also Fabbrini, *op. cit.*, note 1, p. 60

ment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim".[148]

The ECtHR held that due to the hesitation of medical workers, the applicant was "in a situation of great vulnerability".[149] For weeks, she had to live in suspense since "her concerns were not properly acknowledged and addressed by the health professionals dealing with her case". [150] The ECtHR agreed with the assessment of the Polish Supreme Court, asserting that the applicant was "humiliated", and underlined that her "suffering" was reinforced by the fact that the diagnostic services she needed were available to her and she was entitled thereto pursuant to Polish legislation.[151]

In the case of *P. and S. v. Poland* (2012), which concerns an unwanted minor pregnancy resulting from rape, the ECtHR also found violation of Article 8 and Article 3 of the ECHR.[152]

In the context of the positive obligations of the state, the ECtHR observed the right of medical professionals to a conscientious objection. The settled case-law of the ECtHR acknowledged the superiority of individual moral principles over positive law or in this case, the superiority of the right of medical professionals to a conscientious objection.[153] Yet, after Polish legislation had recognized that right of medical staff, it had a correlative (positive) obligation to ensure a legal framework for arranging that the exercise of that right in practice does not affect access to a lawful abortion, which was the case here.[154] The ECtHR noted that the right to a conscientious objection shall be adapted to a patient's interests and be accompanied with appropriate procedural guarantees or obligations of conscientious objectors to refer their patients to their colleagues who possess competences to provide a respective medical service.

> "However, it has not been shown that these procedural requirements were complied with in the present case or that the applicable laws governing the exercise of medical professions were duly respected."[155]

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148 *R.R. v. Poland*, par. 148. See also Fabbrini, *op. cit.*, note 1, p. 60

149 *R.R. v. Poland* (2011), par. 159. Fabbrini, *op. cit.*, note 1, p. 60

150 Judgement *R.R. v. Poland*, par. 159. Fabbrini, *op. cit.*, note 1, p. 60

151 *Ibid.*, par. 160

152 Fenwick, *op. cit.*, note 116, p. 234; Judgement *P. and S. v. Poland* (2012), App. No. 57375/08

153 Judgement *P. and S. v. Poland* (2012), App. No. 57375/08, par. 70

154 *Ibid.*, par. 93

155 *Ibid.*, par. 107

The Court reasserted that "the approach of the authorities was marred by procrastination, confusion and a lack of proper and objective counselling and information".[156] After having been admitted to hospital, the first applicant and the second one, her mother, were exposed to massive stress. Among other things, the chief doctor wanted to impose his viewpoint on the first applicant.[157] The applicant was forced to talk, regardless of her wishes, with a priest and the case ended up in media based on a hospital's press release.[158] Due to the conduct of the authorities, the ECtHR also found, beside violation of Article 8, violation of Article 3 of the ECHR.[159]

Finally, although they do not directly concern the foetal right to life, two cases from February 2020 need to be singled out too. The applicants sued Sweden for the inability to work as midwifes in delivery clinics due to their opposition to abortion. In the case of *Steen v. Sweden*, the applicant complained about the prohibition of her employment as a midwife by the Swedish authorities and thus violation of her right guaranteed in Article 9 of the ECHR, which promotes "freedom of thought, conscience and religion". She also complained about violation of Article 10 of the ECHR because her opinion differed from that of the hospital and in the end, of the state.[160] She added that Article14 of the ECHR was breached as well.[161] Since the applicant did not lodge a complaint according to Article 14 of the ECHR before national courts, the ECtHR rejected her complaint due to non-exhaustion of domestic remedies (Article 35 §§ 1 and 4).[162]

In the second case, *Grimmark v. Sweden*, the applicant also complained, because of her inability to work as a midwife, about violation of Articles 9,[163] 10[164] and 14 of the ECHR.[165] The ECtHR rejected the complaint as "manifestly ill-founded" pursuant to Article 35 §§ 3 (a) and 4 of the ECHR.[166] The Court pointed to the positive obligation of the state to arrange its health care system in a way that the exercise of the personal freedom of medical staff to manifest religion or belief does not interfere with their provision of medical services:

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156 *Ibid.*, par. 167
157 *Ibid.*, par. 163
158 *Ibid.*, par. 164
159 *Ibid.*, par. 168 and 169
160 Judgement *Steen v. Sweden* (2020), App. No. 62309/17, par. 13
161 *Ibid.*, par. 14
162 *Ibid.*, par. 36
163 Judgement *Grimmark v. Sweden* (2020), App. No. 63726/17, par. 17
164 *Ibid.*, par. 18
165 *Ibid.*, par. 19
166 *Ibid.*, par. 28, 37 and 45

> "The Court observes that Sweden provides nationwide abortion services and therefore has a positive obligation to organise its health system in a way as to ensure that the effective exercise of freedom of conscience of health professionals in the professional context does not prevent the provision of such services. The requirement that all midwives should be able to perform all duties inherent to the vacant posts was not disproportionate or unjustified."[167]

3.2. Case law of the Court of Justice of the European Union

The CJ played an important role in the transition of the European Union from an international institution into a supranational constitutional structure guaranteeing individual rights.[168] With respect to abortion and the case-law of this Court, it is important to mention the case of the *Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* (1991).[169] In that case, the CJ was invited to deliver a ruling considering "the preliminary reference procedure from the Irish High Court". The Society for the Protection of the Unborn Child Ltd (hereinafter SPUC), the plaintiff in the main proceedings, was a company engaged in the prevention of decriminalization of abortion in Ireland.[170] It required injunction aimed at prohibition of dissemination of information on foreign abortion providers[171] by the defendants in the main proceedings, Stephan Grogan and representatives of several student organizations.[172] The application for the prohibition resulted from violation of the Eight Amendment of the Constitution of Ireland. In its answer to the question of the national court, the CJ stated that the medical termination of pregnancy, performed in compliance with the legal rules of the respective country, represents a service depicted in Article 60 of the EEC Treaty.[173] It is not contrary to community law, emphasized the CJ, for a contracting state to ban student associations to disseminate information on foreign clinics providing abortion if those clinics are not involved in the distribution of controversial information.[174]

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167 *Ibid.*, par. 26

168 Cichowski, R. A., *Women's rights, the European Court, and supranational constitutionalism*, Law & Society Review, *vol.* 38, no. 3, 2004, p. 489

169 Case C-159/90 *The Society for The Protection of Unborn Children Ireland Ltd V Stephen Grogan and Others* [1991]. See Fabbrini, *op. cit.*, note 1, pp. 23-4

170 *Grogan*, par. 6

171 *Ibid.*, par. 6

172 Fabbrini, *op. cit.*, note 1, pp. 23-4

173 *Grogan*, par. 21. Fabbrini, *op. cit.*, note 1, p. 25

174 *Ibid.*, par. 32

The CJ especially concentrated on the question when life begins in the case of *Oliver Brüstle v. Greenpeace e.V.* (2011), in which it determined "that any human ovum must, as soon as fertilised, be regarded as a 'human embryo' within the meaning and for the purposes of application of Article 6(2)(c) of Directive" 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.[175] Although this interpretation has led some authors to conclude that, by this decision, the CJ defined the beginning of human life (e.g. Hrabar states that in this decision "for the first time in the current legal science and judicature, an explicit view is expressed that human life begins at the moment of fertilisation when a sperm fertilises an egg or ovum, i.e. at the moment of conception. So, undoubtedly, human life (...) begins with conception."),[176] we do not agree with that conclusion. In this decision, the CJ was very cautious and distanced itself in such a way as to limit the definition of a human embryo to the scope of application of the said Directive. This view can also be seen in the Ruling of the Constitutional Court of the Republic of Croatia of 21 February 2017, stating that even without taking into account the limited scope of application of the definition of a human embryo, it seems that the definition of a human embryo

> "cannot be interpreted in this decision as if the term 'human being' were either explicitly or implicitly defined, especially not within the meaning of equal protection extended to live-borns and unborn beings from the moment of conception".[177]

With respect to the issue of abortion at EU level, another case deserves particular attention. On 23 April 2018, the General Court of the European Union dismissed the action submitted by the European Citizens' Initiative with the title "Uno di noi" (One of Us) and seven natural persons who launched this initiative.[178] The action was aimed at annulment of Communication COM (2014) 355 final on that controversial initiative and, in the alternative, at annulment of Article 10 paragraph 1 item (c) of Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative.[179] The applicants were supported by the Republic of Poland. On 28 May 2014, the Commission adopted the contested Communication and decided not to take any

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175 *Oliver Brüstle v. Greenpeace e.V.*, C-34/10, EU:C:2011:669, par. 35

176 Hrabar, D., *Pravo na pobačaj – pravne i nepravne dvojbe*, *Zbornik PFZ*, *vol.*65, no. 6, 2015, p. 816

177 Ruling of the Constitutional Court of the Republic of Croatia, *op. cit.*, note 103, Title VIII, p. 70

178 It must be emphasized that the Court found that the "European Citizens' Initiative One of Us", unlike the seven natural persons who organized it, did not have party capacity, Case T-561/14, *European Citizens' Initiative One of Us and Others v European Commission* (2018), par. 63

179 *Ibid.*, par. 32

action in regard to the One of US initiative.[180] The initiative revolved around the protection of the dignity and right to life of every human being from the moment of their conception. In doing so, the initiative touched upon areas regulated by the European Union.[181] Its goals can be clearly deducted from the internet register:

> "The human embryo deserves respect to its dignity and integrity. This is enounced by the [Court of Justice of the European Union] in the Brüstle case, which defines the human embryo as the beginning of the development of the human being. To ensure consistency in areas of its competence where the life of the human embryo is at stake, the [European Union] should establish a ban and end the financing of activities which presuppose the destruction of human embryos, in particular in the areas of research, development aid and public health."[182]

Among other things, the applicants complained about violation of Article 10 paragraph 1 item (c) of Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative since the Commission failed to propose a legal document as a response to the controversial initiative.[183] They claimed that the Commission's right to stay passive should be narrowly interpreted.[184] Yet, the Commission power of legislative initiative (Article 17 paragraph 2 of the UEU and Article 289 of the UFEU) implies autonomy in making decisions on proposing an act as well as in defining its scope, aim and content.[185]

The Court established that the interpretation of Article 10 paragraph 1 item (c) of Regulation (EU) No 211/2011 by the applicants challenges the discretionary power of the Commission, which is exercised in the form of a legislative initiative with respect to particular European citizens' initiatives. If the Court had accepted the applicants' interpretation, it would have implied that the Commission "shall undertake 'concrete' action" proposed in the respective European citizens' initiative.[186] The applicants' interpretation is, held the Court, contrary to the Commission's "legislative initiative quasimonopoly" granted in the Treaties and its comprehensive discretionary power exercised while performing its function as a legislative

180 *Ibid.*, par. 12
181 *Ibid.*, par. 2
182 *Ibid.*, par. 3
183 *Ibid.*, par. 102
184 *Ibid.*, par. 103
185 *Ibid.*, par. 109
186 *Ibid.*, par. 115

initiative.[187] When playing its legislative initiative role, the Commission should have broad discretionary powers since it, based thereon (Article 17 paragraph 1 of the UEU- a) should promote the general interest of the Union.[188]

4. A CRITICAL OVERVIEW

The European multilevel regulation of human rights protection is characterized by "complex dynamics".[189]Despite the prevailing viewpoint that there is no lack of legal harmonization between national legal systems that restrictively govern the issue of abortion and the normative order based on the ECHR and EU treaties,[190] numerous theoretical and practical aspects of the issue of abortion remain unresolved.

The previous case-law of the ECtHR can be denoted as "value free".[191] Unlike some national constitutional or supreme courts, out of which the American Supreme Court and its management of the case of *Roe v. Wade* 410 U.S. 113 (1973) need to be singled out, the ECtHR has so far managed to escape establishing both the foetal right to life pursuant to Article 2 of the ECHR[192] and the woman's fundamental right to abortion in accordance with Article 8 of the same document.[193] More, it has failed to conduct substantive review of national legislations by establishing a balance between the interest of pregnant women and their foetuses, i.e. the interests of the state in preserving the life of the foetus.[194]

Some eminent critics find such an attitude untenable. Thus, writing in 1994, Williams emphasized that the ECHR is not only a legal but also a moral document. The ECtHR must enforce it in all contracting states. If a foetus is considered a person according to the ECHR in one country, it must logically be considered a person in all the other countries as well.[195]

The scope of deference afforded to states when regulating abortion is still wide.[196] Violation of the ECHR has been found by the ECtHR in several cases involving

187 *Ibid.*, par. 115
188 *Ibid.*, par. 169
189 Fabbrini, *op. cit.*, note 1, p. 34
190 *Ibid.*
191 Fenwick, *op. cit.*, note 116, p. 229
192 *Ibid.,* p. 214
193 *Ibid.,* p. 229
194 *Ibid.,* p. 239
195 Williams, *op. cit.*, note 25, p. 79
196 Weinstein, *op. cit.*, note 82, p. 402-3

omission of states with restrictive abortion regimes to ensure performance of a legally permitted abortion through "effective" legal procedures.[197] In regard to the previous case-law of the ECtHR, states have legitimacy or broad discretion to regulate the issue of abortion. However, if they regulate the issue of abortion in a way that they permit performance of abortion on demand in exceptional situations, like Poland or Ireland had prior to 2018, they will have "a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right to access to a lawful abortion".[198] The adopted legal framework shall not restrain "the real possibilities" of pregnant women to undergo an abortion. Such a framework shall be coherent and enable taking different legitimate interests into account in line with the treaty obligations of a contracting state.[199] As highlighted by the ECtHR in the case of *P and S v. Poland,* "effective enjoyment of the rights guaranteed" under Article 8 of the ECHR can be achieved if "the relevant decision-making process is fair and such as to afford due respect for the interests safeguarded" thereby.[200]

When a contracting state legally regulates access to abortion, its margin of appreciation gets narrower[201] and thus the state ceases to enjoy discretion regarding the "manner" in which it intends to make abortion accessible.[202] The fact that the ECtHR is entitled to monitor the way a contracting state meets its positive obligations set out in Article 8 of the ECHR accounts for the above assertion.[203] In cases against Poland and Ireland, the ECtHR embraced the argument provided by the states themselves, revealing that they have "effective procedures" for permitting access to an abortion, so in its rulings, it imposed on them respect for their own procedural standards.[204] In this context, it should be underlined that when medical staff exercise their right to a conscientious objection, an instrument recognized in the case-law of the ECtHR, the contracting states shall still have, according to Article 8 of the ECHR, a positive obligation to provide pregnant women with access to an abortion since that is what their legislation has foreseen anyway.

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197 Fenwick, *op. cit.,* note 78, p. 249

198 *P. and S. v. Poland*, par. 99. See also Fenwick, *op. cit.,* note 116, p. 229; Fabbrini, *op. cit.*, note 1, pp. 34-5

199 *Ibid.*, par. 99

200 *Ibid.*, par. 99. See also Feinwick, 2014, 227

201 Scott, *op. cit.*, note 18, p. 8; Black, I., *Refusing Life prolonging medical treatment and the ECHR*, Oxford Journal of Legal Studies, 2018, p. 27

202 Fenwick, *op. cit.*, note 78, p. 261; Black, *op. cit.*, note 201, p. 27

203 Fenwick, *op. cit.*, note 116, p. 227; Scott, *op. cit.*, note 18, p. 8; Black, *op. cit.*, note 201, p. 27

204 Fenwick, *op. cit.*, note 78, p. 274

Some authors think that the role of the ECtHR is mostly reduced to shaping a framework for "policing the implementation of national abortion infrastructure".[205] Such a conferred approach has nevertheless allowed the court to create pragmatic protection of pregnant women.[206] Fenwick might be right when he claims that the ECtHR focuses on and uses "procedural values" as replacement for the protection of substantive values.[207] The grounds for his claim that the ECtHR does not have only procedural standpoints are set by the fact that the balance between two normative values,[208]a woman's right to abortion and the foetal right to life, has "a sensitive nature" and for that reason, it is comprised by the margin of appreciation of the contracting states.[209] Nonetheless, in its ruling in cases against Ireland and Poland, the ECtHR implicitly recognised the existence of the request towards the contracting states to provide pregnant women with access to an abortion in early stages of their pregnancies if the pregnancies are harmful to their physical integrity.[210]

Furthermore, concerning the status of foetus, the use of language of rights following the principle "all or nothing" is not satisfactory.[211] The ECtHR still hesitates to tackle the moment when life begins. This issue is not a challenge only to jurists or philosophers but also to biomedical scientists. The idea of "a moment of conception when a new human being is miraculously created" is not compliant with scientific postulates. One cannot speak about, thinks Williams, a "moment" but about a process: "The 'moment' when the two gametes (the sperm and the ovum) fuse resolves itself under the microscope into a succession of clearly discernible stages, which may take 24 hours or more to complete".[212]

In the case of *Vo v. France*, the ECtHR recognized that foetus belongs to humankind and acknowledged its value related thereto, but it did not provide it with legal rights. [213] It did also recognize "the potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts".[214] However, Scott

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205 Fenwick, op. cit., note 116, p. 239

206 *Ibid,* pp. 228, 239

207 Fenwick, *op. cit.*, note 116, p. 229

208 Fenwick, *op. cit.*, note 78, p. 273

209 *Ibid,* p. 275

210 *Ibid.*

211 Scott, R., *The English fetus and the right to life*, European Journal of Health Law, *vol.* 11, no. 4, 2004, p. 348

212 Williams, *op. cit.*, note 25, p. 76

213 Scott, *op. cit.*, note 211, p. 348

214 *Vo v. France*, par. 84

rightly observes that the protection of foetus regarding inheritance refers, from a legal point of view, to the protection of a delivered child since inheritance is related to childbirth.[215] Similarly, the Croatian legal system does not provide a explicit answer to the question when life begins, but it can be derived therefrom that a human being as a holder of rights and duties comes into existence with his/her birth.[216] "Potential persons" who may but does not have to "come into existence" are persons neither in the legal nor in the philosophical sense.[217]

Foetuses and embryos have been believed to belong to human race since the very beginning. This is not challenged. What is in dispute is should they be granted the same protection as those who have already been born.[218] There is a difference between the recognition of foetal rights and the protection of its interests in a way that is not based on rights.[219] Scott should be supported when she promotes further development of the protection of foetus from circumstances pertaining to scientific and technological advancement (genetic engineering or embryo experimentation), though without changing the current legal balance between the interests of the foetus and the mother.[220]

What some authors, like Fabbrini and Fenwick, believe is that ECtHR lacks, due to its focus on procedural issues, substantive protection of women from ill treatment on the grounds of the bare fact that they are women.[221] Both authors tackle the standpoint of the ECtHR not to accept complaints about discrimination when assessing the abortion legislation of some contracting states. Moreover, the ECtHR did not seriously consider the applicants' allegations that strict limitation of access to a lawful abortion may be deemed as gender discrimination.[222] For instance, the claim of the applicants in the case *A., B. and C. v. Ireland*.[223]

Although Article 14 of the ECHR cannot exist autonomously, its effect is evident with respect to the exercise of the rights and freedoms laid down in other substantive provisions of the ECHR.[224] Here is relevant reasoning from the case *Grimmark v. Sweden*:

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215 Scott, *op. cit.*, note 211, p. 352

216 Williams states that this is also the case under English law. The child must be outside the mother's womb and be able to breathe. Williams, *op. cit.*, note 25, p. 71

217 Andorno, *op. cit.*, note 114, p. 228

218 Williams, *op. cit.*, note 25, p.78

219 Scott, *op. cit.*, note 211, pp. 351-2

220 *Ibid.*, p. 348

221 Fenwick, *op. cit.*, note 116, p. 215

222 Fenwick, *op. cit.*, note 116, p. 229

223 *A., B. and C. v. Ireland*, par. 162

224 *Grimmark v. Sweden*, par. 40

> "in order for an issue to arise under Article 14, there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[225]

When assessing whether it came to a different treatment of persons who were affected by the same problems in different contracting states, the ECtHR again did not want to interfere with their margin of appreciation. [226] In Fenwick's opinion, ECtHR judgements lack "gender-based elements"[227].

> "Stigmatisation of women, stress and medical risks linked to restrictive regimes under Article 8. Recognition of the adverse effects on a woman's dignity and mental integrity of stigmatisation of abortion-seekers was largely absent from the jurisprudence." [228]

The ECtHR took a significant step forward when it established that it came to violation of Article 3 of the ECHR in the case of *R. R. v. Poland* and in the case of *P. and S. v. Poland*. However, it should have done more, holds Fenwick, and confirmed that the applicants were exposed to discrimination according to Article 14 of the ECHR in a situation which is unique for women.[229] Interestingly, this important moment in the case-law of the ECtHR, i.e. sanctioning the contracting states for inhuman and degrading treatment of the applicants, has not been incorporated into the Ruling of the Croatian Constitutional Court on rejecting the proposal for assessment of the constitutionality of the applicable Croatian act regulating the issue of abortion.[230]

States with restrictive abortion regimes directly discriminate against women, claims Fenwick, because they treat women differently for the bare fact that only women can get pregnant.[231]

The ECtHR did acknowledge that the "suffering" which the Polish applicants had gone through could be regarded as violation of their rights, but it did not ascer-

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225 *Ibid.*, par. 41

226 *Ibid.*

227 Fenwick, *op. cit.*, note 116, p. 231

228 *Ibid.*

229 *Ibid.,* p. 233

230 Ruling of the Constitutional Court of the Republic of Croatia, *op. cit.*, note 103

231 Fenwick, *op. cit.*, note 116, p. 235

tain "that highly restrictive abortion regimes systematically and persistently create especially invidious discrimination based on gender."[232]

Unlike Fenwick, Fabbrini explores both the case-law of the ECtHR and the case-law of the CJ in regard to the permissibility of abortion. He indicates that here one can also talk about discrimination based on the financial status of pregnant women. Even though there are no common directives referring to abortion at EU level,[233] gender equality represents one of the foundational norms of the European Union which has played a prominent role in the promotion of "gender equality laws and policies".[234]

The EU Member States that do not permit abortion on demand at all or have rather restrictive abortion legislation permitting only few exceptions shall, in accordance with European law and relevant case-law, allow pregnant women to obtain information on undergoing abortion in countries with a more liberal abortion regime and grant them immunity from any sanctions when they return to their homeland.[235] Such abortion regulation results in discrimination against women with low income, who cannot afford to travel abroad to have an abortion.[236]

Due to such abortion regulation in the complex European constitutional structure, abortion has become part of cross-border reproductive care.[237] Expectants choose to travel from countries with a rigorous approach to abortion to countries with a more liberal approach thereto. In line with UK Government's abortion statistics for the year 2013, 3,679 Irish citizens underwent abortion in England and Wales. Moreover, the real number is even bigger since the statistics encompass only women who disclosed their Irish residence when having been admitted to hospital.[238] In Mulingan's opinion, if the majority of Irish women had not had access to foreign abortion providers, the strict Irish abortion legislation would have been put under massive pressure and probably, have liberalized sooner.[239] As far as Poland is concerned, the official statistics reveal that only 1,000 induced abortions are performed in Poland on an annual basis while the real figures are much bigger,

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232 *Ibid.*, p. 214

233 Guillaume, A.; Rossier, C., *Abortion around the world. An overview of legislation, measures, trends, and consequences*, "Population" (English edition) Institut National d'Études Démographiques (INED), No. 2, 2018, p. 235

234 Vida, *op. cit.*, note 58, p. 13

235 Fabbrini, *op. cit.*, note 1, p. 68

236 *Ibid.*, p. 70

237 Mulligan, *op. cit.*, note 41, p. 266

238 *Ibid.*, p. 260

239 *Ibid.*, p. 266

the estimates mention 150,000 abortions per year. Most of them are performed in foreign clinics and lots of women take the so-called abortion pills.[240]

When criticizing the case-law of European courts, Fabbrini obviously relies on the criticism of the establishment of the right to abortion in the United States. Decades after the case of *Roe v. Wade*, prominent American jurists stressed that the right to abortion should have been based on the equal protection clause of the Fourteenth Amendment to the United States Constitution instead on the right to privacy.[241] Per Ruth Bader Ginsburg and her opinion on the issue of abortion, the real conflict does not reflect in the opposing interests of the foetus and state on one side and those of the pregnant woman on the other side but it relates to the independence and equality of the woman.[242] In his well-known article *Neutrality in constitutional law (with special reference to pornography, abortion, and surrogacy*, Cass Sustein indicates that pregnancy as a woman's biological ability entails "social consequences" in the form of involuntary pregnancy only due to the State's decision on the prohibition or restriction of abortion.[243] Such restrictions are not controversial because of the violation of a woman's bodily integrity but because of the way the state imposes them on women, i.e. it foresees different roles for persons considering their affiliation to a certain gender and hence, women are treated as second-class citizens.[244]

> "A law that explicitly and exclusively relates to women, i.e. that contains a gender-based legal distinction is unquestionably a form of gender discrimination".[245]

According to Fabbrini, it is up to the CJ to undertake appropriate steps for the purpose of combatting discrimination against women in the context of abortion.[246] Fabbrini adds that if based on the CFR, the CJ opted, together with national courts, for review of the restrictive abortion legislation of some Member States, it could contribute to establishment of a new regime which would not jeopardize the

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240 Shaun Walker, *Pro-choice activists launch abortion initiative in Poland*, 10 December 2019, [https://www.theguardian.com/world/2019/dec/10/pro-choice-activists-launch-abortion-initiative-in-poland], accessed 10. January 2020

241 Fabbrini, *op. cit.*, note 1, p. 68. For more discussion of this topic, see Blagojević, A.; Tucak, I., *Rethinking the Right to Abortion*, Balkan Social Science Review, *vol.* 15, no. 15, 2020, pp. 135-157

242 Ginsburg, R. B., *Some thoughts on autonomy and equality in relation to Roe v. Wade*, N.C. L. Rev., *vol.* 63, 1985, p. 383

243 Sunstein, *op. cit.*, note 128, p. 33

244 *Ibid.*, p. 39

245 *Ibid.*, p., 32

246 Fabbrini, *op. cit.*, note 1, p. 71

equality principle.[247] Indeed, the hard pluralism affecting Europe in this light today, which can be derived from the fact that regardless of rising consensus among the Member States on abortion liberalization, legal difference between them still persist,[248] might soften considerably if the above steps are undertaken. [249] Pursuant to the aforementioned, a woman's right to abortion in early stages of pregnancy would be thus recognized at supranational level while the Member States could retain their possibility to regulate it at national level in accordance with their internal circumstances. [250]

Although a woman's right to abortion is protected in Europe in a way and women in countries with restrictive abortion regimes have the right to information on foreign abortion providers, it would be good if the right to abortion as an autonomous fundamental right was recognized at European level. As communicated by legal theoretician Richard Flatham, by granting the right to abortion, societies would demonstrate the highest level of respect for the autonomy of every agent.[251] Providing a right to do X in particular jurisdiction means that doing X should be deemed "correct" or "blameless" irrespective of the existence of society members who oppose such qualification.[252]

Fenwick emphasizes that the case-law of the ECtHR can be criticized on account of its implicit permission provided to "the European consensus doctrine" to govern the scope of an accepted margin of appreciation.[253] In doing so, Feinwick paraphrases George Letsas who, when discussing the relation between consensus and public moral, accentuates that the ECtHR allows, contrary to liberal views, communal morality to supersede individual rights.[254]

Ivana Radačić also criticizes the interpretation of morals and consensus by the ECtHR. The author points out that giving priority to the decision of a particular country when there is no consensus between the Member States on the issue of sexual morality prevents "effective protection" of the rights provided for in the ECHR, especially in case of vulnerable groups. Their rights can be equally jeopardized by the demand to be accepted "by the majority of states" as by "the majority within a state". The ECtHR, Radačić argues, must not provide states with

247 *Ibid.,* p. 73
248 *Ibid.*, p.72
249 *Ibid.,* p. 73
250 *Ibid.*
251 Flatham, *op. cit.*, note 20, p. 170
252 *Ibid.*, p. 169. For more discussion of this topic, see Blagojević; Tucak, *op. cit.,* note 241, pp. 135-157
253 Fenwick, *op. cit.*, note 116, p. 222
254 Letsas, *op. cit.*, note 82, pp 92–98

a margin of appreciation in deciding on the standards imposed by the ECHR. In determining a standard, the ECtHR should not be guided by a consensus but by the values of individual autonomy, dignity and equality.[255]

5. CONCLUDING THOUGHTS

A woman's access to a safe and legal abortion in Europe remains a pending issue in the 21st century. The abortion legislation in the Republic of Ireland has changed in 2018 for the sake of its harmonization with international standards of human rights protection and that change partially results from the action of European courts.[256] Something similar happened in Northern Ireland where on 31 March 2020, the Abortion (Northern Ireland) Regulations 2020 came into force.[257]

On the other hand, such a trend is not universally applicable. In some Central and Eastern European countries, the issue of abortion is related to negative demographic trends and performance of abortion is considered unpatriotic.[258] In April 2020, the Polish Parliament postponed making a final decision on the bill aimed at tightening its abortion regime in the sense of banning one of the three exceptions to abortion prohibition – serious foetal abnormality. The bill was returned to the parliamentary committee for additional elaboration. The proposal for this restriction originates from a citizens' initiative launched by a Catholic group who succeeded in gathering more than 100,000 signatures, which makes this topic eligible for being discussed in the Parliament (Sejm). The majority in the Sejm is, by the way, constituted by the right-wing Law and Justice (PiS) party.[259]

Strict abortion legislation remains a terrible example of turning "*a priori* morality into law".[260] The ECtHR recently did recognize the suffering of the Polish applicants as violation of their rights to private and family life (Article 8) and to be free from inhuman or degrading treatment (Article 3). However, we agree with authors, like Fenwick and Fabbrini, who believe that it is vital to take one step

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255 Radačić, I., *The margin of appreciation, consensus, morality and the rights of the vulnerable groups*, Zbornik Pravnog Fakulteta Sveučilišta u Rijeci, *vol.* 31, no. 1, 2010, p. 600

256 Mulligan, *op. cit.*, note 41, p. 266

257 McGuinness, S.; Rooney, J., *A legal landmark in reproductive rights: The Abortion (Northern Ireland) Regulations 2020.* [Web log post], 1 April 2020, [https://legalresearch.blogs.bris.ac.uk/2020/04/a-legal-landmark-in-reproductive-rights-the-abortion-northern-ireland-regulations-2020/], accessed 20. April 2020

258 Fenwick, *op. cit.*, note 116, p. 217

259 Shaun Walker, Polish parliament delays decision on new abortion restrictions, 19 April 2020, [https://www.theguardian.com/world/2020/apr/16/polish-parliament-delays-decision-on-new-abortion-restrictions], accessed 20. April 2020

260 Williams, *op. cit.*, note 25, p. 76

further. It is vital to establish that states with restrictive abortion regimes directly discriminate against women, because they treat women differently for the bare fact that only women can get pregnant.[261] The right to abortion differs from other reproductive rights, such as the right to contraception, in that, unlike contraception, which is important for members of both sexes, the right to abortion directly affects only women.[262] Such abortion regulation results in discrimination against women with low income, who cannot afford to travel abroad to have an abortion,[263] which generally undermines the equality principle.[264]

Although a woman's right to abortion is protected in Europe in a way and women in countries with restrictive abortion regimes have the right to information on foreign abortion providers, it would be good if the right to abortion as an autonomous fundamental right was recognized at European level.[265] Such recognition is required to, as mentioned by the applicants in the case of *A, B and C v. Ireland*, eliminate stigmas, anxieties and insults to a woman's dignity.[266] The dangers to a woman's life and health, which strict abortion legislation accounts for, came to the fore earlier this year when the COVID-19 pandemic closed state borders and made it impossible for women to travel to undergo an abortion in countries with more liberal abortion regimes.[267]

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261 Fenwick, *op. cit.*, note 116, p. 235

262 Hunt; Gruszczynski, *op. cit.*, note 12, pp. 730-1

263 Fabbrini, *op. cit.*, note 1, p. 70

264 *Ibid.*, p. 73. Article 21 The Charter of the European Union prohibits discrimination on the grounds of gender, but also on the basis of property. Fabbrini, *op. cit.*, note 1, p. 71

265 Flathman, *op. cit.* note 20, pp. 169-170

266 *A, B and C v. Ireland*, par. 162

267 Megan Clement; Bertrand Borg, *How Malta's abortion taboo leaves women in despair*, 11 June 2020, [https://www.theguardian.com/world/2020/jun/11/like-ireland-on-steroids-maltas-abortion-taboo-leaves-women-in-despair], accessed 11. June 2020

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UDK 347.611-053.2:342.721
Original scientific paper

MODERN CHALLENGES IN THE IMPLEMENTATION OF THE CHILD'S RIGHT TO KNOW HIS ORIGIN*

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ABSTRACT

The right to know one's origins means the right to know one's parentage, i.e. one's biological family and ascendance and one's conditions of birth. This right raises some of the hardest legal and ethical issues in the case of adopted children, but also in cases of abandoned or displaced children, children conceived by artificial insemination or of children born out of wedlock.

This particular child's right was increasingly debated in recent years, as it conflicts with the right of the biological parent to remain anonymous. The Article 8 of the European Convention on Human Rights, while ensuring respect and protection for private and family life, guarantees at the same time two opposing rights - the right to privacy and the protection of the personal data and the right to know one's origins. This legal solution raises the question whether the right to know the origin in case of children who have reached a certain psycho-physical maturity should prevail when it comes into the conflict with the right of the biological parent to remain anonymous? Although the legal instruments protect both rights, in recent years there is aim to promote the child's right to know their origin rather than the anonymity of the biological parents.

To address the issue of conflict between those rights this paper aims to suggest ways in which rights can be balanced against each other to provide the principles guiding the enforcement of the child's right to known his origin in practice.

Keywords: *right to know one's origins, right to privacy and the protection of the personal data, the conflict between rights*

* The author would like to thank Associate Professor Anica Čulo Margaletić, Ph.D., Chair of Family Law, Faculty of Law, University of Zagreb, on constructive comments that improved the manuscript at the time of its emergence.

1. INTRODUCTION

In the past, children were usually being brought up within nuclear families by those they assumed to be their biological parents.[1] The absence of foolproof methods for establishing genetic links between children and biological parents led to the situations that adopted children, abandoned or displaced children or of children born out of wedlock did not get chance to know their origin. Today, genetic science enables us not only to deepen our knowledge about human origin but also to have children with the help of artificial insemination methods. Although, genetic science helped couples to have offspring's even when they are impaired to have them naturally (i.e. in cases of gamete donation), in legal terms it raised the question whether children in those cases have right to know their genetic origins.

It is now broadly accepted that children who do not know one or both of their biological parents have a "vital interest" to identify them to find out information's about their origin.[2] The notion of "knowing one's origins" is complex and can have a variety of meanings that may cover several aspects. For example, it can cover the medical aspect (i.e. the right to know one's full family medical history and to know medically relevant genetic information about the donor), the identity aspect (i.e. the right to personal narrative information about the donor that could assist offspring in completing the picture of their own identity) and the relational aspect (i.e. the right to know the full identity of the donor to attempt to establish a relationship with him or her).[3] Besides the complexity of its meaning, the right of a child to "know his/her origins" can easily come in the conflict with other's rights, in particular the donor's right to autonomy and privacy.

In paper, the author analyzes what is meant by a "right to know the child's origin" and unpack the conflict between the child's right to know and rights of the gamete donor. The special attention will be dedicated to recent developments in the ECtHR's case law that can be helpful in modelling guiding principles in balancing the child's right to know with the rights of the donor.

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1 Fortin, J., *Children's right to know their origins – too far, too fast?*, Child and Family Law Quarterly, *vol.* 21, no. 3, 2009, p. 341

2 Besson, S. *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, International Journal of Law, Policy and the Family, *vol.* 21, Issue 2, 2007, pp. 137–159

3 Ravitsky, V., *Knowing where you come from: The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness*, Minnesota Journal of Law, Science and Technology, *vol.* 11, no. 2, 2010, pp. 655–684

2. LEGAL RECOGNITION OF THE CHILD'S RIGHT TO KNOW HIS ORIGIN

According to the interest theory of rights, rights are intermediaries between interests and duties.[4] It means that "having a right is having one's interests protected in certain ways by the imposition of (legal or moral) normative constraints on the acts and activities of other people concerning the object of one's interests".[5] If we apply that theory on the right of a child to know his/her origins we can say that this right protects the interest in identity without which one is "deracinated".[6] In other words, it is the interest of the child to identify where he/she comes from.[7] It protects interest to know one's biological family and ascendance, or one's conditions of birth which is of greatest concern to those who have been artificially-procreated.[8] Those children have their biological parentage split from their social or birth parentage and they have legally acknowledged interest to identify where they come from.[9] It is especially recognized in cases when children are born via surrogacy or conceived with the help of the gamete donor. Their interest to be aware of the existence and identity of the persons who contributed to their making is recognized in the United Nations Convention on the Rights of the Child (CRC) and the European Convention on Human Right (ECHR).[10]

2.1. The United Nations Convention on the Rights of the Child

Both conventions, CRC and ECHR, deal with the right to know one's origins, but the CRC in Articles 7 and 8 expressly recognized for the first time the right

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4 Raz, J., *On the Nature of Rights*, Mind, *vol*. 93, no. 370, 1984, pp. 194-214, Raz, J., *The Morality of Freedom*, Oxford, 1986 p. 181

5 MacCormick, N., *Legal Reasoning and Practical Reason*, in: French/Ühling/Wettstein (eds), *Midwest Philosophical Studies VII: Social and Political Philosophy,* Minneapolis, University of Minnesota Press, 1982, p. 271

6 O'Donovan, K., *A Right to Know One's Parentage?,*International Journal of Law and the Family, International Journal of Law, Policy and the Family, *vol*. 2, Issue 1, 1988, pp.27-45

7 Bensson, *op. cit.* note 2, p. 140

8 *Ibid.* 140.; Freeman, M., *The new birth right? Identity and the child of the reproduction revolution*, The International Journal of Children's Rights, *vol*. 4, Issue 3, 1996, p. 277; O'Donovan, K., *What Shall We Tell the Children?" Reflections on Children's Perspectives and the Reproduction Revolution*; in: Lee, R.; Morgan, D., (eds.), *Birthrights: Law and Ethics at the Beginnings of Life*, London: Routledge; 1989, p. 96

9 Bensson, *op. cit.* note 2, p. 140

10 *Ibid*., p. 138.; Article 43(1) of the UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: [https://www.refworld.org/docid/3ae6b38f0.html] Accessed 20 April 2020; Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: [https://www.refworld.org/docid/3ae6b3b04.html] Accessed 20 April 2020

of a child to know his/her parents as a child.[11] Article 7 of the CRC prescribes that "the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents". In the context of the right to know, the term "parents" can be interpreted broadly to include not only social or legal parents but also biological and gestational parents.[12] Although CRC doesn't explicitly define what the right to know and be cared for by one's parents entails, it might imply the right to contact them but as well as knowledge of their identity.[13]

Further, the CRC require from States Parties to ensure the implementation of these rights following their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.[14] In Article 8 CRC prescribes that "States Parties should undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. . . . Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity".[15] Article 8 is mentioning the concept of identity and gives examples of what identity might include (nationality, name, and family relations) without defining it.[16] However, if we accept the idea that the right to identity is a complex concept that includes right to know one's origins, the State Parties would have duties to register and preserve data regarding a child's biological parentage and to make them accessible to the child.[17] A similar interpretation of the CRC is given by the United Nations Committee on the Rights of the Child (UNCRC) as it interprets that the right to know one's origin

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11 Bensson, *op. cit.* note 2, p. 139

12 Clark, B., *A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins,* Georgia Journal of International and Comparative Law, *vol.* 40, no. 3, 2012, p. 626

13 *Ibid.,* p. 626

14 Article 7 has been consistently criticized by nations that do not allow for such a right or that allow mothers to give birth anonymously (e.g. France). See *Ibid.*, p. 626

15 Article 7 CRC.; Article 8 was originally proposed to deal with the abuses committed by the military regime in Argentina in the 1970s and 1980s, which abducted infants from their mothers before their births had been registered and illegally gave them to couples associated with the armed forces and the police. See Blauwhoff, R.J., *Foundational facts, relative truths: a comparative law study on children's right to know their genetic origins*, Utrecht University Repository, 2009, pp. 290-296, 302-305. [https://dspace.library.uu.nl/handle/1874/34380] Accessed 20 April 2020.;Clark *op. cit.* note 12, p. 627

16 Freeman thinks that identity is "an organizing framework for holding together our past and our present and it provides some anticipated shape to future life". See Freeman, *op. cit.* note 8, p. 290; Masson, J.; Harrison, C., *Identity: Mapping the frontiers*, in Loweand, N.; Douglas, G. (eds.), Families Across Frontiers , The Hague: M. Nijhoff , 1996, pp. 278 – 279; Article 8 CRC

17 Article 8 CRC; Bensson, *op. cit.* note 2, p. 138

should include the right of the children to know their genetic identity especially when the children are conceived by artificial insemination.[18] However, access to data relating to the child's origin, according to Article 3 of the CRC, should be made only if it is in children best interest.[19] However, if a right of a child to know origin comes into the conflict with rights of their biological parents (e.g. the right to privacy) neither Article 7 nor Article 8 settles the issue of which among the rights should prevail in case of conflict between them. Also, CRC does not provide any criteria for how to balance the child's interests with those of biological parents in case of conflict. Thus the provisions of the CRC relating explicitly to the child's origin do not directly offer any protection to the child's identity.[20]

2.2. The European Convention on Human Rights

Unlike CRC, ECHR does not guarantee the right to know one's origins expressly. The right to know one's origin was derived in 1989 by ECtHR in the case Gaskin v. the United Kingdom from Article 8 which guarantees the right to private and family life.[21] This case concerned Mr Graham Gaskin was taken into care, following the death of his mother less than a year after his birth, by Liverpool City Council from 1959 until 1977 and was boarded out to foster parents.[22] At the age of 18, he brought negligence proceedings against the Council and asked for the discovery of his case records.[23] He claimed that he was ill-treated in care and sought details of his confidential records from the Council.[24] The Council released several files in which the contributors gave their consent but refused to release file relating to the whole period in which he had been in care. Mr Gaskin claimed re-

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18 UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Denmark*, 15 January 1995, CRC/C/15/Add.33, available at: [https://www.refworld.org/docid/3ae6aec817.html] Accessed 18 May 2020
UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Norway*, 25 April 1994, CRC/C/15/Add.23, available at: [https://www.refworld.org/docid/3ae6aefe8.html] Accessed 18 May 2020
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19 Providing information's about the child's origin could be limited in cases when that information's collide with the child's best interest. Clark, *op. cit.* note 12, p. 629

20 Ronen, Y., *Redefining the Child's Right to Identity*, International Journal of Law, Policy and the Family, *vol*. 18, Issue 2, 2004, pp. 147, 160; Clark, *op. cit.* note 12, p. 628

21 See the case of Gaskin v. United Kingdom, Application no. 10454/83, Judgment of 7 July 1989, Series A, no. 160, 1989

22 *Ibid*., para. 10

23 *Ibid*., para. 10

24 *Ibid*., para. 11

fusal of access to all his records was a breach of Articles 8 that is protecting private and family life and the right to freedom of expression guaranteed by Article 10 as the State had failed to act to protect his rights.[25]

The ECtHR held that the applicant had a vital interest protected by the Convention in receiving information necessary to know and understand his childhood and early development.[26] The ECtHR stated that: "[the file] no doubt contained information concerning highly personal aspects of the applicant's childhood, development and history and thus could constitute his principal source of information about his past and formative years. Consequently, the lack of access to the file did raise issues under Article 8".[27] The ECtHR also stated that: "respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification".[28]

In determining whether or not the United Kingdom obligation to give Mr. Gaskin access to all information's relevant for his family and private life existed under Article 8, the ECtHR concentrated to find the fair balance that had to be struck between the general interest of the community and the interests of the individual.[29]The ECtHR also acknowledge that in striking the balance, the limitations of the right to family and private life mentioned in Article 8 may be of certain relevance in cases when "the interests of national security, public safety or the economic well-being of the country, or the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others" demand.[30]

Thus, in deciding whether the interference in Mr. Gaskin case is justified, the ECtHR concentrated on whether a fair balance had been struck between the general interests of the community and the interests of the individual in cases when the contributor's consent is needed to provide access to information contributed by them. The ECtHR was especially concerned to ensure the interests of the individual who is seeking access to records relating to his/her private and family life when

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25 *Ibid*., para. 30

26 *Ibid*., para. 40

27 *Ibid*., para. 39

28 *Ibid*., para. 39

29 Marshall, J., *Personal Freedom Through Human Rights Law?: Autonomy, Identity and Integrity Under the European Convention on Human Rights*, International Studies in Human Rights, *vol*. 98, 2008, p. 125

30 Article 8(2) ECHR

a contributor to the records is not available or is improperly refusing to consent.[31] In the ECtHR view, such an approach is only in conformity with the principle of proportionality, if it provides that an independent authority finally decides whether to grant access or not in such cases. Therefore, the refusal of the local authority to grant Mr. Gaskin the access to information's, without any kind of independent scrutiny to determine the genuineness of the confidentiality claim, amounted to an infringement of the right to a private and family life in Article 8.[32] Further, the ECtHR concluded that everyone should be able to establish details of their identity as human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality.[33]

Regarding Article 10 Mr Gaskin's complaint proved unsuccessful as the ECtHR held that Article 10 ECHR did not embody any obligation on the State concerned to impart the information.[34]

After Gaskin case, the ECtHR has ruled violation of Article 8 in sense of right to know one's origin in several other cases such as cases on minors under the guardianship of a public administration and adopted children (Odièvre v. France, 13.2.2003[35], and Godelli v. Italy[36], 25.9.2012), and to justify the provenance of actions and claims to non-marital paternity (Mikulic v. Croatia, 7.2.2002[37]), even

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31 Blauwolf, *op. cit.* note 16, p. 65

32 *Ibid*., p. 65

33 Although Gaskin case can only with some effort be analogized with the issue of access to one's genetic parentage, as he knew the identity of his genetic parents, the Gaskin case defined the extent to which individuals should be entitled to access files compiled on them by public authorities under Article 8. *Ibid.*, p. 65

34 The case of Gaskin v. United Kingdom, Application no. 10454/83, Judgment of 7 July 1989, Series A, no. 160, 1989., para. 51

35 See infra Chapter 3 Para. A. France

36 In the case of Godelli v. Italy the applicant, Ms Godelli, was abandoned by her mother at birth. As her mother did not consent being named, the birth certificate of Ms Godelli did not reveal her name. As adult MsGodelli asked the national courts to disclose the identity of her mother but the national courts denied access to such information, by claiming the necessity to protect the rights of the mother. Ms Godelli claimed that a fair balance had not been struck between her mother's right to confidentiality and her right to know her origins, and that has violated her right to private life. To analyze whether the fair balance was struck between the applicant's right to private life and the legitimate interests of her mother, the ECtHR weighted as follows: On the one hand, the child has a right to know its origins, that right being derived from the notion of private life. Individual's interest in discovering his or her parentage does not disappear with age, quite the reverse. The ECtHR considered that the Italian authorities had failed to strike a fair balance between the interests at stake and, consequently, found a violation of Article 8 of the ECHR. See the case of Godelli v. Italy, Application no. 33783/09, Judgment of 25 September 2012

37 In the case Mikulic v. Croatia the mother of a five-year-old girl claimed on her daughter's behalf that the fact that her daughter had no means of forcing a putative father to submit himself to DNA testing

beyond the statutes of limitations for these actions stipulated by the national laws (Jäggi v. Switzerland, 13.7.2006[38] and Backlund v. Finland, 6.7.2010).[39]

3. DISPARITIES IN BALANCING THE CHILD'S RIGHT TO KNOW ORIGIN AND DONORS RIGHTS TO PRIVACY

CRC and ECHR supported by the case law of ECtHR recognized the importance of a child's right to know his/her origin. While broadly declaring a child's right to know his/her origin they are making allowance for adaptation of the right to fit the context of nations with diverse local, political and social cultures.[40] Thus, CRC calls for "taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child".[41] Similarly, the ECHR has regularized this tolerance for local variation by commonly considering whether a state seems incursion on European Convention rights is nevertheless sustainable as within the state's "margin of appreciation".[42] In other words, the ECHR leave states with the room to maneuver in adapting rights to local conditions and values or the state's incursion on the individual interest was justified by overriding collective interests.[43] This zone of discretion within which states can differently interpret their obligations under the ECHR can be illustrated

violated her right to private life under Article 8 of the ECHR since there was no independent authority to which she could submit her paternity claim. The ECtHR held that the right to private life should include the determination of the legal relationship between an extramarital child and her natural father. Croatia needed to put in place procedures to allow her, without unnecessary delay, to obtain certain knowledge of her identity. However, the ECtHR stressed that in each case it is important to strike a balance, recognizing that the father also has a right to privacy that entitles him to avoid forced DNA testing. The case of Mikulic v. Croatia, Application no. 53176/99, Judgement of 7 February 2002

38 In the case of Jäggi v. Switzerland the ECtHR condemned the refusal of Swiss authorities to exhume for the purposes of DNA testing the body of the man the plaintiff claimed was his biological father. The plaintiff sought to establish paternity merely to determine the biological bonds between himself and his presumed father, not to claim any inheritance to which he might have a birthright. While living, the plaintiff's father had always refused to submit to biological testing, despite the suspicions that he was the father. In their brief, the ECtHR notes that "persons seeking to establish the identity of their ascendants have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their identity". The case of Jäggi v. Switzerland, Application no. 58757/00, Judgment of 13 July 2006

39 Farnós Amorós, E., *Donor anonymity, or the right to know one's origins?,* Catalan Social Sciences Review, *vol*. 5, Issue 5, 2015, p. 7

40 Woodhouse, B. B., *Hidden in Plain Sight: The Tragedy of Children's Rights from Ben Franklin to Lionel Tate*, Princeton University Press, 2008, p. 33

41 Preamble CRC

42 Meyer, D. W., *Family Diversity and the Rights of Parenthood*, in McClain, L.C.; Core, D. (eds.) What Is Parenthood?: Contemporary Debates about the Family; New York University Press**,** 2016,p. 138

43 Greer, S., *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights***,** Council of Europe, 2000, p. 5

through the case law of the ECtHR where the right to know child's origin was balanced with other's rights such as the right of gamete donor to stay anonymous. It means that the jurisprudence of the ECtHR maintained that the right of a child to know his/her origin is not absolute as sometimes state can give priority to other interests such as "the interests of national security, public safety or the economic well-being of the country, or the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others".[44] Therefore, there are some important disparities in the enforcement of the right to know the origin between national states. For example, the law in jurisdictions of France and Sweden varies in approach to the issue of conflicting rights of the child and gamete donor. The French law accepts the strict rules on donor's anonymity while the Swedish law very early lifted the donor anonymity rule enabled children to exercise the right to know their origin.

3.1. France

In France the parent–child relationship is considered a "purely social construction" and from a legal standpoint, parenthood is perceived as a set of duties that parents are free to take upon themselves if they so wish.[45] In other words, motherhood and fatherhood are socially determined and biological parenthood is not a source of obligation to care for a child.[46] Since the French Revolution women have possessed the right to give birth anonymously (*accouchement sous X*) but the law gives freedom to the birth mothers to end their anonymity at any time.[47] At first children didn't have the right to access documents revealing the biological mother's name and the possibility of establishing any bond between the mother and the child was generally prohibited.[48] By coming into force the CRC enabled the children to lift the secret birth on their request and with the assent of the moth-

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44 Bensson, *op. cit.* note 2, p. 142

45 Baudouin J.-L., Labrusse-Riou C., *Produire l'homme, de quell droit ? Étude juridique et éthique des procréation sartificielles*, Paris, 1987; Carbonnier, J., *Droit et passion du droit* sous la Ve *République*, Flammarion, 1996, pp 248-250; and Dekeuwer-Defossez, F., *Renover Le Droit de La Famille : Propositions Pour Un Droit Adapte Et Aux Aspirations de Notre Temps*, Documentation Francais, 1999

46 Eekelaar, J., *Parenthood, Social Engineering and Rights*, in: Morgan, D.; Douglas, G. (eds.), Constituting Families; a Study in Governance, Franz Steiner Verlag Stuttgart, 1994, pp 80-97

47 Blauwhoff, *op. cit.* note 16, p. 196

48 For presumption of parentage see Articles 311-319 of the Civil code (*Code Civil*). Article 341-1 of the Civil code (*Code Civil*) prescribed that "After a child's birth his/her mother may request that the secrecy as to her admission to hospital and identity be preserved". [https://www.legifrance.gouv.fr/affichCode.do;jsessionid=2EACFC55F81B97B6B38B1080C0E4929D.tplgfr41s_3?cidTexte=LEGITEXT000006070721&dateTexte=20080225] Accessed 20 April 2020. Births registered under X totaled approximately 550 in 2002 and in 2004 they allegedly numbered around 600. Blauwhoff, *op. cit.* note 16, p. 201

er.[49] However, access to knowledge of child origin has no bearing on "the rights or responsibilities of anyone concerned" as the discovery of birth mother and birth father had "absolutely no impact on the individual's civil status and maternity or paternity".[50] Thereby, the law gave acknowledgement that biological origins may be valuable as such, without being absorbed into the legal category of birthright.[51]

It is interesting to notice that French law which favors birth mother's anonymity is supported by rulings of the ECtHR. In the case of *Odièvre v. France* the petitioner, adopted at the age of four, claimed that right to know origin is breached as she did not have access to information about the circumstances in which she was born and abandoned that would help her to identify the birth mother as French social services had refused to release that information to her.[52] She had obtained access to certain information about her biological mother from her adoption records, but they were insufficient to identify the mother.[53] The ECtHR tested whether it was reasonable to impose on the French state a positive obligation to force the birth mother to divulge her identity.[54] In other words, the ECtHR was trying to determine the limit of the reasonable steps necessary to be taken by the state to secure the applicant's rights under Article 8(l).[55] Although the ECtHR took care to note that "birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the ECHR", it ruled that the French law that gives the right to mother to give birth anonymously was sufficient to ensure a fair balance between the protection of the privacy of the biological mother, who had given birth anonymously, and the child's interest in having access to the identity of his biological parents.[56] Although, the judgment is consistent with ECtHR case-law that "takes into consideration a wide margin of appreciation concerning complex issues where generally there is little common ground between them due to lack of a uniform approach or to the transitional state of the law on these issues", the ECtHR gave an overly

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49 Blauwhoff, *op. cit.* note 16, p. 120–121

50 Article L147-7 of the Social Action and Families Code (*Code de L'action Sociale et des Familles*). [https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006796699&cidTexte=LEGITEXT000006074069&dateTexte=20020123] Accessed 20 April 2020

51 Brunet, L.; Kunstmann, J-M., *Gamete donation in France: the future of the anonymity doctrine*, Medicine, Health Care, and Philosophy, *vol.* 16, no. 1, 2013, p. 77.

52 The case of Odièvre v. France, Application no. 42326/98, Judgement of 13 February 2003, para. 28

53 The case of Odièvre v. France, Application no. 42326/98, Judgement of 13 February 2003, para. 48

54 The case of Odièvre v. France, Application no. 42326/98, Judgement of 13 February 2003, para. 45

55 The case of Odièvre v. France, Application no. 42326/98, Judgement of 13 February 2003, para. 45.; Steiner, E., *Desperately Seeking Mother – Anonymous Births in the European Court of Human Rights,* Child and Family Law Quarterly, *vol.* 15, no. 4, 2003, p. 439

56 The case of Odièvre v. France, Application no. 42326/98, Judgement of 13 February 2003, paras. 44-45

large discretion in this case to the French state.[57] Moreover, as French rules on anonymous births are an oddity when compared and contrasted to the rules and accepted practices on birth registration commonly applied in the vast majority of European jurisdictions where entry of the mother's name on the child's birth certificate is compulsory.[58] ECtHR judgment in *Odièvre v. France* case also suffers from a further flaw as it keeps silent on international instruments, especially Article 7 of the CRC which provides for registration of a child after birth and rights to the name, nationality and, "as far as possible", the right to know and be cared by his parents.[59]

Unlike children born for mother that choose to stay anonymous, children conceived with donated gamete can't even access any information about their biological parent(s) as France is among rare states in the European Union (EU) that respect the donor's anonymity.[60] The rule of donor's anonymity was introduced in France in 1994 as an amendment to Public Health Code (*Code de la santé publique*) and preserved for lack of debate even when the laws were revised in 2004.[61] According to Articles L.12115 and L. 1244-7 of the Public Health Code (*Code de la santé publique*): "No information enabling the identification of either the person who donated a component or a product of his or her body, or the person who received it, shall be divulged. The donor shall not know the recipient's identity; the recipient shall not know the donor's identity. In case of therapeutic necessity, only

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57 Steiner, *op. cit.* note 55, p. 441.; The principle of anonymous birth has most recently been reiterated in the legislative reform of 2002. However, the legislation also aims (i) to encourage the medical team to persuade mothers to keep their babies and to inform them of welfare aid available; and (ii) to improve the situation of children born to anonymous mothers to facilitate and encourage the transmission of information concerning their genetic origins. See Law no. 93-22 of 8th January 1993 (*Loi n° 93-22 du 8 janvier 1993 modifiant le code civil relative à l'état civil, à la famille et aux droits de l'enfant et instituant le juge aux affaires familiales,* JORF n°7 du 9 janvier 1993, p 495) inserting Articles 341 and 341-1 Civil Code (*Code civil*) and the Law no. 2002- 93 of 22nd January 2002 (*Loi n° 2002-93 du 22 janvier 2002 relative à l'accès aux origines des personnes adoptées et pupilles de l'Etat*) relating to access by adopted persons and people in State care to information about their origins. [https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000361918&categorieLien=id] Accessed 20 April 2020

58 For example, in England and Wales under the *Births and Deaths Registration Act* 1953, section 2 recognized a legal duty of mother and father when married to register a child's birth in their name; the obligation falling on the mother to enter her name in the register if she is not married. Germany has similar provisions in the 1937 *Personenstandsgesetz*, sections 16-18 of which regulate the civil status. Similar cases we may find in Norway, Denmark, Netherlands, Belgium, Switzerland, Spain and Portugal. Italy and Luxembourg do not make it mandatory for the mother's name to be entered on the birth certificate. Steiner, *op. cit.* note 55, p.441

59 Steiner, *ibid.,* p.447

60 Rules of donor's anonymity we may find as well in Belgium, Spain, Portugal, Greece, Denmark, Bulgaria, Czech Republic. Brunet, L., *Donors anonymity and right to access to personal origin*, Council of Europe, 2018, p. 3. [www.eshre.eu › 05_BRUNET_NEW] Accessed 20 April 2020

61 Brunet; Kunstmann, *op. cit.* note 51, p. 69

the donor and recipient's physicians shall be entitled to have access to information enabling their identification".[62] With this rule of anonymity, the legislator had an aim to keep donor and recipient from knowing each other's identity to prevent the existence of a market, where such human-body products as gametes could be traded by private agreement.[63]

The parentage of donor offspring is established in a special legal procedure, whereby in the chambers of a judge or notary public, the sterile couples sign consent to the intervention of a donor as a third party.[64] Within this procedure parental rights are established for the sterile couple and they are informed of the duties incumbent upon them as the legal parents of the child to be born.[65] According to Article 16-8 of the Civil code (*Code Civil*): "In case of therapeutic necessity, only the donor and recipient's physicians shall be entitled to have access to information enabling their identification".[66] A similar rule is contained in Article L. 1244-6 of the Public Health Code (*Code de la santé publique*), stating that: "The authorized bodies and establishments, under the provisions of Article L. 2142-1, provide health authorities with appropriate information on the donors. A physician may access no identifying medical data in case of therapeutic necessity relative to a child born through reproductive technologies, using donated gametes".[67] According to the Article L. 1131-1-2 and R. 1131-20-3 of the Public Health Code (*Code de la santé publique*) the physician should provide the concerned children with information's about the serious genetic disorder and invite them to genetic counseling.[68] This kind of regulation provided parents with the freedom to keep the procedure between them or to inform the child about the details of conception.[69] Also, the rule of donor anonymity made easier to attract donors as they were not obligated to assume parenthood for the children who are conceived from their sexually reproductive cells.[70]

However, donor's anonymity resulted with the locked filial relationship of the child with the couple receiving the donation and donor's existence ends up being

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62 Articles L.12115 and L. 1244-7 of the Public Health Code (*Code de la santé publique*). [https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072665] Accessed 20 April 2020

63 Brunet; Kunstmann, *op. cit.* note 51, p. 70

64 *Ibid*., p. 70

65 Articles 311-19 and 311-20 Civil code (*Code Civil*)

66 Articles 311-19 and 311-20 Civil code (*Code Civil*)

67 Article L. 1244-6 Public Health Code (*Code de la santé publique*)

68 Article L. 1131-1-2 and R. 1131-20-3 Public Health Code (*Code de la santé publique*)

69 Brunet; Kunstmann, *op. cit.* note 51, p. 72

70 *Ibid*., p. 72

concealed as the child is divested of any right to trace him or her.[71] Although French rule of donor's anonymity was firstly recommended as an example and followed throughout Europe, the rule had been condemned by the psychoanalysts, child psychiatrists, and sociologists concerned about the effect it would have on the individual born from the donation.[72] Nevertheless, the rule prevailed in France which imposes the question of whether children conceived this way should, as those who were born from anonymous parents, have the same right of access to identifying information about their genetic background which is under the protection of personal autonomy contained in the right to respect for private and family life regulated by Article 8 of the ECHR.[73] The recent French and ECtHR case law confirms the need for change in the French legislature. Thus, in cases *Sillau v.France* and *Gauvin-Fournis v. France,* which were communicated to the Government in June 2018, the applicants were born as a result of artificial insemination using donor sperm.[74] When they reached adulthood their parents told them how they had been conceived.[75] The applicants then took steps to discover the identity of their respective biological fathers (or obtain certain non-identifying information) but their efforts were thwarted by the legal rules on gamete donation, as French law prohibits the disclosure of the donor's identity and only doctors are permitted to provide certain non-identifying information, for the purposes of treatment.[76] The French State Council (*Conseil d'État*) has taken the view that the rule on the donor's anonymity is designed to protect the private and family life of donors, recipients and their families, and that the legislature made a balanced

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71 *Ibid*., p. 70

72 *Ibid.*, p. 70, Widlöcher, D.; Tomkiewicz S., *Actes du Colloque «Génétique, procréation et droit»*, Paris: Actes Sud, 1985, pp. 44, 546; Vacquin, M., *Filiation et artifice*, Le Supplément, 1991, pp. 130–149; Delaisi de Parseval, G.; Verdier, P., *Enfant de personne*, Paris: Odile Jacob, 1994, chap. 5.; Cadoret, A.*et al.,Les lois du silence*, Libération, 2003, p. 39

73 For further elaboration, see Brunet, L. *Le principe de l'anonymat du donneur de gamétes a` l'épreuve de son contexte. Analyse des conceptions juridiques de l'identité.* in:Jouannet, P.;Mieusset, R. (eds.), Donner et aprés? La procréation par don de spermatozoïdes avec ou sans anonymat, Berlin: Springer, 2010, p. 235; Brunet, L., *Des usages prote´iformes de la nature: Essai de relecture du droit franc¸ais de la filiation*, in:Bonte, P.; Porqueres, E.; Wilgaux, J. (eds.), L'argument de la filiation. Aux fondements des sociéteseuropéennes et me´diterrane´ennes, Paris: Maison des sciences de l'homme, 2011, pp. 285–323

74 The case of Gauvin-Fournis v. France, Application no. 21424/16. Application communicated to the French Government on 5 June 2018. [https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-184370%22]}] Accessed 20 April 2020; The case of Silliau v. France, Application no. 45728/17. Application communicated to the French Government on 5 June 2018. [https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-184371%22]}] Accessed 20 April 2020

75 Para. 3 the case of Gauvin-Fournis v. France, Application no. 21424/16.; Para. 3 the case of Silliau v. France, Application no. 45728/17

76 Para. 6-7 the case of Gauvin-Fournis v. France, Application no. 21424/16.; Para. 5 the case of Silliau v. France, Application no. 45728/17

assessment of the risks inherent in lifting secrecy.[77] The applicants maintain that rule infringe their right to be informed of their origins and are discriminatory.[78]

Regarding the need of a change of legislation that supports the strict rule of anonymity the French State Council (*Conseil d'État*) invited the legislator to open the debate.[79] In the end of 2019 the new legislation has been proposed to loosen the strict rule of donor's anonymity. It has been suggested, as in many other countries, that right to know origin should be open to all children that have reached the age of majority and who want to learn more about their donors.[80] According to the proposed amendment donors would have the freedom to choose whether they reveal their identity and will be asked before the donation to accept providing irrevocable access to non-identifying data, available upon request to individuals born as a result of the donation after they turn 18. "This proposed mechanism has an aim to preserve in a more balanced way the interests of the person born from a donation of gametes (access to origins), those of the donor (the donor's right to private life for themselves and their relations) and the general interest (to not discourage gametes donors)".[81]

In February 2020 the French Senate (*Sénat*) debated on lifting the anonymity for gamete donors.[82] Although the initial draft that stipulated that the donor had to reveal his identity if the child requested it when he is 18 was approved by the National Assembly (*Assemblée nationale*) during the first reading, the Senators have amended it to allow the donors the prerogative of whether or not to disclose his identity upon the child's request.[83] As a result of this significant modification, the

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77 Para. 11, 21 the case of Gauvin-Fournis v. France, Application no. 21424/16.; Para. 9 the case of Silliau v. France, Application no. 45728/17

78 Para. 27 the case of Gauvin-Fournis v. France, Application no. 21424/16.; Para. 11 the case of Silliau v. France, Application no. 45728/17

79 Leroyer, A-M., *Why should France change its legislation relating to donor anonymity?*, 2016, pp. 23-24, [ejournals.lib.auth.gr] Accessed 20 April 2020. (This is a prospective comparative study performed for the report ordered by the Minister of Family Law in February 2014, published under the Title: Théry, I.;Leroyer, A.M., *Filiation, Orgine, Parentalité*, Paris, 2014. [http://www.justice.gouv.fr/include_htm/etat_des_savoirs/eds_thery-rapport-filiation-origines-parentalite-2014.pdf] Accessed 20 April 2020

80 *Ibid*., p.18

81 *Loibioéthique: que reste-t-il du projet de loi qui arrive au Sénat*?, 2020, [https://www.france24.com/fr/20200120-loi-bio%C3%A9thique-que-reste-t-il-du-projet-de-loi-qui-arrive-au-s%C3%A9nat] Accessed 20 April 2020

82 *French Bioethics: Main Revisions Adopted by the Senate during First Reading*, 2020, [https://www.alliancevita.org/en/2020/02/french-bioethics-main-revisions-adopted-by-the-senate-during-first-reading/] Accessed 20 April 2020

83 *Ibid.*

lifting of anonymity, unfortunately, will not have much impact on the child's right to know his/her origin.[84]

3.2. Sweden

Sweden was the first jurisdiction in the world to allow a child born through artificial insemination with a donor's gamete to find out the identity of the donor when he/she reaches maturity.[85] Adoption of legislation that aimed to protect child right to know origin was initiated in 1981 by Haparanda case which served as a catalyst for a nationwide controversy over donor insemination.[86] In this case, a boy conceived through donors insemination was declared "fatherless" by a Swedish lower court in the northern town of Haparanda.[87] The boy's mother and social father had divorced a few years after his birth, at which point the father denied paternity to avoid financial responsibility for the child, claiming that he had not consented to the insemination.[88] The court decision in his favor of the father wound its way up to the Supreme Court, which upheld the previous decision.[89] The case was viewed as a precedent for dealing with retracted paternity and it demonstrated the possibility that children conceived by donor's gamete become fatherless.[90] As there was no legal solution that would prevent these situations, a government commission of inquiry was established to study the issue and make policy recommendations.[91] In 1985 the Swedish parliament adopted the Act on Insemination (SFS 1984:1140) with the notion that secrecy and lack of access to donor information were not in the best interests of the child.[92] Originally, the provisions of Act on Insemination

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84 *Ibid.*

85 Ekerhovd, E.; Faurskov, A.; Werner, C., *Swedish Sperm Donors Are Driven by Altruism, but Shortage of Sperm Donors Leads to Reproductive Travelling*, Uppsala journal of medical sciences, *vol.* 113, no. 3, 2008, p. 305

86 Liljestrand, P., *Legitimate State and Illegitimate Parents: Donor Insemination Politics in Sweden*, Social Politics: International Studies in Gender, State & Society, *vol.* 2, Issue 3, 1995, p. 270

87 *Ibid.,* p. 276

88 *Ibid*., p. 276

89 *Ibid*., p. 276

90 *Ibid.,* p. 276

91 *Ibid.,* 277

92 Daniels, K.; Lalos, O., *The Swedish insemination act and the availability of donors*, Human Reproduction, *vol.*10, no.7, 1995, p. 1873; The Act on Insemination (*Lag om insemination,* SFS 1984:1140) complied with the later implemented CRC and its Article 7 which regulates the child's knowledge about its origin. [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19841140-om-insemination_sfs-1984-1140] Accessed 20 April 2020. Isaksson, S., *The child's best interest: Perspectives of gamete recipients and donors*, Digital Comprehensive Summaries of Uppsala Dissertations from the Faculty of Medicine 1152, Uppsala University, 2015, p.19. [https://uu.diva-portal.org/smash/get/diva2:862603/FULLTEXT01.pdf] Accessed 20 April 2020

(*Lag om insemination*) were governing access to identifying information applied only to sperm donation since egg donation was unlawful until 2003.[93]

Today, this law is integrated into a wider legal framework called the Genetic Integrity Act (*Lag om genetisk integritet*) which not only regulates artificial insemination by gamete donors but also in vitro fertilization, genetic research, handling human embryos and so forth.[94] According to Chapter 6, Section 5 and Chapter 7 of the Genetic Integrity Act (*Lag om genetisk integritet*) the child has right to access the data on the donor recorded in the hospital's special journal if he/she has been conceived through donor treatment procedure, and when he/she has reached sufficient maturity.[95] The legal parents and donors have no right to identifying information about each other and donors have no right to know the identity of

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93 The Act on Insemination (*Lag om insemination,* SFS 1984:1140) was proclaimed on 20 December 1984. In 2003, the IVF Act (*Lag om befruktning utanför kroppen,*SFS 1988:711) was amended to permit egg or sperm donation in combination with IVF under certain limited circumstances. [https://riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1988711-om-befruktning-utanfor-kroppen_sfs-1988-711] Accessed 20 April 2020.Today, the Genetic Integrity Act (*Lag om genetisk integritet,* SFS 2006:351) contains two prohibitions particularly relevant to the best interests of donor offspring and their right to identifying information about the donor: the prohibition against the importation of sperm and the prohibition against using the gametes of dead donors. Besides, the regulations on assisted conception prohibit the mixing of gametes in a treatment procedure. Stoll, J., *Swedish donor offspring and their legal right to information*, Uppsala Universitet, Sweden, 2008, p. 59. [https://www.diva-portal.org/smash/get/diva2:398198/FULLTEXT01.pdf] Accessed 20 April 2020

94 The Genetic Integrity Act (*Lag om genetisk integritet,* SFS 2006:351). [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2006351-om-genetisk-integritet-mm_sfs-2006-351] Accessed 20 April 2020. The Genetic Integrity Act (*Lag om genetisk integritet*) also repealed, and subsequently consolidated, the following acts: Act Concerning the use of Certain Genetic Technology in Medical Screening (*Lag om användning av vissgenteknik vid allmänna hälsoundersökningar*,SFS 1991:114); and Act Concerning Measures for Purposes of Research or Treatment Involving Fertilised Human Ova (*Lag om åtgärder i forsknings- ellerbehandlingssyfte med ägg från människa,* SFS 1991:115). [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1991114-om-anvandning-av-viss-genteknik_sfs-1991-114]; [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1991115-om-atgarder-i-forsknings--eller_sfs-1991-115] Accessed 20 April 2020.

95 Ch 6, s 5 (Insemination); Ch 7, s 7 (IVF)., Stoll, *op. cit*. note 93, p. 44; Regarding the meaning of sufficient maturity, if an adult person wants to access information's about his donor, sufficient maturity is presumed. In the case when the child is under 18 years of age, access to information's must first be evaluated by the National Board of Health and Welfare (*Socialstyrelsen*) to establish whether or not they are sufficiently mature to know the identity of the donor. Requirements for sufficient maturity would generally be fulfilled when the child was in the upper teens. Regarding the meaning of sufficient maturity, if an adult person wants to access information's about his donor, sufficient maturity is presumed. In the case when the child is under 18 years of age, access to information's must first be evaluated by the National Board of Health and Welfare (*Socialstyrelsen*) to establish whether or not they are sufficiently mature to know the identity of the donor. Requirements for sufficient maturity would generally be fulfilled when the child was in the upper teens. Stoll, *op. cit*. note 93, p. 46

the child.[96] According to the Genetic Integrity Act (*Lag om genetisk integritet*) the child has right to access the data only if it was conceived either in a publicly funded Swedish hospital or an institution authorized by the National Board of Health and Welfare (*Socialstyrelsen*) to perform artificial insemination procedures.[97] It follows that children conceived with the help of donors gamete through private arrangements or following treatment procedures carried out abroad have no right to information about the donor under the Genetic Integrity Act (*Lag om genetisk integritet*).[98] However, if the child has reason to suspect that he/she was conceived through a donor treatment procedure the National Board of Health and Welfare (*Socialstyrelsen*) is obliged to, on request, help him/her find out if there is any information recorded in a special medical record.[99]

The child to be able to seek out the genetic origin, besides the sufficient maturity, needs to have information that he/she is conceived by donor treatment procedure and the records need to be preserved.[100] However, the law does not require the parents to tell the child about its biological origin. It is recommended that they discuss the matter of family formation at 3-6 years of age.[101] When the question of origin arises from the child in the teenage years, it is recommended that the parents, as in all other matters, respect the integrity of the child and give an honest answer.[102] If records are not preserved the child's right to access information's about the donor would be worthless. As well, the Genetic Integrity Act (*Lag om*

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96 Stoll*, ibid*.

97 Chapter 6, section 2 (Insemination); Chapter 7, section 4(1) (IVF) the Genetic Integrity Act (*Lag om genetisk integritet*)

98 Stoll, J., *op. cit*. note 93, p. 45

99 Chapter 6, section 5 (Insemination); Chapter 7, section 7 (IVF) the Genetic Integrity Act (*Lag om genetisk integritet*); Stoll, *ibid.,* p. 44

100 Stoll, *ibid.,* p. 44; A Swedish study of DI parents in 1998 found that a small majority (52%) stated that they had either told (11%) or intended to tell (41%) their children. Among the rest, 19% were not intending to tell their children, 18% were uncertain and 11% did not answer the question. Two Swedish studies on parents of donor insemination-conceived children (conducted since the introduction of the 1985 legislation) found that, 20% of parents had told their children (age: 1–15 years) about the donation. In a follow-up of the first study, more than half of the parents had told their offspring (first child aged 5–15 years) about the donation, but it was less common to inform the child about his/her right to obtain information about the donor's identity. Isaksson, S. *et al.*, *Two decades after legislation on identifiable donors in Sweden: are recipient couples ready to be open about using gamete donation?,* Human Reproduction, *vol*. 26, no. 4, pp. 2011, p. 854

101 Daniels, K., *The Swedish Insemination Act and Its Impact*, The Australian and New Zealand Journal of Obstetrics and Gynecology, *vol*. 34, no. 4, 1994, p. 438

102 Daniels, *ibid.,* p. 438

genetisk integritet) stipulates that information about the donor is recorded in a special medical record which shall be preserved for at least 70 years.[103]

All above mentioned provisions secure that right to know origin for all Swedish children conceived with donor's gamete are protected in according to the requirements of international law (CRC and ECHR).

4. RIGHT TO KNOW THE CHILD'S ORIGIN IN CROATIA

Medically assisted procreation with donor's gamete has been firstly regulated by the Act Concerning Medical Measures for Exercising the Right to Free Decision about Giving Birth to Children which was in force since 1978.[104] The Act allowed artificial insemination with donor's gamete to an adult and a healthy woman at an age suitable for birth.[105] However, the legislator did not foresee the right for the child to know his/her origin. In other words, the child conceived with donors gamete did not have the claim right against the donor regarding the provision of the data about his/her origin. As well, the health care workers which provide services of medically assisted procreation had the obligation to keep as a secret the data of the donor's identity, the identity of the artificially fertilized woman and her husband.[106]

It is interesting to notice that even though the Act deprived the child of his/her right, there was no case-law on the subject of breaching child's right to know his/her origin.[107] The only case law in Croatia which was the subject of ECtHR judgment concerned a child born out of wedlock who, together with her mother,

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[103] Chapter 6, section 4 (Insemination); Chapter 7, section 6 (IVF) the Genetic Integrity Act (*Lag om genetisk integritet*).; Before the Act on Insemination (*Lag om insemination*) came into force in 1985, record keeping associated with donor treatment procedures was arbitrary and the possibility for donor offspring to discover that they were born through insemination or find out the identity of the donor was very small. All documents concerning insemination treatment were either destroyed or inaccessible to anyone other than the responsible doctor, largely in an attempt to keep the information secret from the child. Stoll, *op. cit.* note 93, p. 49

[104] The Act on Health Measures Related to Right to the Enjoyment of Free Choice in Childbirth (Official Gazette No. 18/78, 31/86, 47/89)

[105] If a woman is married, artificial insemination with another man's semen can be performed only with the consent of her spouse. See Article 33 of the Act on Health Measures Related to Right to the Enjoyment of Free Choice in Childbirth

[106] Article 32 of the Act on Health Measures Related to Right to the Enjoyment of Free Choice in Childbirth

[107] Steering Committee of Bioethics (CDBI), Strasbourg, 9 February 2012, p. 86, available at: [https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/INF_2005_7%20e%20REV2%20MAP.pdf] Accessed 13 May 2020

filed a paternity suit.[108] In this case, the mother claimed on her daughter's behalf that the fact that her daughter had no means of forcing a putative father to submit him to DNA testing violated her right to private life under Article 8 of the ECHR since there was no independent authority to which she could submit her paternity claim.[109] The ECtHR held that the right to private life should include the determination of the legal relationship between an extramarital child and her natural father.[110]Also, the ECtHR stressed that it is important to strike a balance by recognizing that the father also has a right to privacy which entitles him to avoid forced DNA testing.[111] Due to respect for private life, according to ECtHR, everyone should be able to establish details of their identity as individual human beings and entitlement to such information is important because of its formative implications for individual's personality.[112] Consequently to the judgment, Croatia needed to put in place procedures to allow the child, without unnecessary delay, to obtain certain knowledge of his/her identity.[113]

As a response to the ECtHR finding some legislative measures had been taken regarding the right of the child to know his/her origin in the case when mother or father are refusing to take medical tests to establish a legal relationship with the child. For instance, the Family Act that was enacted in 2003 in Article 292 prescribed that national court may request medical tests to establish a parent-child relationship and when the mother or father refuses to undergo medical tests or fail to appear at the appointment, the court will take that notion into account while giving a judgment.[114] Thus, the legal consequence of refusing cooperation by not attending a medical examination to establish paternity/maternity were deemed as evidence in favour of the opposing side.

Although some legal steps had been taken to protect child' right to know his/her origin, the children who were conceived by donated gamete stayed deprived of knowing their origin till July 2009 when the Act on Medically Assisted Procreation was enacted and articles that were regulating the donation of gamete in the

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108 The case of Mikulic v. Croatia, Application no. 53176/99, Judgement of 7 February 2002

109 Paras. 8, 47, 56, 64 of the case of Mikulic v. Croatia, Application no. 53176/99, Judgement of 7 February 2002

110 Paras. 53–55 of the case of Mikulic v. Croatia, Application no. 53176/99, Judgement of 7 February 2002

111 Para. 65 of the case of Mikulic v. Croatia, Application no. 53176/99, Judgement of 7 February 2002

112 Para. 54 of the case of Mikulic v. Croatia, Application no. 53176/99, Judgement of 7 February 2002

113 Paras. 64–65 of the case of Mikulic v. Croatia, Application no. 53176/99, Judgement of 7 February 2002

114 See Article 292 of the Family Act (Official Gazette No. 16/03, 17/04, 136/04, 107/07, 57/11, 25/13, 05/15; hereinafter Family Act 2003). The same provision is kept in Article 390(6) of the Family Act (Official Gazette No. 103/15, 89/19; hereinafter: Family Act 2015)

Act Concerning Medical Measures for Exercising the Right to Free Decision about Giving Birth to Children were repealed.[115] The reason for prolonged passing of the law that regulates right to know in case of gamete donation was the fact that the legislator had one of the most difficult tasks to find "appropriate solutions in the field of reproduction and bioethics while offering values in a national community".[116] Guided by the principle of the protection of the participants in procedures of gamete donation and the principle of the state's control of the hospitals, which undertake the procedures of medically assisted procreation, the Act on Medically Assisted Procreation 2009 enabled a child born from a donated gamete to inspect the register of data on conception and donors that was kept at the State Register on Medical Fertilization of the Ministry of Health.[117] Exceptionally, the Act enabled child's legal representative or child's physician to have access to the State Register in cases when it is necessary because of the medical reasons or if reviling the data is in the best interest of the child and if it is previously approved by the National Commission for Medical Fertilization.[118]In November 2009 the access to data on conception was restricted by amendment of the Act which prescribed that access to data on donor's identity is accessible only if the donor gave his/her approval to access the data before donation of gamete.[119] In other words, without the consent of the donor, the child would still be deprived of the right to know his/her origin. As such provision aimed to protect the donor instead of the child; we may say that the legislator simply lost from his sight the best interest of the child.[120]

To harmonize Croatian legislation with the Article 7(1) of the CRC which prescribes "child's right to know his/hers parents, as far as possible", the new Act on Medically Assisted Procreation was enacted in 2012.[121] The Act aims more to protect child's right to know his/her origin by prescribing in Article 13 right of the

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115 Act on Medically Assisted Procreation (Official Gazette No. 88/09; hereinafter: Act on Medically Assisted Reproduction 2009)

116 Korać, A., *Draft of the Croatian Act on Medically Assisted Procreation – Balancing Procreative Rights*, Društvena istraživanja: časopis za opća društvena pitanja, *vol*. 8, no. 2-3, 1999, p. 230-231

117 *Ibid*. The child can access the data about the donor when he/she reaches the age of majority. Art. 10(2) Act on Medically Assisted Procreation 2009

118 Article 10(3), 41 of the Act on Medically Assisted Procreation 2009

119 Professor Dubravka Hrabar assumes that behind the resistance to "open identity" of donors data stands fear of a reduction in the number of gamete donations, which has happened in some European countries. Hrabar, D., *Pravni dosezi medicinske oplodnje u Hrvatskoj*, Zbornik Pravnog fakulteta u Zagrebu, *vol*. 60, no. 2, 2010, p. 433; Article 3(2) AmendmentoftheAct on Medically Assisted Procreation (Official Gazette No. 137/2009)

120 Hrabar, *op. cit.* note 119, p. 433,440

121 The Final Draft on the Act on Medically Assisted Procreation, Government of the Republic of Croatia, p.44, available at: [https://vlada.gov.hr/UserDocsImages//2016/Sjednice/Arhiva//37.%20-%201.pdf] Accessed 14 May 2020

adult person conceived and born with the donated sperm, donated ovum or a donated embryo to access all information about his/her biological origin, including the identity of the donor.[122] The legislator also prescribed the duty of the parents to inform their child, at the latest by the age of 18, that he/she was conceived with donated gamete.[123] Furthermore, in medically justified cases and when it is in the interest of a child's well-being, the access to the information about the gamete donor is made available to the legal representative and to the physician of the child conceived and born with donated gamete.[124]

On the other hand, the donor does not have the right to know the identity of women who gave birth and the child who was conceived and born from donor's gamete.[125] The donor must be informed about the child's right to know his/her origin which includes information about the identity of the donor.[126] In written and notarized form donor confirms that he/she is informed about the child's right and gives the consent that his/her gamete may be used in the procreative procedure.[127] Thus, donation and usage of donor's gametes should be carried out only with the free, informed and written consent of the donor.[128]

The principle of the legal certainty seeks from legislator to clearly distinguish the question of maternity and paternity in case of the child conceived with the help of medical science.[129] Determining the origin of the child conceived in the medically assisted procedure as well as contesting motherhood and paternity of a child is regulated in the Family Act. According to the Family Act, the mother of a child conceived with the donated gametes is a woman who gave birth to the child.[130] It means that the mother of the child considers being the woman who gave birth to the child although the child is not originating from her.[131] Therefore, it is not permitted to contest the maternity of a child if the woman who gave birth and

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122 The Act on Medically Assisted Procreation (Official Gazette No. 86/12; hereinafter: Act on Medically Assisted Procreation 2012)

123 Parents are informed about this obligation in the counselling procedure that is conducted before the beginning of the procedure of medically assisted reproduction. See Article 13(4) of the Act on Medically Assisted Procreation 2012

124 Article 15(3) of the Act on Medically Assisted Procreation 2012

125 Article 19(4) of the Act on Medically Assisted Procreation 2012

126 Article 19(3) of the Act on Medically Assisted Procreation 2012

127 Article 19(2) of the Act on Medically Assisted Procreation 2012

128 Article 19(1) of the Act on Medically Assisted Procreation 2012

129 Hrabar, D., *Podrijetlo djeteta začetog uz medicinski pomognutu oplodnju*, in: Šimunić, V. *et al.*(eds.), Reprodukcijska endokrinologija i neplodnost – Medicinski pomognuta oplodnja IVF, Zagreb, 2012, p. 675

130 See Article 82(1) of the Family Act 2015

131 Hrabar, *op. cit.* note 129, p. 675

woman who donated gamete gave their consents to participate in that type of medical procedure, according to the provisions of the Act on Medically Assisted Procreation 2012.[132] A father of a child conceived with donated gametes is deemed to be the mother's husband if the child is born during the duration of a marriage or three hundred days from the cessation of the marriage, and if he has given his consent that child may be conceived with donor's gamete according to special provisions of the Act on Medically Assisted Procreation 2012.[133]

Since the right to medically assisted procreation is granted to a full aged and legally competent woman and a man who are married or living in an extramarital union and who, concerning their age and general health, are capable for exercising parental care, legislator specially regulated paternity of extramarital spouse.[134] The Act on Medically Assisted Procreation 2012 prescribes that prior the procedure, man is obliged to make a certified statement of acknowledgement of paternity of the child, and the woman has to make a certified statement of consent to the acknowledgement of paternity of the child.[135] If those statements are given together with the consents to medically assisted procreation with donor's gamete, mother's extramarital spouse is deemed to be the father of a child.[136] In other words, the law does not permit to contest the paternity of a child if consents have been given according to the provisions of the Act on Medically Assisted Procreation 2012. It is logical that "the court procedures, in that case, are not permitted as the medical expertise would show the incompatibility of the biological and legal parent".[137]

We may notice that provisions of the Act on Medically Assisted Procreation 2012 and Family Act 2015 that regulate child's right to know his/her origin is greatly harmonized with the requirements of international law (CRC and ECHR) and aim to favour the child's welfare.

5. CONCLUSION

Developments in medical science have made possible for some adults to become parents with the help of donated gamete. In that case, the child is considered to have been born to the parents who don't have the biological connection with him/her as they are only imitating the natural procreation. Although donation of gamete help many couples to become parents it can result with a serious breach of

132 Article 82 of the Family Act 2015

133 Article 83(1) of the Family Act 2015

134 See Article 4 of the Act on Medically Assisted Procreation 2012

135 Article 16(2) of the Act on Medically Assisted Procreation 2012

136 Article 83(2) of the Family Act 2015

137 Hrabar, *op. cit.* note 129, p. 675

child's right to know his/hers origin if information about the paternal biological ancestry is purely and simply erased from the child's life.

The issue of access to information about child's origins concerns the essence of his/hers identity and it is recognized as a conventional right in the CRC and derived from ECHR with the help of ECtHR case law. The respective sources of this right are Article 7 of the CRC which provides for the right to know one's parents and Article 8 of the ECHR which contains the right to respect for private life.

Despite such recognition of the importance of knowing one's genetic origins and identity, the law in the European states is not uniform as the ECtHR considers that each member state has a quite wide margin of appreciation in regulating such a right, as there is no "consensus amongst member states, regarding the relative importance of the issue at stake or the best ways to protect it, especially when it comes to moral questions or delicate ethical issues"[138] In that manner, the right to know origin may be restricted, or limited, where it conflicts with the protection of the rights of the donor. Accordingly, an unconditional right to identifying information about donor does not, in reality, exist. As an example, we may mention France and Sweden as two Member States with the opposite approach in balancing competing rights –the right of a child to know the origin and right of the donor to privacy. In France donor's right to anonymity may be restricted by medical reasons when some information's regarding donor may be reviled to the child while in Sweden donors are always obliged to revile to children conceived with their gamete information about their identity when children reach sufficient maturity except if they are conceived outside the Swedish hospitals which have competence for conducting artificial proceedings with donors gamete. In other words, in France the interest of donor usually precedes interest of the child while in Sweden the interest of child usually precedes interest of the donor.

In Croatia, the exercise of the child's right to know data about his/her origin is balanced by the principle of the child's well-being. The realization of that right when the child is minor is conditioned with the approval of the special commission for medically assisted reproduction who will disclose information only if it is in accordance with the welfare of the child. In that case, the access to information on the donor is not provided directly to the child but the child's legal representative or the physician of the child on their requests and only if there are medically justified reasons. When the child reaches a certain age, then he/she has the right to access all information on biological origin included the information about the donor's identity. Those provisions clearly define the primacy of the child's well-being

138 See infra chapter 2 and 3

that should always prevail if the interest between the child and donor conflict.[139] In the practice, those provisions can be consistently applied and implemented only if the legal parents fulfill their obligation to familiarize the child with the notion that he/she is conceived with donated gamete.

Above mentioned examples of legal regimes suggest the conclusion that is more than important to find the balance between confronted rights and interest behind the conflict of right to know origin and right to anonymity. In cases when we need to balance between rights of adults and children, children and their interests should not be ignored. One of the major reasons for advocating this is the recognition that secrecy of information about donor deprives the child of his/her right to know the nature of his/her conception and that is not in child's best interests.[140] As the best interest of the child is one of the paramount principles, states should aim to ensure that child's right to access information about his/her origin is always recognized and protected.

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[139] In Croatian family law theory, there is a clearly defined position with which we agree that if a conflict of interest between child and adult person occur priority should be given to the interests of the child. See Alinčić, M., *Medicinski pomognuta oplodnja i obiteljskopravni sukobi interesa*, Zbornik Pravnog fakulteta u Zagrebu, *vol*. 56, no. 4, 2006, p. 904

[140] Daniels, R. K.; Taylor, K., *Secrecy and Openness in Donor Insemination*, Politics and the Life Sciences, *vol*. 12, no. 2, 1993, p 159

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UDK 378(497.5):316.32
Review article

PUBLIC/PRIVATE DIMENSION AND ITS REFLECTION ON THE CROATIAN HIGHER EDUCATION SYSTEM WITH REGARD ON THE GLOBALISATION PROCESS

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ABSTRACT

The system of higher education is, most frequently, perceived as a part of public service which is justified by the fact it is commonly analysed from that point of view. Since the same system has recently been subjected to privatisation and commercialisation processes, it is of outmost importance to define the notion of public and private within the context of higher education, which is the main aim of this paper. Furthermore, it is necessary to place the higher education system within the framework of public and/or private and provide a thorough analysis of the dimensions relevant for all the interested parties in the domain of public administration, that is, its segment significant for the topic. The first part of the paper is, therefore, primarily focused on presenting the dimensions public/private to the interested parties, while providing relevant arguments regarding the topic, so valid approach in this segment of public administration is found by combining various interpretations. Some of the questions particularly interesting to the author are being discussed in the central part of the paper: in what way is the division on public/private evident in the Croatian higher education system, is higher education perceived as public service and to what extent is its development affected by the globalisation process? In the final part of the paper, certain conclusions are made based on the facts presented in the paper, which could be used for improving efficacy and effectiveness of the higher education system in Croatia.

Keywords: *globalisation, public/private, public administration, public goods, public services*

1. INTRODUCTION

The debate about the public and private dimensions is quite frequently found in both domestic as well as foreign literature. Authors emphasize individual advantages along with the disadvantages of public and private in the context of higher education system. This paper sets the concept of public and private in the context of higher education system as public service.

Fundamental research questions are: in what way is public and private evident in the higher education system, is higher education considered a public service and to which extent do globalisation processes influence the higher education system? The following text should provide the answers to these questions.

Many authors have discussed and researched this topic. In their "Administrative Science – public administration in modern European context" Koprić et al. present the overview of the chapter Public Services – services of general interest, which has significantly contributed to this research paper.[1] In his article "Social services in the concept of services of general interest" Đulabić explains the evolution of "services of general interest" (highlighting their features, fundamental characteristics and classification).[2] Menger deals with the differences in the approach of public and private organisations. In his article The development of understanding the "transparency" of the organisations in the organisational theory Menger distinguishes between four approaches of defining "transparency" of organisations: formal, dimensional, normative and integrative approach.[3]

The aim of the paper is to indicate the existence of theoretical debate between the notions of public and private and to provide them with a suitable context within the higher education system. The essence of the paper is to research the perspectives of different authors regarding the topic with the aim of finding the most adequate perspective referring to the Croatian higher education system. In addition, the paper is focused on indicating various changes which have occurred

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1 More in: chapter of the mentioned book – pages 215 to 244. Author`s recommendation is to emphasize the significance of public services in law and politics of the whose analysis is presented in the same chapter with the following relevant subchapters: "Context of the dispute and fundamental dilemmas", "Services of general interest in the EU law", "Categories of services of general interest in law and politics of the EU. More in: Koprić, I. *et al*., *Upravna znanost, Javna uprava u suvremenom europskom kontekstu*, Pravni fakultet Sveučilišta u Zagrebu, Studijski centar za javnu upravu i financije, Biblioteka Suvremena javna uprava, Knjiga br. 25, Zagreb, 2014, pp. 215 – 244

2 More in: Đulabić, V., *Socijalne službe u konceptu službi od općeg interesa*, Revija za socijalnu politiku, *vol*. 14, no. 2, Zagreb, 2007, pp. 137 – 162, [https://hrcak.srce.hr/30325], accessed 25. May 2020

3 See: Menger, M., *Razvoj shvaćanja "javnosti" organizacija u organizacijskoj teoriji*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, *vol*. 39, no. 2, Rijeka, 2018, pp. 989 – 1009, [https://hrcak.srce.hr/204643], accessed 25. May 2020

within the system and researching the scope of their effects on the perception of higher education system as a public service.

Scientific methods used in the paper are the analysis and synthesis method, the abstraction and concretisation method, method of generalisation and specialisation, the classification method and the descriptive method. The paper is divided into five main chapters containing subchapters. The list of used literature is provided in the end of the paper. Individual approaches in the higher education system are described in the initial part of paper. The central part of the paper refers to the globalisation process and its influence on the higher education system. Changes and modifications within the system are discussed in the final part with emphasis on public-private partnership. Author`s conclusions regarding the topic are presented in this part as well.

2. FINDING THE ADEQUATE APPROACH REGARDING THE NOTION PUBLIC/PRIVATE BY COMBINING TWO INTERPRETATIONS

The definition of public goods from the neoclassical economic perspective, as is pointed out by Samuelson (1954), refers to goods (or services) that are non-competitive and non-excludable. According to Samuelson, public goods are non-competitive since they cannot be consumed by an infinite number of users, without being exhausted. On the other hand, the same goods are non-excludable since the benefits cannot be limited to individual users. Many goods possess either one or the other quality and can be described as "partially public" goods (e.g. the notion of "social goods" has been applied to describe goods that are competitive, but non-excludable).[4]

The same author perceives private goods as goods that are both competitive and excludable. Samuelson also tried to naturalise the line between public and private. Goods are, according to Samuelson, basically described as either public or private

[4] More in: Sandler 1999: 40-42, according to Marginson, S., *The public/private divide in higher education: A global revision*, Higher education, *vol.* 53, London, 2007, p. 311. Some of the chosen provisions of the Constitution of the Republic of Croatia will be emphasized here, such as art. 44 in which it is proscribed that every citizen of the Republic of Croatia has the right, under equal conditions, to participate in conducting public affairs and be administered in public service, then art. 66 proscribing that education is available to everyone, under equal conditions, according to their abilities, art. 67 that prescribes that under the conditions prescribed by law it is possible to establish private schools and universities and art. 68 in which the autonomy of universities and their independent decision-making process regarding their organisation and performance in accordance with the law is guaranteed. See: The Constitution of the Republic of Croatia, 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

(determined according to the nature of the goods or service itself). Samuelson presumes that the market is the norm, that the market domain is non-state, in other words, private thus declaring public or partially public goods the exception from the norm itself. His approach has become dominant in neoclassical economics and has been absorbed into the matrix of neo-liberal way of thinking about public politics. Another concept resulting from economics is the one about the influence of side effects i.e. expansion. The ideas which originated from the economics of excludability, rivalry, insufficient production of public goods on the market and side effects are considered extremely useful and can, in more than one way, improve the understanding of higher education (neoclassical economic theory does not offer all the answers regarding public and private goods).[5]

Marginson claims that the opinion of some economists is useless since they perceive education as natural social good, a good that is non-competitive in its consumption, but primarily because its benefits can be limited to individuals. Some forms of education are competitive and not all benefits are excludable. The claim that education is essentially a social good does not justify the changeable character of higher education. Marginson observes that some aspects of education are more excludable or competitive than the others. Its production can be situated in two sectors – public and private. For example, thorough research published freely in public domain is not excludable, while secretive commercial research is more easily subjected to both competitiveness and excludability. It is far more useful to observe education as a potentially competitive or non-competitive, that is, potentially excludable or non-excludable good. In other words, unlike public or private character determined by internal nature of goods, public or private character of education presents a political choice.[6]

When it comes to political philosophy, public and private can lead to wider interpretations than those offered by economics, which has been evident in the text so far. For example, the notion "public" can refer to questions such as: how are the goods manufactured and by whom, who are they controlled by, how widely are they distributed, who benefits from them etc.? In this case, "public" can refer to collectively manufactured and/or consumed goods. Democratic philosophy claims "public" can be applied for widely available goods and/or goods manufactured in a transparent way, or goods whose production is the subject of mutual decision-making process within a community. In liberal political philosophy, however, the notion "public" is frequently related to government or state. The notion "private" refers here to any type of non-state production, for example, production

5 *Cf. ibid.*, pp. 311-312

6 More in: *Cf. ibid.*, pp. 312-313

subjected to legal alienation/private property: the "market" in general, individual markets in specific sectors, home and family and similar. It is evident that the use of the prior mentioned notions is loose and eclectic and indicates the necessity for consistent definitions.[7]

Furthermore, traditional approaches to public/private offer two interpretations. Both are dualistic in a sense that they treat public and private as two mutually exclusive notions. The one is the economics notion of public/private that connects private with unnatural market. The other is the state notion of public/private that connects public with government or state. Both perspectives reflect individual political demands of economic liberalism oriented towards the market (private side of the duality); and social democracy oriented towards state institutions (public side of the duality). However, both are flawed. The notion of public/private, as defined by neoclassical economic theory, treats public and private as natural and universal attributes (it contains implicit biasedness in favour of high individualism and market forms of social organisation). The predicted efficiency is primary for economics and it presupposes market solutions. The neoliberal politician concludes that higher education is mainly a natural private good which should be marketized.[8] Due to its instinctive inclination to market solutions, neoclassical economist tries to reduce or conceal the potential for side effects and collective goods in higher education.[9]

The occurrence of individualised side effects is also present. When providing political advice, neoclassical economist focuses on the possibilities for measuring or altering the market competition in higher education[10], in addition to having the tendency to ignore or overshadow the options which increase the production of most of public goods.[11] The notion of private/public defined in a state sense is equally useless since the concept of public as government or state: 1) underestimates the independent capacity of individual leading universities to shape their economic and social features through non-market activity such as global research cooperation, 2) neglects the possibilities of the universities formally owned by state to sell diplomas to international students on commercial basis, acting as a private company, 3) neglects the potential for collective goods and side effects

7 *Cf. ibid.*, p. 313

8 *Ibid*.

9 Pusser, 2002, according to: *Cf. ibid.*, p. 314

10 More about the conduct of people in administrative organisation in: Cvitan, O., *Upravna organizacija*, Veleučilište u Šibeniku, Šibenik, 2008, pp. 126-133. Moreover, it is the author`s recommendation regarding the terminological specification of the notion organisation to see more in: Blažević, R., *Upravna znanost – kompendij*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2004, pp. 79-83

11 Marginson, *op . cit.* note 6, p. 314

generated not in the government, but in citizens` associations, 4) etatism ignores the possibility of global public goods (considering the philosophical point of view in which the public = government; in the international sphere, where there is no government, the question arises regarding the way public goods have been produced).[12]

Etatism, in fact, treats higher education within a country/nation as public and state terrain, in contrast to cross-border higher education perceived as private and market terrain. Nationally, higher education is public, globally it is private. The etatist construct of global surroundings concurs with neoclassical economics. Even though they disagree regarding the national/state issue, both market economist and etatist perceive global surroundings as a relevant area of commerce. Marginson establishes that the alleged presents an impoverished perspective of global and a useless perspective of higher education.[13]

Koprić et al. emphasize that the quality of public administration[14] has been questioned in theory and practice since the middle of the 20th century and has gained importance during expansion of public services. It is claimed that certain improvements of quality and functioning of public administration are evident through regaining citizens` trust in government, state and its institutions, enhancing the image of public administration in public and similar, which the author greatly concurs with.[15]

When developing the wanted approach regarding the notion public/private it is necessary to extract the useful aspects from two areas, both the area of economics and political philosophy. According to Marginson, public goods are those that contain a significant element of non-competitiveness and/or non-excludability and are widely available to population. Public goods are the implicit biproducts of the "invisible hand".[16]

The interpretation of public/private leads to a conclusion that a combined approach regarding the described interpretations should be adopted in the area of

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12 Kaul *et al*. 1999: 12, according to: *Ibid*.

13 *Ibid*.

14 It is recommended to see some of the chosen regulations relevant for higher education: Act on Quality Assurance in Science and Higher Education, Official Gazette, No. 45/09 and the Science and Higher Education Act, Official Gazette No. 123/03, 198/03, 105/04, 174/04, 02/07, 46/07, 45/09, 63/11, 94/13, 139/13, 101/14, 60/15, 131/17

15 More about European perspectives of improving the quality of public administration in: Demmke, 2006, according to: Koprić *et.al.*, *Europski upravni prostor*, Institut za javnu upravu, Zagreb, 2012, p. 201

16 Marginson, *op. cit*. note 9, p. 315

higher education (it should be adjusted in accordance with the Croatian higher education system). Considering that private techniques and values nowadays occur more frequently in the public sphere, it is to be expected that in the near future along with the public higher education institutions there will be more private colleges (in Croatia there are already several private universities). It is consequently important to constantly point out the importance of interpretation of higher education as public service. Higher education should without a doubt belong to public sphere and be available to everyone under the same conditions (current research has shown that the privatisation and commercialisation processes are becoming more present in this important system).

2.1. How is the modification of interpretations of public/private evident within the higher education system?

The combination of public and private goods is determined by public politics, institutional managers and staff activities. As has been stated, it is not specified whether the emphasis is put on private or public goods intrinsic/inner nature of the goods (including the services), since this is a prior reached political decision. Whether the goods are manufactured and distributed through competitive market economy, is also a prior reached political decision. It is important not to forget the capacity of the politics creator to not only enhance market competitiveness, but also to take counter steps in order to expand the elements of non-competitiveness and non-excludability in both production and distribution – for example in higher education, expansion through distribution of benefits of study programmes and research findings. Non-competitiveness and non-excludability do not offer clear and simple solutions to all political problems. They are useful starting points for solving complex questions solved through politics and political issues. The same political issues may be related to both public and private goods. Different public and private goods may have differential influence within the population (for example, environment protection is a non-excludable and a non-competitive public good useful to everyone but at the same time it harms individual community members who benefit from ecologically harmful activities). When environment is protected, those persons acquire a non-excludable and a non-competitive public good (intact environment); they lose a part of the other public good which is non-excludable, but competitive under certain circumstances (economic freedom); and perceive "private as bad" compared to the first public good (loss of income). This example shows that public good does not exhibit unambiguous values and that it does not present the sum of public goods (political activities of

enhancing public goods can include political confrontations as well as compromises between public and private goods).[17]

In the article "Managing natural resources as common goods: theoretical approach in differentiating public goods and common resources" Petak defines the notion of common (general) goods which in domestic legal literature are presented as general goods and are together with public goods treated as "general useable goods in general use".[18] The article also refers to the notion of public goods which are as is stated "in the real-legal regime and in the property of individuals of public law".[19] In his article "Is education a public good?" Petak presents several types of goods: private, club, common and public. He distinguishes two basic criteria: competitiveness in consumption and the possibility of exclusion of the non-payers from their consumption while emphasizing that the main feature of public goods is their non-competitiveness in consumption and inability to exclude the non-payers from their consumption. In his remarks, Petak questions whether it is possible to apply the term public good to higher education. He concludes that education possesses some features of private or club goods and it is therefore not possible to unambiguously specify it as a public good.[20]

In conclusion, there are different interpretations regarding the notions of public and private. Each system should be combined with the interpretation which

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17 *Cf. ibid.*, pp. 315-316. About personality traits and how to apply them in a team (especially useful for improving work in the area of higher education) more in: Tudor, G.;, Srića, V., *Menadžer i pobjednički tim*, MEP Consult i Croman, Zagreb, 1996, pp. 41-43. The efficiency of higher education system is also considerably influenced by implementation of the so-called entrepreneurial ethics, more specifically principles applied within the framework of entrepreneurial ethics, more about the topic is available in: Bebek, B.; Kolumbić, A., *Poslovna etika*, Sinergija, Zagreb, 2000, pp. 69-75. The definition of public and private is presented in the following way: private goods are goods „that can be parcelled out and made excludable, so that clear property rights can be attached to them", public goods are goods „that are non-excludable, meaning that the goods' effects (benefits or costs) are shared by everyone". More in: Kaul, I., *Global Public Goods, A concept for framing the Post – 2015 Agenda?,* p.10, [https://www.ingekaul.net/wp-content/uploads/2014/01/Internetfassung_DiscPaper_2_2013_Kaul1.pdf], accessed 29. May 2020. The questions of public/private are thoroughly explained in two collections prepared by UNDP: "Global Public Goods" (Kaul et al. 1999) and "Providing Global Public Goods" (Kaul et al. 2003). Both point out the distributional aspects of "public" in various sectors and explore the potential of political mechanisms for increasing and regulating global public goods. See: Marginson, *op. cit.*, note 13, p. 316

18 More in: Aviani, 2009., prema: Petak, Z., *Upravljanje prirodnim resursima kao zajedničkim dobrima: teorijski pristup razlikovanju javnih dobara i zajedničkih resursa*, Forum za javnu upravu – izazovi upravljanja javnim dobrima, Friedrich-Ebert-Stiftung, ured za Hrvatsku, Institut za javnu upravu, Zagreb, 2019, p. 10, [https://iju.hr/Dokumenti/fju_17.pdf], accessed 26. May 2020

19 See: Jug, 2004: 19, according to: *Ibid.*

20 More in: Petak ,Z., Je li obrazovanje javno dobro?, [http://www.rsp.hr/ojs2/index.php/rsp/article/viewFile/877/773], accessed 26. May 2020

mostly suits the current social atmosphere. In Croatia there are nowadays various public and private colleges offering different programmes. Many people support the notion that education should be public and available to everyone, however, this is not always the case. In order to achieve healthy competitiveness, it is essential to provide a wide choice of study programmes for students on both public and private colleges (the choice will depend on students` socioeconomic status). By accepting benefits and drawbacks of both types of studying the principle of equal availability will be fulfilled and students will be provided with equal opportunities when choosing a preferred university. Marginson`s claim that there is a necessity to establish an approach completely devoid of political and economic theorising is to be concurred with.

Higher education is exclusively public, private or combined. That, what has been produced, is a varying combination of public and private goods worldwide to the degree that public/private compose a positive sum (one can increase the other). Universities without state control are, therefore, producing certain private goods; while at the same time, even the most expensive private universities contribute to public goods, collective goods including their side effects. Even though public and private goods are mutually "heterogenous", they are produced within the same higher education institutions devoted to a wide range of teaching/learning, exploring, community and national service activities. This, however, does not imply that the public/private combination is everywhere always equally balanced (different public/private balance is one of the key elements distinguishing institutions from national higher education politics). Some institutions and national systems, primarily those in which higher education is organised as a market, put more emphasis on private goods than other institutions and systems.[21]

3. GLOBAL/LOCAL PRIVATE/PUBLIC GOODS IN HIGHER EDUCATION

Higher education is potentially competitive or non-competitive, excludable or non-excludable. It produces a complex and varying combination of public and private goods. Regimes of higher teaching may endanger equality of opportunity. Market forces strive to enhance competitiveness and excludability, while insufficiently ensuring the goods characterised as non-competitive and non-excludable. Pro-markets, ideologies and politics have the tendency to obscure the possibili-

[21] *Cf. ibid.*, pp. 316-317. The recommendation of the author is to further research the Agency for Science and Higher Education primarily using their official web page: [https://www.azvo.hr/hr/], accessed 19.March 2020 and to read more about the same topic in: Antić, T., *Ustrojstvo i djelokrug javnog sektora*, Pravni fakultet u Rijeci, 2014, p. 218

ties and current issues of public goods. Insufficient recognition and insufficient production, however, do not eliminate public goods. Higher education market indicates the necessity of the politics designed in a way which enhances those public goods which create markets and it compensates for those public goods which the markets are trying to suppress and conceal from different perspectives and effects.[22]

Globalisation expands potential for both global private and public goods in higher education. The term globalisation implies expansion, deepening and accelerating of world connections.[23] It is frequently connected with production of private goods through cross-border production and liberalisation of commerce within global financial system. Global co-dependence increases the scope of cross-border side effects whereby actions of one nation create benefits or expenses for other nations. Similarly, the development of global systems increases the potential of collective goods in a twofold sense of collective population (e.g. expanding the knowledge of public health issues) and collective nation (e.g. coordination of banking systems). This part of the study is based on Marginson´s quote: "*We all become too easily entrapped in understanding higher education in a sense of dual public/private ideology, and political horizon still bordered by a nation-country despite the obvious fertility of globalisation*".[24]

Marginson´s considerations indicate the following: a) neo-classical economists who implement the categories public/private in outcomes of higher education (public/private goods) instead of property (government sector/non-government sector) should be followed, neo-classical economists who privilege higher education markets on a national level and fail to understand public goods[25] on a global scale should not, etatists who ignore the potential of private goods and the role of the market in national higher education, limit politics on a national level and fail to comprehend public goods on global scale shouldn`t be followed; b) when determining the nature of goods, irrelevant whether public or private, it is more important to determine whether they have been produced by market or by government or non-government sector, even though government institutions are more prepared to create politics than institutions in private property, institutions from both sectors produce public and private goods thus making both sectors available to politics being one of the two input units determining higher education; c) public and private goods are specific rather than universal attributes, goods produced

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22 *Cf. ibid*., pp. 320-321

23 Held *et al*. 1999: 2, according to: *Cf*. *ibid*., p. 323

24 *Ibid*.

25 More about public goods in general in: Antić, *op. cit*., note 14, pp. 83-98

in higher education can be changed from public to private and vice versa while considering the fact that their position is historically determined and politically sensitive; d) public goods frequently include complex distributional questions, whereby one agent´s public good is "public bad" or "private bad" of the other agent; e) tools are needed to enable complete understanding of private and public goods on a global scale and to link them with national systems and local higher education, global public goods in higher education are the key to more balanced, globally friendly, mutually useful, globally educated environment in which the contribution of higher education to development is increased; f) from the analytical point of view, tools to register cross-border side effects, such as "brain circulation" need to be developed; g) from the point of view of politics, units within the government focused especially on global side effects should be established on a national level, they could develop financial techniques thus enabling internalisation of side effects by identifying optimal national cross-border knowledge flows etc.; h) the approach to global public goods that are already available needs to be improved, particularly research, establishing national capacity in higher education in developing countries is the condition for wider circulation, admittance and production of knowledge, which in return establishes a better global balance; democratisation of planning and production of national and global public goods make them more transparent and encourage wider distribution while increasing their transparency; democratisation is achieved by making public goods explicit, by encouraging political debate and by involving numerous non-government agencies and participants.[26]

When taking Marginson´s interpretation into consideration, following conclusion are to be drawn: there are two "streams" in the area of higher education, private and public. With the aim of achieving efficiency within the system of higher education, the administrative doctrine connecting the public sector with the private should be followed but to an extent acceptable to all the key participants within the higher education system. It is quite hard to acquire all the values and techniques from the private sector and to incorporate them into the public sector without having to disturb the interpretation of higher education as public service. It must be a service of common (public/social) interest. Market administrative reforms are trying to introduce market principles and methods in the public sector, which is preferable provided the traditional values are not completely abandoned.

[26] Marginson, *op. cit.*, note 19, pp. 330-332

3.1. Globalisation and national trends in higher education system

With the aim of explaining unbelievable institutional and organisational similarities in social systems of countries around the world, "global institutionalists" (e.g. Meyer et al.,1997; Finnemore 1995) have for the last twenty years been debating about how have government institutions including state itself been modelled on "supra-national" level according to dominant values and processes of western ideology more than they have been modelled as autonomous and specific national creations. This perspective has been based on the idea that universal norms and culture shape national politics and political activities of national countries. Transnational accomplices such as UNESO, OECD, the World Bank and IMF support the idea of spreading global patterns and trends within the area of education. This is particularly true when taking teaching categories and the correlation model between the state and higher education into consideration. Perspective which includes regulation of government systems, including introduction of private higher education, might increase compassion of the institutions of higher education toward ecological pressures, whereby increasing overall efficacy of the system of higher education thus becoming a part of supranational agencies' ideologies (like e.g. World bank 1994). According to global institutionalists the guidelines of national educational system, in Dale´s words, are "*something more than performing informed scriptures, and accepting their legalisation on behalf of world ideologists, values and cultures"*.[27] Dale opposes this approach by claiming that globalisation,[28] when referring to education, is not merely a reflection of the western culture of education (cognitively based on values and norms which are spreading worldwide), but "a set of political-economic understandings for organisation of global economy, led by the necessity of detaining the capitalist system more than any other set of values."[29]

Regardless of the perspective, that of global institutionalists or Dale´s, it is clear, that current trends in higher education cannot completely be explained on the basis of national specificities. On the other hand, the growth of transnational trends such as mass production, return of expenses, regulation through deregulation, management, increase of stratification of the higher education system and increase in separating research and teaching functions. There is significant correspondence between the changes of political, institutional and academic patterns of produc-

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[27] Amaral A.; Magalhães A., *Epidemiology and the Bologna Saga*, Higher Education, 48, Issue 1, Springer, 2004, pp. 80-81

[28] In that sense, it is interesting to read Kursar`s article in which he recounts Rosenberg`s review of "globalisation theory". More in: Kursar, T., *Smrt „globalizacijske teorije" ili kraj još jedne revolucije?,* Politička misao, *vol.* 45. no. 1, Zagreb, 2008, pp. 8-20

[29] Dale, 2000:10, according to: Amaral i Magalhães, *op. cit.*, note 29, p. 81

tion, distribution and consumption. International trends frequently operate as legitimate sources for national politics.[30]

Zsifkovits also talks about the concept of globalisation and distinguishes between the narrow interpretation of the concept of globalisation (focused on the economy) and wider interpretation of the same concept (the process that includes all the areas of life and consistently transcends national borders).[31]

However, some authors by connecting the globalisation process with hyper-capitalism, emphasize that the same terms have become the subject of numerous debates in an attempt to explain modern movements and global occurrences (current debates regarding the globalisation process refer to globalisation as a phenomenon characteristic for triangle Japan – USA – EU). Furthermore, it is claimed that globalisation and hyper-capitalism are a consequence and instruments of the governing theory of neoliberalism (whose basic idea was to separate and limit the influence of government politics from corporation administration, from supranational or transnational organisations and consequently subject and instrumentalise them to achieve goals and interests of financial capital separated from real economy).[32] However, it is certain that globalisation truly does represent a set of economic, social, political and cultural processes that lead to a greater connection and co-dependence between particular parts of the world.[33]

Milardović´s approach in clarifying two basic terms – globalisation and globality is considered quite interesting. Milardović emphasizes that globalism means "that global market is suppressing or compensating for political action, that is, ideology of authority over global market, the ideology of neoliberalism" while globality refers to the attitude that "we have been living in one global society for quite long… and that no country or community can be isolated. In this way various economic, cultural, political forms collide…".[34]

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30 *Ibid*. More about the concepts of public administration in: Marčetić, G., *Upravljanje ljudskim potencijalima u javnoj upravi*, Suvremena javna uprava, Zagreb, 2007, pp. 43-67

31 Zsifkovits` contribution to the topic of globalisation refers to economic globalisation and its ethical viewpoints (this way he processes the issue of globalisation process, its direction towards international general goods, its influence on unemployment and similar). More in: *Zsifkovits, V., Globalizacija i etika, in: Baloban, S. (ed.), Gospodarsko – socijalni izazovi u tranzicijskim zemljama, Institut društvenih znanosti Ivo Pilar, Zagreb, 2001, p. 107*

32 This way Kulić explains the notion of hyper-capitalism as a concentrated term having the furthest range in neoliberal doctrine, system philosophy and politics. See in: Kulić, S., *Neoliberalizam kao socijaldarvinizam*, Rat za dominaciju ili bolji svijet, Prometej, Zagreb, 2004, p. 170; 172

33 Kalanj, R., *Globalizacija i postmodernost*, Politička kultura, Zagreb, 2004, p. 62

34 Milardović, A., *Globalizacija*, Pan liber, Osijek – Zagreb – Split, 2001, pp. 64-65

The United Kingdom and New Zealand were the first to introduce neoliberal politics and have later been copied by other countries as examples for international agencies. In addition, Ball claims that "in certain contexts this project brings ideas and creates a sort of cultural and political dependence leading to devaluation or denial of feasibility of local solutions." [35]

Moreover, Levin (1988) interprets the other version by using medical metaphor. Levin compares political transfers of current education with the spread of diseases, whereby international experts, political entrepreneurs and organisation representatives are those selling "wonderous hand-made solutions to national problems, infected agents who move from country to country seeking adequate hosts to infect". [36] From the cultural and economic point of view, globalisation presents a concept that can enrich the analysis of development trends of higher education but is not the only factor determining the development. Globalisation is recurrently presented as a fact or a process which cannot be avoided: as the only way to general prosperity, which is connected to erosion of national borders and awakening of the role of supranational governments.[37]

Some authors claim that globalisation[38] does not mean that national variations do not stay strong nor does it question homogenous nature of global culture and its models. The ever-growing transnational influence does not destroy the power of connections between the countries, nor their sovereignty. Boyer and Drache, by using the instability of the financial market as an example of administration limit in absence of state intervention, conclude that "the idea of global market will completely erode legality".[39] On the other hand, the logic of globalisation tolerates and demands the promotion of cultural (and if possibly even political) divergence and diversity. Globalisation will be built on diversity and should operate according to patterns that seem paradoxical – both global as well as decentralised – forms of social organisation conveying powerful images of elections, freedom and diversity.[40]

The biproduct of globalisation of neoliberal economy is the appearance of "the new regionalism" (Acharya, 2001) whose results vary slightly and are at times even

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35 Ball 1998: 123, according to: Amaral; Magalhães, *op. cit*. note 31, p. 82

36 *Ibid*.

37 Porter 1999: 31, according to: *Ibid*.

38 About the implications of globalisation and the occurences accompanying it, read more in: Pusić, E., *Nauka o upravi*, Školska knjiga, Zagreb, 2002, p. 4

39 Boyer i Drache 1996: 8, according to Amaral i Magalhães, *Epidemiology and the Bologna* Saga, *loc. cit*.

40 Jones, 1998: 149-150, according to: *Cf. ibid*., pp. 82-83

conflictive. Yet, so far, only the European Union has initiated visible intervention within the systems of higher education.[41]

4. CHANGES WITHIN THE SYSTEM OF HIGHER EDUCATION

The word *change* brings both positive and negative implications. More specifically, the changes that have been happening, and are still happening today, within the system of higher education[42] are frequently connected to certain drawbacks which become difficult to correct after a while. Every change for the better is more than welcome. However, oftentimes bad changes are introduced which is negatively reflected on the higher education system. It is not justified to change the higher education system only for the purposes of causing the change itself. What is more, these changes lead to passivation of almost all participants of the system while at the same time causing users´ dissatisfaction (the priority is users´ satisfaction). How should the higher education system be improved?[43]

In the White Paper on the Future of Europe – considerations and scenarios for EU-27 by 2025 it is said that the European Commission will contribute to debates, among others those regarding exploiting the development of social dimensions of citizens, as well as those regarding exploiting the globalisation process.[44]

Beukel claims that the higher education politics has for a long time not been a part of the European agenda and that the deeper integration and cooperation in the agenda of higher education or even *European Higher Education Area (EHEA)* have seemed unthinkable, whereas the wider European corporation has been limited to programmes of EU mobilities (Beukel, 2001). The situation has significantly

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41 Mittelman, 1996: 6, according to: *Ibid*.

42 The presented viewpoint of higher education as public service is closely related to the definition that public services are definitely "the key element of social state and are provided by public institutions and corporations whose founders are the state, local and regional units." Public services are primarily regarded as social services such as education, healthcare, culture, social care and others. Recently, a noticeable trend of implementation of the process of privatisation, commercialisation and agentification of public services has been present. Koprić et al. also say, that when discussing public services, the emphasis is on subsidiarity. Liberalisation refers to "forming a sectorial market in which a particular type of public services is ensured based on market competition", by privatisation, a public organisation is sold to a private owner. More in: Koprić *et al.*, *op. cit.*, note. 1, pp. 7-8

43 When it comes to changes that might eventually occur in the area of higher education, one particularly important variable should be mentioned, that being the organisational structure, which according to Buble, does not present an independent variable, but is rather under the influence of numerous factors, from which the following will be pointed out: environment, strategy, technology and size. More in: Buble, M., *Osnove menadžmenta*, Sinergija nakladništvo d.o.o., Zagreb, 2006.

44 Available on: [https://ec.europa.eu/commission/sites/beta-political/files/bijela_knjiga_o_buducnosti_europe_hr.pdf], accessed 14. March 2020

changed since 1999. Ninety-nine ministers responsible for higher education signed the Bologna declaration marking the beginning of the so-called Bologna process. The ministers have agreed to found EHEA by 2010. Despite legally non-binding and intergovernmental character, different reforms related to the process have been initiated by all the countries who signed the declaration showing at the same time "(..) that the governments have developed policies that correspond with the European agenda according to convergent systems of higher education."[45] The noticeable degree of national changes within the system of higher education still significantly varies.[46]

Other documents based on the Bologna declaration are the Prague Communique from 2001, the Berlin Communique from 2003 and the Bergen Communique from 2005. The common feature of all the documents is that they strive to enhance the social dimension in higher education (equal opportunities to enrol in and finish a preferred university, achieving balance between economic competitiveness and social cohesion within the European higher education system).[47]

In conclusion, the significance of the European area is crucial for political circles, all the parties in the higher education system as well as for the industrial sector. Empowering and enriching this area can only result in satisfaction for all the interested parties. The recommendation is that all working on improvement of the higher education system follow the European Commission`s referral to enable access to the best education and training for youth as well as to open new workplaces for youth across Europe. The Commission encourages creating the European area of high education and highlights the following: studying abroad should become general practice, school and university qualifications should be acknowledged in the entire EU, knowledge of two languages should become a standard, all students should have equal access to education regardless of their socioeconomic status,

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45 Huisman and Wende 2004: 355, according to Heinze T.; Knill, C., *Analysing the differential impact of the Bologna Process: Theoretical considerations on national conditions for international policy convergence*, Higher Education, 56, Issue 4, Springer, 2008, pp. 493-494

46 Luijten-Lub *et al*., 2005: 158; Witte, 2006, according to: *Ibid*. About the agencies as parts of public service more in: Mecanović, I. *et al., Državne (regulatorne) i javne agencije*, Sveučilište Josipa Jurja Strossmayera u Osijeku, Pravni fakultet u Osijeku, pp. 61-79. The analysis of legal acts regarding the Agency for Science and Higher Education is available in the prior mentioned book written by Mecanović, I. *et al*., p. 116

47 More in: Puzić, S. *et al*., *Socijalna dimenzija „Bolonjskog procesa" i ne (jednakost) šansi za visoko obrazovanje: neka hrvatska iskustva*, Sociologija sela, *vol.* 44, no. 2-3, 2006, p. 244, [http://idiprints.knjiznica.idi.hr/581/1/SS%202006_2-3%20%20Puzi%C4%87.pdf], accessed 29. May 2020

all citizens should become more aware of their own identity, European cultural heritage and its diversity.[48]

4.1. Organisational changes within the system of higher education

Changing the organisational structure is a process "of remodelling the existing organisational structure with the aim of improving organisational efficacy (changes may refer to organisational hierarchy, level of responsibility of different organisation members and similar), whereby the following factors are to be taken into consideration: the involved participants; what needs to be changed; what type of change should be introduced; individuals affected by the change and the estimate of the change".[49] Most important organisational changes of higher education system on strategic level comprise of "diversification" of higher education and organisational and administrative changes on universities which optimise the relationship between integration and decentralisation within the framework of a single university. On the organisational level "diversification" of higher education[50] refers to introducing programmes of different duration, that is development of binary system in higher education (establishing two subsystems of higher education). This concept is compliant with the development trend of European higher education and in Croatia it was introduced in 1993 by Science and Higher Education Act. Higher education in Croatia is, therefore, achieved through undergraduate and graduate professional study programmes. There are significant problems in both development of undergraduate studies and in improving organisation and administration of universities.[51]

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48 More in: Europska komisija, *Obrazovanje i izobrazba, Europski prostor obrazovanja*, [https://ec.europa.eu/education/education-in-the-eu/european-education-area_hr], accessed 29. May 2020

49 Certo, S. C.; Trevis Certo, S., *Moderni menadžment*, Zagrebačka škola ekonomije i menadžmenta, MATE d.o.o., Zagreb, 2008, p. 300; 302

50 More about higher education as public service in: Dujmović, J., *Visoko obrazovanje kao javna služba*, doctoral thesis, Zagreb, 2014. It is the author`s recommendation to see the entire research about the successfulness of reforms in higher education in Croatia implemented for the purposes of the author` s doctoral dissertation. The mentioned research has included all the components within the framework of Josip Juraj Strossmayer University in Osijek referring to the fact that surveys have been conducted on a relevant number of teachers, assistants on one hand and students on the other. It is recommended to study the set hypotheses/sub-hypotheses as well as the results of the conducted research that have led to a complete or partial confirmation of the mentioned hypotheses. More about the empirical research in the prior mentioned source: pp. 207-247

51 Cf. *ibid*, p. 75. More about managerial styles, that is interaction between the society and managers in: Pende, H., *Moć neetičkog poslovanja – organizacijska kultura u Hrvatskoj*, Hrvatska sveučilišna naklada, Zagreb, 2008, pp. 51-52. One should see the analysis of administrative reforms in transitional countries in: Marčetić, G., *Javni službenici i tranzicija*, Suvremena javna uprava, Zagreb, 2005, pp. 99-117

Public – private partnership (hereinafter: PPP) is a long-term contractual relationship between public and private partners, subject of which being the construction and/or reconstruction and maintenance of public building with the purpose of providing public services from the jurisdictional framework of public partner.[52] Numerous domestic and foreign scientific papers have been written on the issue of public – private partnership, whereby the main subject matter of debates regarding implementation of PPP within the higher education system are frequently matters such as: is implementation of PPP within the higher education system necessary?, what are the advantages and disadvantages of implementation of PPP, is the implementation of PPP within the higher education system useful or harmful to the entire system? and similar.

When analysing the term PPP, *stakeholders* play a very important role. *Stakeholders* are influential interest groups relevant for a system. In the analysis of influential interest groups Tipurić defines *stakeholders* as "influential interest groups within a corporation (or any other organisation) and around it. Influential interest groups are individuals, groups and organisations, as well as coalitions of individuals, groups and organisations within and outside of the corporation, who have certain rights, demands or interests regarding the corporation. They express them due to the special relationship, taking in the process lesser or greater risk, based on their connection to the corporation.[53] Tipurić considers that the providers of critical resources, shareholders, employees, buyers and suppliers, large creditors are primary stakeholders. This, however, still does not mean the organisation should consider the interests of its primary stakeholders equal (their interest are direct and tangible and they are crucial for the organisation´s existence and activities) while secondary stakeholders are those who indirectly influence the organisation and their status is frequently determined by their activity (their interests are indirect and remote such as those of end consumers, competition, state on different levels, public, society as a whole, media etc.).[54] In literature, the key reason for applying PPP is frequently the effectiveness achieved by its implementation, but in any case the traditional values provided by traditional (social) way of public service providing should not be neglected. PPP does in fact change the traditional relationship "state service delivery – citizens" into the relationship "private service delivery – users (buyers) consumers". According to the Guidelines for successful PPP application,

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[52] Definition taken from the Public - Private Partnership Act, Official Gazette No. 78/12, 152/14, 114/18

[53] The mentioned analysis is available on p. 21: [http://www.efzg.unizg.hr/UserDocsImages/OIM/dhruska/2014-2-%20Situacijska%20analiza%20-%20okolina%20i%20SWOT.pdf], accessed 21. March 2020

[54] *Ibid*., p. 22

every project financed by PPP should meet the following criteria: public and private sector cooperate based on public contractual relations, the concept of sharing the responsibility, costs and risks should be stated in the contract, project arranged by PPP must simultaneously ensure both public interest and commercial goal of both PPP partners, both PPP partners should expect higher results for the same price or the same results for a lower price and each partner keeps its own identity and responsibility.[55]

Stainback claims that when providing public service there are four different types of mergers: a) *traditional process or public project* – public sector is the owner of the project; it is responsible for financing of the project, for creating the project outline; it controls the project and takes its risks; b) *private project with public participation*; c) *public – private partnership* – public and private sector share the ownership, risk management and responsibility for the project as well as its finances; d) public + public-private partnership – the agreement in which more local units of the public sector signs contract with a private partner.[56]

PPP is the product of the last third of the 20th century presenting a form of participation of the private sector in public affairs (in some administrative systems it is also known as private financial initiative) which is mostly used for financing construction and managing large infrastructural objects. It is a long-term agreement (e.g. in Croatia PPP can last between five and forty years) after which the constructed infrastructure belongs to the public sector. Various PPP models can be reduced to two basic models – institutional or status in which a combined trade association is founded and contractual in which such association is not founded. In Croatia, private partner participating in the PPP project is obligated to establish a special trade association exclusively for realisation of PPP project (special purpose association) with whom then public partner signs the contract about PPP. Relevant elements of strategic public projects through PPP are ensuring public benefit for invested means, quality contract elaboration about PPP that needs to possess adequate mechanisms to ensure realisation of public aims and protection of public interest, comparison of costs and benefit, selection of optimal private partner, key risks identification and allocation and similar. Drawbacks of PPP arise from the preparation of relevant elements upon which successful realisation of PPP is based, such as insufficiently prepared mechanisms for public interest protection, deficient risk identification and allocation, too large costs etc.[57]

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55 European Commission, 2003, according to: Šimović J. i dr., *Javno-privatno partnerstvo kao nefiskalni instrument financiranja javnih interesa*, Hrvatska javna uprava, *vol.* 7, no. 1, 2007, p. 173; 181

56 Stainback, 2000:16, according to: *Cf. ibid.*, pp. 181-182

57 More in: Koprić *et al.*, *op. cit.*, note 22, pp. 245-246

In his article Molnar analyses the segment of public-private partnership in higher education by stating basic advantages and drawbacks of this model. In addition, Molnar studies the relationship between the government, university and the industrial sector. Basic benefits are increased employment rate of well-educated youth and increase in employability of graduates and postgraduates.[58] On the other hand, the main drawbacks would be unequal ability of educational institutions for cooperation with private partners (the advantage is given to faculties of technology and faculties of natural sciences).[59]

The model of public-private partnership within the system of higher education is welcome unless it disturbs the principle of equal educational opportunities. The emphasis should be on cooperation between the three participants: government, university and the industrial sector. This would finally make the model desirable for all who decide to take part in the higher education system regardless of their role in it.

5. CONCLUSION

General approach to higher education is variable in nature which will, in author`s opinion, cause the debate between public and private to last for quite a long time. Since the processes of privatisation and commercialisation are becoming more noticeable, perception of higher education as public service is changing accordingly. Marginson´s definition of public goods as those goods that are available to wider population and are trying to stay competitive is therefore completely acceptable.

There is a significant need for an informal approach which would present an adequate combination of the public/private approach. Sectors as higher education, that have been analysed in this paper, are in their essence neither public nor private and can be presented in both ways. This means that the area of higher education can be exclusively public, private or a combined area. One combined model of public and private is preferred worldwide while highlighting the fact that public and private must form a positive sum.

It is evident that globalisation process comprehended as expansion and acceleration of global connections largely influences the development of higher education.

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58 More in: Thune, 2009 i 2010; Carayannis, Alexander and Ioannidis, 2000; Enders and Jongbloed, 2007, according to: Molnar, T., *Javno – privatno partnerstvo u visokom obrazovanju kao promotor razvoja tržišno primjenjivog znanja*, Andragoški glasnik: glasilo Hrvatskog andragoškog društva, *vol.* 17, no. 2 (31), Zagreb, 2013, pp. 160, [https://hrcak.srce.hr/116178], accessed 29. May 2020

59 Thune, 2009, according to: *Ibid.*

The White Paper on the Future of Europe – considerations and scenarios for EU-27 by 2025 supports this fact.

Public – private partnership is welcome within the system of higher education, however, without the risk of losing basic values upon which, this extremely important segment of every citizen´s life, is based. Traditional values should be preserved within the system while aiming for responsibility for the achieved results. It is concluded that the cooperation between the three participants: government, universities and industrial sector is relevant, but only if it contributes to financial and innovation progress of the higher education system (at the same time achieving economic growth). In addition, the following questions need to be answered: does PPP present the transitional form to total privatisation of higher education; is promoting PPP model undermining social values and similar. Once the answers are found, the direction in which to head will be known, presuming this direction at the same time represents "the right way".

Finally, the following conclusion can be made:

1. since there are different interpretations of the notion public/private a precise and specific attitude regarding categorisation of higher education system should be formed without losing the fundamental comprehension of higher education as public service,

2. encourage and support the values which will in the foreseeable future improve the public services (e.g. improving the quality of higher education in Croatia),

3. accept and follow the globalisation processes by supporting the values represented by the majority of the developed countries,

4. find an adequate model to follow (values and techniques),

5. enable spontaneous changes within the higher education system which are supported by political and other interested parties,

6. ensure political support and continuity for all the changes that are occurring (political determination),

7. identify the advantages and disadvantages of the public-private partnership model and apply it within the Croatian higher education system,

8. follow the world trends in the area of higher education,

9. notify all the participants and interested parties about the current changes within the higher education system framework,

10. observe all the occurring changes from the perspective of the European context and encourage the implementation of values which will result in improvements of higher education as public service without contributing to forgetting the main aspects of the interpretation of higher education as public service.

The presented analysis including the theoretical background should in the future be used for conducting empirical research with the purpose of validating or disputing the given assumptions. The research results would greatly contribute to administrative science especially in the segment of public services while supporting the notion of higher education as public service.

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UDK 316.3(37):342.734-053.9
Review article

ROMAN VIEWS ON 'ACTIVE AGEING' – LESSONS AGAINST AGEISM

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ABSTRACT

Mostly due to negative demographic trends and unfavourable ratios between the inactive and active working population, prejudiced ideas against older people, that they are unproductive and redundant, are contributing to discrimination and their exclusion. Although human rights should not diminish with age, we are nowadays witnessing discriminatory practices against the older persons considering employment, social protection and access to services.

The social construct of 'ageism', according to which older people are treated differently because of the attitudes relating to their age, is not a contemporary idea. Rather, it is a human rights issue that has existed throughout history. Examining the extremely positive and negative descriptions of elderly in ancient Roman literature, the first part of this article contains an analysis of the legal and social position of older people and, consequentially, their contribution to society. Focusing on the concept of 'active ageing', specifically propagated by the Article 25 of the Charter of Fundamental Rights, the second part of the paper will tackle the existing efforts of the EU in the struggle against ageism.

Although Croatian national legislation is largely aligned with the European acquis, due to the large margin of discretion left to Member States, a systematic approach to care for the elderly is still lacking, not to mention its effective implementation. Finally, by exploring the experiences from the past and reflecting on the current EU policy advancements, the goal of this paper is to facilitate a vital shift from the paradigm of the old people as a burden of passive service recipients towards active participants in society.

***Keywords**: active ageing, ageism, ancient Roman society, Charter of Fundamental Rights of the EU, discrimination*

1. INTRODUCTION

Both today and throughout history, ideas about age have fluctuated depending on various cultural, biological and social elements. In times when the old age threshold is constantly being re-assessed,[1] Evans's definition of age as "a number derived from a birth certificate" that "cannot be a cause of anything (apart from prejudice)"[2] is highly applicable. The prejudices on grounds of age are an integral part of the social construct of ageism, which was introduced to popular discourse by Robert Butler, the first director of the U.S. National Institute of Ageing in 1969, who compared it to bigotry similar to racism and sexism.[3] Numerous attempts at defining the term boil down to discrimination and prejudice based solely on the person's age, and since it results in the insufficient contact of young people with the elderly, it eventually led to the creation of stereotypes and myths. Butler gives an interesting explanation of ageism as a fear and dread of growing old, which ultimately serves as a psychological mechanism that makes it possible for the younger individuals to avoid dealing with the reality of getting old.[4] Regardless of the proposed exposition, it can be recognized that ageism as such contributes to the poor treatment of old people and their consequential social exclusion.

Specifically in modern capitalism, given that older people are seen as an unproductive part of society, they are perceived exclusively as a burden on resources, primarily in terms of medical care and pensions. This is partly due to changes in demographic structure that resulted in a significant increase in the number of old-

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1 There is little consensus in contemporary society regarding the beginning of old age. For the purpose of this discussion, we agreed to use the UN Department of Economic and Social Affairs, Population Division's approach shown in its 2019 report, according to which the term 'old people' is nowadays used to describe a person aged 65 years or older. The United Nations Department of economic and Social Affairs, *World Population Ageing 2019,* p. 1, available at: [https://www.un.org/en/development/desa/population/publications/pdf/ageing/WorldPopulationAgeing2019-Report.pdf], accessed 20. June 2020

2 Evans, J.G., *Age discrimination: Implications of the Ageing Process,* in: Fredman, S.; Spencer, S. (eds.), Age as an Equality Issue*,* Hart Publishing, Oxford, 2003, p. 19

3 Butler described the term as "a process of systematic stereotyping and discrimination against people because they are old"; see Butler, R. *Ageism,* in: Maddox, G. (ed.), *The Encyclopedia of Aging,* p. 38–39. Bitheway points out that "ageism is not a discrimination by the dominant social group against a specific minority group but a set of beliefs originating in biological variation between people and relating to the ageing process and it is in the actions of corporate bodies." Bytheway, B., *Ageism,* Open University Press, Buskingham, 1995, p. 14. Compare with other similar definitions, for instance: Palmore, E.B., *Ageism, Negative and Positive,* Springer, New York, 1999, p. 4; Cuddy, J. A. C.; Fiske, S. T., *Doddering but Dear: Process, Content, and Function in Stereotyping of Older Persons,* in: Nelson, T.D. (ed.), Ageism, Stereotyping and Prejudice against Older Persons*,* Cambridge, 2002, p. 1–27; Greenberg, J.; Schimel, J.; Martens, A., *Ageism: Denying the Face of the Future*, in: Nelson, T. D. (ed.), Ageism: Stereotyping and prejudice against older persons, MIT press, Cambridge & London, 2004, p. 27

4 Butler, *ibid.*

er people in relation to the total population. Results of the last Croatian national census from 2011 show that 17,7% of the Croatian population is older than 65 years, and it is anticipated that this percentage will be 37,4% by 2030. At the same time, it is estimated that the percentage of people older than 65 years in the EU is currently around 19,7% and that it will grow to 31,3% by the year 2100.[5] Such estimations show reasons for concern, especially if we take into account the data on discrimination against the older population, which is on the rise.

As one of the tools to combat ageism and to ensure a higher quality of ageing, the WHO originally introduced the theoretical concept of 'active ageing', which is widely used to form strategies and policies at the international as well as the EU level.[6] Since the philosophy of the social virtue of ageing actively has been known from antiquity, the aim of this paper is, through historical and comparative methods, to explore the challenges of ageing from historical and contemporary perspectives and use the wealth of experience from past human actions in a problem-oriented manner to tackle the modern-day social issues of ageing.

Considering that the historical perspective can unveil values that are influencing social behavior, the first part of the contribution will elaborate the discussion and controversies about old age in ancient Rome. As an integral part of the relatively new field of 'elder law'[7], an overview of the European legal framework against discrimination of the old persons and the active ageing policy will be provided in the

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5 Državni zavod za statistiku Republike Hrvatske, *Projekcije stanovništva Republike Hrvatske od 2010. do 2061.,* Zagreb, 2011, [https://www.dzs.hr/Hrv_Eng/Projections/projekcije_stanovnistva_2010-2061.pdf], accessed on 14. June 2020; Eurostat, *Population structure and ageing,* [https://ec.europa.eu/eurostat/statistics-explained/index.php/Population_structure_and_ageing#The_share_of_elderly_people_continues_to_increase], accessed 14. June 2020. On the increased share of older age groups in Croatia and the EU see: Lulić, M.; Rešetar Čulo, I., *The rights of older persons with disabilities in the Republic of Croatia,* in: Vinković, M. (ed.), New Developments in EU Labour, Equality and Human Rights Law, Osijek, 2015, p. 198–202

6 It refers to a "process of optimizing opportunities for health, participation and security" for the purpose of improving the quality of ageing. *Cf. Active Ageing. A Policy Framework*, p. 12 [https://extranet.who.int/agefriendlyworld/wp-content/uploads/2014/06/WHO-Active-Ageing-Framework.pdf], accessed 29 July 2020; For a debate on different approaches and definitons of 'active ageing' see Boudiny, K., '*Active ageing': from empty rhetoric to effective policy tool*, Ageing & Society, *vol.* 33, no. 6, 2013, pp. 1077–1098.

7 The field of 'elder law' has experienced considerable advancements, however due to the global demographic changes, strategic dialog and effective instruments on the international level are required. *Cf.* Doron, I., *From National to International Elder Law*, The Journal of International Ageing & Policy 1, 2005, pp. 43–67; Numhauser-Henning, A., *An Introduction to Elder Law and the Norma Elder Law Research Environment*, in: Numhauser-Henning, A. (ed.) Introduction to the Norma Elder Law Research Environment: Different Approaches to Elder Law, Lund University, 2013, pp. 21–38; Mikołajczyk, B., *Is the ECHR ready for global ageing?*, The International Journal of Human Rights, 17:4, 2013, 511–529

second part of this article. Given that Croatia is not lacking the legal framework but an efficient implementation in the field, the third part aims at substantiating the Croatian challenges in standards of care for the elderly, specifically considering their health, participation and security. Finally, in order to help old persons to remain valuable members of society, we will conclude with the potential to adapt old ideas and solutions to the contemporary practice of active ageing.

2. AGEISM AND ACTIVE AGEING IN ANCIENT ROME

It is not possible to determine with certainty who was considered old in ancient society and which was the overall demographic structure of the Roman population as we do not have access to the relevant statistical data. To some extent, demographic evidence can be extracted from indirect sources, such as epigraphic monuments, legal documents and literary works. Useful epigraphical evidence can be traced from the age of the deceased commemorated on tombstones.[8] Nevertheless, since not all age groups were equally represented, these epigraphic samples do not provide reliable mortality data.[9] However, the inscriptional data evidence evaluated with reference to the external standard of the UN model life tables, which were completed by Hopkins, show that life expectancy at birth was presumably under 30.[10] This current estimate may lead us to the conclusion that there was almost no older population because the statistical data is affected by high infant and child mortality, above 200 per 1,000.[11] According to information from the Roman census conducted in 73 AD, which has been preserved for us thanks to Pliny's comment (*Nat. Hist.* 7,162–163), 81 people in the Po region claimed to be over 100 years old. Although it is surely an exaggeration, Pliny enumerates over-90-year-olds by name to prove his point and emphasize the cases of longevity.[12] Surprisingly, but very similar to today's notion, old age, according to the perception of Romans, began around the age of 60, when the Roman citizen was freed

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8 *E.g.* CIL XIII 7101; CIL VIII 1558; CIL VIII 298; CIL VIII 579

9 For attempts of mapping the age structure of the Roman population and limitations that come with the usage of inscriptions for the purpose of mortality calculations, see Hopkins, K., *Sociological studies in Roman history*, Cambridge University Press, 2017, 106–134; Durand, J. D., *Mortality estimates from Roman tombstone inscriptions*, American Journal of Sociology, *vol.* 65, no. 4, 1960, pp. 365–373; Parkin, T. G., *Demography and Roman society*, JHU Press, Baltimore, 1992, 4–19

10 Hopkins, *ibid.,*p. 133

11 It is estimated that as many as 50% of children died before the age of ten, but if they survived that year, life expectancy would increase significantly. *Cf.* Cokayne, K., *Old Age in Ancient Rome*, 2005, [https://www.brlsi.org/events-proceedings/proceedings/25020], accessed 10. June 2020

12 Harlow, M; Laurence, R., *Growing up and growing old in ancient Rome: a life course approach*, Psychology Press, London & New York, 2000, p. 7; Parkin, *op. cit.,* note 9, p. 107–111

from military duties and other civic obligations (*munera*).[13] The only specificity, Cokayne points out, compared to the current share of the total population is that the Roman figure was approximately around 6–8%.[14] The argument in favour of that percentage arises from the commonly named Ulpian's 'Life Table', which is included in Justinian's digest D. 35,2,68 pr as an excerpt from the second book *Lex Iulia de vicesima hereditatium* from the jurist Aemilius Macer. The regulation was probably an administrative provision for the purpose of the calculation of tax annuities, but Macer's citation of Ulpian's chart with age categories could also serve as a table of life expectancy in the 3rd century AD. Although it is certain that such an ancient actuarial table does not statistically have a foothold in the actual population,[15] the data are indicative and provide us with a rough overview of life expectancy according to which 7,87% of the population would be 50 years or older, similar to other pre-industrial societies.[16]

As in today's society, chronological transition to a certain age did not necessarily affect everyone equally, but it depended on the physical and psychological complexity of the individual experience.[17] Moreover, the experience of ageing differed significantly depending on the social status of the individual. Literary sources provide evidence to the various psychological, physiological and emotional changes of a person in old age.[18] Perhaps the best known complete work on the sorrows and consolations of old age is Cicero's discourse *Cato Maior de Senectute.* Given that he himself was then 63 years old when he wrote it, Cicero expressed his own sentiments of ageing and identified its four major challenges: exclusion from activities, physical disabilities, absence of pleasures and awareness of imminent death.[19] Likewise, in his late sixties, Seneca dealt intensively with the vulnerabilities of

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13 Covey, H. C., *The Definitions of the Beginning of Old Age in History*, The International Journal of Aging and Human Development, *vol.* 34, no. 4, 1992, p. 327; Luh, A., *Das „Goldene Zeitalter der Alten"? Alter in historischer Perspektive*, Zeitschrift für Gerontologie und Geriatrie, *vol.* 36, no. 4, 2003, p. 307. The term *senex* was not clearly defined in the context of age; however, according to the analysis of literature conducted by Parkin, it could cover the range from 45 to 77 years. This notion was much more dependent on the appearance, health and behavior of the individual than their actual chronological age. Parkin, T. G., *Ageing in antiquity. Status and participation*, in: Johnson, P.; Thane, P. (eds.), Old age from antiquity to post-modernity, Routledge, London & New York 2002, p. 21

14 *Cf.* Cokayne, *op. cit,* note 11; Parkin, T. G., *Old age in the Roman world: a cultural and social history*, JHU Press, Baltimore, 2003, p. 50

15 *Cf.* Parkin, *ibid.*, p. 27–41

16 Frier, B., *Roman life expectancy: Ulpian's evidence*, Harvard Studies in Classical Philology *vol.* 86, 1982, p. 248

17 For a positive perspective towards ageing, see for example: *Plinius, Epistulae* 3,1; *Seneca, Epistulae* 12. Negative attitudes towards ageing are expressed in: *Plinius*, *Epistulae* 8,18, 9–10

18 *Cf. Ovidus, Metamorphoses* 15, 199–236; *Plutarch, Moralia* 786a

19 *Cf. Cicero, De senectute* 5,15

ageing and, in the last two years of his life, compiled a series of letters dealing with the subjects of the loss of physical ability, fear of death, cessation of work, childish behaviour and dependability of the elderly.[20] Even though we can assume that the observations of individual writers were very subjective and affected by their own backgrounds, at the same time, they were able to detect and indicate the fundamental difficulties that are universally inherent to ageing.

On the other hand, negative stereotyping which is seen in the attribution of distinctive features to all *senibus* gives evidence that discrimination was an integral part of the society.[21] Prejudices were mostly manifested in descriptions of real or imaginary characters who embodied the major characteristics of the group's key attributes. In his epistle *Ars Poetica,* Horace focuses on the behavioural description of a *senex* as a quarrelsome, greedy, cowardly grumbler, and compared to other stages of life, he portrays this last one as extremely negative.[22] Indictment of ageing was quite harshly expressed in comedy[23] and satirical genres.[24] The attribution of distinctive negative features of the elderly often coincides with gender discrimination, which can be observed in the satirical representations of older, often affluent women.[25] Even though it is clear that the utilization of the old persons as objects

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20 *Cf. Seneca, Epistulae morales ad Lucilium* 4, 19, 24, 26

21 *Cf. e.g. Juvenalus, Satires* 10, 198–204: [...] but old men all look alike. Their voices are as shaky as their limbs, their heads without hair, their noses drip like an infant's, and their bread, poor wretches, has to be chewed by toothless gums. They become so offensive to their wives, their children and themselves that even the legacy-hunter, Cossus, turns from them in disgust. Their numbed palate no longer takes pleasure in wine or food, and sex has long been forgotten. 10, 241–5: And even if the powers of his mind remain strong, he [an old man] must carry his sons to burial and he must see the funeral pyres of his dear wife and his brothers and urns filled with the ashes of his sisters. Such are the penalties of the one who lives for long: he sees renewed disasters hit his house, he lives in a world of sorrow, growing old among constant grief and mourning clothes. *Trans. cit.* Hope, M. V., *Death in Ancient Rome: A Source Book*, Routledge, New York, 2007, 16. See also Pliny's's description of Domitius Tullus *Epistulae* 8,18,9

22 *Horatius, Ars Poetica* 169–174: Many discomforts besiege an old man, either because he seeks [things] and [yet], wretched, holds back what he has found and fears to use it, or because he manages all things timidly and coldly, a delayer, long in hope, inactive and fearful of the future, a curmudgeon, given to complaining, a praiser of time past when he was a boy, a chastiser and censor of younger ones. The years as they come bring many comforts with them, and take many away as they recede. *Trans. cit.* Ferriss-Hill, J., *Horace's Ars Poetica: Family, Friendship, and the Art of Living*, Princeton University Press., Princeton & Oxford, 2019, pp. xxii–xxiii

23 In his comedy *Casina*, Plautus ridicules the childishness and frivolity of old men (*senex amator*) by describing their different approaches in seducing young women. Stinginess and mistrust are the main features of the elderly protagonist Euclio in comedy *Aulularia* (21–23, 311–313), while the typical physical appearance of an old man was portrayed by Demipho in *Mercator* (546–549).

24 *Cf. e.g.* Pliny's description of Domitius Tullus *Epistulae* 8,18,9; *Juvenalus, Satires* 10

25 *E.g. Juvenalus, Satires* 6; *Plautus, Aulularia* 534–535; *Horatius, Epodes* 8; 12; *Propertius*, *Elegies* 3,25, 11–16

of ridicule are exaggerations for the purpose of critical assessment of the society, they still give a hint of the fundamental stereotypes (as senile, rigid, conservative and useless) based exclusively on the belonging to the social group of the elderly.

Since age, in spite of all the accompanying negative features, was seen as a natural process dependent on the mind-set and initiative of the individual, Parkin calls attention to the fact that "systematic and deliberate marginalisation of the elderly did not occur".[26] He pointed out that the integration of the elderly in the society, aside from their status and gender, depended mostly on the competences of the individual and his/her abilities to stay useful to the community. All the shortcomings of ageing were attributed to the person's character rather than age.[27] According to Cokayne, old persons could enjoy respect, authority and status as long as they were still useful to their community and inasmuch as they fulfilled the societies' expectations on how to live.[28] Protection against social marginalization was provided by the Roman family and the institute of *patria potestas*,[29] while the concept of *pietas* incorporated a moral duty to respect one's parents.[30] The obligation of financial support of children towards their parents and other ancestors was legally regulated.[31] Despite the fact that there was no retirement, for those who had the financial means, a withdrawal from public life was common.[32] This did not mean, however, that the elderly would not be included as counsellors. In his essay, *Whether an old man should engage in public affairs*, Plutarch reveals the need for justification that older people can still contribute to society with their experience, knowledge and determination. In an attempt to strike out a better social and political position for the elderly, he argues, "For youth is meant to obey and old age to rule, and that State is most secure where old men's counsels and the young men's spears hold highest rank."[33] Cicero stressed that the elderly should be given due respect because of their experience and advisory function, which would

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26 *Cf.* Parkin, *op. cit.,* note 13, p. 39

27 "[…] the actual status of an old person in the ancient world depended more on the person him or herself than on the general fact that he or she was old." Cf. Parkin, *ibid.*, pp. 34

28 Cokayne, *op. cit,* note 11

29 *Cf. Gai. Inst.* 1,55

30 *Cf. Ulp.* D. 27,10,4; *Cicero, De inventione* 2,22,66

31 *Cf. Ulp.* D. 25,3,5,1-2

32 Harlow, M.; Laurence, R., *Growing up and growing old in ancient Rome: a life course approach*, Psychology Press, London & New York, 2000, p. 118

33 *Plutarch, Moralia* 789 *Trans. cit.* [http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Moralia/An_seni_respublica_gerenda_sit*.html], accessed 01. July 2020

motivate them to stay productive in the community, especially in caring for and tutoring the younger generation.[34]

Apart from the conventional advice about the need for a regular biorhythm, physical and intellectual activity, and a healthy diet regimen prescribed by Pliny,[35] one philosophical approach constantly re-emerges in all Roman sources. A very important idea on which we should build our action plan nowadays was expressed in Cicero's words: "... to those who have not the means within themselves of a virtuous and happy life every age is burdensome."[36] Regardless of age, according to him, the most important is the approach to life. Ageing is a natural course of events for which we need to prepare, so with the right approach, we will find it easier to bear. Ambrosius perfectly underlined that concept with this statement: "Years and grey hair do not make this an honourable age; one's actions do."[37] Given the above, we can conclude that the Romans had already established a philosophical and practical approach to active ageing that included a healthy lifestyle and proactive engagement in the community.

3. OVERVIEW OF THE EU LEGISLATIVE FRAMEWORK

As if no time has passed, older people nowadays still experience discrimination based on their age. This discrimination is mostly grounded on the stereotypes that they lack motivation and flexibility and are unable to accept new ideas.[38] Such discrimination violates the fundamental right to human dignity, and it results in social exclusion, the refusal to grant access to basic goods and services, and poverty, which consequentially disturbs the economic and social welfare of the society.[39] Even though law and society started to recognize the importance of 'social groups' as the societal approach of systematic discrimination, age as a specific legal

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34 *Cicero, De Senectute* 5,15 *sqq*

35 *Plinius, Epistulae* 3,1: „[...] I like to see men map out their lives with the regularity of the fixed courses of the stars, and especially old men. [...] Then dinner is served, the table being as bright as it is modest, and the silver plain and old-fashioned; [...] he has passed his seventy-seventh year, his hearing and eyesight are as good as ever, his body is still active and alert, and the only symptom of his age is his wisdom.

36 *Cicero, De Senectute* 2,4

37 *Ambrosius, Epistulae* 16,5

38 On the definition and analysis of discrimination, see: Horta, O., *Discrimination in Terms of Moral Exclusion,* Theoria, *vol.* 76, 2010, pp. 314–332; Mair, J., *Direct discrimination: limited by definition?,* International Journal of Discrimination and the Law, *vol.* 10, 2010, pp. 3–17

39 Fredman, S. *The age of Equality,* in: Fredman, S.; Spencer, S. (eds.), Age as an Equality Issue, Hart Publishing, Oxford, 2003, pp. 22–35; O'Cinneide, C., *Age discrimination and European Law*, European Commission, 2005, p. 10

category is often missing or invisible.[40] 'Elder law' is still *in statu nascendi*, and while discrimination as a negative and unwanted phenomena of making distinctions between humans on numerous grounds is forbidden by several international conventions, age as a discrimination ground is often not directly mentioned but rather covered by an open clause: "discrimination on any ground, such as."[41]

The social exclusion of certain groups, such as women, ethnic and sexual minorities and older people, as a process which disables individuals or groups from adequately taking part in the social, political and economic life of the community, is recognized in the EU, which has led to the development of EU antidiscrimination legislation.[42] At the primary EU law level, age is covered by the mentioned anti-discrimination clause. Art. 19 of the *Treaty on the Functioning of the European Union (TFEU)* as a legal solution introduced by the Amsterdam Treaty in 1999. It provides that the EU may take actions to combat discrimination. Another important provision is Article 21 of the *Charter of Fundamental Rights of the European Union*, which prohibits discrimination based on age, amongst other grounds.[43]

Within secondary EU law, discrimination based on religious belief, disabilities, sexual orientation and age has been covered by the *Framework Equality Directive 2000/78*.[44] However, the Directive is applicable only in the field of occupation and employment, such as conditions for employment, access to vocational training and guidance, working conditions including salary and dismissals, and membership in unions, regardless of whether the employment is in the public or private sector. This directive provides protection against both direct and indirect discrimination, harassment, and orders to discriminate. Unfortunately, apart from this legal rem-

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40 Doron, I. I.; Georgantzi, N., *Introduction: between law, ageing and ageism*, in: Doron, I. I.; Georgantzi, N. (eds.), Ageing, ageism and the law: European perspectives on the rights of older persons, Edward Elgar Publishing, 2008, p. 1

41 For instance, see Article 26 of the UN International Covenant on Civil and Political Rights and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

42 See more in: Ćapeta, T. *et al.*, *Reforma Europske Unije, Lisabonski ugovor,* Narodne Novine, Zagreb, 2009, p. 343-361; Vasiljević, S., *Equality, non-discrimination & fundamental rights: old habits die hard!,* in: Vinković, M. (ed.), New Developments in EU Labour, Equality and Human Rights Law, Osijek, 2015, p. 177–195

43 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C 202/13; Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02. On the origins of the EU antidiscrimination law see: Craig, P.; De Búrca, G., *Eu Law, Text, Cases, and Materials,* Oxford, 2016, p. 893 *sqq.* On the relation between Article 13 of the TFEU and Article 21 of the Charter see: Bercusson, B., *European Labour Law,* Cambridge, 2009, p. 240–242

44 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2.12.2000

edy, there is no directive, which would broaden the principle of non-discrimination horizontally. Thus, the EU still has a task ahead of it to adopt a far-reaching secondary legal framework which would ensure the equal position of old people, especially considering the access to health care, housing and social protection. A legislative proposal, the *Equal Treatment Directive (ETD)*, which could fill the legal gap and have far-reaching effects, was drafted by the Commission in 2008. Due to complaints that it infringes upon the competence of the member states in certain matters and that it is in conflict with the principles of subsidiarity and proportionality, the legal instrument has still not been accepted as unanimity in the Council has not been reached so far.[45]

Another important tool against all kinds of discrimination is the fact that the European Court of Justice (ECJ) has increasingly relied on equal treatment as a general principle of EU law.[46] This principle has its roots in a question of equal treatment and non-discrimination between genders as seen in cases *Defrenne III, P v S* and *Schröder*.[47] After the already mentioned expansion of the non-discrimination principle in the Treaty of Amsterdam, the ECJ started to broaden the principle of equal treatment outside the field of gender equality.[48] For this topic, in the case of *Mangold*, the ECJ declared that a general principle of non-discrimination on the grounds of age is relevant to EU law.[49] In quoted cases, even though the period for transposing the Framework Employment Directive into national law has still not expired, the ECJ nevertheless ruled that the general principle of equal treatment in EU law precluded national law from permitting the arbitrary discrimination on the grounds of age.[50] So, the ECJ has decided that even though the implementation period has not yet expired, discrimination based on age, which was forbidden by the (at that time) non-effective Directive, is applicable, which ultimately means it is binding for the national legislation and courts as a general principle. This was subject to certain criticism, and later, the ECJ later backtracked on the

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45 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation* COM(2008)0426 - 2008/0140(CNS), available at: [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52008PC0426], accessed 03. July 2020

46 Craig; Búrca, *op. cit.,* note 43, p. 932

47 Case 149/77 Defrenne v Sabena [1978], ECR 1365; Case C-13/94 P v S and Cornwall County Council [1996] ECR I-2143; Case C-50/96 Deutsche Telekom v Schröder [2000] ECR I-7

48 Craig; Búrca, *op. cit.,* note 43, p. 933

49 Case C-144/04 Mangold v Rüdiger Helm [2005] ECR I-9981

50 Schiek, D., *The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation,* Industrial Law Journal, *vol.* 35, no, 3, 2006, p. 332; Schlachter, M., *Mandatory Retirement and Age Discrimination under EU Law, vol.* 27, no. 3, 2011, p. 288

application of principle of age discrimination in the *Bartsch* case before the expiry of implementation period, but it continued to address non-discrimination on the grounds of age as a general principle.[51] As a result, we can say that the continuous struggle to enable the equal treatment of older people within EU legislation and in the activity of the ECJ is visible, which gives hope that both will continue to operate in the same direction.

A document that shows the real situation on the field in the member states is the *Fundamental Rights Report*, which is issued every year by the European Union Agency for Fundamental Rights. Comparing the 2019 and 2020 reports, which published research on equality in member states as well as an analysis of good practices regarding age as grounds for discrimination, reveals the rise of discriminatory practices.[52] Especially in the field of employment, according to the Eurobarometer survey, old age is perceived as the most common form of discrimination and producing the highest disadvantage for the job applicants.[53] The concerning data is that the three out of four data subjects who were exposed to discrimination did disclose or report it, mainly because they thought it would not change anything. The best practices pointed out in this publication that could serve as a role model are the retirement and fixed-term contract guidelines issued by the Irish Equality and Human Rights Commission. These guidelines direct older workers to legal and human resources professionals, trade unions and other competent bodies in order to ensure that they are not discriminated against if they choose to remain in employment.

The international *acquis* specifically dealing with active ageing is mostly based on soft law, which serves as guidelines and checklists for stakeholders. *The United Nations Principles for Older Persons, General Assembly resolution 46/91* of 16 December 1991 in particular urges governments to integrate certain standards concerning independence (especially the decision about withdrawal from work into retirement), participation (as active members of the society), dignity (safe from abuse and discrimination), self-fulfilment (by developing their potential and continuing

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[51] Case C-427/06 Bartch [2008] ECR I-7248. For criticism of Mangold, see: Craig; Búrca, *op. cit.,* note 43, p. 933; Krebber, S., *Social Rights Approach of the European Court of Justice to Enforce European Employment Law*, Comparative Labour Law and Policy Journal, *vol.* 27, no. 3, 2006, pp. 377–404; Masson, A.; Micheau, C., *The* Werner Mangold *Case: An Example of Legal Militancy,* European Public Law, *vol.* 13, no. 4, 2007, p. 587–594

[52] European Union Agency for Fundamental Rights, *Fundamental Rights Report 2019*, p. 73, available at: [https://fra.europa.eu/en/publication/2019/fundamental-rights-report-2019#TabPubOverview0]; *Discrimination in the EU in 2015,* Special Eurobarometer 437, pp. 16, 78 [https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2077], all accessed 02. July 2020

[53] *Discrimination in the EU in 2015, ibid.,* pp. 16, 78

education) and access to healthcare or other services into national agendas. *Madrid Political Declaration* and *Madrid International Plan of Action on Ageing* from 2002 put emphasis on three key areas: creating supportive environments, improving health and full participation of the elderly in the development. We have to admit, that the focus of the economy is on productivity; certainly not on the older population, so the success of this legal instruments will depend on the consent of states and awareness of the importance of the social category of the elderly. Mikołajczyk expressed his view, which we support entirely, that if we do not want the concept of active ageing to become a hollow form without substance, there is a need for a consolidated European strategy that would stimulate EU member states in an active approach to their internal protocols.[54]

4. CROATIAN CHALLENGES IN STANDARDS OF CARE FOR OLD PEOPLE

Demographic trends that indicate reduced birth rates and the continuous ageing of the population position Croatia amongst the oldest nations in Europe[55] and pose major challenges to standards of care for the old people guaranteed by the EU. The national legislation being largely aligned with the European acquis, the real obstacles arise in the actual implementation of the adopted requirements. Taking into account the active ageing concept, quality of life is predominantly dependent on the health, participation and security of the elderly and such a comprehensive and systematic approach is lacking.[56]

An issue that is very prominent in Croatia and contributes to reduced quality of life is the lack of activity,[57] especially if we consider that the active participation

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[54] Mikołajczyk, B., *Legal basis of active ageing: European developments*, in: Doron, I. I.; Georgantzi, N. (eds.), Ageing, ageism and the law: European perspectives on the rights of older persons, Edward Elgar Publishing, Cheltenham & Northampton, 2008, p. 90

[55] The average age of the total Croatian population is 43.1 years (men 41.3, women 44.8), with an ageing index of 136,9%. Croatia entered the ageing process as early as 1953, when the average age was significantly lower—only 30.7 years—and the ageing index was 27,9%. Cf. *Population estimate of Republic of Croatia 2017*, Croatian bureau of statistics, [https://www.dzs.hr/Hrv_Eng/publication/2018/07-01-03_01_2018.htm], accessed 29 June 2020; *Social care strategy for the elderly in the Republic of Croatia for the period from 2017 to 2020,* p. 6, Official Gazette 150/11, 119/14, 93/16

[56] The main objectives listed in the *Social care strategy for the elderly in the Republic of Croatia for the period from 2017 to 2020* include the improvement of the legislative framework, raising awareness about the rights of old persons and improving services with the help of EU funds. *Ibid*. p. 5. The long-term effects of the strategy have yet to be assessed.

[57] Lepan, Ž.; Leutar, Z., *Važnost tjelesne aktivnosti u starijoj životnoj dobi,* Socijalna ekologija Zagreb, *vol.* 21, no. 2, 2012, p. 204; Puljiz, V., *Demografske promjene i socijalna politika,* in: Živić, D.; Pokos,N.; Mišetić, A. (eds.), Stanovništvo Hrvatske – dosadašnji razvoj i perspektive, Zagreb, 2005, p. 105. The

of the elderly in recreational physical activity, besides providing direct medical benefits for physical health, also contributes to their subjective life satisfaction and independence, as demonstrated by Lepan and Leutar.[58] Within the EU, the scope of activity in old age is calculated with the help of a tool, the Active Ageing Index (AAI), which investigates 22 indicators in four areas: employment, participation in society, independent living and an enabling environment for ageing actively in order to aid the stakeholders to identify problems and define goals for enhancement.[59] The most recent data of the AAI, calculated for EU countries, positions Croatia at the bottom of the list, way below the European average.[60]

Older people privately remain active contributors to their families, but due to insufficient understanding of the importance of voluntary work, in Croatia, they are still not recognized as a strategic resource. Specifically, the share of people over the age of 60 in volunteer activities is unsatisfactory.[61] Volunteering of the elderly has the potential to become a significant form of building social capital in the local community and combating social exclusion. This process has a double gain: by volunteering, certain local or global (social) problems are addressed without the need for additional capital investment, and on the other hand, older volunteers receive recognition for their contribution and the feeling of (still) being needed by society.[62] So far, volunteering is the focus of numerous NGO projects, but it

lack of physical activity contributes to the reduction of the quality of life and consequences in older age are more severe and expressed much faster. For instance, negative effects of the lack of physical activity are the weakening of the muscle structures, the loss of minerals in bones, the possibility of a diabetes or coronary diseases, and even certain types of tumours. *Cf.* Maček, Z. *et al.*, *Fizička aktivnost u zdravom i aktivnom starenju,* Physiotherapia Croatica, *vol.* 14 (supplement), no. 12, 2017, p. 146–148; Vuori, I., *Physical activity and cardiovascular disease prevention in Europe: an update,* Kinesiology, *vol.* 42, no. 1, 2010, p. 12

58 Leptan; Leutar, *ibid.,* p. 218

59 Mikołajczyk, *op. cit.,* note 54, p.73 *sqq*

60 With the index 29.3, Croatia took the penultimate position in the ranking, slightly better than Greece with the score of 27.7. See *2018 Active ageing index, Analytical report*, United Nations Economic Commission for Europe, 2019, p. 6 & 11, [http://www.unece.org/fileadmin/DAM/pau/age/Active_Ageing_Index/ECE-WG-33.pdf], accessed 01. July 2020

61 For example, according to the Annual Report of the Volunteer Center Zagreb from 2010, the share of people over 60 was 1%. In 2019, that percentage increased to 6%. [https://www.vcz.hr/vcz/godisnji-izvjestaji/], accessed 13. July 2020

62 In this sense, research conducted by Rusac and Dujmović has shown that the volunteering of old people, besides obvious physical activity, also has a beneficial influence on their overall health and self-esteem, which consequently raised the quality of their lives. Rusac, S.; Dujmović, G., *Volontiranje u starijoj životnoj dobi,* Nova prisutnost, *vol.* 12, no. 2, 2014, p. 286; Warburton, J.; Maypeel, N, *Volunteering as a productive ageing activity: the association with fall-related hip fracture in later life,* European Journal of Ageing, *vol.* 5, 2008, p. 129-136

requires additional financial resources and the promotion of its positive aspects in the earlier stages of life.

On a global scale, modern society focuses on profit and the prevailing ideals of youth and success. These 'values' are constantly promoted by the media, and Croatia is no exception.[63] The influence of mass media on the general perception of ageing and on elderly people in general have been the subject of several studies.[64] Such a view of the elderly has a highly negative impact on their social status and the life quality since younger people tend to avoid them; thus, it makes communication and social interaction difficult. This contributes to the continuation of prescribed stereotypes and the creation of new ones, which eventually discourage younger people from interacting with the older ones. Systematically conceptualized campaigns through the media, education of the youth, and the creation of programs that enable interaction between the young and old through activities are of utmost importance.

Regardless of economic changes and GDP growth, the risk of poverty puts older persons in a vulnerable position.[65] The Croatian ombudsman pointed out that the average pension is below the 'at-risk-of-poverty threshold', and many elderly, due to strict censuses, unfortunately do not have access to the social security system.[66]

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63 In Croatia, mass media often aim at younger people, and in this sense, certain studies have demonstrated a deficit of older people in movies, commercials and central news programs, and when they do appear, their portrayal is often negative or comical. Kovačević, I.; Milosavljević, Lj., *Kratki rezovi; antropološko proučavanje savremene reklame,* Etnoantropološki problemi, *vol.* 9, no. 2, 2014, p. 446 *ff*.; Perišin, T.; Kufrin, T., *Ageizam u televizijskom mediju na primjeru središnjih informativih emisija HRT-a, RTL-a i Nova TV*, Ljetopis socijalnog rada, *vol.* 16, no. 1, 2009, pp. 36–44; Robinson, T.; Callister, M.; Magoffin, D., *Old characters in teen movies from 1980–2006,* Educational Gerontology, *vol.* 35, no. 8, 2009, p. 699–700

64 Zovko and Vukobratović point out that the social dimension of old age is often connected with negative stereotypes, while Green states a typical stereotype is that older people are tired, capricious, passive and often lack energy. Green, S. K., *Attitudes and Perceptions about the Elderly: Current and Future Perspectives,* The International Journal of Aging and Human Development, *vol.* 13, no. 2, 1981, p. 100; Zovko, A.; Vukobratović, J., *Percepcija starenja i društveno-medijska slika o starima,* Androloške studije, no. 1, 2017., p. 113. See more on research on stereotypes of ageing in Heckhausen, J.; Lang, F. R., *Social Construction and Old Age: Normative Conceptions and Interpersonal Processes* in: Semin, G. R.; Fiedler, K. (eds.), Applied Social Psychology*,* Sage, 1996, London, p. 382 *sqq*

65 Compared to the EU average of 14.4%, the risk of poverty for those over aged 65 is 28,1%, while for singles at that age it is as high as 48,1%. Approximately 64% of the Croatian population over the age of 65 receives pension. *Indicators of poverty and social exclusion 2018, Statistics on income and living conditions 2018*, Croatian Bureau of Statistics, [https://www.dzs.hr/Hrv_Eng/publication/2019/14-01-01_01_2019.htm], accessed 02. July 2020

66 *Croatian Ombudsman's report for 2019,* p. 62 [https://www.ombudsman.hr/wp-content/uploads/2020/04/Izvje%C5%A1%C4%87e-pu%C4%8Dke-pravobraniteljice-za-2019._3.pdf], accessed 02. July 2020

Due to insufficient accommodation capacities, the *Social care strategy for the elderly in the Republic of Croatia for the period from 2017 to 2020* envisaged the introduction of the special status of caregivers for people caring for elderly and infirm family members, but to our knowledge this institute has not been introduced yet. In terms of retirement, contradictions occur: while the state pressures the extension of the working age within the pension reform, employers discriminate against older workers and force them into early retirement, often just prior to their achieving the requirements for a pension.[67] In rural areas, the elderly are often isolated and lonely, which indicates that a support network is not effectively established. The same problem is visible in the unequal availability of health care. Where the state fails to provide adequate support services, diverse models of non-institutional protection are acquiring significance.

The lack of basic means of subsistence make older persons dependent on informal care and family solidarity and place them at higher risk of financial abuse. As such, it is one of the most common—and yet most rarely reported—forms of abuse of the elderly. The WHO quotes UK's 'Action on Elder Abuse' definition of abuse as "a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person", with the addition that financial abuse means: "the illegal or improper exploitation and/or use of funds or resources."[68] Croatian national legislation unfortunately still does not have a definition of financial abuse of the elderly, but the phenomena is partially covered in Article 10 of the *Protection from Domestic Violence Act*.[69] The most common form of financial abuse of older people is represented in the lifelong support contract and the until-death support contract, which are regulated in *Civil Obligations Act* (Art. 579–589).[70] Both contracts should provide the respondent with care for the counteraction consisting of the transfer of property to the provider of the support, the only difference being the moment at which the transfer of ownership has been carried out. Since the caregiver immediately becomes the owner of the dependent's property, the until-death support contract often leads to fraud and becomes a tool for the acquisition of property with minimum investment. This puts the supported person in a

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67 *Croatian Ombudsman's report for 2018,* p. 94, [https://www.ombudsman.hr/en/download/annual-ombudsman-report-for-2018/?wpdmdl=6777&refresh=5f088d18f2dd81594395928], accessed 02. July 2020

68 WHO, *Missing voices: views of older persons on elder abuse, A study from eight countries: Argentina, Austria, Brazil, Canada, India, Kenya, Lebanon and Sweden,* 2002, p. 3, available at: [https://www.who.int/ageing/publications/missing_voices/en/], accessed 14. June 2020

69 Protection from Domestic Violence Act, Official Gazette 70/17, 126/19

70 Civil Obligations Act, Official Gazette 35/05, 41/08, 125/11, 78/15, 29/18

highly dependent position with eventual loss of financial resources and adequate care and no other means than to initiate uncertain, expensive and exhausting legal proceedings for rescinding the contract. Unaware of the threats and mechanisms of protection against fraud and abuse, such types of discrimination are rarely reported because of insufficient knowledge of their owns rights, distrust in legal institutions and unenviable financial situations. Still, in recent times, progress can be seen in the sense that there are numerous publications and campaigns that educate older people about the risks and advantages of such contracts.[71]

The significant problem with the financial abuse of older people is in fact that abusers, in most cases, are their grown up children, grandchildren or other relatives, which complicates detection and prevention, especially because such abusers consider that material property of older people belongs to them as family property, which they will inherit anyway.[72] Another problem of older victims of financial abuse can be recognized in the absence of its reporting to competent bodies, such as the police or the Centre for Social Welfare, due to fear and shame. We believe this emanates from the traditional view of the family, where all the problems which arise should be solved within the family. Also, there is a problem in the fact that it is hard for the older person to accept that the abuse is conducted by someone with whom he/she has spent most of a lifetime. However, there have been positive actions in Croatia, which can be seen in the activity of the Croatian Pensioners'

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71 See more in: Butković, M., *Ugovor o doživotnom i dosmrtnom uzdržavanju u sudskoj praksi,* Prilozi Hrvatske javnobilježničke komore, *vol.* 3, 2012, available at: [http://www.hjk.hr/Portals/0/CasopisJB/Prilog%20uz%20br%2037.pdf]. For examples of mentioned brochures see: Victims and Witnesses Support Association website [http://pzs.hr/prava-kod-ugovora-o-dozivotnom-i-dosmrtnom-uzdrzavanju/]; SOS Rijeka, Center for Nonviolence and Human Rights website [http://sos-rijeka.org/wp-content/uploads/Brosura-Ugovori-o-dozivotnom-i-dosmrtnom-uzdrzavanju.pdf]. For news articles, see: Bogdanović, S., *Ovo morate znati o ugovorima o doživotnom i dosmrtnom uzdržavanju*, My time website, [https://www.mojevrijeme.hr/magazin/2017/10/ovo-morate-znati-o-ugovorima-o-dozivotnom-i-dosmrtnom-uzdrzavanju/]; Belak Krile, A., *Pazite što potpisujete: ugovor o dosmrtnom ili doživotnom uzdržavanju - razlika je velika!*, Zadarski.hr website [https://zadarski.slobodnadalmacija.hr/zadar/regional/pazite-sto-potpisujete-ugovor-o-dosmrtnom-ili-dozivotnom-uzdrzavanju-razlika-je-velika-607352]; Penzići [Pensioners] Rijeka website, [https://penzici.rijeka.hr/ugovor-o-dozivotnom-i-dosmrtnom-uzdrzavanju/]. In addition to that, the Croatian ombudsman proposed measures in the prevention of abuse by introducing a special 'registry of maintenance providers', limiting the number of possible contracts a single provider can conclude, and by accelerating the court proceedings. *Croatian Ombudsman's report for 2018,* p. 110, [https://www.ombudsman.hr/en/download/annual-ombudsman-report-for-2018/?wpdmdl=6777&refresh=5f088d18f2dd81594395928], all sites accessed 02. July 2020

72 Jackson, S. L.; Hafemeister, T. L., *Characteristics Differ across Four Types Of Elder Maltreatment:Implications for Tailoring Interventions to Increase Victim Safety,* Journal of Applied Gerontology, *vol.* 33, no. 8, 2014, pp. 982–997; Vuić, I.; Rusac, S., *Financijsko zlostavljanje starijih osoba,* Revija socijalne politike, *vol.* 24, no. 3, 2017, p. 332; Naughton C. *et al.*, *Elder abuse and neglect in Ireland: results from a national prevalence survey,* Age and Ageing, *vol.* 41, 41, no. 1, 2012, pp. 98–103

Union's project, "Zaustavimo zloupotrebu starijih osoba" [Let's stop the abuse of older people].[73] The main goal of this project was the dissemination of information to the general public on the often unspoken abuse and the discrimination against older people, which we consider the best way to address the mentioned issues on the national and supranational levels. Even though a single project is not enough, it represents a good starting point that should be encouraged.

Maybe the biggest obstacle in the Croatian mentality is the belief of the elderly themselves that they are supposed to be passive service recipients who have no confidence to voice their claims for the recognition of rights or power to change their position in society. As this confidence has been degraded by small pensions as well as lack of social care and access to medical services, it would be too much to expect them to have the courage to change the system. Their right to make their own choices was also often not respected. In the context of the legal capacity of individuals, the issue of independence of older persons was even raised by the ECHR in the case of X and Y v. Croatia (EctHR 2011b).[74] However, creating conditions at the state level through effective legal instruments, the sustainability of the pension system, and accessible social and medical care would give them their dignity back. Volunteering and social inclusion would stimulate their awareness that they themselves are capable of changing things. Modern science has confirmed the Roman philosophical approach and the findings of Levi et al. that, in addition to chronological age, the attitude towards one's own ageing is the most important predictor of an individual's life expectancy.[75] Although the attitude of a person towards ageing is individual, empowerment from the earliest age would certainly contribute to creating responsible and active citizens.

5. CONCLUSION

Conducted comparisons of Roman and modern collective views of the elderly reveal that all societies are in essence ageist and that ancient features of this modern construct were practiced in Roman culture and reflected in negative stereotyping. The age composition and number of the elderly in proportion to the total population today varies significantly from the Roman example; the chasm between the

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[73] Croatian Pensioners' Union website [http://www.suh.hr/index.php/18-naslovna/278-suh-krenuo-s-projektom-za-prevenciju-financijskog-zlostavljanja-starijih], accessed 14. June 2020

[74] The procedure was conducted at the request of Social Services in order to deprive a person suffering from dementia of her legal capacity. The Court found the violation of right to a fair trial and the right to private and family life (Art. 6 §1 and Art. 8) of the European Convention on Human Rights

[75] This research found that a positive attitude towards ageing extends the life expectancy by 7.5 years. Levy, B. R. *et al.*, *Longevity increased by positive self-perceptions of aging*, Journal of personality and social psychology, *vol.* 83, no. 2, 2002, p. 261

young and old is even more pronounced nowadays. Furthermore, in the absence of a pension system, the well-being of the elderly in the past depended mostly on the family and was rather a moral obligation. Despite various institutional supports aimed at the oldest age group, due to changes in family structures, the social exclusion and alienation of the elderly has never been higher. Once experienced as a natural stage of the lifecycle, ageing is now considered a major social challenge, and just as old people in today's society have become invisible, so is their discrimination pushed somewhere into the shadows. Therefore, it is of utmost importance to raise awareness about the subject and sensitize the society to the stereotyping of a vulnerable but not homogenous group of the elderly.

Since social constructs are generally created to help explain and organize the objective world, they can be altered by changing the values and beliefs about the specific construct. What we need is the shift that Cicero once pled for—a transformation in thinking about old age as a burden that weighs down society into the integration of the elderly as active advocates of their rights: "For old age will only be respected if it fights for itself, maintains its own rights, avoids dependence on anyone, and asserts control over its own to the last breath. For just as I approve of the young man in whom there is a touch of age, so I approve of the old man in whom there is some of the flavour of youth. He who strives thus to mingle youthfulness and age may grow old in body, but old in spirit he will never be."[76]

As we have demonstrated, the EU has gradually developed appropriate legal foundations for the protection of older people against discrimination as well as various mechanisms which aim at the social inclusion and prevention of all kinds of discrimination, including the one on the grounds of age. However, its implementation in practice leaves room for improvement. Furthermore, there is a need to adopt the Equal Treatment Directive, which would offer comprehensive protection against age discrimination in areas such as education, social protection and access to goods and services as well as to work on a consolidated EU strategy to achieve the overall goal of active ageing.

The problems of the elderly in Croatia are not difficult to identify but to enumerate: discrimination at work, poverty as a result of small and unfair pensions, differences in regional access to social care, insufficient space and non-transparent admission to nursing homes, long waiting lists, unavailability of medical care, unprofessional treatment in the institutions, exposure to neglect and domestic violence, no access to information, disorientation in the digital environment, social marginalisation and exposure to prejudice, to name the most basic ones. It is

[76] *Cicero, De Senectute* 38

pointless and unfair to expect the elderly to be assertive and actively voice their challenges when they are deprived of their dignity and live on the edge of existence. As soon as the state, in line with the adopted legal framework, creates the basic conditions for a decent existence, only then it will be possible to expect greater initiative of older people. Meanwhile, volunteering and intergenerational joint activities can be used as examples of good practice to foster social inclusion, independence, self-confidence and the feeling of contribution to the local community. In the long term, we consider that a shift in paradigm is needed. Change in mentality can only be achieved through education for active citizenship from an early age into adulthood to secure fruitful and pleasant old age for the generations to come. It will take time, financial means and a lot of effort of the community to address explained issues and to reach the proposed goal. The positive philosophical Roman approach is very much applicable. In a hopeless state where the system is inefficient and one is often left to one's own devices, a personal attitude indeed does make a difference.

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UDK 340.12:621.39](4-67EU)
Original scientific paper

TO COPY OR TO LEARN FROM THE PAST? A RESEARCH PATH FOR A CRITIQUE OF THE NEO-MEDIEVAL APPROACH TO THE REGULATION OF NEW TECHNOLOGIES

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ABSTRACT

A part of the literature considers the collapse of the legal categories of modernity as an opportunity for the recovery of concepts of medieval juridical experience. The evidence for such approach includes the following: the variable geometry of the legal sources, the diversification between the recipients of the norms, the collapse of bourgeois property and the substitution with a multilevel order, the overcoming of the state and the definition of a new society in which power is managed by different centers of production of law, the return of the lex mercatoria, the soft law and the ius commune. This paper contributes by reviewing some of the main positions and analyzing the reasons for this possible recovery. Then, such approach will be criticized highlighting that, from a theoretical-general perspective, the technological landscape does not allow a naïve recovery of the past. Rather than copying from the past and imagining impossible continuities, the relationship between technology and humanities points to a different path. In this path, historical methodology could be useful for the law of new technologies, allowing us to distance ourselves from present legal and political concepts and to adopt new ones.

Keywords*: humanities, new technologies, legal theory, legal history, constitutional law, European law, constitutionalism, legal concepts*

1. INTRODUCTION

1.1. The general question

«Dieses also ist die allgemeine Frage: in welchem Verhältniß steht die Vergangenheit zur Gegenwart oder das Werden zum Seyn?»[1] With this question, in 1815, F. C. von Savigny opened his *manifesto* of the *Historische Rechtschule*, dedicated to the purpose of the new founded review, the *Zeitschrift für geschichtliche Rechtswissenschaft*. [2]

In the *manifesto,* the author divided the world of culture into two opposite factions. The first, the historical one, in which history was not to be considered only a «Beyspielsammlung, sondern der einzige Weg zur wahren Erkenntiß unsers eigene Zustandes».[3] The second, the non-historical or philosophical one, which considered the future as a world detached from the present and the past, with a naïve hope of designing a rational world.

The historical challenge between the Enlightenment thought and the historical School is still considered open.[4] The dark relationship between *Werden* and *Sein*, between continuity and fracture, is repeated in the regulation of the new technological landscape. One question arising from this new declination is: do new technologies require new legal concepts or, maybe, are the answers from the past sufficient? [5]

A first path seems to follow a tricky route. It is clear that the categories of modernity are in crisis;[6] then, a revival of the previous concepts seems possible. If the

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1 «So this is the general question: what is the relationship between past and present or between becoming and being?» (our translation), this quotation is from von Savigny, F. C., *Über Den Zweck dieser Zeitschrift*, Zeitschrift für geschichtliche Rechtswissenschaft, no. 1, 1815, pp. 1-18; here, pp. 2-3

2 On this manifesto see, among others, Rückert, J., *Savigny Studien*, Klostermann, Frankfurt am Main, 2011, or *Id.* (ed.), *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny*, Klostermann, Frankfurt am Main, 2019

3 Savigny, *op. cit.* note 1, p. 4: «not an example collection, but the only way to the true knowledge of our own condition».

4 On the School, see the recent study of Haferkamp, H.-P., *Die Historische Rechtsschule*, Klostermann, Frankfurt am Main, 2018

5 In the Italian literature, for example and overall, Irti, N., *Un diritto incalcolabile*, Giappichelli, Torino, 2016

6 The crisis of the legal and political concept is observed by several scholars; in Italian constitutional legal doctrine see Luciani, M., *L'antisovrano e la crisi delle costituzioni*, Rivista di diritto costituzionale, no. 1, 1996, pp. 164-65; in the legal philosophical field, see also Preterossi, G., *Tramonto del diritto moderno?*, in: Bazzicalupo, L.; Esposito, R. (eds.), Politica della vita. Sovranità, biopotere, diritti, Laterza, Roma-Bari, 2003, pp. 43-48

pars destruens of this topic seems to be right, maybe the *pars construens* can hide a paralogism.

In this view, modernity appears like a bubble in the history of humanity. Once this bubble has burst, with its ambitions and its pretensions, the future would appear as the return to a sort of disordered Middle Ages, in which the modern absolute concepts do not exist. In this landscape, constitutionalism dissolves, leaving room for a new "glocal" balance, a tension between global empire and small counties, typical of some static and illusory images of the Middle Ages that moderns have built.[7]

In this contribution we are dealing with a contemporary general theoretical approach to new technologies, underlining the attempts to recover solutions from the past. We analyze some of the appeals to "neo-medieval" legal concepts as an alternative to the modern legal concepts that appear to be in crisis. Nevertheless, the overall framework of references to the entanglement and multi-normativity in legal history allows for deconstructing some current assumptions of "positive jurists".

First, we will focus on the *clichés* of the appeal to history in contemporary law. Then, we will underline the profiles of the categories adopted, highlighting some naivety, as the static image offered by the *lex mercatoria* and the *ius commune*. Such an appeal to the past may flatten the historical reflection, because of the use of abstract and static concepts and historical misconceptions. The latter methodological approach also tends to simplify the view of the present.

The regulation of the technological landscape often uses premodern concepts, if not medieval ones, because of the inadequacy and the uselessness of modern legal models.

However, the legal history, rather than appearing as a reservoir of positive solutions, from the methodological point of view and in the approach to the issue of multi-normativity and entanglement in legal history, allows the jurist to detach himself from the dogmatic and static legal concepts.

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7 Gamble, A., *Regional Blocs, World Order and the New Medievalism*, in: Telov, M. (ed.), European Union and New Regionalism, Ashgate, Aldershot, 2001, pp. 30-31 and Friedrichs, J., *The Meaning of New Medievalism*, European Journal of International Relations, no. VII, 2001, pp. 483-486; see also Kobrin, S. J., *Neomedievalism and the Postmodern Digital World Economy*, in: Prakash, A.; Hart, J. A. (eds.), Globalization and Governance, Routledge, London, 1999, p. 167 ff.

History allows us to distance ourselves from the present, just as the historian does with the past. This effort could lead us to gain a scientific and methodologically founded perspective on the regulation of new technologies.

The direction allows, finally, for us to undertake a hard but mandatory path to rethink legal concepts, with special reference to the framework of constitutionalism and the challenges of the technological landscape.

1.2. The state of art

A part of the literature considers the collapse of the modern legal concepts as an opportunity to recover concepts of medieval law but, from a historical point of view, several criticisms come to light.[8]

The concepts suitable for recovery are the following: the variable geometry of the legal sources,[9] the diversification between the recipients of the norms,[10] the collapse of bourgeois property and the substitution with a multilevel order,[11] the overcoming of the state[12] and the definition of a new society in which power is managed by different centers of production of law, the return of the *lex mercatoria*,[13]

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8 One of the best and most remarkable examples of this approach is maybe in Grossi, P., *Unità giuridica europea: un medioevo prossimo futuro?*, Quaderni fiorentini, no. 31, 2002, pp. 39-57, in the same volume, see also the contributions of Costa, P.; Ferrarese, M. R.; Padoa Schioppa, A.; D'Andrea, D.; Duso, G.; Cassese, S.; Malandrino, C.; Cannizzaro, E; Fioravanti, M.; De Benedictis, A.; Castiglione, D.; Berti, G. and Mattei, U.; the reference to the "overcoming Middle Ages" is commonly linked to a well-known Italian futurology book, Vacca, R., *Il medioevo prossimo venturo*, Mondadori, Milano, 1973

9 On this new geometry, see overall Teubner, G., *Constitutional Fragments: Societal Constitutionalism and Globalization*, OUP, Oxford, 2012, pp. 1-14

10 The crisis of concept of citizenship is also observed by Costa, P., *Cittadinanza*, Laterza, Roma-Bari, 2014; see also Habermas, J., *Citizenship and National Identity: Some Reflections on the Future of Europe*, Praxis International, no. 12, 1992, pp. 1-19

11 On the modern concept of property, see diffusely Grossi, P., *La proprietà e le proprietà nell'officina dello storico*, Editoriale Scientifica, Napoli, 2006

12 This subject is deeply developed in Italian doctrine also by Cassese, S., *La crisi dello stato*, Laterza, Roma-Bari, 2002

13 About the history of commercial law and the myth of *lex mercatoria*, see also Petit, C., *Historia del derecho mercantile*, Marcial Pons, Madrid, 2016, pp. 33-37; diffusely in Piergiovanni, V. (ed.), *From* Lex Mercatoria *to Commercial Law*, Duncker & Humblot, Berlin, 2005; on the new *lex mercatoria*, Berger, K. P., *The Creeping Codification of the New* Lex Mercatoria, Kluwer, Köln, 2010, pp. 1-18, or diffusely in Galgano, F., *Lex mercatoria*, Il Mulino, Bologna, 2001

the soft law[14] and even the *ius commune* with its *usus modernus* (or *hodiernus*).[15] In this framework, the neo-medieval taste also encompasses a sort of neoclassicism, attempting to recover the tradition of Roman law, if not of a proper form of new *Pandektistik*.[16]

1.3. The starting point of the research

The paper aims to resume the main positions and analyze the reasons for this recovery. Then, such an approach will be criticized, highlighting that, from a theoretical and general perspective, the technological landscape does not allow a naïve recovery of the past. Rather than copying from the past and imagining impossible continuities, the relationship between technology and humanities points to a different learning path.

Moreover, this vision of history belongs only to a European perspective, and it does not connect the European context to a global approach.[17]

Therefore, *historia magistra vitae* will not mean just recovering solutions from the past but learning how the past invented new solutions and how legal history may approach discontinuities. The history of legal innovations could become a way to approach future law and politics. Indeed, innovation is a characterizing element of Western culture, much more than a static tradition.

In this broad picture, the European Union is also at a crossroads. On the one side the EU could recover past legal concepts as if it were a museum of Western culture. On the other side, the EU could become a laboratory of a new legal framework. An important part of the challenge is the field in which the European

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14 The soft law is observed, recently and from a constitutional point of view, also by Algostino, A, *Il diritto proteiforme. Studio sulla trasformazione delle fonti del diritto*, Giappichelli, Torino, 2018, pp. 171-197; see the relevance in international contract law, in Vogenauer, S., *Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?*, European Review of Contract Law, no. 6, 2010, p. 143 ff.

15 For the topic of *ius commune* in modern age, also referring to European public law, see Silvestri, G., *Verso uno ius commune europeo dei diritti fondamentali*, Quaderni costituzionali, no. 1, 2006, pp. 7-24; for the private law, see Zimmermann, R., *Usus Hodiernus Pandectarum*, in: Schulze, R. (ed.), Europäische Rechts- und Verfassungsgeschichte, Ergebnisse und Perspektiven der Forschung, Duncker & Humblot, Berlin, 1991, pp. 61-88

16 A critical view of this phenomenon is in Caroni, P., *La solitudine dello storico del diritto: appunti sull'inerenza di una disciplina altra*, Giuffrè, Milano, 2009, p. 176 ff., which speaks openly of *neopandettismo*

17 Duve, T., *Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive*, Rechtsgeschichte, no. 20, 2012, pp. 7-18; or recently and diffusely in Duve, T., *Global Legal History: Methodological Approach*, Oxford Handbooks Online, Oxford, 2017

institutions will exist. Will the European institutions be on the side of global economic governance or on the side of new constitutionalism?

Some decisions already seem to direct Europe towards the path of globalization, in a sort of "glocal balance", in which the naïve and neo-medieval approach will have some space.[18]

However, in many cases, we are witnessing new regulatory phenomena and new legal frameworks, of which Europe is the main if not the only laboratory in the World. The future is yet to be written. On the path of the new constitutionalism, we will not necessarily find the concepts of the past. Our task will also be to recognize the new forms of law and to participate in this new *Kampf ums Recht*.[19]

2. METHODOLOGY

This contribution aims to adopt the methodological framework offered by the most recent historical thought, which underlines the difficulty of adopting static categories and univocal perspectives and promotes a braided approach with contextual and contrastive views of the same object of study.[20]

First, there is a progressive tendency to adopt different perspectives for the investigation of historical phenomena, in order to deconstruct static and simplified images of the past.

However, the entanglement in legal history and the *histoire croisée*[21] are methodologies, as also noted by historians, not sufficiently rooted in the awareness of jurists.

Indeed, "positive law" jurists often make forays into history, frequently without any methodological prudence. It happens for example, when the current legal tools no longer seem usable for the regulation of new phenomena.

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18 Algostino, *op. cit.* note 14, 112

19 *Ibid.* in the sense of the fight for the constitutionalism more than for the law, but still with reference to Jhering's idealistic use of the expression, von Jhering, R., *Der Kampf ums Recht*, Manz, Wien, 1872

20 Also in Duve, T., *European Legal History – Concepts, Methods, Challenges*, in: *Id.* (ed.), Entanglements in Legal History: Conceptual Approaches, Frankfurt am Main, 2014, pp. 3–25; recently also Duve, T., *Global Legal History: Methodological Approach*, Oxford Handbooks Online, Oxford, 2017; in the field of legal transfer and transplant, see Foljanty, L., *Legal Transfers as Processes of Cultural Translation: On the Consequences of a Metaphor*, MPI Research Paper Series, 2015, or Vano, C., *Canti per il diritto. In margine alla traduzione di un testo interdisciplinare*, in: Fögen, M. T., Il canto della legge, Editorale Scientifica, Napoli, 2012, p. 129 ff.; some significant methodological reflections also in *Ead.*, *Della vocazione dei nostri luoghi. Traduzioni e adattamenti nella diffusione internazionale dell'opera di F.C. von Savigny*, Historia et ius, no. 10, 2016, pp. 1-16

21 This proposal was strongly supported by Werner, M.; Zimmermann, B., *Penser l'histoire croisée: entre empirie et réflexivité*, Annales, no. 58, 2003, pp. 5-36

Therefore, a comparison between historical research methodologies and legal research is important. The effort may indicate to the jurists the possible ways to disengage from the current legal concepts. For this reason, a comparison among methodologies can appear much more productive than a comparison among results.

There is at least one other fundamental factor, well-known to legal historiography: law is only one of the normative dimensions in every social context. Therefore, an understanding of historical problems appears risky and incomplete if there is no awareness of the importance of multi-normativity.[22]

The same considerations, which apply to the past, can apply to the future of law.

From a methodological point of view, the approach aims to highlight the critical issues of a naïve recovery of the past. Nonetheless, the paper intends to contribute theoretically to strengthening a proposal: to open a comparison with the historical methodology to enrich the reflection on the regulation of new technological phenomena and society in the world of the future.

3. THE FALL OF MODERN LEGAL CONCEPTS

The literature on the legal concepts crisis is very broad and it is possible to list many examples. This contribution can investigate only a few concepts, with reference to constitutional law in the European legal framework, which is maybe one of the most characteristic elements of modernity as well as the most at-risk area. The direction of future research can be positively influenced by the common interest of other researchers who share the general frame. A deeper analysis could be developed in relation to some of the following fundamental issues.

- **Citizenship.** In this case a plurality of recipients of the rules replaces the concept of citizen, the only legal entity of modern legal Codification. This varied set of different subjects induces some authors to think of a parallelism with the different social categories (with different statuses) that characterized the whole population in the Middle Ages.[23] A landscape characterized by the presence of consumers and multinational corporations does not allow for the use of abstract concepts of formal equality. This erosion of citizenship has repercussions for both civil and constitutional law.

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22 Duve, T., *Was ist ›Multinormativität‹? – Einführende Bemerkungen*, Rechtsgeschichte, no. 25, 2017, pp. 88-101

23 On the return to a society organised into categories and the relationship between citizenship and globalization, see Joerges, C.; Sand, I. J.; Teubner, G. (eds.), *Transnational Governance and Constitutionalism*, Hart Publishing, Portland, 2004

- **Territory.** The link between sovereignty and territory, a progressive result of the Modern Age starting from the Peace of Westphalia, seems to be compromised due to the phenomenon of "deterritorialization".[24] The main erosion factor of the concept of territory relates to the creation of the digital environment, next to the linked issue of the multilevel governance of different public institutions.[25]

- **Sovereignty.** This fundamental concept of modern constitutionalism is under strong discussion. The weakening of the concepts of citizenship and territory contributes to the erosion of this concept, occurring from the broadening of local and supranational powers.[26] The new technologies have a strong impact both because they are in the domain of private companies and because sovereign powers need to use them for legitimacy and to reach consensus.[27] Some authors speak openly of a crisis or an erosion of the sovereignty.[28]

- **Representation.** This concept has two problematic aspects: the possible deficit of democratic representation of some political institutions (criticism addressed to the institutions of the European Union);[29] the attempt to introduce different mechanisms of democracy in parliamentary institutions or instead of them (the side of e-democracy and direct online voting). Both aspects allow reference to be made to pre-modern concepts: forms of legitimacy different from the democratic one; a model of political representation closer to the delegative model of private law (a sort of medieval model of representation).[30]

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24 The digital deterritorialization is also observed by Sassen, S., *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton University Press, Princeton, 2008

25 Also in Bache, I.; Bartle, I.; Flinders, M., *Multi-level Governance*, in: Ansell, C.; Torfing, J. (eds.), Handbook on Theories of Governance, Elgar, Cheltenham, 2016, pp. 486-498

26 This stretching is observed, for example, in Teubner, G., *Constitutional Fragments: Societal Constitutionalism and Globalization*, OUP, Oxford, 2012, pp. 42-71

27 The impact of technology on sovereignty, Deibert, R. J., *The Geopolitics of Internet Control: Censorship, Sovereignty, and Cyberspace*, in: Chadwick, A.; Howard, P. N., *Routledge handbook of Internet politics*, Routledge, Abingdon, 2008, pp. 339-352

28 Ruggeri, A., *Prime note per uno studio su crisi della sovranità e crisi della rappresentanza politica*, Consulta online, no. 3, 2016, pp. 444-451; or Bin, R., *La sovranità nazionale e la sua erosione*, in: Pugiotto. A. (ed.), Per una consapevole cultura costituzionale. Lezioni magistrali, Jovene, Napoli, 2013, pp. 369-381

29 For the democracy deficit in the EU, see also Grimm, D., *The Constitution of European Democracy*, OUP, Oxford, 2017, pp. 105-115

30 The concept of delegative models of democracy for e-government, for example, is in Brill, M., *Interactive Democracy: New Challenges for Social Choice Theory*, in: Laslier, J. F.; Moulin, H.; Sanver, M.; Zwicker, W. (eds.), The Future of Economic Design, Springer, Berlin, 2019, pp. 59-66; on the concept of representation in Italian literature, recently Girelli, F., *Il mandato parlamentare e lo spazio della sua libertà*, Editoriale Scientifica, Napoli, 2018; see also Luciani, M., *Il paradigma della rappresentanza di fronte alla crisi del rappresentato*, in:

- **Hierarchy of sources.** The disorder on the horizon of the sources is described by some authors as a "law upside down". The power of regulation of privates is also observed as one of the main factors of this issue.[31] This disorder entails a reflection on the rule of law and the principle of legality. The literature frequently tries to describe this landscape, referring also to the variable "geometry of sources" in the Middle Ages.

In all these fields there are more examples of solutions from the past in the present landscape. As a matter of fact, the jurists often use figures from the past for the regulation of new phenomena of globalization and technologies: the return to *lex mercatoria* for new markets; a *ius commune* after the fall of the States; the appeal to the relevant role of the jurists; a return to a big courts era, etc.

The contribution addresses just some misconceptions of this use of legal history. A greater awareness by jurists of the historical methodology could induce more prudence towards the use of the past.

In addition, this relationship between humanities and technologies would also appear productive to enrich the methodology of the law of new technologies, in which entanglement and multi-normativity could become real buzzwords.

Furthermore, the erosion of the legal concepts of modernity cannot be described only as a negative phenomenon. In other words, the crisis can represent an opportunity for a rethinking of legal concepts.

4. A NEW *IUS COMMUNE* IN THE EUROPEAN FRAMEWORK?

A typical question regarding the use of past concepts seems to be that of the *ius commune*.[32] References to this concept crowd the legal doctrine in different areas. In private law, a frequent reference is made both as regards common European private law, and in a global context.[33] In public law, it is meant as *commune*, that

Zanon, N.; Biondi, F. (eds.), Percorsi e vicende attuali della rappresentanza e della responsabilità politica, Giuffrè, Milano, 2001, pp. 109 ff.

31 *E. g.* the law upside down in Iannuzzi, A., *Il diritto capovolto*, Editoriale Scientifica, Napoli, 2018; the self-regulation and soft law, in Italian literature are in Sileoni, S., *Autori delle proprie regole*, CEDAM, Padova, 2011

32 Grossi, *op. cit.* note 8, p. 39 ff.

33 For the European private law, Smits, J. M., *The Making of European Private Law: Toward a Ius Commune Europaeum as a Mixed Legal System*, Intersentia, Cambridge, 2002, p. 2 ff.

common basis of fundamental rights, nominated by the international community, or more specifically informed in the European context.[34]

First, it is necessary to highlight what the *ius commune* in Europe was.[35] Legal historiography allows the concept of *ius commune* to be defined as a universal subsidiary law. It deals with a concept initially founded on universal medieval ideology, once linked to the unitary idea of the medieval empire. In the reconstruction by historians, medieval law was therefore described by *iura propria* (different local rights for each territory) and by a common reservoir, the *ius commune*, rooted in the tradition of Roman law. However, the validity of this common law and its effectiveness was not identical in time and space.[36]

More specifically, the expression '*ius commune*' refers to the result of the doctrinal option that made the "rediscovered Justinian law as the new law of the medieval emperor" and "configured it as the *universal ius commune* of the *respublica Christiana*".[37] The tradition of the Roman law was recovered. The *corpus iuris civilis* was studied with a new methodology to define a subsidiary law, independent from local urban laws. The *ius commune*, as a common legal framework, was often enforced thanks to the fall of the barbarian realms and the onset of a new system of public relations (the feudal system).[38]

This common and subsidiary legal ground was gradually weakening due to the emergence of the nation-states, ideally attributable to the Peace of Westphalia.[39] In other words, national sovereignty and territory connected in such a way as to exclude the general application of a common European law. With the birth of the nation-states, the preconditions of *ius commune* were lacking, because the empire was gradually eroding and its (true or false) legitimacy in the Roman Empire and

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34 An example in von Bogdandy, A.; Hinghofer-Szalkay, S., *European Public Law - Lessons from the Concept's Past*, MPIL Research Paper, no. 5, 2017, pp. 2 ff. and 23 ff.; see also this use of the concept in von Bogdandy, A., *Ius Constitutionale Commune en América Latina: Observations on Transformative Constitutionalism*, in: *Id. et al.* (eds.), Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune, OUP, Oxford, 2017, p. 27 ff.

35 On the concept of *ius commune*, Santarelli, U., *Il* ius commune*, frutto maturo dell'esperienza giuridica medievale*, in: Greco, T.; Bonsignori, F. (eds.), Un solo mondo, un solo diritto?, Pisa University Press, Pisa, 2012, p. 25 ff.

36 Diffusely in Wieacker, F., *Privatrechtsgeschichte der Neuzeit*, Vandenhoeck & Ruprecht, Göttingen, 1967, *vol.* 1, Chapt. III

37 Cavanna, A., *Storia del diritto moderno in Europa*, Giuffrè, Milano, 1982, pp. 34-35

38 About the German history and the fall of the *regnum Teutonicum*, Wieacker, *op. cit.*, note 36, *vol.* I, Part II, § 6.

39 Preterossi, G., *Un diritto internazionale postmoderno? Il contributo di Martti Koskenniemi tra realismo politico e retorica*, Sociologia del diritto, no. 3, 2015, p. 131 ff.; or Koskenniemi, M., *Why History of International Law Today?*, Rechtsgeschichte, no. 4, 2004, pp. 61-66

in Roman law no longer found a *raison d'etre*. A sort of new "Westphalian law", different for each territory and decided by various national authorities, replaced the old *ius commune*.[40]

Therefore, the *ius commune* was the result of a cultural operation in a plural political context. Vice versa, with the development of the state in the modern age, the law was gradually brought back to the power of the single states. According to the modern view, "the law would be only a force or a will, which would radiate from the state".[41] However, the model of modern state law weakened after the liberal state crisis in the last century. With regard to the Italian legal culture, Santi Romano highlighted, at the beginning of the twentieth century, that the state system was not «the only system in the legal world». [42] He underlined that, although modernity combined together state and law, there is an inverse process in the contemporary world. According to Romano, «with the discovery of the complexity of law, which stemmed directly from the complexity of society, the victory of the society was sanctioned».[43] In other words, the law survives the erosion of the concept of state and turns back to a multi-model horizon.

For this reason, the crisis of the concepts of modernity once again changes the landscape. This time it happened by eroding the same geopolitical and philosophical assumptions that had weakened the *ius commune*.[44] Such a narrative would, therefore, allow the recovery of the concepts of medieval law and, among these, of a new *ius commune* as a collective and subsidiary reservoir.

In this contest, the concept plays completely different roles. First, it can be used to describe that part of private law common to Western countries, to the global market or, more specifically to Europe. The commonality, in this case, is a precondition of the (European or global) single market, which allows or facilitates the exchanges. The exercise of national sovereignty in the possible imposition of a different law would self-exclude some communities from the market, with all economic consequences.

In the opposite direction, some authors think that there is a core of values and fundamental rights, common to Western states. In typical rhetoric, then, these

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40 See also Stolleis, M., *Vor Modernes und postmodernes Recht*, Quaderni Fiorentini, no. 37, 2008, pp. 543-551

41 Romano, S., *L'ordinamento giuridico* (1918), Quodlibet, Macerata, 2018, p. 98

42 *Ibid.*, p. 102

43 Grossi, P., *L'Europa del diritto*, Laterza, Roma-Bari, 2010, p. 222

44 Cassese, A., *States: Rise and Decline of the Primary Subjects of the International Community*, in: Fassbender, B.; Peters, A. (eds.), The Oxford Handbook of the History of International Law, OUP, Oxford, 2012, p. 50 ff.

different "common" fundamental rights and values limit the possible distorted effects of globalization and the global market. Again in this sense, it is stated that there is an *ius publicum europaeum*, which characterizes the different continental nations and permeates the European institutions and the other European international organizations.[45]

Another similar but different case present in the doctrine consists of the use of "common goods", a concept that characterized pre-modern property, in an attempt to remove some assets from possible market abuse.[46]

In all these examples, the use of the past often appears to be instrumental. Only certain features of some historical narratives are emphasized. There is nothing wrong with this operation. Nonetheless, it does not seem appropriate to qualify such attempts as recovery; they seem rather an invention of new concepts. In other words, the recourse to the past seems to play overall an instrumental and rhetorical function.[47]

The preconditions of the medieval contest are utterly absent in the contemporary one. In the terminology of historians, "common" is what is not affected by local laws (urban laws, *iura propria*), an eventual, labile and subsidiary ground. In the contemporary context, "*commune*" is that nucleus of principles that cannot be attacked by states or by the market. These principles cannot be eroded by the single nations either because it is economically unfavourable or because it can be contrary to a framework of values typical of constitutionalism (and Western ethics).[48] In none of the cases does the new *ius commune* appear to be subsidiary and eventual. Furthermore, the use of these expressions risks feeding simplified narratives of the contemporary world. New technologies are changing the conditions of modernity, starting from a distorting of distances and the concept of territory. Also for this reason, the recovery of concepts from the past can often be erroneous.

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45 *E. g.* the volume von Bogdandy, A.; Cassese S.; Huber, P. M. (eds.), *Ius Publicum Europaeum*, *vol.* IV, CF Müller, Heidelberg, 2011

46 On this subject, Clavero, B., *El Común y no su doble (a propósito de Pasado y Presente de los comunales y de lo comunitario)*, Quaderni Fiorentini, no. 31, 2008, p. 899 ff.; in the Italian doctrine, Lucarelli, A., *La democrazia dei beni comuni: Nuove frontiere del diritto pubblico*, Laterza, Roma-Bari, 2013; see also Somma, A., *Democrazia economica e diritto privato. Contributo alla riflessione sui beni comuni*, Materiali per una storia della cultura giuridica, no. 2, 2011, p. 461 ff.; or the *pamphlet* of Mattei, U., *Beni comuni: un manifesto*, Laterza, Roma-Bari, 2012

47 About this question, Stolleis, M., *Traditions and Changes and the Role of Legal History*, Giornale di storia costituzionale, no. 30, 2015, pp. 11-16

48 von Bogdandy, A.; Hinghofer-Szalkay, S., *European Public Law - Lessons from the Concept's Past*, MPIL Research Paper, No. 5, 2017, pp. 2 ff. and 23 ff.; again Silvestri*, op. cit.,* note 15, p. 7 ff.

Briefly, this approach can be summarized in a series of inequalities: the European Union is not the Holy Roman Empire;[49] the new global market does not have a *lex mercatoria* like the medieval one;[50] environmental problems cannot be solved simply by the use of common goods of medieval law;[51] the new constitutionalism is not merely a new *ius publicum Europaeum*; contract law is not a sort of new Roman law,[52] etc.

None of these sentences is more valid or more erroneous than their opposites. However, it should be emphasized that good practices and dangerous abuses exist in the use of the past. On the one hand, we can adopt models of historical interpretation to explain new legal and political concepts. In this operation, the risk is to simplify the narration of the present by placing critical characteristic elements. On the other hand, we observe that historiography has a very prudent methodology, which avoids adopting static and abstract concepts in the explanation of complex phenomena.

For this reason, a close comparison with the historians' methodology can allow for greater flexibility in the analysis of future landscapes. The first possible result would consist of avoiding errors deriving from the abuse of concepts suitable to represent a reality but inadequate to another context. In the long run, however, this exercise can allow the positive jurist to distance himself from the conceptual schemes of the present.

Indeed, the new landscape places the jurist in a new position with strong analogies with the past. Then, we can hypothesize a «revival of remote legal civilizations», which is a «useful and, at the same time, distorting thought», because there is a high risk of overlooking the specific features of the current context.[53] The analogies with the past lead us to consider as European unitary elements a common science, a standard legal method, and a framework of shared values. The challenge of building a common science arises in the current context similarly to the past, when «the historical *Ius Publicum Europaeum* was founded on an integrated sci-

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49 In the legal-historical debate, see Cassese, S., *Che tipo di potere pubblico è l'Unione Europea?*, Quaderni Fiorentini, no. 31, 2008, p. 141 ff.

50 A review of the debate in Gialdroni, S., *Gerald Malynes e la questione della* lex mercatoria, Zeitschrift Savigny Stiftung, Germ. Abt., no. 126, 2009, p. 38 ff.

51 On this concept, see diffusely Kempshall, M. S., *The Common Good in Late Medieval Political* Thought, OUP, Oxford, 1999

52 For example, this approach is in Zimmermann, R., *Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit*, Juristenzeitung, no. 1, 1992, pp. 8-20

53 *Ibid.*, 255

entific culture».[54] In the current context, the strength of the Roman law tradition returns to fascinate private law scholars whereas a set of common values attract the public and constitutional law scholars. The interaction between these two trends leads to a new form of *ius commune* and a new secularized form of *respublica christiana*.[55] The object of the new common science would no longer be the private law, as defined by the nineteenth-century bourgeoisie. The modern common science should focus on a European, interdisciplinary, and cross-national administrative law, thanks to the convergence of the private law's methodology with the fundamental values of constitutionalism.

The scientific option for a new European *ius commune* is not a mere recovery of a past dream. The analogy uses references to the past without overlooking the characteristics of the present. However, this scientific option often insists on strong continuity with an idealized past. Furthermore, this option is based on conditions that may not arise in the future.

The option of a modern common science rises some critical issues.

First, it could be optimistic and unfeasible to build a common science independent of local contexts.

Second, the success of the option depends on the existence of a European community of values rather than on a mere commercial and economic space.

Third, the option highlights the pivotal role of jurists, as a class capable of mediation between society and law, although democratic issues rely on the pressure of political representative institutions. Thus, the attempt to save the values of constitutionalism with the use of a law produced by courts and doctrine could fail because it neglects the role of representative democracy in the affirmation of fundamental rights.

5. POSSIBLE FUTURE RESULTS AND IMPLICATIONS: INTERDISCIPLINARY REFLECTION BACKGROUND

The research path aims to recover the results of the most recent historiography, that demonstrate the partial groundlessness of the images of the past built by modernity. As a matter of fact, some views of the past adopted in legal culture seem to be an artificial construction, in which historical truth, myths and misunderstandings are mixed.

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[54] See also Bogdandy, A., *Il diritto amministrativo nello spazio giuridico europeo: cosa cambia, cosa rimane*, in: *Id*.; Cassese, S.; Schiera, P., *Lo Stato e il suo diritto*, Il Mulino, Bologna, 2010, p. 135

[55] On this topic, see Schmitt, C., *Der Nomos der Erde*, Duncker & Humboldt, Berlin, 1974, Chapt. 2

These misunderstandings can offer a wrong image of the past and do not help to build legal models and solutions for the future, because they tend to simplify the interpretation of the phenomena. A good example is certainly the one offered using the concept of *ius commune*, but possible research in other directions could achieve similar results.

The future analysis could show that literature, almost unanimously, converges in attributing a decisive role in the collapse of the categories of modernity to new technologies and the impact of disruptive innovation in progress. This perspective, therefore, would not permit a simple and naïve recovery of the past, because the landscape is crowded with new protagonists and new problems.

Any search for solutions for the future in the *Beispielsammlung* of history would not be the right way of describing the relationship between *Werden* and *Sein*. Another relationship is instead possible: the legal history is a discipline in which scholars try to distance themselves from their object of research. Legal historians study law, without being limited by its static concepts. The research of legal frames for regulating new technologies could therefore learn from historical methodology, making history of our own present and moving away from current legal concepts. The question this paper would address is: in what relationship do legal historians and jurists of the future place themselves?

Within the framework of this research path it is possible, once the in-depth context has been chosen, to begin a collaboration with other researchers. In the long run it is also possible to imagine that historians and jurists of new technologies can collaborate on a common ground. The paper aims to contribute to opening an interdisciplinary field of reflection in which legal historians and jurists participate in the debate on the regulation of new technologies.

The need for a connection between technology and humanities is frequently affirmed. The plot of possible links between these two worlds is full of pitfalls. The contribution addresses the theoretical and methodological aspects of this relationship, highlighting the risks of naïve uses of the past and the advantages of a methodologically founded comparison.

For these reasons, the implications on the methodological level are central in this research path, with reference to a comparison between legal theory and legal history.

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UDK 316.647.82 : 613.885
342.565.2(497.5):341.645(4-67EU)
Professional paper

SEXUAL ORIENTATION DISCRIMINATION - A EUROPEAN PERSPECTIVE THROUGH THE PRACTICE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

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ABSTRACT

Any discrimination or exclusion based on sexual orientation for the purpose of reducing equality before the law, as well as providing preferential treatment on these grounds, constitutes sexual orientation discrimination . This paper will, inter alia, address the rights of same-sex partners vis-à-vis the rights of heterosexual partners, with the aim of analyzing the current stage of the European perspective in the area where the legal arrangements of certain EU Member States

(hereinafter: MS) will be presented by a comparative method. It is precisely these issues that have been decided by the Court of Justice of the European Union (hereinafter: CJEU), from which the major problems in the area of sexual orientation discrimination are identified. In the view of the CJEU, in order for a treatment to be characterized as discrimination on the basis of sexual orientation, a community of same-sex partners must be legalized in a MS. Only when such a legal framework exists can the CJEU decide whether there is a basis for discrimination. Such an interpretation begs the question, what about states that do not have any legal framework that recognizes the same-sex life community? The first part of the paper will analyze international and European standards of protection against sexual orientation discrimination, and after that, the current level of same-sex rights in the EU will be briefly presented. The second part of the paper will be based on analysis of the impact of CJEU decisions on changes in Romanian legislation in the field of recognizing the effect of same-sex marriage, concluded in another MS, as well as an analysis of the process of recognizing the effect of same-sex marriage in the Republic of Croatia (hereinafter: Croatia) In addition, the paper will also analyze the judgment of the Constitutional Court of the Republic of Croatia (hereinafter: CCRC) regarding discrimination on the grounds of sexual orientation observed in the positive regulation governing the issue of foster care. Based on these analyzes, de lege ferenda guidelines will be given at the end of the paper in order to reduce the possibility of sexual orientation discrimination.

Keywords: *sexual orientation discrimination, CJEU, equality, same-sex partners*

1. INTRODUCTION

This paper discusses sexual orientation discrimination and the rights of same-sex communities in the European Union (hereinafter: the EU). The prohibition of discrimination, which also applies to sexual orientation discrimination, has its foundations in international and EU law. During the last quarter of the 20th century, it can be clearly seen that attitudes towards same-sex communities still vary greatly between nations, but as legal decriminalization gradually progresses and it moves towards increasing recognition and equality of same-sex communities, however, not in all MS. The integration and coexistence of same-sex communities within one nation is most commonly manifested at the legal level, such as the right to a partnership or marriage. The analysis of EU countries shows that there are still major differences in the approach to regulating same-sex partnership. Some countries recognize same-sex marriage and have the necessary legal regulations to make same-sex marriage equal to traditional marriage. In other countries, however, there is another type of institution that is not called marriage but most often a registered partnership. Currently, the biggest problem in the EU are MS that do not recognize any form of same-sex community. In such countries, like Romania, same-sex partners remain without legal protection. EU promotes the rights of same-sex communities, but each MS adopts its own legislation on same-sex partnerships. A society committed to equality and non-discrimination portrays the development of an awareness of individuality and acceptance of the diversity and equality of all persons before the law, which should be an aspiration for every society. The first

part of the paper will analyze international and European standards of protection against sexual orientation discrimination, and after that, the current level of same-sex rights in the EU will be briefly presented. The second part of this paper will analyze the impact of CJEU decisions, as a binding and important source of law in EU, on changes in Romanian legislation in the field of recognizing the effect of same-sex marriage, concluded in another MS, as well as an analysis of the process of recognizing the effect of same-sex marriage in the Croatian system. In the light of the analysis of sexual orientation discrimination in Croatia, an analysis of the judgment of the CCRC will be made, related to the observed discriminatory provision of the legislation governing foster care. Based on these analyzes, *de lege ferenda* guidelines will be given at the end of the paper in order to reduce the possibility of sexual orientation discrimination.

2. PROHIBITION OF SEXUAL ORIENTATION DISCRIMINATION IN INTERNATIONAL LAW AND LAW OF THE EUROPEAN UNION

When defining homosexuality, Borić considers it's a physical, sexual, emotional and spiritual attraction to a person of the same sex.[1] Sexual orientation discrimination or gender identity means any distinction, exclusion or preferential treatment on these grounds, which aims at the annulment or reduction of equality before the law, that is, the recognition, enjoyment or enjoyment on an equal basis of all human rights and fundamental freedoms.[2]

2.1. INTERNATIONAL LAW

When it comes to International human rights law, the Universal Declaration of Human Rights imposes as a milestone which proclaims, by Article 2, equality and prohibits discrimination:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[3]

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1 Borić, R., *Pojmovnik rodne terminologije prema standardima Europske unije*, Ured za ravnopravnost spolova Vlade RH, Centar za ženske studije, Biblioteka ONA, Zagreb, 2007, p. 30

2 Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, International Commission of Jurists (ICJ), 2007, Available at: [https://www.refworld.org/docid/48244e602.html], accessed 01. April 2020

3 Universal Declaration of Human Rights, 10 December 1948., 217 A (III)

As the provisions of the Universal Declaration of Human Rights are not legally binding on States, or have no binding force, its provisions have been transposed into the International Covenant on Civil and Political Rights,[4] and in the International Covenant on Economic, Social and Cultural Rights,[5] to make these provisions the obligations of all MS. The International Covenant on Civil and Political Rights, in Article 2 (1) states that each State Party undertakes to respect and guarantee the rights recognized by the Covenant to all persons within its territory and territories within its jurisdiction, regardless of race, color skin, gender, language, religion, political or other belief, national or social origin, property, birth or other circumstance. The International Covenant on Economic, Social and Cultural Rights in Article 2 (2) states in much the same way that States Parties undertake to guarantee that the rights set out in the Covenant will be exercised without any discrimination regarding race, color, sex, language, religion, political or other belief, national or social origin, property, birth or any other circumstance. Therefore, the term "sexual orientation" as a basis for discrimination is not mentioned in the Universal Declaration of Human Rights or in the two international pacts subsequently adopted. Nonetheless, States Parties are obliged to protect persons against sexual orientation discrimination, since, in the opinion of the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights, sexual orientation is an integral part of the protected sex/gender base, resulting from the Article 2 of the Covenant on Civil and Political Rights, and as such falls into the category of expressly cited grounds under Article 26 of the same Covenant.[6] Therefore, it is clear that the prohibition of discrimination does not only relate to the grounds mentioned above, but this prohibition is much broader and requires equality of every person before the law. The role of States Parties is significant because, as stated by the UN Committee on Human Rights, the principle of equality sometimes requires States to take certain positive steps to alleviate or abolish conditions that lead to, or may lead to discrimination.[7]

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4 International Covenant on Civil and Political Rights, 16 December 1966, TS 999, p. 171, The Republic of Croatia is a party to the International Covenant on Civil and Political Rights of 6 October 1991, pursuant to the Decision on the publication of multilateral international treaties to which the Republic of Croatia is a party on the basis of succession notifications. The decision was taken by the Government of the Republic of Croatia on 30 September 1993 (Official Gazette - International Agreements, No. 12/1993)

5 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, TS 993, p. 3

6 This principle is confirmed in the case *Toonen v. Austria*, No. 488/1992, United Nations, 1994. In cases *Young v. Australia*, Communication No. 941/2000, United Nations, 2003 and *X v. Colombia*, No.1361 / 2005, United Nations, 2007, such principle was reaffirmed.

7 General Comment No. 18 of the Human Rights Committee, United Nations, 1989, para. 10, Available at: [http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/04/Op%C5%A1ti-comments-Community-for-Human-Rights.pdf], accessed 10. April 2020

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) guarantees equal access to all human rights and fundamental freedoms, set out in the Convention, for all persons:

"The enjoyment of the rights and freedoms recognized in this Convention shall be ensured without discrimination on any grounds, such as gender, race, color, language, religion, political or other opinion, national or social origin, national minority, property., Birth or other circumstances. "[8]

ECHR has limited reach, as it guarantees rights and freedoms only on the grounds mentioned above, but Protocol no. 12. takes a step further and proclaims a general prohibition of discrimination.[9] It is clear that neither ECHR nor Protocol 12. do not mention the prohibition of discrimination on grounds of sexual orientation. However, the European Court of Human Rights (hereinafter: ECtHR) has played a major role in deciding that Article 14 of the ECHR covers sexual orientation, and the explanatory report to Protocol no. 12 indicates that this instrument would provide protection against sexual orientation discrimination.[10] The ECtHR considers that, within the meaning of Article 14 of the ECHR, different treatment is discriminatory as there is no reasonable and objective justification for it, respectively if it does not seek to achieve a legitimate aim.[11] The ECtHR also considers that the margin of appreciation afforded to states in such cases, that interferes with one of the most intimate matters of private life, is narrow and that there must be particularly serious reasons that would justify interference by public authorities.[12] The role of the States Parties to the ECHR and Protocol no. 12. was reaffirmed as essential, but the ECtHR made it clear that there must be a proportionality between the means used and the aim to be achieved, as the necessity of achieving that goal must be proved. The ECtHR also played a major role in strengthening the rights of same-sex communities by interpreting certain provisions of the ECHR, so it follows from the case-law of the ECtHR that the relationship of homosexual marriage can indeed be encompassed by the terms "private" and "family life" on the same basis as heterosexual marriage in a comparative situation.[13] As

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8 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

9 Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, 4 November 2000, ETS 177

10 See: Judgment *Salgueiro da Silva Mouta v. Portugal* (1999) 31 EHRR 1055, as well as: *Judgment Karner v. Austria* (2003) 38 EHRR 528

11 Judgment *Karner v. Austria*, *ibid.*, para. 37

12 *Ibid.*, para. 41

13 According to: Judgment *Vallianatos and others v. Greece* (2013) 59 EHRR 12, para. 73, as well as Judgment *Orlandi and others v. Italy* (2017) 389 ECHR 1153, para. 143

Joseph and Castan point out, it should be borne in mind that the States Parties do not have complete freedom in defining the family, as this would significantly weaken the guarantees under Art. 23 of the International Covenant on Civil and Political Rights. Thus, a State Parties would not be able to adopt the definition of the family by applying values that are in complete conflict with the standards of international human rights protection.[14] The disadvantage in this interpretation is that no criteria have been set in International human rights law, according to which it would be decided what would be contrary to fundamental human rights and freedoms, ie whether the restriction of family and marriage to the community of men and women is considered as violation of these rights.

2.2. EUROPEAN UNION LAW

When it comes to EU law, it is important to emphasize that European human rights law has evolved in line with the normative progress of human rights protection at the UN and Council of Europe levels. Unlike the international organizations that created the first human rights instruments, sexual orientation discrimination is already mentioned at European level in the Treaty of Amsterdam.[15] Relevant provisions of the Treaty on European Union (hereinafter: TEU) and the Treaty on the Functioning of the European Union (hereinafter: TFEU) refer, as explicitly stated, on the prohibition of sexual orientation discrimination and gender identity.[16] This means that the TEU and TFEU include sexual orientation on the list of grounds for discrimination. Likewise, the Charter of Fundamental Rights of the European Union (hereinafter: the EU Charter) in Article 21 (1) contains a general anti-discrimination provision, which explicitly states sexual orientation as a basis for discrimination:

"Any 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."[17]

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14 Joseph, S.; Castan, M., *The International Covenant on Civil and Political, Rights: Cases, Materials and Commentary*, 3rd edition, Oxford: Oxford University Press, 2013, p. 668

15 Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts [1997] SL C 340, Article 6 (a): *"Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"*

16 Consolidated version of the Treaty on the Functioning of the European Union [2007] SL C 326

17 Charter of Fundamental Rights of the European Union [2012] SL C 326

Article 9 of the EU Charter stipulates that the right to marriage and family life must be ensured at national level. Given that there is no mention of the phrase "man and woman" in the said provision, Barić and Vincan consider that at European level there is no barrier to recognition of same-sex relationships in the context of marriage, but there is also no explicit requirement that MS should allow same-sex marriage.[18] European Council Directive 2003/86/EC on the right to family reunification[19] explicitly states sexual orientation as a basis for discrimination, as does Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, stating that the purpose of the directive is to establish a general framework for combating against discrimination on the grounds of religious belief, disability, age or sexual orientation in relation to employment and occupation, in order to ensure that the principles of equal treatment are applied in the MS (hereinafter: Directive 2000/78).[20] Directive 2000/78 applies to all persons, whether in the public or private sector, including public institutions. The prohibition of discriminatory conduct applies equally to nationals of EU MS, as well as third country residing in the EU.[21] Petrašević, Duić and Buljan state that the purpose of any legal order is to give individuals in their social community the full and free development of their personality, including sexual orientation as well. However, as they state, the legislation of individual MS on same-sex community are regulated in different ways, as this aspect of status law falls under the exclusive competence of MS.[22] In 2016, the Council of the EU adopted a Regulation 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and nforcement of decisions in matters of matrimonial property regimes (hereinafter: Regulation 2016/1103),

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18 Barić, S.; Vincan, S., *Ustavnopravno načelo jednakosti i pravno uređenje istospolnih zajednica*, Zbornik radova Pravnog fakulteta u Splitu, *vol.* 50, no. 1, 2013, p. 103

19 Council Directive 2003/86/EC on the Right to Family Reunification [2003] OJ L 251

20 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303, Article 1

21 *Ibid*., According to Article 2 there are four types of discrimination: direct discrimination, indirect discrimination, harassment, and instruction to discriminate. Direct discrimination presupposes that a particular person is treated worse than another in similar situations. Indirect discrimination is when a seemingly neutral provision puts the measure or conduct in an unequal position of a person of a particular sexual orientation compared to other persons, except when those provisions of the measure or conduct are justified by a legitimate aim and the means to achieve it are appropriate and necessary. Humiliation is a form of discrimination that results in undesirable behaviors related to sexual orientation in order to violate a person's dignity and to create an intimidating, hostile and degrading or abusive environment. An instruction to discriminate against persons on any grounds shall be deemed to be discrimination

22 Petrašević, T.; Duić, D.; Buljan, E., *Prava istospolnih zajednica u Europskoj uniji s posebnim osvrtom na Republiku Hrvatsku*, Strani Pravni život, *vol*. 61, no. 3, 2017, p. 167

which *inter alia* regulates the issue of property rights in registered partnership.[23] The provisions in the aforementioned text clearly distinguish between married and registered communities from unregistered partnerships. The regulation respects the basic principles of the EU Charter, such as the principle of non-discrimination and respect of family and private life. Despite the Regulation 2016/1103 and its regulation, there are differences in the legislation of the MS on property matters. The CJEU has played a major role in the formation of European legal regulation regarding the rights of same-sex communities, as well as the protection against discrimination on grounds of sexual orientation, which will be discussed later in this paper.

3. THE RIGHTS OF SAME SEX COMMUNITIES IN THE NATIONAL LEGISLATION OF THE MEMBER STATES

An analysis of the legislations of the MS shows that there are still major differences in the regulation of same-sex partnerships as well as the application of European law. Some countries (eg. Netherlands, Spain, Portugal, France, Germany, Finland, Norway) recognize same-sex marriage in their legislation and have the necessary legal regulations to make same-sex marriage more equitable to traditional marriage.[24] In other countries (eg. Italy, Croatia, Slovenia, Hungary and the Czech Republic) there is another type of community not called marriage but a registered partnership.[25] There are also countries that do not recognize any form of same-sex community (eg. Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia).[26] As Petrašević, Duić and Buljan point out, the fact that each EU country defines its own legislation on same-sex partnership raises the issue of resolving legal situations if the partners are from countries that differently define same-sex partnership.[27] Currently, the biggest problem are countries that do not recognize any form of same-sex partnership. In such countries, same-sex marriage partners, who are legally married, are not entitled to the rights arising from such status, which can lead to many legal issues and violations of the fundamental rights to which they are entitled. The Netherlands is the first country ever to legalize same-sex marriage

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23 Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and nforcement of decisions in matters of matrimonial property regimes [2016] SL L 183

24 Lipka, M.; Masci, D., *Where Europe stands for gay marriage and civil unions*, Pew Research Center, 2019, Available at: [https://www.pewresearch.org/fact-tank/2019/10/28/where-europe-stands-on-gay-marriage-and-civil-unions], accessed 10. April 2020

25 *Ibid.*

26 *Ibid.*

27 Petrašević; Duić; Buljan, *op. cit.*, note 22, p.148

back in 2001.[28] By legalizing same-sex marriage, they equated it with traditional marriage before the law and allowed same-sex partners to adopt children. For this reason, among others, the Netherlands is a country that can be taken as an example when it comes to equality and non-discrimination of persons on the basis of sexual orientation. It is interesting to note that Denmark legalized the first formal form of same-sex community in 1989, that produced all the rights and obligations produced by marriage.[29] The Czech Republic does not allow same-sex marriage, but it permits another type of non-marriage community.[30] In 2006, the Czech Republic legalized a registered partnership, as a formal life-form of persons of the same sex, thereby becoming, according to Jagielska, the first country of the former Eastern Bloc to recognize and legalize some form of same-sex community.[31] Such legislation exists also in Croatia, Italy and Hungary. On the basis of a referendum held in 2013, Croatia introduced the provision in the Constitution of the Republic of Croatia (hereinafter: Constitution Act) that states: "marriage is a community of a woman and a man."[32] Croatia institutionalized the same-sex community by Same-Sex Communities Act[33] that was adopted in 2003, which was in force until 2014, when the Life Partnership of Persons of the Same Sex Act was adopted.[34] Croatia differentiates formal from an informal life partnership that equates with an extramarital community.[35] Italy stated in its legal provisions that all same sex communities of Italian nationals concluded abroad would be recognized, as if they were assembled under Italian law, and provides registered partnership for same-sex partners.[36] Such legislation is a consequence of the ECtHR decision in *Oliari and Others v Italy* case, when the ECtHR ruled that Italy had breached Article 8 of the ECHR guaranteeing the right to privacy and family life by lack of legal recognition of same-sex relationships.[37] Hungary also knows only the form of a

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28 Dutch Civil Code [1992] NLD-1992-L-91671, Article 1:30.

29 The Danish Registered Partnership Act [1989] D/341- H- ML, Act No. 372

30 Chech Civil Code [2012] 89/2012 Sb.

31 See: Jagielska, M., *Eastern European Countries: From Penalisation to Cohabitation or Further?,* in: Boele-Woelki, K.; Fuchs, A. (es.) Legal Recognition of Same-Sex Relationships in Europe, National, Cross-Border and European Perspectives,Cambridge Portland, 2012

32 Constitution of the Republic of Croatia, consolidated text, 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, Article 62

33 Same-Sex Communities Act, Official Gazette, No. 116/2003

34 Life Partnership of Persons of the Same Sex Act, Official Gazette, No. 92/14, 98/19

35 *Ibid*., Article 3

36 Italian Act on civil partnerships between persons of the same sex, and on living together without being married, Official Gezette, No. 76

37 Judgment *Oliari and Others v Italy* (2015) Application no. 18766/11 and 36030/11

registered partnership without providing right to same-sex marriage.[38] As stated by Szeibert-Erdős,[39] in 1999 and 2002, the Hungarian Constitutional Court made very important decisions equalizing the required age for consent in a heterosexual and homosexual community, which resulted with change in the legal and social perception of homosexuality in Hungary[40] Romania is among the most recent states in Europe to decriminalize homosexuality. Although same-sex community rights, activists have advocated repealing Article 200 of Romania's Criminal Code since the early 1990s, its removal was only accepted in June 2001 when Romania began EU accession negotiations as an indicator of progress in aligning its laws with EU legislation.[41] Ireland is the first country to legalize same-sex marriage on the basis of a referendum in 2015, when the people of Ireland decided in favor of same-sex marriage, giving same-sex partners the right to be legally equated to traditional marriage.[42] Such a referendum presents opportunities for other countries that have legal restrictions on equalizing same-sex partnership rights with traditional marriage rights. There are six such countries in the EU: Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia. Such a solution may encourage other countries to launch a referendum if public opinion and laws in the country do not match. Romania, Bulgaria, Lithuania and Latvia are EU countries where the opinion of society is not on the side of same-sex marriage and there is no regulation on same-sex partnership in these countries.[43] That confirms that Western countries are more prone to non-discrimination, while in eastern EU countries, with a few exceptions, public opinion is still conservative.

4. DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION THROUGH THE PRACTICE OF CJEU

The first case in which the CJEU found sexual orientation discrimination was *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* case (hereinafter: *Maruko*

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38 Hungarian Civil Code, [1960] Act VI

39 Szeibert-Erdős, O., *Same-sex partners in Hungary - Cohabitation and registered partnerships*, Utrecht Law Review, Igitur, *vol*. 4, no. 2, 2008, p. 215

40 Decisions of the Hungarian Constitutional Court, No. 20/1999 (VI. 25.), ABH, 1999, p. 159. and No. 37/2002 (IX. 4.), ABH, 2002, p. 230

41 Andreescu V., *From Legal Tolerance to Social Acceptance: Predictors of Heterosexism in Romania*, Revista Romana de Sociologie, *vol* 3-4, 2011, p. 209-231

42 Ireland Marriage Act [2015] No. 35, previously Bill No. 78

43 Pew Research Center, *Eastern and Western Europeans Differ on Importance of Religion, Views of Minorities, and Key Social Issues*, 2018, Available at: [https://fra.europa.eu/en/databases/anti-muslim-hatred/node/4277], accessed 11. April 2020

case).[44] In that case, thr CJEU ruled that MS are obliged to treat equally couples who are in heterosexual marriage and those in a registered same-sex community in a comparable situation. What the CJEU has left to the national courts is to decide on a case-by-case basis whether this is indeed a comparable situation. At the time of the judgment in the *Maruko* case, such a judgment seemed to have moved far beyond the boundaries of same-sex rights. Such a view is understandable, given that by that time the CJEU had taken completely different decisions in this area, and thus, such a judgment was revolutionary. The CJEU brought clear guidance to MS to guarantee equal rights to same-sex partners as to persons in heterosexual marriage in a comparative situation, but left them to determine what those situations were. Furthermore, it did not push the boundaries when it comes to states that do not recognize any form of same-sex community, and in the *Maruko* case made it clear that discrimination on the basis of sexual orientation can only be addressed if a particular MS knows some form of same-sex community in its legislation, otherwise, there is no comparative situation in which such discrimination against the homosexual community could be reflected. The fact that certain states in the 21st century do not recognize any form of same-sex community in their legislation is, if not legal, then certainly morally discriminatory. According to Krešić, another weaknesses of the *Maruko* ruling is that the EU still believes that defining marital status should remain entirely within the competence of the MS.[45] Unlike in the case above, in the case of *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, the CJEU itself examines whether or not marriage partners are in a comparable situation to persons having a registered partnership because of their inability to marry in a particular MS.[46] The CJEU has held that married persons and registered partnerships are in a comparable situation and that, therefore, the reduction of workers' rights, such as days off and bonuses due to marriage, is a direct discrimination based on sexual orientation. The latest decision in which the Court ruled on discrimination on the basis of sexual orientation and, accordingly, advance the rights of same-sex communities by protecting primarily the right to freedom of movement and its effects in the Member States, was the case of *Relu Adrian Coman, Robert Clabourn Hamilton and Asociaţia Accept v Inspectoratul General. to the Immigrant Center* (hereinafter: *Coman* case), which

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[44] See more: Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECLI 2008:179

[45] Krešić, B., *Zajednice* života *istog spola u pravu zemalja EU*, Sarajevski otvoreni centar, Sarajevo, 2015., p. 36-37

[46] See more: Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* [2013] ECLI 2013:823

will be briefly analyzed in the following text.[47] A request for a preliminary ruling was sent to the CJEU as a result of a dispute between Relo Adrian Coman, Robert Clabour Hamilton and the Accept Association and the General Inspectorate of Immigration and the Ministry of the Interior in Romania. Dispute was related to a request by R.C.Hamilton for granting a residence permit for more than three months in Romania. The request therefore concerned the interpretation of the relevant provisions of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the MS.[48] This case was a mirror of what the doctrine warned could happen when persons in the same-sex community wish to move from one MS to another, and thereby exercise the right of free movement, which is one of the cornerstones of the EU.[49] In this case, the CJEU reminded the MS that they were obliged to respect the fundamental rights of the EU and in all those areas left to the jurisdiction of the MS. The CJEU also reminded that MS cannot arbitrarily invoke reasons of public interest and national security when accessing restrictions on fundamental rights, such as the right of EU citizens to freedom of movement and the legal effects that right. The CJEU has made it clear that under Directive 2004/38 "spouse" is a gender-neutral term that comes under the term "family member", and a right to reside with a third-country national, who has legally married in one of the EU countries, the MS derives from the provisions of the TFEU. That statement requires recognition of the effects of same-sex marriage concluded in one of the MS, without prejudice to the national position on the existence of same-sex marriage or a registered partnership. With this judgment, the CJEU partially addressed the problem that existed after the *Maruko* ruling, which was related to those MS that did not know any form of same-sex community in their legislation. Therefore, after the judgment in *Coman* case all MS, including those who do not know any form of same-sex community in their legislation, are obliged to recognize same-sex marriages concluded in another MS, only in the purpose of exercising the rights conferred on them by EU law. One of the disadvantage of such a judgment is the fact that there is no mention of same-sex marriages that have taken place outside the borders of the EU, when it comes to the EU citizens. What Tryfonidou sees as another drawback is certainly that the verdict deals with cross-border situations,

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47 Case C-673/16 ,*Relu Adrian Coman, Robert Clabourn Hamilton and Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne* [2018] SL C 268 (Case C-673/16 *Coman*)

48 Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] SL L 158

49 See: Petrašević; Duić,; Buljan, op. *cit.,* note 22, p. 165

which leaves same-sex partners in domestic, purely national issues still unprotected.[50] Therefore, the CJEU should express its position more confidently, regardless of the reaction of MS that do not recognize any rights to same-sex communities and leave no room for doubt in the interpretation of its judgments. This would ensure legal certainty and protection of fundamental human rights and freedoms, regardless of the status issues of persons and the legislation of EU MS in which they reside. Such inequality of the legal systems of the MS leads to a situation where same-sex partners move to countries where they will enjoy greater rights and equality, which can lead to *forum shopping*.

4.1. IMPACT OF THE JUDGMENT IN THE *COMAN CASE* ON CHANGES IN ROMANIAN LEGISLATION IN THE FIELD OF RECOGNIZING THE EFFECT OF SAME-SEX MARRIAGE, CONCLUDED IN ANOTHER MEMBER STATE

In Romania, marriage is defined as a union of man and woman, and in such a marriage citizens have the right to marry in order to start a family.[51] Same-sex marriage is prohibited, and marriages and registered partnerships made by same-sex partners in another country were not recognized in Romania by Romanian nationals or foreigners at the time of the *Coman* case, as well as at the time of completion of the analysis for the purposes of this paper.[52] Romania, following its ruling in the *Coman* case, declined to amend the text of Article 277 (2) of the Civil Code, according to Hagean, on the grounds that the issue of legalizing same-sex marriage and the recognition of such marriages were left to MS and that, with the appearance of such a decision of the CJEU, the Romanian legislation on these issues cannot be considered repealed or amended.[53] Furthermore, Romanian's doctrine states that in the judgment the CJEU stated that the marital status of persons, including rules pertaining to marriage, is an issue that falls within the competence of the MS, and that EU law does not affect that jurisdiction, so they are therefore free to provide or not provide same-sex marriage in their own country. It also states that the judgment calls into a question constitutional provisions and does not oblige the Romanian state to legalize same-sex marriage.[54] Therefore, on the basis

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50 Tryfonidou1, A., *The EU Top Court Rules that Married Same Sex Couples Can Move Freely Between EU Member States as "Spouses": Case C 673/16, Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept v Inspectoratul General pentru Imigrări,* Feminist Legal Studies, *vol.* 27, 2019, p. 211–221

51 Romania Code Civil, Officially Law No. 287/2009, Article 259, para. (1) (2)

52 *Ibid*., Article 277, para (1) (2)

53 Hageanu, C., *Articolul 277 din Codul civil român,* încotro*?*, Revista Româană de Drept Privat, *vol.* 3, 2018, p. 151

54 *Ibid*. p. 152

of such an interpretation, Article 277 of the Romanian Civil Code remained unchanged after the *Coman* case, with the exception of paragraph 3, which Romania amended following the ECtHR judgment in *Oliari and Others v Italy*. Romania, misinterpreting a judgment of the Court and not changing its legal provisions explicitly, stating that the effects of same-sex marriage contracted abroad are not recognized, violates international law, EU law and ignores judicial practice that is a source of EU law. Undoubtedly, this judgment promoted the rights of same-sex communities, but the merits of this judgment are not the issues of national arrangements for same-sex marriage and registered partnerships, but merely the recognition of such marriages for the purpose of a derived right of residence in a MS on the basis of European law. The consequences of this are enormous. It is unacceptable to prevent nationals of a particular country from exercising their fundamental rights guaranteed by International human rights law and European legislation deriving from the TFEU and from the EU Charter, because of national legislation. Romania, however, has some achievements in terms of equality of person of different sexual orientations. Equality and non-discrimination were achieved at the level of employment, goods and services, education, health and sexual orientation, and the Criminal Code introduced provisions on hate crime based on sexual orientation.[55] Despite advances in Romanian law, same-sex marriage or some form of same-sex partnership is still not regulated by law.

4.2. RECOGNITION OF THE SAME-SEX MARRIAGES, CONCLUDED IN ANOTHER MEMBER STATE, IN THE PRACTICE OF REPUBLIC OF CROATIA

Formal and informal life partnership in Croatia is regulated by the Life Partnership of Persons of the Same Sex Act. Croatian legislation does not recognize the concept of same-sex marriage, but knows the concept of life partnership of persons of the same sex. When a life partnership is concluded in Croatia, the existence of such a partnership is entered in the Life Partnership Register kept by the Ministry of Administration. Such registration is not performed when Croatian citizens enter into a same-sex marriage or life partnership abroad. In that case, according to the data obtained from the Registry Office, on the basis of the Instructions for keeping the Life Partnership Register,[56] the existence of such a status is entered in the Registry of Birth Certificates kept at the Registry Office according to place of residence. Since Croatian legislation does not recognize the concept of same-sex marriage, a note on the conclusion of a life partnership of

[55] Romanian Criminal Justice Act [2003] Official Gezette, No. 34, 378, 39, 42

[56] Instruction for keeping Life Partnership Register, Official Gazette no. 147/2014, Article 13

persons of the same sex is entered in the Registry of Birth Certificates.[57] Same-sex marriage is the highest level of realization of the rights of same-sex partners, which would mean that if recognition of the effect of a same-sex marriage contracted abroad is sought, there is a certain degradation of such relationships to the level of life partnership. However, in Croatia, the rights of persons living in a formal or informal life partnership are equal to the rights of extramarital or marital unions. As Lucić points out, regardless of which of the four family law institutes known to Croatian legislative (marriage, cohabitation, formal or informal life partnership) the partners decide to live, they will enjoy exactly the same legal effects. In other words, after three years of living together informal life partners and extramarital partners in Croatian legislative have all the rights and duties as spouses and formal life partners.[58] Precisely for this reason, a life partnership between persons of the same sex has the same legal effects as a marriage of persons of the opposite sex. In addition, according to the Life Partnership of Persons of the Same Sex Act, life partners who are in a same-sex marriage, or life partnership, have the right to apply for temporary residence as a family member in Croatia.[59] In addition, persons who are in a same-sex marriage or life partnership and are both EU citizens or at least one of them is an EU citizen *"enjoy equal access to rights and benefits that fall within the scope of the guarantee of fundamental freedom of movement within the European Economic Area".*[60] It can therefore be concluded that Croatia fully implements the recognition of the effect of same-sex marriages or life partnerships concluded abroad, provides them with freedom of movement and temporary residence as a family member, in accordance with the decision of the CJEU in the *Coman* case.

5. SEXUAL ORIENTATION DISCRIMINATION THROUGH THE PRACTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

Although the Croatia recognizes the form of same-sex community in the form of life partnership, and even informal life partnership of persons of the same sex, the Decision of the CCRC No. UI-144/2019, of 29 January 2020,[61] established the

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57 Data obtained on the basis of an interview conducted on June 20, 2020 in two Registry Offices in Vukovar-Srijem and Osijek-Baranja counties

58 Lucić, N., *Pravno uređenje braka i drugih oblika* životnih *zajednica,* in: Rešetar, B. *et al.* (eds.), Suvremeno obiteljsko pravo i postupak, Pravni fakultet Osijek, Osijek, 2017, p. 61–102

59 Life Partnership of Persons of the Same Sex Act, op. cit., note 34, Article 73 (1)

60 Life Partnership of Persons of the Same Sex Act, op. cit., note 34, Article 73 (1)

61 Decision and ruling of the Constitutional Court of the Republic of Croatia No. U-I-144/2019 and others of 29 January 2020, Available at: [https://www.hrt.hr/uploads/media/UI1442019dr.pdf], accessed 29. June 2020

existence of discriminatory provisions, based on sexual orientation, in the Foster Care Act.[62] The request for an assessment of the legality and compliance of the Foster Care Act with the Constitution Act was initiated by thirty-three members of the Croatian Parliament. The request was based on numerous rejections of foster care requests made by persons living in formal or informal life partnerships by the Ministry of Demography, Family, Youth and Social Policy of the Republic of Croatia. What was disputable in a particular case was that the Foster Care Act in defining a foster family omits to mention persons living in a same-sex life partnership, which according to the applicants constitutes a form of sexual orientation discrimination. According to the applicants, denials of foster care applications submitted by persons in same-sex life partnerships, also constitute a form of sexual orientation discrimination, especially as the rights of persons in same-sex life partnerships in Croatia are equal to those in marriage or cohabitation. In its decision, the CCRC emphasized that the exclusion of access of a certain social group to foster care services, without objective and well-argued reasons, reduces the potential of foster care as a public service given that the circle of persons who could meet the needs of its users is narrowed. Therefore, according to the CCRC, the Foster Care Act strives to achieve an important social legitimate goal - taking care of foster care users as a public service, and from the aspect of the constitutional principle of proportionality, its ability to achieve that goal is questioned.[63] The CCRC provides that it is legitimate and necessary for foster parents to be subject to restrictions in order to protect the best interests of beneficiaries. However, CCRC points out that restrictions relating to the procedural aspect of foster care and apply only to one group of potential foster parents, determined solely by the form of family community in which they live, according to their sexual orientation, are not necessary in a democratic society, are discriminatory and therefore unacceptable according to Article 14 of the Constitution Act. CCRC also considers that such exclusion is, within the meaning of Article 16 of the Constitution Act, disproportionate in relation to the purpose of the prescribed restrictions.[64] What is the result of the omission of same-sex partners, as possible foster parents from the Foster Care Act, can also be interpreted as the impossibility of fostering one's own relative. Precisely on this fact, the CCRC pointed out that the denial of adoption of one's own relative is also not necessary in a democratic society, declaring it discriminatory and unacceptable according to Article 14 of the Constitution

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62 Foster Care Act, Official Gazette no. 115/18

63 Decision and Ruling of the Constitutional Court of the Republic of Croatia No. U-I-144/2019, *op. cit.*, note 62, para. 24

64 *Ibid.*, para. 25

Act and disproportionate to the purpose of the prescribed restrictions.[65] The life partnership in the field of the social welfare system creates the same effects that are recognized to the extramarital community by special regulations governing the social welfare system.[66] The CCRC, therefore, pointed out that same-sex life partners in social need have a legitimate right to expect that in the case of foster care in the traditional type of foster care they can be placed together - based on the fact that the Life Partnership Act protects same-sex partnerships equally as well as cohabitation.[67] The CCRC finds no reason for a different interpretation when it comes to the issue of the right to work, freedom of work and accessibility of every job to everyone under equal conditions, according to Article 54 of the Constitution Act, in the segment of professional foster care. According to the CCRC, Article 54 of the Constitution Act does not guarantee anyone employment and work in a particular job or position, but guarantees everyone under equal conditions access to an appropriate procedure, in which all applicants will be equally considered.[68] The CCRC also points out that equal participation in all aspects of social life is guaranteed to same-sex communities in family life by the Constitution Act and the legislative anti-discrimination framework, which elaborates the constitutional value of gender equality under Article 3. Therefore, in the opinion of the CCRC, the Constitutional Order of Croatia, based on the stated constitutional values, respects the dignity of all minority social groups, guarantees them equal rights and prohibits discrimination in their exercise, which the competent bodies and courts must respect in interpreting and applying relevant legislation.[69] Although the CCRC did not accept the applicant's request because it considers that his intervention cannot eliminate the discriminatory effects and the fact that the Foster Care Act has a legitimate aim that is not inconsistent with the Constitution Act, it has made great strides to protect same-sex communities in Croatia. However, CCRC stressed that all law enforcers must inevitably work in order to achieve the goal and purpose of the regulations. Which in this case means that the disputed legal provisions must be interpreted and applied in a way that will enable all persons on equal terms to participate in public foster care, regardless of whether the potential foster parent lives in marriage, cohabitation, or life partnership. This judgment is the first verdict in Croatia that opens numerous opportunities for same-sex partners. Such a judgment of the CCRC is revolutionary in Croatia

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65 *Ibid*., para. 26

66 Life Partnership of Persons of the Same Sex Act, op. cit., note 34, Article 64-65

67 Decision and Ruling of the Constitutional Court of the Republic of Croatia No. U-I-144/2019, *op. cit.,* note 62, para. 27

68 *Ibid*., para. 28

69 *Ibid*., para. 29 (3)

and on the example of established discriminatory provisions in the Foster Care Act, ie establishing that omission of one social group constitutes discrimination, opens equal opportunity for all other legal regulations that do not mention life partnership and their rights.

6. SOME OPEN ISSUES AND DE LEGE FERENDA GUIDELINES

Regard to the increasing harmonization of national legislation with the acquis communautaire, numerous problems and open issues in the field of same-sex community, formal or informal, continue to arise. Hageanu states that judgment in the *Comman* case raises a number of other issues such as immigration, tax law, child protection law, as well as other issues related with rights of same sex partners.[70] What Oprescu sees as an additional outstanding issue that the CJEU will certainly address in the future is the issue of recognizing same-sex marriage concluded in a non-EU country, with one partner being an EU citizen, as well as marriage between same-sex partners who have married in a MS of the EU and where child has been adopted.[71] Valenti points out that the new approach of European supranational courts and the US Supreme Court is launching a meaningful dialogue between lower courts, state legislators and civil society in order to gradually achieve the full meaning of the principle of non-discrimination on the basis of sexual orientation. Therefore, it is possible to say that the current question is not whether same-sex marriage is constitutional, but who decides on that matter.[72] What is certain is that the judgment in the *Comman* case paved the way for both, freedom of movement and many other fundamental rights that EU citizens enjoy. Therefore, the *de lege ferenda,* recognition of the legal effects of same-sex marriage and life partnerships needs to be harmonized in the form of a directive at EU level.[73] In addition, changes need to be made as well to the definition of cohabitation at EU level because EU legislation does not distinguish between homosexual

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70 Hageanu, *op.cit.*, note 53, p. 154

71 See more: Oprescu, M. A., *Notice de conjoint "in the Sens de la Directive 2004/38 du Parlement européen et du Conseil, du 29 April 2004*, Synergies Roumanie, *vol.* 13, 2018, p. 131-142

72 See more: Valenti, V., *Principles of Non-discrimination on the Grounds of Sexual Orientation and Same-Sex Marriage. A Comparison between the United States and the European Case Law*, in: Pineschi, L. (ed.), General Principles of Law - The Role of the Judiciary, Springer International Publishing Swizerland, 2015, p. 215-242

73 The European Parliament adopted in 2010 a Resolution on aspects of civil law, commercial law, family law and private international law of the Stockholm Program Implementation Plan (2010/2080), the purpose of which is to recognize documents on the effects of citizenship in the EU. Such a resolution is certainly a good step towards achieving the ultimate goal, but it does not impose an obligation on Member States, and this document and EU case law could be a good basis for drafting a directive that would oblige Member States to exceed the current one to recognize the effects of civil status.

and heterosexual cohabitation. As Lucić, Duić and Muhvić state, obstacles to the harmonization of national standards of legal protection of cohabitation are found where EU legislation should operate, in the national laws of the MS.[74] The CJEU makes a number of decisions supplementing EU legislation, but only legislation regarding the distinction between heterosexual and homosexual extramarital unions would also greatly contribute to the strengthening of same-sex unions and their rights. It is necessary to adopt a directive that would address the issue of recognizing the impact of same-sex marriages and registered partnerships, even in those countries that do not know such a form of community in their legislation, which would also define the concept of informal heterosexual and homosexual communities. In addition, it is also necessary to insert the concept of life partners in all European directives concerning family rights, marital and extramarital partners. According to Rijpma and Koffeman, an approach based on mutual recognition of relations in the MS would allow for an inclusive definition of the family, while respecting the division of competences between the EU and its MS.[75] From the judgment of the CJEU in the *Maruko* case to the judgment in the *Coman* case, and with the similar position of the ECtHR in the *Oliari and Others v Italy* case, there are a number of adopted principles and protection of same-sex communities witch can use as a basis for the adoption of a directive aimed to harmonizing the procedures for recognizing same-sex marriages and registered partnerships in order to exercise the fundamental rights guaranteed by the EU and international law.

At the Croatian level, research conducted for the purposes of this paper has shown that there is no uniformity in Croatian legislation when it comes to mentioning the rights of persons living in formal or informal life partnerships. Thus, for example, the Social Welfare Act recognizes the term life partner, ie the term formal and informal life partner, and thus equates such a community with a marital or extramarital union.[76] The Foster Care Act, therefore, does not recognize the concept of life partner and omits to regulate the issues of foster care by same-sex partners. The Family Act recognizes the concept of life partnership of persons of the same sex and elaborates their rights in its provisions, but in Article 1 (1), when the scope of that law is stated, it omits the application to formal and informal life partnership

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74 See: Lucić, N.; Duić, D.; Muhvić, D., *Izvanbračna zajednica: analiza međunarodnih i europskih normi u svrhu stvaranja nacionalnih standarda*, Zbornik Pravnog fakulteta u Nišu, year LIX, no. 86, 2020

75 Rijpma, J.; Koffeman, N., *Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?*, iIn: Gallo D.; Paladini L.; Pustorino P. (eds.) Same-Sex Couples before National, Supranational and International Jurisdictions. Springer, Berlin, Heidelberg, p. 455-491

76 Social Welfare Act, Official Gazette no. 130/17, Article 123 (a)

of persons of the same sex.[77] The Pension Insurance Act recognizes the concept of life partnership and provides for certain rights as well as for marital and extra-marital partners.[78] According to the Life Partnership of Persons of the Same Sex Act, referring to the provisions of the law governing inheritance, the life partner is equal to the spouse in inheritance, and children over whom he has partner care are equal to children born in a marital union.[79] It is clear that this provisions provides protection with regard to the inheritance of life partner, but the Inheritance Act also does not recognize the concept of life partnership in its provisions.[80] Also, the Life Partnership of Persons of the Same Sex Act prescribes the same tax position in terms of privileges, exceptions and obligations, which is granted to spouses and their children, in accordance with a special law governing real estate tax, while the Real Estate Sales Tax Act,[81] as well as the General Tax Act[82] does not recognize the concept of life partnership. Nevertheless, if Croatian legislation recognizes all the rights of persons in same-sex communities on an equal footing with those enjoyed by spouses, it is necessary to introduce the term "formal and informal life partner" in order to ensure equality and non-discriminatory provision in all legislation related to marital and extramarital unions. Therefore, after the CCRC has determined that omission of a certain social group of persons in the provisions of the Foster Care Act is discriminatory, it is proposed to introduce the concept of formal and informal life partner in all Croatian legislative governing the rights and obligations of family, marital and extramarital unions, with the purpose of preventing discriminatory interpretation of the provisions of certain laws, and thus legal certainty.

7. CONCLUSIONS

In this paper, there was a discussion on sexual orientation discrimination in the EU. Following the international and European standards of protection against sexual orientation discrimination, a brief analysis of the current level of guaranteed rights of same-sex communities in EU MS is presented. After analyzing the practice of the CJEU, by which the EU has developed over time the increasing

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77 Family Act, Official Gazette no. 103/15, 98/19, *"This law regulates marriage, cohabitation of women and men, relations between parents and children, measures to protect the rights and welfare of the child, adoption, guardianship, alimony, compulsory counseling and family mediation, and procedures related to family relations and guardianship "*, Article 1 (1)

78 Pension Insurance Act, Official Gazette no. 151/14, 33/15, Article 22 (a)

79 Life Partnership of Persons of the Same Sex Act, op. cit., note 34, Article 55

80 Inheritance Act, Official Gazette no. 48/03, 163/03, 35/05, 127/13, 33/15, 14/19

81 Real Estate Sales Tax Act, Official Gazette no. 115/16, 106/18

82 General Tax Act, Official Gazette no. 115/16, 106/18, 121/19, 32/20, 42/20

protection of same-sex communities from sexual orientation discrimination, the impact of latest revolutionary judgment in the *Comman* case on changes to Romanian legislation was analyzed in the field of recognizing the impact of same-sex marriage concluded abroad. Judgments of the CJEU are binding MS and they should comply with them. An analysis of Romanian legislation has shown that Romania has not changed its legislation in the direction of the CJEU decision, refusing to do so, citing the fact that Romania does not recognize any form of same-sex communities and does not intend to change its legislation. Misinterpreting the CJEU judgment, Romania disregarded such a decision and refused to acknowledge the effect of a same-sex marriage concluded abroad. At the time of completion of this paper, the consequences for such deafness to the CJEU judgment by Romania, were absent. An analysis of Croatia's approach to recognizing the impact of same-sex marriages concluded abroad has established that Croatia is fully complying with CJEU decisions. Although Croatian legislation does not recognize the institute of same-sex marriage, every same-sex marriage concluded abroad by Croatian citizens is entered as a note on the life partnership of persons of the same sex in the Registry of Birth Certificates. Such recognition, although degraded into a life partnership in the Croatian system, has the effects of marriage and is equated with extramarital and marital unions, and life partners are guaranteed freedom of movement and the right of residence as a family member. However, based on the analysis of the judgment of the CCRC, it was established that the omission of one social group such as life partners from the Foster Care Act is a discriminatory provision and prevents life partners from fostering, even their own relatives. Although all rights of life partners are provided by the Same-Sex Life Partnership Act, the analysis shows inconsistency in Croatian legislation in emphasizing the rights of life partners. The omission of life partners from such legal provisions may lead to a discriminatory interpretation of such provisions, and it is proposed that, regardless of the provisions of the Same-Sex Life Partnership Act, life partners should be explicitly listed in all legal provisions relating to family rights, marital and extramarital partners in order to achieve legal certainty and equality. It is also proposed that a directive be adopted at EU level to recognize the effect of same-sex marriages or life partnerships in all MS for the realization of fundamental human rights and freedoms, regardless of whether a MS recognizes such or similar rights to same-sex communities. In addition, it is necessary to insert the concept of life partners in all others European directives concerning family rights, marital and extramarital partners. This would be a major step in protecting the fundamental human rights and freedoms to which every person is entitled, regardless of his or her marital, extramarital or partnership status.

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UDK 342.727:342.565.2(497.5)
Review article

FREEDOM OF EXPRESSION OF THE MEDIA AND VIOLATION OF PERSONAL RIGHTS (CONSTITUTIONAL FRAMEWORK AND PRACTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA)

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ABSTRACT

In democratic societies, a lot of time and effort has been invested in creating the conditions for the freedom of the public media, setting impressive standards that must be respected but further developed. In their activities, the media is obliged to respect the personality of the people, that is, the freedom of man, therefore democratic societies must find ways to strike a balance between two fundamental rights, equal in value to the Constitution and the European Convention: the right to privacy and the right to freedom of expression. The problem arises when the media do not function in the service of the public interest but in the service of the immediate interest of the public (curiosity, sensationalism and desire for the highest circulation and profit), which inevitably entails acting outside the permissible limits. The state, through the judiciary, seeks to remedy violations resulting from freedom of expression, however, the Croatian judiciary still does not adequately respond to all the challenges posed by the daily development of the media, as well as those developed through the positions and principles of the Constitutional Court and the European Court of Human Rights. Perhaps one of the problems is that cases related to freedom of the media and infridgements of the rights of the person very rarely end up before the Supreme Court, which has one of the constitutionally guaranteed roles and that is harmonization of case law, so this type of cases are often resolved (closed) before lower instance courts. The Constitutional Court, like the European Court of Human Rights, has issued a significant number of decisions that have developed principles regarding freedom of expression, in particular freedom of expression of the media. The recent cases decided by the Constitutional Court are in support of the above, and in recent decisions it has decided principled positions that are applicable in all cases assessing a possible violation of freedom of expression, setting boundaries in the protection of freedom of expression and the protection of the rights of the person. In light of the above, the paper (analysis method and comparative method) will look at the constitutional framework of the right to freedom of thought and expression, to analyze the characteristics of

the right to freedom of expression, and to give an overview of the principled positions as well as the reasons why some constitutional complaints are upheld and some rejected, including a critical review of three decisions taken.

Keywords: *freedom of expression, media, personality*

1. INTRODUCTION

Freedom of expression, and therefore freedom of media, is regulated in all constitutions, declarations and laws. The most famous and shortest text regulating freedom of speech is the First Amendment of the United States Constitution[1], which states that the Congress shall make no law abridging the freedom of speech, or the press. Freedom of speech is a fundamental human right, and this extends to freedom of the media, given that modern communication takes place through the media. Even though professional journalism should be based on truthfulness, fairness, accuracy, balance and impartiality, we witness that the media do not practice sufficient responsibility for the information they publish, leading to the rise of a sort of media "violence" whose victims are most often (exposed) individuals. Freedom of thought and expression are protected by Article 38 of the Constitution of the Republic of Croatia.[2]

Freedom of expression of thought entails freedom of press and other media, freedom of speech, freedom of public opinion, and freedom of establishment of all institutions of public communication. This freedom, however, is not absolute, given that Article 35 of the Constitution guarantees each citizen legal protection of their personal and family life, dignity, reputation and honor. In their practices, the media are obligated to respect human personality, in other words, individual freedom, so democratic societies must find ways to reconcile the highest standards of freedom of media workers and the highest standards in protection of freedom (personality) of citizens, which is sometimes jeopardized by these same media. These standards are adopted and, through its principled positions, upheld by the Constitutional Court in its more recent decisions. This topic has lately gained a lot of attention among the general public, as well as the legal and journalist professions. The paper consists of six chapters. Following an introductory overview, the second chapter discusses the characteristics of the right to freedom of thought and personality rights. The third chapter provides relevant legal foundations and restrictions to the right to freedom of expression. The fourth part deals with liability for damage. The fifth chapter analyzes Constitutional Court decisions, outlines

[1] [http://www.prafak.ni.ac.rs/files/nast_mat/Ustav_SAD_sprski.pdf], Accessed 30 March 2020

[2] Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14, hereinafter the Constitution

principled positions, and discusses reasons for upholding or rejecting constitutional complaints. Finally, the sixth chapter presents concluding remarks.

2. RIGHT TO FREEDOM OF EXPRESSION

According to some authors, the right to freedom of expression stems from the right to freedom of speech and "was created as a safeguard to those who hold opinions that differ from the state's or from the majority of its citizens'."[3] Alaburić V. thinks the individual right to freedom of expression (as a fundamental personal right) is expanded by the democratic right of citizens to access information (collective political right of the public, i.e. the citizens). The right to freedom of expression is among fundamental political freedoms and rights derived by constitution-makers from the highest values of the constitutional order, above all – freedom. This is a constitutionally and conventionally established and protected human right and fundamental freedom and is elaborated according to standards of organic law to allow its further exercise and protection.

Taking into account the European Convention on Human Rights and Fundamental Freedoms[4] (hereinafter: Convention), which clearly states in Article 10 that "everyone has the right to freedom of expression," and considering the constitutional position of the European Convention in the constitutional framework of the Republic of Croatia, it follows that the right to freedom of expression pertains to all natural persons and legal entities, citizens and foreigners, and to legal entities under the jurisdiction of the Republic of Croatia.

According to Article 38 of the Constitution, freedom of expression entails freedom of expression of thought, freedom of speech and public opinion, freedom of press and other media, and freedom of establishment of all institutions of public communication. Its restriction (like any other human right restriction) is possible only for the reason prescribed by Article 16 of the Constitution and in circumstances prescribed in Article 17 of the Constitution.[5] However, the right to free-

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3 Smerdel B., *Ustavno uređenje europske Hrvatske*, Zagreb, 2013, pp. 320-325

4 European Convention on Human Rights [https://www.echr.coe.int/Documents/Convention_ENG.pdf], Accessed 10 March 2020

5 Article 16 of the Constitution states: "Freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, the legal order, and public morals and health. Any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in each individual case." Article 17 of the Constitution states: "Individual constitutionally guaranteed freedoms and rights may be restricted during a state of war or any clear and present danger to the independence and unity of the Republic of Croatia or in the event of any natural disaster…. The extent of such restrictions must be appropriate to the nature of the threat, and may not result in the inequality of citizens with respect to race, colour, gender, language, religion, or national or social origin."

dom of expression is specific in relation to other rights and freedoms in that it is also affected by the constitutional prohibition from Article 39, stating that any call for or incitement to war or use of violence, to national, racial or religious hatred, or any form of intolerance shall be prohibited and punishable by law.

The right to correction of published information is protected by Article 38, paragraph 5 of the Constitution[6], which implies the media have a right to make mistakes, but also establishes the right to legal action against the journalist or institution whose information violated the right of the natural person or legal entity. In the part pertaining to individual and political rights, the Constitution guarantees respect for and legal protection of each person's private and family life, dignity, and reputation (Article 35).

2.1. Personality rights

There is no unequivocal and final definition of personality rights. These are the rights inherent to each natural person, obtained upon birth. In Article 22, Paragraph 1, the Constitution states that a person's personality is inviolable. Personality rights encompass the right to life, to physical and mental health, reputation, honor, dignity, name, privacy of personal and family life, freedom etc. (per Civil Obligations Act[7], Article 19, paragraph 2). Legal entities are also entitled to personality rights, other than the rights pertaining to the biological character of a natural person. Through such a general definition of personality rights, the Constitution enables their legal protection by determining a range of rights falling under its scope. In so doing, the COA leaves the range of personality rights open-ended, not limited by exhaustive enumeration, making the COA favorable to the injured party. In practice, however, this position requires additional effort on the judges' part in evaluating specific circumstances of the case, especially if the alleged violation is not described in the COA provisions. As a result, courts determine personality rights protection on a case-by-case basis, extending protection to personality rights not explicitly described in the COA. Given the importance this discussion places on the right to dignity, reputation and honor, we provide its definitions below.

In case law, violation of dignity is cited as a subjective impression a person has, caused by an external stimulus or offensive behavior of those in his or her sur-

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6 Article 38, paragraph 5 of the Constitution states: "The right of correction is guaranteed to anyone whose constitutionally and legally established rights have been violated by public communication."

7 Official Gazette No. 35/05, 41/08, 125/11,78/15 and 29/18; hereinafter: COA

roundings.[8] Reputation is regarded as recognition of honor or dignity manifested or expressed as respect for the person in his or her social environment.[9] Honor and dignity on the one hand, and reputation on the other, can be threatened by the act most commonly referred to as insult or defamation. Insult is defined as any belittlement or disrespect of another person's honor, dignity or reputation. Defamation is defined as asserting or disseminating in front of a third party a false claim about another person which can damage his or her honor or reputation in their social environment.[10] Insults and defamation disseminated in the media are considered more severe, as they can result in a greater violation of personality rights.

The media generally retain the right to write about all public affairs, but they are obliged to check the facts and publish only truthful information. Citizens' reputation, honor, dignity and privacy must be respected. "Journalists may not, without consequence, make up (possibly for sensationalist purposes) factual and unverified information about a person, manipulate public opinion, publish superficial news or news of dubious origin."[11]

3. RELEVANT LEGAL SOURCES

The constitutional right to freedom of expression, as a human right and fundamental freedom, is developed in organic laws in accordance with the Constitution. Specifically, we will describe only a few organic law provisions relevant to understanding the concept and scope of the right to freedom of expression, and the applicable law governing the practice of the Constitutional Court and the ECHR. Apart from the constitutional provisions mentioned above, the legal basis for exercising and protecting freedom of expression and personality rights (their constitutional framework) are provisions of the European Convention and the Charter of Fundamental Rights, laws elaborating the right to freedom of expression, views held in individual cases by the ECHR and the Court of Justice of the European Union in Luxembourg, and the Constitutional Court of the Republic of Croatia.

8 Compare Supreme Court Judgment No. Revr-60/14 of 28 April 2015

9 Bačić F.; Pavlović Š., *Komentar Kaznenog zakona*, Organizator, Zagreb, 2004, p. 713

10 Articles 147 and 149 of the Criminal Code, Official Gazette No. 125/11, 144/12, 56/15, 61/15, 101/17,118/18 and 126/19; hereinafter: Criminal Code

11 Supreme Court Judgment No. Rev-2257/13 of 11 March 2014

3.1. The Convention

The right to disseminate and receive different ideas and information is guaranteed in several international human rights documents, including Article 19 of the UN Universal Declaration of Human Rights[12] and Article 19 of the International Covenant on Civil and Political Rights[13]. However, for the purposes of this paper, it suffices to cover the scope of the European Convention, the more so because it is informed by the original spirit of political ideals and tradition, respect for freedoms and the rule of law as the common tradition of the European civilizational and cultural circle, which Croatia is part of. Also, the jurisdiction of the ECHR is recognized in matters of human rights protection in the Republic of Croatia, and through the judicature of the ECHR, the interpretation of the content of those rights has gained a new dimension. In light of this, Omejec J. rightfully pointed out: "By the nature of things, it is moot to talk about compliance to the Convention, i.e. applying European Court practices, if the signatory state limits it to decisions made by this court in relation to the state in question. Namely, European constitutional standards stem from the totality of this court's jurisprudence."[14]

Article 10, paragraph 1 of the Convention guarantees every person the right to freedom of expression. This right entails freedom of thought, freedom to receive and disseminate information and ideas without interference from public authorities and regardless of frontiers. International sources of media law highlight three key conditions for restricting the freedom of media: a restriction may be prescribed by law, may be prescribed only to achieve specific interests, and only if it is necessary in achieving those interests.[15] Article 10, paragraph 2 of the European Convention exhaustively predicts possible restrictions to media freedoms: protection of other persons' rights and reputation, preserving court authority and impartiality, national security, public health, public security, public order, preventing disorder or crime, and preventing disclosure of intelligence obtained in secrecy. As seen in the above, Article 10 of the European Convention does not specifically mention freedom of press or journalist freedom, but ECHR's judicature implies that the conventional formulation of freedom of expression entails freedom of the press, i.e. freedom of the media.

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12 The Universal Declaration of Human Rights was adopted and enacted at the General Assembly of the United Nations, Resolution No. 217/III, on 10 December 1948

13 The International Covenant on Civil and Political Rights was adopted at the General Assembly of the United Nations, on 16 December 1966 (Resolution No. 2200 A/XXI), and came into force on 23 March 1976

14 Omejec, J., *Načela i sredstva za priznavanje interpretativnog autoriteta presuda protiv drugih država – iskustvo Ustavnog suda Hrvatske*, Konferencija u Skopju, Republika Makedonija, 1-2 October 2010, Ministarstvo pravde Republike Makedonije u suradnji s Venecijanskom komisijom, p. 8

15 Vodinelić V., *Pravo masmedija*, Fakultet za poslovno pravo, Beograd, 2003, pp. 57-60

The Convention guarantees the inviolability of every person's private and family life, home and correspondence, by a provision protecting citizens from unnecessary interference of the state in their privacy, except in cases of predominant public interest. Here it is also maintained that the right to respect and protection of privacy, dignity, reputation and honor is not an absolute right of citizens, and may be restricted in order to protect the guaranteed freedom of thought and expression, i.e. freedom of the media. A fundamental issue arises in how to resolve in a fair and proportional way possible conflicts between the right to freedom of expression and the right to respect and protection of personal and family life. This conflict should be resolved in a way that prevents the exercise of one right or freedom from encroaching on and suppressing the other, applying instead a degree of restriction to each of the conflicted rights, to preserve the other right or freedom. The principle in determining the limits of freedom of expression as opposed to the right to privacy is that of "justified interest."

3.2. Media Act

The Media Act[16] is a fundamental act of Croatian media law. It is in nature an organic law replacing an older Public Communications Act.[17] The content of the Media Act was harmonized with the European acquis, particularly the part pertaining to human rights and fundamental freedoms, and with Recommendations and Declarations of the Council of Europe. Provisions of the Media Act are applied and interpreted in accordance with the European Convention. This is because the ECHR, through its judicature, reserves the right to interpret the content of human rights protected by the European Convention and those violated by public authorities, requiring that interpretation of the Media Act be compatible with the ECHR's judicature.

In this manner, the Media Act prescribes what freedom of the media entails, what is prohibited, who has the right to protection of privacy and to which degree, as well as the level of privacy protection. While protecting values such as dignity, reputation and honor, the Media Act does not specifically define them.

3.3. Civil Obligations Act

In all matters otherwise or not at all regulated by provisions of the Media Act (lex specialis), provisions of the Civil Obligations Act (lex generalis) apply, according to the principle of subsidiarity. This is the case in the part regulating establishment

[16] Official Gazette No. 59/04, 84/11 and 81/13

[17] Public Communications Act, Official Gazette No. 83/96

of liability for damage, but only where liability for damage is not otherwise regulated by the Media Act, which specifically pertains to exculpatory clauses from Article 21, paragraph 4 of said law. In this way, provisions of the COA complement provisions of the Media Act, and they are subject to cumulation (more on non-material damage below).

4. DAMAGE LIABILITY

In modern democratic states, personality rights of every person are subject to special protection. The right to compensation for non-material damage due to infringements of rights to reputation, honor and dignity stems from Articles 35, 37 and 38 of the Constitution.

The Media Act defines damage as the reduction of a person's property or prevention of its increase (material damage) and infliction of physical or mental pain or fear (non-material damage).[18] The COA defines damage as reduction of someone's property (pure economic loss), prevention of its increase (loss of profit) and violation of personality rights (non-material damage).[19] The main difference between ways of remedying the damage according to these two laws is that The Media Act, as a lex specialis, regulates remedying damage caused by publishing of information in the media, while the COA prescribes compensation for damage caused by any means.

In particular, Article 22 of the Media Act prescribes the following remedies for non-material damage: non-pecuniary – by publishing corrected information and publisher's apology[20] and pecuniary – by paying a compensation per general provisions of the Civil Obligations Act.

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18 Article 21, paragraph 2 of the Media Act

19 Article 1046 of the COA

20 At the 4th Session of the Civil Law Department, No. Su-IV-270/17-10 of 18 December 2017, the Supreme Court adopted a new legal position on the issue of remedying non-material damage by issuing a final judgment in the media. It stated as follows: "… issuing a final judgment in the press is an acceptable form of remedying non-material damage to the injured party in a procedure regulated by the Media Act." The Supreme Court's current practice (upheld by the Constitutional Court's Decision No. U-III-1162/2012 from 9 May 2012) maintains the legal position that the provision of Article 22 of the Media Act does not include remedying non-material damage in the form of publishing the judgment awarding compensation to the injured party for non-material damage caused by publication of information in the media. Such practice, according to Ivica Crnić's view, is wrong, because Article 22 of the Media Act covers non-pecuniary remedies and states these, as a rule, consist of publishing a correction of information and publisher's apology. The expression "as a rule" does not preclude the injured party's right to have the remedy designated in the form of publishing the judgment. "With such an interpretation, the Supreme Court harms victims of the media, by depriving them of the right to have their remedy in the form of publishing the judgment which states that their personality rights

The lawmaker's intention to resolve non-material damage disputes of this kind primarily out of court by providing redress to the injured party in the form of publishing a correction of contested information in the media, or an apology when correction is not possible, or in the form of reply to the published information. However, most disputes arising from publication of contested information are resolved in civil procedure and the injured party is awarded just pecuniary compensation.

Judging by relevant case law, publication of the final judgment, correction of information or apology[21] do not entirely eliminate the damage. It should be taken into account that not all readers, listeners or viewers see or hear the apology or correction, nor do news on correction and apology spread as much as do those of the original (offensive) information. False, incorrect and offensive information has an impact and spreads even after a correction has been made. Corrections are often published (contrary to Article 41, paragraph 1 of the Media Act) inconspicuously, in the final pages, at the bottom of the page, and the correction text is often shortened and edited. For the above reasons, it is possible to cumulate requests for non-pecuniary compensation (Article 1099 of the COA and Article 22 of the Media Act) and requests for just pecuniary compensation (Article 1100 of the COA).

An injured party is entitled to file for compensation of non-material damage only if they have previously requested correction of contested information or publisher's apology where correction is not possible. Submission of this request is a procedural prerequisite for filing a claim[22] for just pecuniary compensation. Just pecuniary compensation must take into account both the interests of the injured party and the interests of the community. It is therefore not acceptable to put a media outlet out of business by imposing too high a compensation, or to use it as a means of private punishment[23]. In individual claims judges have a great responsibility in striking a balance between the right to freely report on current events in the media and the right of each person to protection of reputation, honor, dig-

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have been violated by the media." Crnić, I., *Zakon o obveznim odnosima s izmjenama iz 2018. i dodatnom sudskom praksom*, Organizator, Zagreb, 2018, pp. 1830 -1836

21 "The purpose of correction is to correct false or incomplete information. Publication of an apology pertains to offending statements, as only false statements can be corrected, and not offensive ones." Skoko, B., *Objavljivanje neistina i manipuliranje činjenicama u hrvatskim medijima i mogućnost zaštite privatnosti, časti i ugleda*, Politička misao, Zagreb, 2007, pp. 93-94

22 The claim may be filed not later than within three months from the day of learning about the publication of the information which caused the damage. This is treated as a preclusion period (Article 23 of the Media Act).

23 For example, in Austria, compensation in such cases in limited to 50,000 euros; in Italy the limit is 30,000 euros. Radolović, A., *Odnos prava osobnosti i medijskog prava*, Pravni fakultet Sveučilišta u Rijeci, 2007, p. 44

nity, privacy and other personality rights from lies, defamation and insult. Once a court determines liability for damage, the judges decide the just compensation amount on the basis of their knowledge and experience, taking into account the circumstances of the present case. Therefore, in determining just pecuniary compensation, the court needs to consider the circulation of the media in question, as well as the width of the audience who had access to the information (e.g. whether the media outlet operates on a national, local, regional scale). Also, it needs to consider whether this information was circulated by other media, all while taking into account the injured party's personal and professional life and family status.[24]

When determining liability of media for damage, the ordinary court must take into account whether the published information is fact-based. "The facts are either there or not. They may be agreeable or disagreeable to the person they refer to, but they must be facts."[25] This means courts must take into account whether research prior to publication was done by the media in good faith and in accordance with professional standards of fact-checking (per ECHR – the more serious the claim, the firmer its factual basis must be).[26] The media are entitled to report on all events and are not liable for writing about a person in a negative context. However, if the claims are proved to be unfounded or constitute a severe breach of privacy, dignity, honor or reputation, the media should be aware of serious consequences such claims can have for the person targeted, and as such, the publisher is liable for them.

However, if the media report a person's statement (conversation, interview, statement at a public forum or public discussion) which is damaging to the person referred to, the person is responsible for their own statement. In conclusion, when deciding the media's liability for damage, ordinary courts must take into account all circumstances of the specific case, apply the principled positions of ECHR and the Constitutional Court, and come to a decision which will resolve in a fair and proportionate way the dispute between right to freedom of expression and right to respect and protection of private and family life.

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24 For comparison, see Supreme Court Decision No. Rev-1114/09 of 15 October 2009. In this case, courts took into account the injured party's profession and family status

25 Supreme Court Decision No. Rev-1261/97 of 29 August 2001 and No. Rev-2257/13 of 14 March 2014; Constitutional Court Decision No. U-III-4056/03 of 5 July 2007

26 For comparison, see Constitutional Court Decision No. U-III-5408/08 of 4 April 2012, which references legal positions expressed in the case *Europapress holding d. o. o. v. Croatia, No*. 25333/06 of 22 October 2009, par. 66

5. PRINCIPLED POSITIONS AND CURRENT CASE-LAW OF THE CONSTITUTIONAL COURT

Even though the Constitutional Court has taken its principled positions on the meaning, scope and limitations of freedom of speech in its earlier decisions, it still continues to develop its own case-law relevant to the need to protect freedom of expression, all while respecting and adopting recent case-law of the ECHR. In this manner, the Constitutional Court has adopted, in its recent decisions, a set of principled positions applicable in all cases related to violation of freedom of expression (freedom of the media) on the one hand, and protection of personality rights on the other. We outline them below.

Pluralism, tolerance, and freedom of thought, as foundations of "democratic society," require the right to freedom of expression to apply not only to "information" or "ideas" that are favorably received or regarded as inoffensive, but also to those that offend, shock or disturb. Exercising these freedoms entails responsibilities, which makes them subject to formalities, conditions, restrictions and penalties prescribed by law and necessary in democratic societies. Such restrictions must be unambiguously interpreted and reasonably justified (for comparison, see cases *Guja v. Moldova* and *Bédat v. Switzerland)*.[27]

The right to freedom of expression is not an absolute right. Freedom of expression can be restricted if necessary in democratic society, and for this purpose a test of necessity was devised. The test of necessity in democratic society requires that the court handling the "claim" for restricting someone's freedom of expression determine whether such restriction is necessary and proportional to a legitimate goal in a democratic society, and provide sufficient and relevant reasons for doing so (for comparison, see *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland).*[28] Restriction of freedom of expression must be considered in the context of the entire case, including the content of statements and their context (compare *Europapress holding d.o.o. v. Croatia).*[29]

When assessing proportionality of interference, a distinction between facts and value judgments needs to be made. While the existence of facts can be demonstrated, the truth of value judgments can not, and as such should not be required. In order to distinguish whether a statement is a fact or a value judgment, circumstances of the case need to be taken into account, as well as the "general tone"

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27 *Guja v. Moldova,* No. 14277/04, of 12 February 2008, par. 69 and *Bédat v. Switzerland No*. 56925/08 of 29 March 2016, par. 48

28 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland,* No. 931/13, of 25 June 2017, par. 164

29 *Europapress holding d.o.o. v. Croatia*, No. 25333/06 of 22 October 2009, par. 54

of the contested statement, keeping in mind that statements on topics of public concern tend to be value judgments, and not facts (for comparison, see *Morice v. France*).[30]

The media enjoy a broad scope of protection, which extends to journalists' research and inquiry prior to publication, as well as to protection of news sources (for comparison, see *Goodwin v. United Kingdom* and *Sanoma Uitgevers B.V. v. Netherlands).*[31]

Freedom of the media is conditional upon journalists' conduct in good faith and according to professional ethics (for comparison, see *Stoll v. Switzerland* and *Pedersen and Baadsgaard v. Denmark*).[32]

Freedom of media may not overstep certain limits, especially with regard to reputation and rights of others, but it should be maintained that its primary purpose is to convey information and ideas on all matters of public interest (in line with their obligations and responsibilities). Media have a duty to convey information and ideas, and the public has the right to receive them. If this were not the case, the media would not be able to exercise their role of "public watchdog" (for comparison, see *Satakunnan Markkinapörssi Oy and Satamedia Oy* and *Magyar Helsinki Bizottság v. Hungary).*[33]

When statements are given in political debate on a topic of public interest, only the most basic limitation of freedom of speech is acceptable. When it concerns politicians, limits of acceptable criticism are wider than with private individuals. Unlike private individuals, a politician has inevitably and knowingly exposed himself to close scrutiny of his every word and deed, and accordingly has to display a greater degree of tolerance (for comparison, see *Sürek v. Turkey; Mladina d.d. Ljubljana v. Slovenia; Lingens v. Austria* and *Lopes Gomes da Silva v. Portugal).*[34]

In determining whether a contested statement could affect protection of reputation and rights of others, this "conflict" needs to be resolved by evaluating relevant factors which include, on the one hand, right to freedom of expression, and on

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30 *Morice v. France*, No. 29369/10 of 23 April 2015, par. 126

31 *Goodwin v. United Kingdom*, No. 17488/90 of 27 March 1996, par. 39. and *Sanoma Uitgevers B.V. v. Netherlands*, No. 38224/03 of 14 September 2010, par. 88-92

32 *Stoll v. Switzerland*, No. 69698/01 of 10 December 2007, par.103 and *Pedersen and Baadsgaard v. Denmark, No*. 49017/99 of 17 December 2004, par. 78

33 *Satakunnan Markkinapörssi Oy and Satamedia Oy*, *op. cit.*, par. 125 and 126; *Magyar Helsinki Bizottság v. Hungary*, No. 18030/11 of 8 November 2016, par.165

34 *Sürek v. Turkey,* No. 26682/95 of 8 July 1999, par. 61; *Mladina d.d. Ljubljana v. Slovenia,* No. 20981/10 of 17 April 2014, par. 40; *Lingens v. Austria,* No. 9815/82 of 8 July 1986, par. 42 and *Lopes Gomes da Silva v. Portugal*, No. 37698/97 of 28 September 2000, par.30

the other hand, right to respect of others' personal life (for comparison, see *Von Hannover v. Germany*; *Axel Springer AG* v. *Germany*; *Couderc and Hachette Filipacchi Associés* v. *France and Medžlis Islamske zajednice Brčko and others v. Bosnia and Herzegovina)*.[35] Both rights warrant equal protection and courts have a duty to achieve a fair balance between them. In cases requiring balancing between the two values, the outcome should be the same for the person claiming another's public statement has damaged his or her dignity, honor or reputation as it would be in case of violation of freedom of expression of thought (for comparison, see *Narodni list d.d. v. Croatia*).[36]

To ensure consistency and avoid discretionary decisions regarding fair balance between conflicting rights in a particular case, ECHR listed several criteria for balancing the two in the case *Axel Springer AG*: a) whether the publication contributes to a debate of general interest; b) how well known is the person concerned and what is the subject of the report; c) the prior conduct of the person concerned; d) the methods of obtaining the information and its veracity; e) the content, form and consequences of the publication; f) the severity of the sanction imposed and its chilling effect."[37]

5.1. Constitutional Court case No. U-III-458/2018

The present case concerned articles published in "Večernji list" reporting on "controversial election" of a judge to the State Judiciary Council (for the third time), without constitutional grounds. The judge filed a claim against the publisher and was awarded, at the end of the proceedings, a 50,000.00 kuna compensation for non-pecuniary damage. The Constitutional Court upheld the complaint brought by the publisher, deciding that interference in freedom of expression, guaranteed by Article 39, paragraphs 1 and 2 of the Constitution, was not necessary in a democratic society.

Competent courts determined that the author of contested article made factual claims that the plaintiff should not have applied for office in the State Judiciary Council (hereinafter: SJC) and should not have been elected for it. They also found that the author of contested article did not act in good faith, given that he,

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35 *Von Hannover v. Germany (No. 2*), No. 40660/08 and 60641/08 of 7 February 2012, par. 104 – 107; *Axel Springer AG* v. *Germany*, No. 39954/08 of 7 February 2012, par. 85 – 88; *Couderc and Hachette Filipacchi Associés* v. *France, No*. 40454/07 of 10 November 2015, par. 90 - 93 and *Medžlis Islamske zajednice Brčko and others v. Bosnia and Herzegovina*, No. 17224/11 of 27 June 2017, par.77

36 *Narodni list d.d. v. Croatia*, No. 2782/12,of 8 November 2018, par. 70

37 Constitutional Court Decision No. U-III-458/2018 of 23 May 2019

having a degree in law, was familiar with the content of relevant legislation and its application.

In the present case, the Constitutional Court did not uphold the judgment of ordinary courts that the author of the article made factual claims. While it is indisputable that this is a topic of public interest, the Constitutional Court found that, in the present case, the author made a value judgment (personal opinion of the journalist on interpretation and application of constitutional and relevant law provisions), and not a statement of fact as per ordinary court decision. The journalist's opinion on interpretation of constitutional and other relevant provisions can not *a priori* be considered a statement made in "bad faith," nor can the complainant, as a lawyer by education (nor any other person), be denied the right to a different opinion on constitutional and other law provisions, even when it differs from the commonly held or "official" one. Ordinary courts established that the contested article could publicly hurt the dignity, honor and professional reputation of the claimant as a judge, impute to him behavior incompatible with duties of a judge, and as such provoke the average reader to take a negative view of the claimant as a judge, causing him damage, as occurred in the present case.

The Constitutional Court ruled such judgment as wrong, reasoning that the contested article was inoffensive and, contrary to the courts' opinion, found the content and context of the contested article did not contain criticism directed at the claimant, but rather criticism of the practice of the competent Committee and its alleged negligence in allowing the claimant to apply for office in the SJC for the third time. In conclusion, the Constitutional Court found that, in the present case, courts did not achieve a fair balance between constitutionally guaranteed conflicting rights of the claimant as judge and the complainant as a newspaper publishing company.

5.2. Constitutional Court case No. U-III- 964/2017

The present case concerned a claim lodged in civil procedure by a judge of Muncipal Court of Zadar against the publisher of "Zadarski list" for compensation of damage to honor and reputation caused by publication of an article about events in that court and the actions of its then president. The article claimed that the judge authored an anonymous letter detailing the situation in this court (comparing its president to Goebbels), which circulated among Zadar's public. Courts established that said article caused damage to claimant's reputation and honor and awarded her a 50,000.00 kuna compensation.

The Constitutional Court decided that interfering in rights of the newspaper publisher was not necessary, considering the topic was one of public interest (administration of justice) which is subject to public criticism that may be wider in scope than is the case with ordinary citizens (as long as the criticism is in the public interest and based on facts).

The contested article reported on an anonymous letter regarding the Municipal Court of Zadar and its judges, only on the basis of a statement by the president of that court. Considering the claimant was a judge of this court, it could be asserted that this was a matter of predominant public interest and that publication of information on that event was part of the media's duty in democratic society. The complainant claimed the contested article did not represent his personal opinion or statement, and it was established that the contested article was published on the basis of a statement made by the court's president (which was confirmed by said president). Article 21, paragraph 4 of the Media Act stipulates that the publisher is not liable for damage if the damaging information is based on facts or on claims the author had reasonable grounds to believe to be true and took all required measures to check their veracity, there was legitimate public interest for its publication, and the author acted in good faith.

That courts did not give adequate explanation of the circumstances crucial for the decision on the compensation amount, nor did they explain how the fact that the complainant published a correction of the published article affected their decision. The Constitutional Court referenced ECHR's judgment in the case *Buvač v. Croatia*[38] that the purpose of correction is to allow the publisher to amend the inaccurate perception created among the public about the injured party, allowing him or her to repair the actual damage that could have occurred as a result of the incorrect publication in the media. It also remained unclear whether courts properly took into account that the amount of compensation awarded should not discourage the publisher from publishing similar information of public interest in the future.

The disputed judgments did not achieve fair balance between constitutionally guaranteed conflicting rights of the claimant as judge and the complainant's right to a guarantee of freedom of thought and expression of thought. The decision to uphold the complaint was made by majority decision with the dissenting opinion of one judge.

[38] Buvač v. Croatia, No. 47685/13 of 6 September 2018, par. 25

5.2.1. *Comment on the above decision*

The author disagrees with the final judgment because the complainant did not fulfill basic conditions of acting in good faith, nor did he act in accordance with professional ethics he was obliged to. Taking into account that it was established in the proceedings that the complainant's journalist often writes what is not said and adds what she finds interesting, the president of the court said in a conversation with her that he does not know who wrote the letter, but that, judging by the vocabulary, he suspects it was the claimant. Also, the journalist said in her statement that she tried to contact the claimant in order to check the information (but it was her secretary who picked up), but the claimant said both she and her secretary were on leave during that time. In the present case, there was an omission in checking the veracity of the published information, whereas the value of the information does not contribute to a debate of significant public interest regarding the judicial system. Furthermore, the anonymous letter should have been analyzed in the context in which it was written, that is, internal relations between the judges of the court in question, which makes clear that the letter was not intended for the public, but rather for competent judicial authorities. In the present case, the claimant holds the office of judge, whose practice is essential to the rule of law. Given their role, the operation of courts should enjoy public confidence and protection from unfounded attacks. Courts, like other institutions, are not exempt from criticism and control, but this criticism should not overstep certain limits. Constructive criticism should be clearly distinguished from violations of reputation, honor and dignity on the basis of superficial information (and "exploiting" judges' personal relations), which was not taken into account by the complainant when they published the contested article. Considering all of the above, I think the constitutional complaint should have been rejected.

5.3. Constitutional Court case No. U-III-2944/2018

The complainant was ordered to pay the claimant a 20,000.00 kuna non-pecuniary damage compensation for emotional suffering caused to him by reports published in a column in "Novi list". The claimant filed a civil case for violation of personality rights, alleging that the complainant had made offensive and false claims against him. Ordinary courts decided that the manner in which the article was written and the expressions used indicate that the complainant had intention to offend, and that the work of the claimant could have been analyzed and criticized in a way that did not include offensive terms. They decided the complainant used unacceptable and offensive terms which should not be tolerated, and has thereby overstepped acceptable limits.

The Constitutional Court decided that the second-instance court, in concluding that the complainant's aim was to offend the claimant, neglected the fact that limitations to freedom of thought and expression are considerably lesser in matters of public debate, and that the importance of the debate and the motives of the complainant in contributing to it (which were stated in said article) are not negligible. In the circumstances of the present case, the importance of public debate on said topics in a democratic society cannot be ignored. The Constitutional Court maintains that the complainant's freedom of expression in a public debate, even in the form of criticism directed at the claimant, when provoked by the claimant's stance relevant to the subject of the debate, is independent of whether the claimant was addressing the complainant or writing about him. In other words, the contested article by the complainant and his statements cannot be evaluated independently of the current public debate on that topic in our society (the debate on World War II and the advent of fascism in Croatia).

The Constitutional Court maintained that limits of acceptable criticism are wider when the criticism is directed at politicians, than is the case with private individuals.

By clearly stating his opinions on a topic subject to lively public debate, the claimant should have known it would provoke reactions from his opponents. Therefore he does not enjoy the same level of protection from criticism regarding his views as any other private individual, and the court should have taken this into account. Also, it was noted that the contested article was published in a section titled "Reactions" and it was clearly visible that this was the complainant's reaction (as a reader, not as a journalist) to a previously published article by the claimant. The Constitutional Court reminded that constitutional and conventional provisions on freedom of expression are not applicable only to information or ideas that are favorably received, or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

The Constitutional Court concluded that fair balance was not achieved between constitutionally guaranteed conflicting rights of the claimant and the complainant, and established that the complainant's right to a guarantee of freedom of thought and expression, as vouchsafed in Article 38, paragraphs 1 and 2, was violated.

5.4. Constitutional Court case No. U-III-4336/2017

The present case concerned the complainant's statements about the claimant (former director of HRT)[39] made on HRT where he was presenting his candidate list for the local elections on 8 May 2013, after which he claimed that the claimant was a member of the counterintelligence agency of the former Socialist Federal Republic of Yugoslavia (hereinafter: KOS). The statement was later published on YouTube. The claimant alleged the complainant caused him damage in the form of personality rights violation, for which he was awarded just compensation of 30,000.00 kuna in a civil procedure. The Constitutional complaint was rejected because it was established that interfering with the complainant's freedom of expression was proportional to a legitimate cause – protection of claimant's reputation and honor.

It was established that the statement was false and that it did not contribute to public debate, confirming the decision of the second-instance court. Prior to making the statement, the complainant was interrupted in making a statement that was to be aired on HRT as part of the election campaign, because HRT staff considered it inappropriate and offensive in content. After that, the complainant made negative comments about the event in front of the HRT building, protesting the interruption, claiming it was censorship, and calling HRT staff derogatory names.

The Constitutional Court concluded that alleged or actual prior tolerance of previously made claims about the claimant as a KOS agent does not deprive the claimant of the right to protection of his private life. Given the circumstances in which it was given, the contested statement intended to present the claimant as a member of the former state's counterintelligence agency, which is in itself dishonorable, and all with the aim of harming his reputation and honor. The Constitutional Court determined that the complainant did not act in good faith in making the contested statement. The complaint was rejected by majority decision, with two dissenting opinions.

5.4.1. *Comment on the above decision*

The author disagrees with the final decision, because the statement in question was a value judgment of the complainant and part of public debate, and his right to freedom of expression was violated. In the proceedings, ordinary courts insisted that the complainant prove the veracity of his claims, which they ultimately characterized as a statement of fact. This raises the question of how criteria for free-

[39] Croatian Radiotelevision

dom of expression will subsequently be evaluated and established in the context of political debates and presentations of political programs, given the fact that it is customary in such circumstances to exhibit offensive, shocking, and disturbing behavior, alongside (in these parts, at least) frequent mentions and "exhumations" of former regimes and imputing participation therein. In conclusion, specific circumstances of the present case should have been taken into account. Public figures directly involved in election processes may not invoke the right to protection of reputation, because election processes favor the public interest of freedom of expression and freedom of political speech (for comparison, see ECHR in the case *Karako v. Hungary*).[40] In this context, it was determined that there is only an appearance of conflict of conventional rights to respect of private and family life and the right to freedom of expression (paragraph 17 of the Judgment). In the context of the present case (statement), a relevant interpretation to be considered is the case *Ungváry and Irodalom Kft. v. Hungary*,[41] in which the ECHR established a violation of Article 10 of the Convention in sanctioning an individual for making a statement claiming that a judge of the Constitutional Court of Hungary previously cooperated with communist Hungary's secret services. Considering all of the above, I think the constitutional complaint should have been upheld.

5.5. Constitutional Court case No. U-III-1084/2015

The present criminal procedure concerned the complainant's statement in an interview published on an online portal, in which, when asked by a journalist "Stipe Mesić claimed that veterans gathered in the Defense Headquarters of Croatian Vukovar are the same as Serb rebels in 1991. What is your opinion?", he answered "Stipe is an idiot."

The present case was a criminal procedure against the complainant, filed by the former Croatian president, claiming a criminal offense against honor and reputation committed by insult in the form of a statement made on an online portal. The contested statement by the complainant was given in an interview, as an answer to a journalist's question, and as an opinion on a statement made by the private plaintiff, and the author titled the article "Mesić is an idiot..." Ordinary courts established that the complainant offended the private plaintiff by claiming he is an idiot, the publication of which was accessible to a large number of people. For the criminal offense of insult, the complainant was ordered to pay a compensation of 10,000.00 kuna. Courts established that the complainant had the intention of

[40] *Karako v. Hungary,* No. 39311/05 of 28 April 2009, par. 27-28

[41] *Ungváry and Irodalom Kft. v. Hungary*, No. 64520/10 of 3 December 2013

humiliating and belittling the private plaintiff personally and before the general public.

The complainant claimed that the aim of the contested statement was to condemn the private plaintiff's controversial view. The Constitutional Court concluded that this was a value judgment and not a factual claim and that the complainant was asked to give an opinion on a topic of public interest, wherein both participants are public figures and politicians, and that the complainant's statement was taken out of context. It decided that courts failed to establish all the circumstances of the present case, and failed to provide grounds that it was a criminal offense. It also found that they did not establish the existence of predominant public interest to favor the protection of personality rights of the private plaintiff over the complainant's right to freedom of expression, and insomuch failed to achieve fair balance, whereupon the complaint was upheld. The decision was made by majority, with three dissenting opinions.

5.5.1. *Comment on the above decision*

The author disagrees with the final decision, because a statement made in such a way does not constitute a value judgment. It was directed at the private plaintiff and not the context of what he said and it was not given in good faith – it constitutes an attack on his dignity. The more so because the complainant, as a writer and an intellectual, was aware of the meaning of the words uttered, and the fact he was thereby directly belittling the private plaintiff. Ordinary courts provided detailed statements of reasons with their decisions, including the reasoning that, when someone calls another person an idiot, this cannot be well-intentioned and that it undoubtedly indicates the defendant's intention to humiliate and belittle the private plaintiff personally and before a large public. The topic of the interview were various current events to which the complainant responded by giving his views and opinions. However, when asked to give his opinion on the private plaintiff's statement, he responded with the contested insult. In so doing, he did not express an opinion about his statement, but about his person. For this reason, protection of the right to expression of thought may not be favored over protection of the private plaintiff's right to dignity, especially if the behavior is offensive and demeaning. Insult, humiliation, and hate speech are not protected under Article 10 of the European Convention (for comparison, see ECHR judgment in *Rujak v. Croatia*).[42] For the above reasons, I think the constitutional complaint should have been rejected.

[42] Rujak v. Croatia, No. 57942/10 of 2 October 2012, par. 28-30

6. CONCLUSION

The media have an active role in political life and elsewhere, considering they promote discussion on matters of public interest. The scope of freedom of expression in the media is interpreted widely, given their assigned role of "public watchdog." In that regard, the European Parliament states in its Resolution 1165: "Personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media."[43] In light of the above, protection within the judicial framework will remain an important factor in protecting infringed rights and interests and achieving their fair balance. It is therefore necessary to ensure that the rapidly increasing development of the media and their freedoms is accompanied by a high-quality judicial system. New criteria for submitting revisions to the Constitutional Court will undoubtedly have an impact in this context.[44] As a consequence of these changes, and taking into account the now abundant case-law of the Constitutional Court and the ECHR, ordinary courts will be able to adequately respond to challenges in resolving cases formerly "reserved" for the Constitutional Court. Weighing decisions based on circumstances of each particular case does not oblige only ordinary courts but also the Constitutional Court itself, and in this context the author provided commentary on the three decisions described above. Cases related to freedom of expression on the one hand and protection of personality rights on the other are among the most complicated and "living" proceedings. Alongside their guaranteed standards of freedom of expression, the media have the responsibility to apply their own standards of professionalism in respecting the personal rights of everyone else. The judicial system as a whole, and the Constitutional Court in particular, are to keep building and developing their case-law with the aim of protecting freedom of expression and personality rights.

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43 [http://www.europarl.europa.eu/doceo/document/TA-8-2018-0204_HR.html], Accessed 30 March 2020

44 Until the latest amendments to the Civl Procedure Act, the value of the subject of the dispute for submitting regular revisions was "set too high," while exceptional revisions required an important issue from article 382, Paragraph 2 of the CPA. However, recent amendments to the CPA, Official Gazette No. 70/19, effective from 1 September 2019, removed the criterion of value and introduced revision on request by the Supreme Court (which has to be in the public interest – this was previously reserved for exceptional revisions; Article 382). These changes apply to all cases in which the second-instance decision was made after 1 September 2019 [https://www.zakon.hr/z/134/Zakon-o-parni%C4%8Dnom-postupku], Accessed 30. March 2020

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2. The Universal Declaration of Human Rights was adopted and enacted at the General Assembly of the United Nations, Resolution No. 217/III on 10 December 1948
3. International Covenant on Civil and Political Rights was adopted at the General Assembly of the United Nations, Resolution No. 2200 A /XXI on 16 December 1966 (effective 23 March 1976)

LIST OF STATE LAWS, ACTS AND COURT JUDGMENTS

1. Constitution of the Republic of Croatia, Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14
2. Civil Obligations Act, Official Gazette No. 35/05, 41/08, 125/11,78/15 and 29/18
3. Media Act, Official Gazette No. 59/04, 84/11 and 81/13
4. Criminal Code, Official Gazette No. 125/11, 144/12, 56/15., 61/15, 101/17, 118/18 and 126/19
5. Public Communications Act, Official Gazette No. 83/96
6. Civil Procedure Act, Official Gazette No. 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 28/13, 89/14 and 70/19
7. Constitutional Court Decision No. U-III-5408/08 of 4 April 2012
8. Constitutional Court Decision No. U-III-4056/03 of 5 July 2007
9. Constitutional Court Decision No. U-III-964/2017 of 26 June 2019
10. Constitutional Court Decision No. U-III-2944/2018 of 26 June 2019
11. Constitutional Court Decision No. U-III-4336/2017 of 26 June 2019
12. Constitutional Court Decision No. U-III-458/2018 of 23 May 2019
13. Constitutional Court Decision No. U-III-1084/2015 of 10 December 2019
14. Supreme Court Decision No. Revr-60/14 of 28 April 2015
15. Supreme Court Order No. Rev-2257/13 of 11 March 2014

16. Legal position of the Supreme Court No. Su-IV-270/17-10 of 18 December 2017, Hrvatska pravna revija, May/June 2018
17. Supreme Court Decision No. Rev-1114/09 of 15 October 2009
18. Supreme Court Decision No. Rev-1261/97 of 29 August 2001
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UDK 316.361.15(4-67EU):342.565.2
Professional paper

THE PAST AND FUTURE OF SAME-SEX RELATIONSHIP IN EUROPE (THE ANALYSIS OF EU AND ECTRH LAW STANDARDS IN VIEW OF THEIR INFLUENCE ON NATIONAL CONSTITUTIONAL STANDARDS)

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ABSTRACT

The purpose of this paper is to examine the scope of the CJEU's and ECtRH's standards of protection of same-sex relationships as new modern realities of family life and the same-sex couples' rights, insofar as it concerns human rights – the right to private and family life, dignity, equality and non-discrimination. The legal regulation of same-sex relationships as a family law issue is primarily matter of national law. Consequently, the divergent views on this issue in national jurisdiction raise complex questions requiring adequate answers and clear standards at EU and International (Convention) levels. Therefore, the author (by case study method, normative and comparative analyses) gives an overview of the progress of the protection of same-sex couples' rights on the national level, with particular reference to the Republic of Croatia but also at EU and Convention levels. The paper focuses on the CJEU and ECtRH case law as regards the same-sex relationships and same-sex couples' rights and offers landmark cases with an analysis of the most recent judgments. In connection to the latter, a brief discussion of the nature of EU and Convention legal orders and the role of two European Courts within these legal orders is given as well as their interrelation on this issue. The paper will try to provide an answer to the question how the EU and Conventional law standards that have been established regarding the legal recognition of same-sex relationships and protection of same-sex couples rights influenced a national constitutional standard, with an analysis of two most important decisions of the Constitutional Court of the Republic of Croatia directly concerning the same-sex couples rights.

Keywords: *Same-sex couple, Same-sex marriage, Same-sex partnership, Non-discrimination, CJEU, ECtRH, Constitutional Court of the Republic of Croatia*

1. INTRODUCTION

The legal recognition of same-sex relationships is one of the most controversial topics in modern society that leads to complex legal issues to which different states provide different solutions. These issues include the difference between same-sex marriages and registered partnerships but also unregistered partnerships, as well as the access of same-sex couples to adoption or employment benefits or non-recognition of same-sex relationships in cross-border situations. The legal regulation of same-sex relationships as a family law issue belongs to full competence of each Member State.[1] Consequently there are divergent views in each Member State, and wider on the Convention/Council of Europe level (hereinafter: CoE), starting from a very liberal approach as opening up marriage to same-sex couples to no legal recognition of same-sex relationships, where some Member States defined marriage in their Constitutions as a union of a man and a woman and have thus imposed explicit constitutional ban for same-sex marriages. Therefore, the European Union (hereinafter: EU or Union) and International (Convention) law must find adequate answers and provide a clear legal standard for the protection of same-sex couples.

The aim of this paper is to examine the scope of the two European Courts – the European Court of Human Rights (hereinafter: ECtHR) and the Court of Justice of the European Union (hereinafter: CJEU) standards of protection of same-sex couples as regards human rights – the right to private and family life, dignity, equality, non-discrimination and especially in EU scope, when it has an implication for the internal market, in the sense of family reunification. Firstly, the author, by using a case study method, normative and comparative analyses, gives an overview of legal recognition and the progress of same-sex relationships in Europe. The paper focuses on the regulation of same-sex relationships and protection under national law of the Member States by analysing different models of legal protection in selected national legislations of the EU, and with a particular emphasis on the Republic of Croatia. The paper offers useful insights into the matter of EU regulation and Convention regulation of this issue and provides an overview on the case law of the CJEU and ECtRH, especially landmark cases and analysis of the most recent judgments in this regard. Furthermore, the paper briefly discusses the CJEU's and ECtRH's roles and their interrelation on this issue. A relevant case law of the Constitutional Court of the Republic of Croatia (hereinafter: Constitutional Court) is given as well and the meaning, content and legal effect of the two most important decisions of the Constitutional Court directly concerning same-

[1] About competence of the EU in a cross-border family law, see: Bačić Selanec, N.; Bell C., *Who is a "Spouse" Under the Citizens' Rights Directive? The Prospect of Mutual Recognition of Same-Sex Marriages in the EU*, European Law Review, *vol.* 41, no. 5, 2016, pp. 658-660

sex couples are examined. Finally, the paper will try to provide an answer to the question how the EU and Conventional law standards that have been established regarding the legal recognition of same-sex relationships and protection of same-sex couples influenced a national constitutional standard.

2. LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE

The same-sex relationship in the meaning of law is a relationship between two persons of same sex and it could be formalized in the form of same-sex marriage, registered same-sex partnership - registered before a competent authority or *de facto* same-sex partnership (non-registered union). Discussion about whether to permit same-sex couples to formalize their relationship is one of the most contested issues in Europe and wider, e.g. in the United States (hereinafter: US).[2]

The level of legal recognition and protection of same-sex couples' rights in particular, vary greatly across the Europe, because the regulation of civil status remains within the competence of EU Member States and within the margins of appreciation of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention or ECRH) [3] signatories.

Generally speaking, the acceptance of same-sex marriages and equality of same-sex couples' rights is high in Western and Northern European Member States, whilst it is the lowest in Central and Eastern European Member States.[4] The reasons for divergences are numerous, starting from geographical location, complex history, socio-cultural values, social-democratic tendencies, legal tradition, religious features and political standpoints, whereas on the other hand there are personal motives of same-sex couples to live in non-formal or registered partnerships or in a marriage.

The Nordic Countries were the first in the world to incorporate same-sex relationships into the sphere of traditional family law. The legal development in this area is the trust in democratic processes and lack of challenges through the judiciary[5],

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2 About discussion of same-sex marriage debates within the EU as well as the US, see e.g. Bell, M. *Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union*, European Review of Private Law, *vol.* 12, no. 5, 2004, pp. 613-614

3 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005, signed in Rome on 4 November 1950, and came into force on 3 September 1953

4 Special Eurobarometer 493, Discrimination in the EU in 2019 (publication October 2019), pp. 123-124, https://data.europa.eu/euodp/en/data/dataset/S2251_91_4_493_ENG, Accessed 02.03.2020

5 Friðriksdóttir, H., *The Nordic Model: Same-Sex Families in Love and Law*, in: Gallo, D.; Paladini, L.; Pustorino, P., (eds.), Same-Sex Couples before National, Supranational and International Jurisdictions,

while for example in Germany and Austria, a leading role was played by legislatures, but with the constitutional framework of the state setting the contexts for occasional judicial intervention, and a 'separate but equal' regime of a registered partnership rather than marriage for same-sex couples. The legal status of same-sex couples in Eastern European countries is to a large extent the result of an interplay between the courts and Parliaments in the recognition of same-sex couples within a legal system.

Until the late 1980s, there was no legal recognition of same-sex relationships in the European jurisdiction.[6] Legal recognition of same-sex relationships in Europe began, as stated above, in the Nordic countries[7]. Denmark was the first state to introduce a registered partnership for same-sex couples in 1989. Soon other Nordic and other countries followed Denmark's lead, Sweden (1994), the Netherlands (1997), Spain (1998), Belgium (1999), France (1999), Portugal (2001), Germany (2001), Finland (2001), Luxembourg (2004), the United Kingdom (2004), Slovenia (2005), the Czech Republic (2006), Hungary (2009), Ireland (2010), Austria (2010), Croatia (2014), Malta (2014), Greece (2015), Cyprus (2015), Estonia (2016) and Italy (2016).[8]

The next step in the evolution of the same-sex relationship was the opening up to same-sex marriage. The Netherlands was the first state, which allowed same-sex marriage in 2001 and thus became the first state to depart from the traditional notion that only the persons of opposite sex may enter into marriage. Belgium (2003), Spain (2005), Sweden (2009), Portugal (2010), Denmark (2012), France

Heidelberg: Springer, 2013, p. 161

6 That changed to a large extent, due to the effort and persistence of many organizations and individuals. "In the European jurisdictions the broader legal recognition of same-sex relationship was generally brought through legislation, as a result of the efforts of organisations and political parties. By contrast, outside of Europe, litigation based on constitutional and human rights was more often the way legal recognition of same-sex couples was effected, e.g. in many US states. In European jurisdictions where the legislative route has not fostered progress and there is still no or incomplete recognition of same-sex couples, litigation based on national constitutions and the ECHR can, and presumably will, be utilised to bring about legal reform"; Scherpe, J., M., *The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights,* The Equal Rights Review, Vol. Ten, 2013, p. 83

7 By contrast, see cohabitation, Lucić, N.; Duić, D.; Muhvić, D., *Izvanbračna zajednica: Analiza međunarodnih i europskih normi u svrhu stvaranja nacionalnih standarda*, Zbornik radova Pravnog fakulteta u Nišu, 2020, p. 17

8 For an overview on the legal status of same-sex relationships, see e.g. Boele-Woelki, K.; Fuchs, A. (eds.), *Legal Recognition of Same-Sex Relationships in Europe*, 2nd ed., 2012; Wintemute, R.; Andenæs, M. (eds.), *Legal Recognition of Same-Sex Partnerships* – A Study of National, European and International Law, Hart Publishing, 2001

(2013), the United Kingdom (2014), Luxembourg (2015), Ireland (2015), Finland (2017) and Germany (2017) followed its example.[9]

In many European countries, particularly in Eastern Europe e.g. Poland, Hungary, Bulgaria, Latvia, Lithuania, etc. (but also in Greece) there is a strong opposition to the legal recognition of same-sex relationships. Additionally, some of them in their Constitutions[10] defined marriage as a union of a man and a woman.[11]

As regards the member states of the CoE, twenty-eight out of forty-seven states so far have passed legislation that allows same-sex couples to have their relationship recognized. This lack of consensus among the member states of the CoE confirms that the states generally have a broad discretion as to whether marriages that are entered into abroad, are recognized as marriages.[12]

It could be concluded that Europe is not harmonized about this issue, although today it is one of the most progressive continents in terms of recognizing and legal regulation of same-sex relationships. Acceptance of same-sex relationships is high in Western and Northern European Member States and the difference is only in the form of the relationship whether it is a marriage, registered partnership or informal union[13], whilst it is the lowest in Central and Eastern European Member States. There are six EU Member States i.e. Eastern EU Member States that still have not identified or recognized same-sex relationships in any way[14], and five Member States[15] (also Eastern EU Member States) that have constitutionally "banned" a same-sex marriage.[16] However, the number of same-sex marriages and

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9 Additionally, Canada, South Africa, Iceland and Argentina followed the Netherlands example and the states in the USA: Washington, D.C., Massachusetts, Connecticut, Iowa, Vermont, New Hampshire and New York as well as Mexico City, see: Latten, J.J.; Mulder, C.H.; *Partner relationships in the Netherlands: new manifestations of the Second Demographic Transition*, Genus, *vol*. 69, no. 3, 2013, p. 108

10 Rijpma J., J. *You Gotta Let Love Move: ECJ 5 June 2018, Case C-673/16, Coman, Hamilton, Accept v Inspectoratul General pentru Imigrări*, European Constitutional Law Review, *vol.*15, no. 2, 2019, p. 326

11 Digoix, M., *Same-sex families and legal recognition in Europe,* Cham: Springer, 2020, pp. 12-19

12 See the judgment *Orlandi and Others v Italy* (2017)

13 Scherpe, *op.cit*., note 6, pp. 85-86

14 Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia

15 Hungary, Latvia, Croatia, Lithuania and Slovakia, while Romania has included a provision to that effect in its Civil Code – Article 277(1) of the Romanian Civil Code

16 Tryfonidou, A., *The EU Top Court Rules that Married Same-Sex Couples Can Move Freely Between EU Member States as "Spouses": Case C-673/16, Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, Feminist Legal Studies, *vol.* 27, issue 2, 2019, p. 216; Khan, M. *Europe's quiet new culture wars over LGBTI rights*, Financial Times, 2018, available at: [www.ft.com/content/d027b3c8-f902-11e8-8b7c-6fa24bd5409c], accessed 30.03.2020

other forms of same-sex unions has been increasing and there are general trends towards their regulation and legalization.

3. LEGAL PROTECTION OF SAME-SEX COUPLES IN SELECTED NATIONAL JURISDICTION IN BRIEF

In the light of the above mentioned, the national legislators have developed different models of protection of same-sex couples. Regarding the level of recognition and formalization of same-sex relationships and protection of the rights of same-sex couples, the European countries can be divided into several categories and these are: countries that allow same-sex couples to enter into marriage the same way as the heterosexual couples: Western and Nordic European countries, e.g. The Netherlands, Belgium, Spain, Sweden, Denmark, Germany, etc.; countries that recognize rights of same-sex couples in their laws and some of them allow registering their same-sex union as a registered partnership with the legal effect as almost the same as marriage: e.g. Croatia, Hungary; countries that recognize some rights of same-sex couples as a result of international and national court decisions: e.g. Poland and Romania, countries that passed the laws prohibiting discrimination with regard to sexual orientation in addition to the EU member and candidate states e.g.: Albania, Bosnia and Herzegovina, etc.

The development of favourable same-sex legislation within family law in the Nordic Countries is the fact that changes have been brought about through the democratic process. The Nordic Countries have gradually taken action to reduce exclusion of same-sex couples in family law, starting from the adoption of laws on registered partnership leading up to the acceptance of a gender-neutral marriage in all of the Countries except Finland.

Sweden[17] allowed same-sex couples to register same-sex partnerships in 1994 through the Registered Partnership Act.[18] The informal relationships of both opposite-sex and same-sex couples (couples living habitually together and sharing a joint household) who have not entered into marriage are governed by a Swedish Cohabitation Act (2003). The registration of the same-sex partnership before a competent authority was allowed for same-sex partners before it allowed them to enter into marriage in 2009. Once marriage became an available option for

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17 Jänterä-Jareborg, M.; Brattström M.; Eriksson, L., *Informal relationships - Sweden, National report: Sweden*, 2015, p. 1, available at: [http://ceflonline.net/wp-content/uploads/Sweden-IR.pdf], Accessed 02.03.2020

18 In June 1994 the Swedish Parliament adopted Act No. 1117/1994 on registered partnership, Scherpe, *op. cit.*, note 6, p. 171

same-sex couples (2009)[19], there was no need for the Swedish model of registered partnership.

In 2001, the Netherlands was the first country in the world to legalize same-sex marriage. Prior to this, the possibility to register a partnership before the competent authority was introduced into Dutch legal system in 1998 for both same-sex and opposite-sex couples. There are almost no differences in legal effects between a marriage and a registered partnership[20], so they differ mainly in the way they are established and terminated, whereas informal partnerships take less legal effects than those registered before a competent authority.[21]

In Germany, the traditional resistance toward same-sex marriage has not prevented the national legislators from adopting a regulation introducing same-sex registered partnerships.[22] Germany is an example of a country that, respecting the form as a basis of legal certainty, refused to extend legal effects of formal unions such as marriage and registered partnership to informal partnerships. The German legislator provided for same-sex couples to enter into marriage in 2017. Previously, same-sex couples could enter into a registered partnership thus enjoying the same rights as spouses. The German registered partnership exclusively for same-sex couples was introduced in 2001, but originally there were some significant substantial differences in the legal consequences of marriage and the registered partnership.[23] Many of those were challenged successfully, both politically and in the courts, particularly before the Federal Constitutional Court and the CJEU. According to German legislation, *de facto* partnership did not enjoy protection deriving from family law. The standpoint of the German legislator was that all heterosexual partners wishing to legally regulate their family relations can at any time enter into marriage, whereas same-sex partners can register their partnerships and that the free will of those who do not want it, should be respected. Having allowed all couples, regardless of their gender to enter into marriage, Germany abolished the

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19 *Ibid*, p. 173

20 Schrama, W., *National Report: The Netherlands*, 2015, pp. 1-8, available at: [http://ceflonline.net/wp-content/uploads/The-Netherlands-IR.pdf], accessed 01.04.2019

21 In order for all partners to enjoy the same rights, the law provided for the possibility to alter the previously solemnized marriage into registered partnership. However, this legislative option was dismissed in March 2009 because it was often taken up by partners wishing to end the marriage more easily since the termination of a registered partnership was simpler than the termination of a marriage, and because similar option was not available in other jurisdictions, Latten; Mulder, *op. cit.*, note 9, p. 110

22 Repetto, G., *At the Crossroads Between Privacy and Community: The Legal Status of Same-Sex Couples in German, Austrian and Swiss Law*, in: in Gallo, D.; Paladini, L.; Pustorino, P., (eds.), Same-Sex Couples before National, Supranational and International Jurisdictions, Heidelberg: Springer, 2014, p. 263

23 *Ibid*, p. 272

institution of registered partnership, and has not extended the legal effects of marriage to *de facto* unions since then.

Hungary[24] has recognized informal same-sex couples for several decades and since 1995 the definition of cohabitation has been changed in favour of same-sex couples by the decision of the Hungarian Constitutional Court.[25] The aim of the Hungarian legislature was to allow the formal regulation of both same-sex and opposite-sex partnerships by their registration before a competent authority, which will guarantee their legal protection similar to spouses. However, this has never come to life in Hungary. The Constitutional Court of Hungary found the law unconstitutional even before it entered into force.[26] It applied the reasoning that allowing not only same-sex but also opposite-sex partners to register their partnership would result in duplicating the institution of marriage and violating its special protection under the Constitution. Under the influence of these standpoints, the Hungarian legislator adopted a new act allowing only same-sex partners to formally register their partnership.

Romania, as mainly Orthodox and relatively conservative country, decriminalised homosexuality as late as 2001, after sustained international pressure. Romania does not provide same-sex couples with any form of legal recognition. The constitution of Romania, unlike the constitution of e.g. Bulgaria, Croatia, Latvia, Lithuania, contains a gender-neutral phrasing surrounding 'family' and the Romanian Civil Code does not only define marriage as the union of a man and a woman, but also stipulates that "marriage between persons of the same sex shall be prohibited" and, even more specifically, "marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognized in Romania". In 2016, the Citizens' Initiative "Coalition for the Family" collected three million signatures in support of the definition of marriage as a "union of a man and a woman" in the Romanian Constitution. In October 2018, the Romanians voted in favour of a referendum on marriage. More than 90 percent of voters voted in favour of the definition of marriage as a union between

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24 Szeibert, O., *National Report: Hungary, Informal relationships – Hungary,* 2015, available at: [http://ceflonline.net/wp-content/uploads/Hungary-IR.pdf], accessed 01.04.2019

25 The Hungarian Constitutional Court held in decision No. 14/1995 that marriage was reserved for heterosexual relations, but it found that the exclusion of same-sex couples from common-law civil unions violates the principles of equal treatment and human dignity, see: Bodnar, A.; Śledzińska-Simon, A., *Between Recognition and Homophobia: Same-Sex Couples in Eastern Europe*, in: Gallo, D.; Paladini, L.; Pustorino, P., (eds.), Same-Sex Couples before National, Supranational and International Jurisdictions, Heidelberg: Springer, 2013, p. 227

26 Hungarian Constitutional court decision No. 32/2010, *Ibid*, p. 228

a man and a woman. However, the threshold of 30 percent of the total number of voters was not reached, thus the referendum failed.[27]

Accordingly, the fact that Europe is not unique about the legal recognition of same-sex relationship and protection of same-sex couples has been accounted for in only a few selected national jurisdictions and in support of the argument that there are still diverging views in each Member State.

3.1. LEGAL PROTECTION OF SAME-SEX COUPLES IN THE REPUBLIC OF CROATIA

The prohibition of discrimination based on sexual orientation is protected by Article 14 of the Constitution[28] of the Republic of Croatia (hereinafter: the Constitution).[29] In addition to the Constitution, the rights of persons of same-sex orientation are protected by the laws of the Republic of Croatia that comprise non-discrimination provisions concerning sexual orientation, such as the Gender Equality Act[30], the Anti-Discrimination Act[31], etc.

Currently, family law protection of life partnerships of partners of different sex (spouses and cohabitees) and same-sex (life partners and informal life partners) in Croatia is governed by two separate laws i.e. the Family Law[32] and the Same-sex Life Partnership Act.[33] Regardless of which of the four family law institutions provided by these laws, the partners decide to live in, they shall enjoy exactly the same legal effects, so that after three years of living together, the partners of different sexes (cohabitees) according to the Croatian law enjoy the same rights and duties as spouses. The informal life partners shall enjoy all rights and have duties as life partners who solemnized their life partnership before a competent authority.

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27 See: [https://narod.hr/eu/referendum-o-braku-u-rumunjskoj-90-posto-biraca-podrzava-brak-kao-zajednicu-jednog-muskarca-i-jedne-zene], and Cojocariu, C., *Same-Sex Marriage before the Courts and before the People: The Story of a Tumultuous Year for LGBT Rights in Romania*, Verfassungsblog, 25 January 2017, available at: [https://verfassungsblog.de/same-sex-marriage-before-thecourts-and-before-the-people-the-story-of-a-tumultuous-year-for-lgbt-rights-in-romania], accessed 02.10.2019

28 Constitution of the Republic of Croatia, Official Gazette Nos. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14

29 Also see Articles 3 and 35 of the Constitution

30 Gender Equality Act, Official Gazette, Nos. 82/2008 and 69/2017

31 Anti-discrimination Act, Official Gazette Nos. 85/08 and 112/12

32 Family law, Official Gazette, Nos. 103/15 and 98/19

33 Same-sex Life Partnership Act, Official Gazette Nos. 92/2014 and 98/19

Previously, relationship between same-sex partners in the Republic of Croatia was governed for the first time by the Same-Sex Union Act,[34] under which same-sex partners were only able to enter into a *de facto* partnership, which could produce certain legal effects, but were not given the opportunity to enter into marriage or formally establish same-sex partnership.[35]

On 1 December 2013, the first national referendum on the definition of marriage to amend the Constitution was held whereby the definition of marriage as a life union between a man and a woman would be introduced into the Constitution.[36] As a result of the referendum, the Constitution "banned" same-sex marriages. In its Communication on the Citizens' Constitutional Referendum on the Definition of Marriage, the Constitutional Court gave an opinion on the definition of marriage as a union between a man and a woman, in which it clearly stated that "it is relevant from the point of view of substantive law that marriage, cohabitation, and same-sex partnership are legally recognized in the Republic of Croatia, and that the Croatian law of today is in line with European legal standards regarding institutions of marriage and family life".[37]

In 2014 in response to the Constitutional amendment, the Same-sex Life Partnership Act, which recognizes both a life partnership[38] and an informal life partnership, was adopted. The existence of an informal life partnership is demonstrated in the same manner and under the same requirements as cohabitation.[39] Under the Same-

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34 Same-Sex Union Act, Official Gazette No. 116/2003

35 The Same-Sex Union Act regulated a very small scope of rights (the right to maintenance and property relations), which did not form the basis for a normal and equal life as recognized for the persons of different sex. This was confirmed in practice, as no same-sex union has officially been registered, Petrašević, T.; Duić, D.; Buljan, E., *Prava istospolnih zajednica u Europskoj Uniji s posebnim osvrtom na Republiku Hrvatsku*, Strani Pravni život, *vol.* 61, no. 3, 2017, p. 157

36 The initiator was the association "On behalf of the family" which aimed at transposing a definition from the Family Law defining marriage as a union of a woman and a man into the Constitution. Due to the number of collected signatures (749,316.00), the Croatian Parliament voted to call a referendum on the definition of marriage. There were 37.89% voters that took part in the referendum, out of which 67.75% voted in favour and 33.63% against it

37 Communication on the Citizens' Constitutional Referendum on the Definition of Marriage No.: SuS-1/2013, 14.11.2013, Official Gazette No. 138/2013. In the Communication, the Constitutional Court of the Republic of Croatia stated also, *inter alia*, clearly and unambiguously as follows: "... Any possible amendment to the Constitution by the provision that marriage is a life union of a woman and a man shall not affect further development of the legal framework of cohabitation and same-sex union institutions in accordance with the constitutional requirement that every person in the Republic of Croatia has the right to respect and legal protection of their private and family life and human dignity."

38 A life partnership is a family life relationship between two persons of the same sex, concluded before a competent authority, pursuant to the provisions of this Act

39 The informal life partnership is a family life relationship between two persons of the same sex who have not concluded a life partnership before a competent authority, provided the relationship has lasted no

sex Life Partnership Act, same-sex life partners have the right to respect for family life, as well as all the effects of a marriage, except the right to adopt children.[40]

The Republic of Croatia is an example of a state in which the international and national courts played a crucial role in the legal recognition of rights of same-sex couples and the accession to the CoE and the EU contributed to progress in achieving the standard of protection against discrimination with regard to sexual orientation. Nevertheless, the Republic of the Croatia is among the relatively few European countries that have changed their constitutions to the effect that marriage is only possible between a man and a woman, thus precluding same-sex marriages. The Croatian national legislation has in response shown definitely progressive in its view to grant equal rights to same-sex partnership, making them equal to marriage, except in child adoption issues and it extended the rights of formalized same-sex life partnerships to same-sex informal partnerships.[41] However, there are a number of aspects in which same-sex couples lead to disputes.[42]

4. LEGAL PROTECTION OF SAME-SEX COUPLES AND THEIR RIGHTS UNDER COE AND EU LAW

It must be noted that the Convention and the Charter of Fundamental Rights of the EU (hereinafter: the EU Charter)[43] contain corresponding rights, and these rights have in principle the same meaning and scope.[44] The right to private and family life[45], the right to marry and to found a family[46] the right to respect for

less than three years and from its beginning has met the requirements prescribed for the validity of a life partnership. More about informal relationships see: Lucić; Duić; Muhvić, *op.cit.*, note 7, pp. 21-22 and Lucić, N., *Pravno uređenje braka i drugih oblika životnih zajednica*, in: Rešetar B. *et al.* (eds.), Suvremeno obiteljsko pravo i postupak, Osijek: Pravni fakultet Osijek, 2017, p. 70

40 The institution of child adoption should be distinguished from the possibility of providing a public foster care service, which was as one of the main objections to the requests and proposals, among others, of same-sex partners and the LGBT community, submitted to the Constitutional Court in abstract control - the proposals to institute proceedings to review conformity with the Constitution of Articles 9, point 3, 11(3) and 13(2) of the Foster Care Act, Official Gazette, No. 115/2018; Decision No. U-I-144/2019 and others of 29 January 2020

41 About critical review of legal uncertainty in equal treatment of formal (marriage and life partnership) and informal (cohabitation and informal life partnership) life unions see: Rešetar, B., *Uvod – odrednice novog obiteljskog prava i postupka*, in: Rešetar, B. *et.al.*(eds.), *Suvremeno obiteljsko pravo i postupak*, Osijek: Pravni fakultet Osijek, 2017, p. 16 and pp. 84-86; 95-97

42 See note 40

43 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012

44 However, this does not prevent EU law from granting more protection - Article 52 (3) of the EU Charter

45 Article 8 of the Convention and Article 7 of the EU Charter

46 Article 12 of the Convention and Article 9 of the EU Charter

family life[47], the prohibition on discrimination[48] and the right to human dignity.[49] Both the ECRH and the EU Charter provide that the right to marry and to found a family is guaranteed in accordance with national laws governing the exercise of this right.

As already mentioned, in cases where same-sex couples were legally recognised on a broader scale, in Europe this generally happened through legislation rather than litigation. The litigants often relied on non-discrimination and equality provisions in national constitutions, but also on Convention provisions, Articles 8 and 14 of the Convention. In this context, the paper deals exclusively with these rights of the Convention that correspond with Article 7 and 21 of the EU Charter.

Although the Convention and the Charter of the EU contain corresponding rights, it is interesting to note that in the European jurisdiction the broader legal recognition of the right to respect for family life in EU law differs significantly from the right laid down in Article 8 of the Convention and the practice of the ECtHR. Article 8 of the Convention does not guarantee the right to family reunification by itself but imposes the minimum protection that must be provided by the State. In this context the paper, in EU scope regarding implications for the internal market, also deals with right to family reunification.

The right to family reunification[50] has been one of the main sources of migration in the EU for the last twenty years.[51] However, one should distinguish between the

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47 Article 8 of the Convention and Article 7 of the EU Charter

48 Article 14 of the Convention and Article 21 of the EU Charter and the recital 31 of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158

49 Article 1 of the EU Charter

50 The freedom of movement of persons is one of four fundamental freedoms of EU law. It is recognized to EU citizens and their family members and to some extent, to third country nationals. It was originally introduced for economic reasons, to allow workers to move freely where there is a shortage of labour in their qualifications. However, in practice it did not live up to expectations due to language and cultural barriers, but also because the decision to move to another Member State was influenced by (in)ability to take the family. Thus, the family appeared as a barrier to mobility of workers, see: Petrašević, T., *Pravo na spajanje obitelji u EU*, in: Župan, M. *et.al.*(eds.), Prekogranično kretanje djece u Europskoj uniji, monografija, Osijek, 2019, p. 100; Barnard, C., *The Substantive Law of the EU, The Four Freedoms*, Third edition, Oxford University Press, 2011, p. 265

51 See European Commission Press Corner: Press release 28 March 2006, *Europeans move for love and a better quality of life*, [https://ec.europa.eu/commission/presscorner/detail/en/IP_06_389]; 25 November 2013, also see *Free movement of people: five actions to benefit citizens, growth and employment in the EU*, [https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1151] *and* 15 January 2014,

right to family reunification of EU citizens and their family members irrespective of their nationality on one hand and the right of third-country nationals to family reunification on other.[52] The right of the Union citizens to move freely is stipulated by Article 21 Treaty on the Functioning of the EU (hereinafter: TFEU)[53] and further developed in secondary legislation - Directive 2004/38/EC[54] (hereinafter: Directive 2004/38/EC or Citizens' Rights Directive).[55] The Citizens' Rights Directive does not provide a definition of the term "spouse" in one way or another but contains a neutral provision leaving the interpretation of the meaning "open". Before the final versions of Directive 2004/38/EC, the Commission advocated restricting the term "spouse" to persons of different sex, Parliament was in favour of defining the term as "neutral" and the Council was neither willing to explicitly refer to the term "spouse" as a same-sex partner, nor to explicitly exclude it. Therefore, the final text of Directive 2004/38/EC refers simply to "spouse".[56]

Every EU citizen has the right to move freely within the territory of the Member States for the period not exceeding three months, with a valid travel document – an identity card or a passport. For a stay exceeding three months, in accordance with Article 7 of Directive 2004/38/EC, a Union citizen must have a special status. A continuous legal residence of at least five years entitles Union citizens and their family members to permanent residence. In accordance with the relevant EU regulations a Union citizen can be joined by his/her family members regardless of the category the citizen belongs to.[57] The concept of a family, and thus the circle of persons who can join a Union citizen in the host Member State has expanded over

European Commission upholds free movement of people: [https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_9], accessed 29.02.2020

52 Among EU citizens there are those who have made use of the free movement i.e. - dynamic citizens involving a cross-border element and then those who have not made any use of the freedom of movement, - static EU citizens, see Petrašević, *op.cit.*, note 50, p. 95

53 Treaty on Functioning of the European Union (Consolidated version 2016), OJ C 202, 07.06.2016

54 Directive 2004/38/EC, which grants residence rights to Union citizens and their family members when they move to or reside in a Member State other than that of which they are nationals and these rights are crucial for third-country nationals as their residence rights in the EU are derived from their status as family members of Union citizens

55 See Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States; [https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF], accessed 01.10.2019.

56 Bačić Selanec; Bell, *op. cit.*, note 1., p. 658, also see: Rijpma, J.; Koffeman, N., *Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?*, in: Gallo, D.; Paladini, L.; Pustorino, P., (eds.), Same-Sex Couples before National, Supranational and International Jurisdictions, Heidelberg: Springer, 2013, pp. 465-475

57 Article 16(1) Directive 2004/38/EC

time. Family members who must be admitted are defined in Article 2 of the Directive. This includes the spouse[58] and the registered partner[59], to the extent the home and host member state consider registered partnership the equivalent of marriage.

The answer to the question whether or not the measure violates Article 8 of the Convention differs on a case-by-case basis as it leaves a wide discretion to States, in contrast to which EU provisions on free movement and citizenship are very clear and precise with no room for discretion.[60] This shall be supported by case-law analysis in following paragraphs of the paper.

5. COURTS' CASE LAW

5.1. THE CJEU CASE LAW

The CJEU has a progressive approach towards family law, especially when it has implications for the internal market, human rights, dignity, equality and non-discrimination.[61] The same-sex couples who find themselves within the scope of EU law (whether EU citizens or not) must be able to rely on the protection of their fundamental rights, including the right to respect for family life. When exercising their rights of free movement, the same-sex couples may encounter the obstacles deriving from a lack of recognition of their relationships and arising mainly in areas of the law in which different-sex spouses traditionally enjoy certain benefits. Consequently, the CJEU case-law needs to provide an adequate answer to solve complex issues and to make a framework of cross-border movement of same-sex couples. The cases on the rights of same-sex couples have tended to reach the CJEU mostly as staff cases or preliminary references in the field of equal treatment in employment and occupation.[62]

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58 Article 2(2) (a) of Directive 2004/38/EC

59 Article 2(2) (b) of Directive 2004/38/EC

60 However, in the cases: C-60/00 Mary Carpenter v Secretary of State for the Home Department, [2002], C-459/99 Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State, [2002] , C-291/05 Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind, [2007], Metock and other, the CJEU found that right to family life, as guaranteed by Article 8 of the Convention, was one of the fundamental rights guaranteed in the EU legal order (Article 7 of the EU Charter)

61 More about legislative and judicial competence in matters related to family law, see Bačić Selanec; Bell, *op.cit.*, note 1, pp. 659-661

62 In contrast to restrictive Treaty provisions on cross-border family legislation and the static progress of the EU legislator, See e.g.: Case C-249/96, Lisa Jacqueline Grant v. South-West Trains Ltd., [1998]; Joined Cases C-122/99 P and C-125/99 P D and Kingdom of Sweden v Council of the European Union, [2001]; Case C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, [2008]; Case C-147/08 Jürgen Römer v. Freie und Hansestadt Hamburg, [2011]; Case C-267/12 Frédéric

The first case in which the CJEU encountered unfavourable treatment of persons of same-sex orientation and same-sex couples was the *Grant* case (1998)[63]. The Court ruled that the refusal of travel allowances for Mrs Grant's same-sex partner had not constituted discrimination based on sex orientation, and that stable relationships between same-sex couples were not equalled with marriage or stable cohabitation of persons of opposite sex.

In 2001, in case *D. and the Kingdom of Sweden*[64], the CJEU faced the issue of gender discrimination. Although Sweden provided at that time equal treatment for registered same-sex partners as well as for spouses, the Council of the EU dismissed the appeal and stated that the provisions of Regulation 781/98 could not be interpreted as treating same-sex registered partnership as equivalent to marriage. The CJEU maintained the standing taken in *Grant* case, concluding that the present case does not constitute discrimination, despite the fact that the Member State in which the same-sex partnership was registered recognized the institution the status equal to marriage. The CJEU found that it was not the partner's gender that determined whether there were grounds for obtaining a household allowance under the Regulation, irrespective of their sexual orientation and that the intention of the legislator in this case was not to grant household allowances to registered partners.

The most direct case law on the rights of same-sex couples is found in the following three cases of *Maruko,*[65] *Römer*[66] and *Hay*[67]. All three cases concerned the availability of employment benefits under the Equal Treatment Directive[68] to homosexual couples in registered same-sex partnerships where they were available to heterosexual married couples. The CJEU in *Maruko* took a different view and found discrimination on the grounds of sexual orientation[69] and ruled that denying that a person, whose same-sex partner had died, was entitled to survivor's benefit paid on the same conditions as a surviving spouse was direct discrimination on grounds of that person's sexual orientation. It explicitly acknowledged that the

Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, [2013], Case C-443/15, David L. Parris v Trinity College Dublin and Others [2016], *etc*

63 See note 62

64 See note 62

65 See note 62

66 See note 62

67 See note 62; Decision in the case *Hay* was passed a few weeks after the ECtHR judgment *Vallianatos and Others v. Greece* (2013) and was the answer to the ECtHR judgment

68 Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16

69 The case *Maruko* is important in the context of the division of competences between the EU and the Member States, as well as regarding the distinction between direct and indirect discrimination even beyond the field of discrimination on grounds of sexual orientation

area of family law falls within the exclusive regulatory competence of the Member States, but pointed out that in exercising that competence the Member States must comply with EU law and, in particular, with the provisions relating to the principle of non-discrimination.

In *Römer* case, the CJEU takes a step further, finding that denying access to a tax benefit entitlements to pension amount to persons in a registered same-sex partnership constitutes discrimination based on sexual orientation, if the same benefit is granted under same conditions to spouses. The CJEU points out that EU law depends on the Member States legislature, but since the laws of Member States can significantly discriminate the rights of persons of same-sex orientation, it must therefore be careful and play an active role in preventing any discrimination against same-sex partnerships. In *Maruko* and *Römer* cases, the final assessment of the comparability of the civil status of traditional marriages and registered partnerships was left to national courts of Member States.[70] However, the CJEU did conduct such an analysis in *Hay* case.

In *Hay* case the CJEU faces the question of whether an employer's practice according to which employees who entered into marriage have the right to be awarded days of special leave and a salary bonus constitutes discrimination on the basis of sexual orientation, since this is not granted to persons of same-sex orientation. At the end of the reasoning, the Court pointed out that adverse treatment based on marital status, rather than on direct sexual orientation, is still direct discrimination, since homosexual couples cannot contract marriage under national law.[71]

In long-awaited decision in *Coman* case[72], the CJEU was given the opportunity to decide for the first time on the term 'spouse' in the context of Directive 2004/38/EC related to a marriage contracted between two persons of the same sex. The CJEU clarified that the gender-neutral term 'spouse' in Article 2(2)(a) of the Directive 2004/38 implies that married same-sex couples enjoy free movement rights equal

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70 Maruko (C-267/06) para. 72 and Römer (C-147/08) para. 52

71 Selanec, G., *Praksa evropskih i američkih sudova u oblasti pravne regulacije životnih zajednica osoba istog spola*, in Petrić, N., *et.al.* (eds.), Izvan zakona: Pravna regulacija životnih zajednica parova istog spola u Bosni i Hercegovini, Sarajevo: Sarajevski otvoreni centar, 2016, pp. 111-112

72 Case C-673/16 Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne, [2018], ECLI:EU:C:2018:385; The question put before the CJEU in Coman case has been a topic of much academic debate, see e.g. Bell, *op. cit.*, note 2; Bell; Bačić Selanac, *op. cit.*, note 1; Tryfonidou, *op. cit.*, note 16; Rijpma, *op. cit.*, note 10; Rijpma; Koffeman, *op. cit.*, note 56; Kochenov, D. *On Options of Citizens and Moral Choices of States: Gays and European Federalism*, Fordham International Law Journal, *vol.* 33, no. 1, 2009, pp. 156-205, available at: [https://ssrn.com/abstract=1557955]; Toner, H., *Migration rights and same-sex couples in EU law: a case study*, in: Boele-Woelki, K.; Fuchs, A. (eds.), Legal Recognition of Partnerships in Europe, Intersentia 2012, pp. 285-308, *etc*

to heterosexual married couples in the EU, regardless of how each particular Member State frames 'family' in its own legislation. The case involves a same-sex couple, Mr. Coman, a Romanian and US citizen, and Mr Hamilton, an American citizen, who met in New York in June 2002 and lived together for four years. Mr. Coman then moved to Brussels to work for the European Parliament while Mr Hamilton remained living in New York. They married in Brussels in November 2010, and in March 2012 Mr. Coman stopped working for Parliament and continued to live in Brussels, where he was entitled to unemployment benefits until January 2013. Following several years spent in a long-distance relationship, Coman and Hamilton decided to settle in Romania, and Mr. Coman applied for a residence-permit for his American husband based on the family reunification clause of Directive 2004/38.

The Romanian authorities refused to abide by the Directive, explaining their decision by non-recognition of "homosexual unions" in Romania. Supported by the reputable LGBT organization, the couple appealed the decision of the Romanian authorities. When their case reached the Constitutional Court of Romania, the court decided to stay the proceedings and submitted a preliminary reference to the CJEU to clarify the conditions under which Mr. Hamilton may be granted the right to reside in Romania for more than three months.

The CJEU established that it is apparent from a textual, systematic and teleological interpretation of the provisions of the Directive that it prescribes only the conditions for the entry and residence of a Union citizen in Member States other than the Member State whose national he is and does not allow the exercise of a derived right of residence for the benefit of third-country nationals, family members of a Union citizen in the Member State of which that Union citizen is a national. However, in certain situations third-country nationals who are family members of a Union citizen and who by virtue of the Directive are not granted derived right of residence in a Member State of which that citizen is a national, may be granted that right pursuant to Article 21(1) TFEU. The CJEU clarified that the gender neutral framing of 'spouse' in Article 2(2) (a) of the Directive 2004/38 implies that married same-sex couples enjoy free movement rights equally to heterosexual married couples in EU, regardless of how each Member State defines a 'family' in its own legislation.

Following the *Coman* ruling, the Romanian Constitutional Court[73] rendered a decision No. 534/2018[74], stating, inter alia, that in addition to a few other EU

[73] The Romanian Constitutional Court was confronted with the question of sexual orientation twice before the *Coman* case; [https://blogs.eui.eu/constitutionalism-politics-working-group/paying-lip-service-cjeu-unsurprising-decision-constitutional-court-romania-coman-case/], accessed, 04.01.2020

[74] Decision of the Constitutional Court of Romania, No 534/2018 on the exception of unconstitutionality of the provisions of Article 277 (2) and (4) of the Civil Code was rendered with majority of votes,

Member States, Romania has not legally regulated same-sex unions in any way. Acting in the "spirit"[75] of the CJEU ruling, the Romanian Constitutional Court declared the said provisions constitutional, but only to the extent of freedom of movement and residence in Romania, noting that it did not recognize same-sex unions in Romania by such a decision. However, the *Coman* case and the decision of the Romanian Constitutional Court faced sharp criticism, especially in Romania.[76] Although most people considered the CJEU judgment exclusively as focusing on the freedom of movement of persons within the Union, some[77] considered it a redefinition of the term "spouse", by which the CJEU called into question the competence of the Member States.[78]

With its ruling in the *Coman* case[79], the CJEU has provided legal certainty for married same-sex couples regarding their rights of free movement under EU law, especially because it requires the recognition of same-sex spouses as "spouses" rather than "partners" and that is crucial to ensure effective enjoyment by union citizens of free movement rights, and to prevent discrimination on the basis of sexual orientation and to ensure respect for their family life. Failure to recognize same-sex marriage by Member States that do not regulate same-sex marriage under national law would result in failure to recognize the right to family reunification of EU citizens, which then would limit the freedom of movement for Union citizens.[80]

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with two dissenting opinions, the access to the decision in the English language is available on the site of the Judicial Network of the EU, [https://curia.europa.eu/rjue/upload/docs/application/pdf/2019-03/decro2018071801en.pdf], accessed 01.10.2019

75 In the Communication of July 2018, before the decision was announced, the Romanian Constitutional Court President Valer Dorneanu had made a public statement and given a brief reasoning of the decision pointing out that it had been made in the "spirit" of the CJEU *Coman* ruling that recognizes same-sex marriage in Romania for the purposes of freedom of movement of EU citizens, and revealed that the Romanian Constitutional Court had not conferred "more" rights for persons of same-sex orientation, but only fulfilled the minimum of the required rights, *op.cit.*, note 74

76 [http://www.europeandignitywatch.org/disturbing-decision-by-the-eu-court-of-justice-redefines-the-term-spouses/], accessed 01.10.2019

77 Adina Portar, who is a Romanian lawyer working as a legal advisor with the ADF International in Brussels and who on behalf of the ADF International submitted an amicable report to the Romanian Constitutional Court requesting an approval for the organisation of the referendum vote

78 See: [https://www.nytimes.com/2018/06/05/world/europe/romania-ecj-gay-marriage.html], accessed 01.10.2019

79 It is interesting to note that the government of the Netherlands, the first member state to open up civil marriage to same-sex couples, was the only member state to intervene, along with the European Commission, on the side of Mr Coman

80 It outlines the US Supreme Court decision in case *Obergefell v. Hodges*, 576 U.S. (2015), which was passed just one year before the *Coman* ruling and has greatly influenced the development of protection for same-sex unions outside the US, especially in EU Member States. The Supreme Court of the US held that the XIV Amendment of the US Constitution required every State to legalise same-sex marriage and to recognize same-sex marriages lawfully conducted in other States. The US Supreme

In order to avoid the consequences of the decision, some Member States will attempt (or they already have) to prohibit same-sex marriage by their Constitution. However, the prohibition of same-sex marriage will not protect Member States from the consequences of the *Coman* ruling, since the supremacy of EU law also outweighs the constitutional provisions of Member States, in the event of conflict between the law of Member States and EU law.

It is noticeable that the CJEU in the *Coman* ruling resolved the issue primarily within the framework of the free movement of persons rather than as a fundamental right issue. Additionally, the judgment left a number of important questions open, e.g. recognizing same-sex marriage in other legal matters (inheritance, survivor pension, hospital visits, etc.[81]) or in situations when marriage is legally concluded outside the EU, and the CJEU also faced the issue of the obligation of mutual recognition of same-sex marriages entered into in accordance with applicable legislation in EU Member States, but not with the issue of same-sex (registered) partnership.[82]

The CJEU plays a significant role in the application of the principle of free movement of persons and the prohibition of sexual orientation discrimination. CJEU's case law and its landmark judgements on this topic show significant changes in its view. That progress shows a consistent and non-discriminatory application to EU citizens, irrespective of their sexual orientation. The *Coman* case gave an answer to important questions, although for the time being just for same-sex marriage recognition for immigration purposes in the EU, but also made the leads to the further development of equality and non-discrimination law in Europe.

Court ruled with five votes in favour and four votes against the decision that federal states cannot ban marriage licenses for same-sex couples. This made all bans on same-sex marriages in any US state or territory invalid and same-sex marriage became legal at federal level. This meant that marriage had to be redefined in all US states and contracting same-sex marriage had to be made legal, thus deciding that a ban on same-sex marriage was a violation of the US Constitution. In this way, the duty to redefine marriage was imposed on all US states, including those that defined marriage at the level of their legislation as a union of one woman and one man. This decision was preceded by important decisions - *Hillary Goodridge and Others v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) and *Hollingsworth v. Perry* 570 U.S. (2013)

81 Tryfonidou, A., *An analysis of the ECJ ruling in Case C-673/16 Coman, The right of same-sex spouses under EU law to move freely between EU member states*, research report for NELFA, 2019, pp. 13-14, available at: [http://nelfa.org/inprogress/wp-content/uploads/2019/01/NELFA-Tryfonidou-report-Coman-final-NEW.pdf], accessed 29.02.2020

82 See Case C-89/17 Secretary of State for the Home Department v. Rozanne Banger, [2018]

5.2. THE ECtHR CASE-LAW

For decades, the ECtHR has consistently held that marriage is exclusively a union of a man and a woman. Having recognized the changes in social development and political changes, the ECtHR responded with a change in doctrine.[83] The ability for same-sex couples to secure protection is set under Article 8 (right for private and family life), Article 12 (right to marry) and Article 14 (right to non-discrimination) of the Convention

In the landmark case *Karner v. Austria*[84], the ECtHR was confronted with the question of whether it amounted to discrimination, if national legislation that allows heterosexual partners in stable emotional relationship to rent an apartment and in the event of death of the tenant, his/her companion has the possibility of renting it, does not provide the same for stable emotional relationship of persons of the same sex. Considering that the State failed to prove that there was any reason to justify the difference in treatment as necessary for the protection of an important interest, the ECtHR found a violation of Article 8 of the Convention.

In *Burden v. UK*[85], two sisters lived together for thirty-one years. They jointly owned property and each left a part of the property by will to the other. In the event of the death of one of them, due to the estate value exceeding the established threshold, the surviving sister had to pay inheritance tax. They pointed out the discriminatory interference with their property rights since married partners and same-sex partners were exempt from inheritance tax. The ECtHR found that the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners under the United Kingdom's Civil Partnership Act. Marriage and same-sex partnership are considered special relationships that are entered into voluntarily and thoughtfully resulting in contractual rights and obligations. Since the applicants were in blood relationship, it was a completely different issue.[86]

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83 See judgement Christine *Goodwin v. UK* (2002); the case involved the possibility of transgender persons to adjust their official documents with the fact of gender change so that they could enter into marriage. The ECtHR acknowledged that, in the face of developments in the Member States, it has changed its established position on the exclusive heterosexual nature of marriage and similar family unions and established violation of Articles 8 and 12 of the Convention. Following the Goodwin ruling, in 2004, the United Kingdom introduced a regulation requiring transgender persons to request an official gender recognition certificate

84 See judgment *Karner v. Austria* (2003)

85 See judgment *Burden v. UK* (2008)

86 See also the more recent interesting judgment *Ratzenböck and Seydl v. Austria* (2017)

The most important step in the development of the ECtHR case law is the judgment *Schalk and Kopf v. Austria*[87], which brought same-sex relationship within the scope of family life. The Court ruled that cohabiting same-sex couples living in a stable *de facto* partnership enjoy not only the right to respect for their private life, but also the right to respect for their family life. Mr. Schalk and Mr Kopf who lived in a stable emotional *de facto* partnership claimed that they were discriminated on the basis of their sexual orientation with regard to the protection of right guaranteed by Articles 8, 12 and 14 of the Convention, because they were denied the opportunity to marry or have their relationship otherwise recognised by law in Austria. During the dispute, the Registered Partnership Act was introduced, which granted their partnership legal recognition. This allowed the ECtHR "not to refer" to the applicant's complaint. The decision essentially obliges contracting states to provide at least some form of legal framework, some form of legal recognition for same-sex couples and their family life.[88]

In its judgment in *X v. Austria*[89] and decision *Boeckel v. Germany*[90], the ECtHR held that same-sex couples entering into a partnership must have access to adoption to the same extent granted to respective heterosexual partnership, which means that same-sex partnerships in which partners raise a child together represent the union of family life referred to in Article 8 of the Convention.

The case of *Vallianatos et al. v. Greece*[91] argues that the fact that the Greek registered partnership is open only to couples of the opposite sex amounts to a violation of family life (Article 8) and non-discrimination (Article 14). The ECtHR found a violation of Article 8 of the Convention to applicants who lived in a stable emotional same-sex relationship, given that the State did not provide them with the minimum legal recognition that is provided to (civil) partnership of heterosexual couples. The Court established that same-sex partnerships were as capable as heterosexual partnerships of entering into stable committed relationships, and those same-sex couples sharing their lives had the same needs as heterosexual couples in terms of mutual support and assistance. The fact that the State did not legally recognize same-sex partnership is a violation of their dignity, since they have the same right to the same respect as heterosexual partnership. The ECtHR rejected the Greek government argument that the legal recognition of status of civil part-

87 See judgment *Schalk and Kopf v. Austria* (2010)

88 See also judgment *P.B. and J.S. v. Austria* (2010)

89 See judgment *X v. Austria* (2013)

90 See decision *Sabine Boeckel and Anja Gessner-Boeckel v. Germany* (2013)

91 See note 67

nership was limited to heterosexual couples for the protection of families in the traditional sense.[92]

Following the *Vallianatos* case, the ECtHR clearly indicated to the Convention seeking to ensure a kind of legal recognition of stable emotional same-sex partnerships.

Shortly after the US Supreme Court ruled in *Obergefell*[93], the ECtHR ruled in *Oliari and Others v. Italy*,[94] in which the mere fact that the state did not secure legal recognition of the status of stable same-sex partnerships as a union generating adequate scope of rights and obligations is a violation of their dignity. The ECtHR found that the refusal to recognize same-sex marriage solemnized abroad constitutes a violation of the right to family life and that Italy should introduce a possibility to regulate same-sex partnerships. The ECtHR's interest in the fact that the EU legal order has clearly departed from the traditional family concept, both through the provisions of the Charter and through the fact that most EU Member States have legalized either equality to marriage or a partnership of persons of the same sex.[95]

The Oliari case was primarily concerned with the lack of any legal protection for same-sex couples in Italy, including civil unions.However in *Orlandi and Others v. Italy*[96], the Court was faced with the inability to register a same-sex couple's marriage in Italy when they were legally married in another country. Thus, the ECtRH had to decide first whether Italy's refusal to register the applicants' marriages as marriages in Italy, violated the Convention. The ECtHR found a violation of the right to family life. It had to determine whether the failure to recognize marriage in any form resulting in the applicants being left in a legal vacuum and without any protection before the new law came into force, violated their rights under Article 8 of the Convention. The Italian government did not prove that there was a prevailing public interest over the applicants' interests, nor did it state any legitimate aim to refuse recognition of their marriages other than a general reference to

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92 According to the ECtHR, the goal of protecting families in the traditional sense is quite abstract, and there is a wide range of concrete measures that can be taken to achieve this goal "given that the Convention is a living instrument interpreted in the circumstances of the present moment, the State, in its choice of measures designed to protect the family and to ensure respect for family life under Article 8 of the Convention must take into account the development of relations in the society and changes in understanding of social and civil status issues and relationships, including the fact that there is no single choice when it comes to leading someone's family or private life."

93 See note 80

94 *Oliari and Others v. Italy* (2015)

95 Selanec, (*op. cit.)* note 71, pp. 112-113

96 See note 12

"internal public order". Bearing in mind that it is primarily up to the national law to lay down rules on the validity and legal consequences of marriage, the ECtHR accepted that a national regulation governing the recognition of marriage entered into abroad, may serve the legitimate aim of protecting public order. The ECtHR found that until the passage of the new law, the applicants had no legal framework in place to ensure the recognition and protection of their same-sex unions, by which the State violated their right to family life as guaranteed by Article 8 of the Convention.[97]

In the *Pajić v. Croatia* case,[98] the ECtRH continued advancing the family rights of homosexual persons. In the case which encompasses a triple challenge to the margin of appreciation doctrine: the concept of "family life", the immigration policy, and the positive obligations doctrine about family reunification, the ECtRH declared that same-sex unions imply a possibility of family reunification[99] and that same-sex unions should be considered as family life for the purposes of Article 8 ECHR and it put an end to the debate on whether the concept of family for immigration purposes would encompass such unions.[100] The facts of the case concern a refusal of a family reunification request made by Ms. Pajić, a woman from Bosnia and Herzegovina, in order to be reunited with her female partner, Ms D.B., a Croatian citizen, with whom she had been in a relationship for two years, and with whom she wanted to establish a household and start a business. National authorities dismissed the applicant's request with a summary reasoning indicating that the relevant requirements under the Aliens Act[101] had not been met. In particular, domestic Courts claimed that union between two same-sex persons could not be considered as marriage or cohabitation. Since family reunification was allowed for unmarried different sex partners, the applicant alleged discrimination on the grounds of her sexual orientation in obtaining a residence permit in Croatia, under Article 14 taken in conjunction with Article 8 of the Convention.

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97 About absence of a Convention right to marriage for same-sex couples (Article 12) see e.g.: Kleine – Victoire, M.; de Maillard, V.; Piat, A., *The Role of the European Courts in Developing Same-sex couples' rights Team France*, Themis competition 2018, Vilnius Semi-Final B – European Family Law, [http://www.ejtn.eu/PageFiles/17292/WR%20TH-2018-02%20TEAM%20FR.pdf], accessed 02.04.2020 and Puppinck, G.; de La Hougue, C.; Popescu, P., *European Centre for Law and Justice, Third Party observations submitted to the ECtRH in the cases of Orlandi & others v. Italy (no. 26431/12) and Oliari & A. v. Italy and Felicetti & others v. Italy (no. 36030/11 18766/11)*, Strasbourg, 2014, [http://media.aclj.org/eclj/Oliari-Orlandi-v-Italy-ECHR-ECLJ-WO-English.pdf], accessed 02.04.2020

98 See judgment *Pajić v. Croatia* (2016)

99 Para. 74-77 and para. 85

100 Almedia, G., *Family reunification for same-sex couples a step forward in times of crisis- comments on the Pajić ruling of the ECtRH*, [http://web.jus.unipi.it/summer-lisbon/wp-content/uploads/sites/3/2016/06/Gil-Almeida-Family-reunification-for-same-sex-couples.pdf], accessed 02.04.2020

101 Aliens Act, Official Gazette Nos. 79/2007 and 36/2009

It found that the applicant had suffered discrimination, and that Article 14 in conjunction with Article 8 of the Convention was violated when her request for residence permit for the purpose of family reunification was refused exclusively on the basis of her sexual orientation. This put her unjustifiably at a disadvantage against other persons in a similar situation (unmarried different-sex couples).[102] The ECtRH finds that the applicant was affected by the difference in treatment based on sexual orientation introduced by the Aliens Act. It noted that under the Croatian legislation in force at the time when the applicant applied for a residence permit, cohabitation and same-sex relationship were regulated in such a way that both heterosexual and same-sex partners could establish a stable relationship. However, at the time, the applicable Aliens Act provided for the possibility of temporary residence for the purpose of family reunification solely for unmarried heterosexual couples. By tacitly excluding same-sex couples from the term "family", the Aliens Act rendered different treatment of persons in similar situations on the grounds of their sexual orientation. The ECtHR found that the arguments given by the Government did not justify different treatment of same-sex and cohabiting (heterosexual) couples that arose from the applicable Aliens Act. It also noted that the national authorities did not justify the difference in treatment on objective and reasonable grounds. It indicated that the case in question did not relate to the question of whether or not the applicant's residence permit in the Republic of Croatia should have been granted, but rather whether the applicant suffered discrimination on the grounds the national authorities considered according to the domestic law, that the same-sex partner was not entitled to temporary residence for family reunification in the Republic of Croatia.[103]

The Taddeucci and McCall v. Italy case[104] was brought by Mr Taddeucci (an Italian national) and Mr McCall (a New Zealand national) who complained about the refusal of Italian authorities to grant Mr McCall a residence permit on family grounds. The applicants alleged that this amounted to discrimination based on their sexual orientation. The ECtRH has held that treating same-sex couples differently to opposite-sex couples, for the purposes of granting residence permits

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[102] See the Overview of the ECtHR case law, Office of the Representative of the Republic of Croatia before the ECtHR, January-February 2016, available at: [https://uredzastupnika.gov.hr/UserDocsImages/dokumenti/PREGLED%20PRAKSE/PREGLED%201_16.pdf], accessed 01.10.2019

[103] Due to the above decision, the Republic of Croatia had to amend the Aliens Act, which it did by 2017 amendments to the Aliens Act (Official Gazette No. 69/2017) in such a way that Article 56 of the law, was added the subparagraph by regulating the temporary residence of same-sex couples for the purpose of life partnership

[104] *Taddeucci and McCall v. Italy* (2016), also see communicated cases: *S.K.K. and A.C.G. and others v. Romania*, application No. 5926/20, communicated on 30.03.2020 and *Florin Buhuceanu and Victor Ciobotaru and Others v. Romania*, application No. 20081/19, communicated on 16.01.2020

for family reasons, violated the applicants' right to freedom from discrimination based on sexual orientation in the enjoyment of their rights under Article 8 of the Convention. Thus, there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention. Unlike heterosexual couples, same-sex couples were unable to marry in Italy, making obtaining residency impossible.[105] The ECtHR concluded that Taddeucci and McCall had endured the same treatment as a differently situated group – heterosexual couples who chose not to marry.[106]

The ECtRH's case law, especially starting from the *Schalk and Kopf* judgement which is undoubtedly a landmark for the rights of same-sex couples to most recent "Italian cases" shows a significant impact on the development of European family law. Because same-sex couples are now deemed to have "family life" and thus are protected by Article 8 of the Convention, those decisions now establish the positive obligation of the State to ensure specific legal framework providing for the recognition and protection of same-sex unions and their family life. Crucially, not providing such a framework constitutes violation of the right to respect for family life enshrined in Article 8 of the Convention. It is important to point out that the Court's jurisprudence on the right of same-sex couples to marry, in contrast with its dynamic interpretation of Article 12 has remained static.[107]

5.3. AN OUTLINE OF THE EU AND ECtRH COMPETENCE

The ECtHR has made it clear that it has been closely monitoring how the EU law regulates the status of the persons of same-sex orientation, by pointing to the EU context when presenting essential parts of the reasoning of its particular judgments (*Schalk and Kopf* judgment). Moreover, the CJEU closely follows the steps on which the ECtHR builds its doctrine (*Maruko* case). Their mutual relationship and mutual influence has experienced its last phase through recent precedent decisions – the CJEU in *Coman* case, and the ECtHR "in Italian cases" – *Oliari and Others v. Italy* and *Orlandi and Others v. Italy*, preceded by the decision of the US Supreme Court in *Obergefell* case.

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105 Taddeucci and McCall v. Italy, para. 83

106 *Ibid*, para. 94-95 and para. 93: "While protecting the traditional family is sometimes a legitimate aim under Article 14, the ECtHR held, it was not sufficiently compelling in this case to justify discrimination on the basis of sexual orientation."

107 About critical analysis of the ECtRH's jurisprudence on Article 12 of the Convention in respect of same-sex marriage see: Johnson, P.; Falcetta, S., *Same-Sex Marriage and Article 12 of the European Convention on Human Rights*, in: Ashford, C.; Maine, A. (eds.), Research Handbook on Gender, Sexuality and the Law (Edward Elgar Publishing, Forthcoming), 2018, available at: [https://ssrn.com/abstract=3136642], accessed 02.04.2020

However, the difference in legal order between the convention law and the EU law has far-reaching consequences. In its recent precedent judgement[108], the ECtHR has unanimously emphasized obligation of the CoE member states to provide same-sex couples the opportunity to legal regulation of their relationship, since otherwise the right to family life of same-sex couples is violated. The possibility of recognizing same-sex marriage for all legal purposes and situations outside the scope of EU law can only take the form of voluntary harmonization by the CoE member states. The Convention does not insist on equality of these partnerships with marriage and the ECtHR does not require from the member state to recognize equality of these partnerships with marriage. Therefore, the ECtHR judgments are binding only for the signatories to the Convention against which they have been pronounced, while their implementation, as well as the legal position of the Convention itself in the national law, depends solely on the constitution and the will of the State itself.

Unlike the ECtHR, which has no way of deciding for itself that the legal recognition of same-sex relationship poses an obligation for everyone, the CJEU has been able to go a step further, because EU law is superior to the national laws of Member States, including their constitutions. The decisions of the CJEU are directly binding on all EU Member States. The CJEU is not bound by ECtHR decisions, but ECtHR decisions undoubtedly affect the CJEU and *vice versa*, as evidenced by the case law of both courts, preceded by the case law of the US Supreme Court.[109] It is undisputable that the continuous new decisions from both European Courts, but also national courts have produced a range of inspiring jurisprudence. The CJEU's and ECtRH's case law clearly show not only their tremendous influence on national legal systems, but also their mutual influence on each other.

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[108] See notes 12 and 94

[109] The main difference in the legal effects of the CJEU decisions and the US Supreme Court decisions lies in the legal effect of the fundamental rights and freedoms guaranteed by the EU to its citizens. In the USA, the fundamental rights and freedoms laid down by the Constitution are equally restrictive to both federal government and the states. The CJEU does not have the competence to require Member States to legalize same-sex marriage in their national laws, but it has the right to require from Member States to recognize same-sex marriages for the purposes of freedom of movement of persons and to harmonize EU law. In this context, in the USA a redefinition of marriage has taken place, whereas the EU has no competence to do the same for the Member States, since mutual recognition of same-sex marriage in no case puts an obligation on Member States to provide a new definition of marriage in their national laws

5.4. CASE LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

The Croatian Constitutional Court has so far decided in abstract and individual control proceedings in several decisions that stand out, directly concerning same-sex couples.[110]

The first case is *Pajić* case in which as stated above, constitutional complaint was lodged by Ms. Pajić, a national and resident of Bosnia and Herzegovina for residence permit in the Republic of Croatia in order to join her female partner.[111] In the constitutional complaint, the applicant stated that the impugned decision had violated her right to private and family life[112] contending that she had been discriminated on the basis of her sexual orientation.[113]

The Constitutional Court rejected the applicant's constitutional complaint but in author's view it stated the reasons for which the constitutional complaint should be dismissed and not rejected.[114] The Constitutional Court found that the challenged decision of the Administrative Court did not violate the applicant's right under Article 14(1) of the Constitution, stating that discrimination under Article 14(1) of the Constitution does not have an independent standing for a constitutional complaint but must be submitted in conjunction with another (substantive) constitutional right. Article 14(1) of the Constitution contains constitutional guarantee against discrimination on any ground in securing a concrete right. Al-

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110 See also decisions Nos. U-III-2284/2015, 08.05.2019 (contentious proceedings in establishing a same-sex partnership, partnership assets and surrendering possession of things); U-IIIBi-2349/2013, 10.01.2018 (failure of the authorities of the Republic of Croatia to conduct an effective investigation into the alleged abuse of a police officer against the same-sex orientation applicant) and U-III-872/2016, 22.03.2017 (contentious proceedings, discrimination against the persons of the same-sex orientation in media, freedom of thought and expression of thoughts. It has also addressed the issue of transgender persons' rights protection regarding the registration of their gender and name change (decisions Nos. U-III-1216/2013, 18.11.2016 and U-IIIB-3173/2012, 18.3.2014, the issuance of a new altered diploma according to a new personal name and gender identity (decision No. U-III-361/2014, 21.11.2017) and the issues of asylum application in the Republic of Croatia, in cases where the asylum seeker or applicant is a transgender person (decision No. U-III-839/2011, 18.05.2011), [www.usud.hr], accessed 01.10.2019; also see communicated cases: Sabalić v. Croatia, application No. 50231/13, communicated on 07.01.2014 and Zahtila and Koletić v. Croatia, application No. 63344/17, communicated on 12.06.2018

111 Decision of the Constitutional Court No. U-III-1319/2013, 29.05.2013, the decision is not accessible at [www.usud.hr]

112 Article 35 of the Constitution

113 Article 14 of the Constitution

114 See para. 47 of the judgement *Pajić v. Croatia*, where ECtRH noted that the reasoning of the Constitutional Court's decision is "somewhat confusing" (see para. 16 of the judgement *Pajić v. Croatia* and para. 8.1-8.2 of the Constitutional Court's decision)

though the appellant relied in her constitutional complaint on Article 35 of the Constitution and corresponding Article 8 of the Convention, the Constitutional Court found that these provisions were not applicable. The Constitutional Court did not find facts or circumstances that would suggest that in the proceedings before the appellant was discriminated against on any ground. Thus, the Constitutional Court finds her complaint of a violation of Article 14(1) of the Constitution, unfounded.[115] The Court further pointed out that the applicant had failed to prove that she had previously exhausted all domestic remedies (under the Anti-discrimination Act), recalling the standpoint taken in the Court's Decision No. U-III-1097/2009 of 9 November 2012.[116] It also notes that the appellant, in the concrete case, did not show that she had used the legal remedy under the Anti-discrimination Act. In this context, there has been no violation of her constitutional right under Article 14(1) and 14(2) of the Constitution.

The analysis of this decision shows that the Constitutional Court rejected the constitutional complaint, *inter alia*, on the grounds that the applicant had not exhausted the remedy provided for by the Anti-discrimination Act, which is in accordance with the established practice of the Constitutional Court. However, it follows from the "usual practice" of the Constitutional Court that when the applicant has not previously exhausted the remedy provided by the Anti-discrimination Act, the Constitutional Court dismisses the constitutional complaint entirely or partially, for the time being only in the reasoning part of the decision.[117] However, in this case, the Constitutional Court relied on the merits of the reasoned violation. Such "vague" reasoning of decisions enables the ECtHR to consider the case meritoriously. It is further noted that, in relation to violation of Article 14(1) of the Constitution, the applicant also pointed out a violation of Article 35 of the Constitution, thereby fulfilling the required condition for Article 14(1) of the Constitution, but, regardless thereof, it did not find this article relevant in this case. It should also be noted that at the time of lodging the constitutional complaint (8 March 2013), and passage of the judgment (29 May 2013), the case law had been established by the ECtHR (in *Schalk and Kopf v. Austria*[118], and *X v. Aus-*

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115 It reiterates that discrimination means difference in the treatment of persons in the same or relevantly similar situations without an objective and reasonable justification

116 See e.g. Decisions of the Constitutional Court Nos. U-III-1097/2009, 9.11.2012, Official Gazette No. 130/10 and U-III-4644/2017, 18.04.2019, [www.usud.hr], accessed 01.10.2019

117 See judgment *Guberina v. Croatia* (2016), outlining two alternative ways of using legal protection under the Prohibition of Discrimination Act

118 The question as to whether same-sex *de facto* unions would fall within the scope of "family life" was finally solved in the judgement *Schalk and Kopf*, where the Court considered "it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8"

tria)[119] and CJEU (in *Römer, Maruko et al.*)[120] At that time, a considerable number of European countries experienced a rapid evolution regarding legal recognition of same-sex couples. Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of "family".

The ECtHR held that Croatia violated the right to non-discrimination under Article 14 taken in conjunction with Article 8 on the Convention.[121] It found discrimination not only due to the deficiencies existing in the legal system of the Republic of Croatia and failure of the Constitutional Court to eliminate discrimination, but also due to a formalistic interpretation of rights by national authorities[122] in the procedure prior to the procedure before the Constitutional Court. It should also be noted that this is not an isolated case where national authorities[123] apply the relevant substantive law norms on the basis of strictly grammatical interpretation, instead of relevant doctrines achievements of the ECtRH and CJEU and other law interpretation methods, such as teleological, comfort etc., taking into account the dynamics of the legal system and social development as a whole and interpreting the norms in order to eliminate discrimination.

The second and the most recent case in which the Constitutional Court, inter alia, dealt with the protection of the rights of persons of same-sex orientation was through abstract control, i.e. in proceedings for a review of conformity with

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119 In the judgment *Schalk and Kopf v. Austria* - ECtRH recognized stable emotional same-sex unions as family unions, note 87; In judgment *X v. Austria* – ECtRH held that same-sex partnerships in which partners raise a child together represent a family life union referred to in Article 8 of the Convention, note 89; see also decision *Mata Estevez v. Spain* (2001) and judgement *P.B. and J.S. v. Austria* (2010), note 88

120 Although, at the time of lodging the constitutional complaint in this case, the Republic of Croatia was not yet a EU member state but in the pre-accession negotiations for EU membership, the Constitutional Court could have taken the EU legal standards, case law and the achievements of the relevant doctrine into account when dealing with issues of the protection of persons of same-sex orientation. However, the Constitutional Court did not take ECtRH relevant doctrine and consequently did not find any violation concerning constitutional rights, whereas, consequently, the ECtHR found violation of Article 14 of the Convention in that case

121 See note 98

122 It is interesting to note that the couple had been together for three years by the time their case was heard by the Administrative Court, but the court had not evaluated the factual basis of the application because it relied only on Ms. Pajić sexual orientation. In other words, the couple was in stable *de facto* same-sex relationship, which was maintained by constant visits to Croatia

123 "The extent to which judges acknowledge the existence of an inviolable core the rights implied in such principle and the way in which they interpret it are two factors that have a strong impact on the powers and functions of the legislature. The interpretation of the courts can, indeed, have the effect of urging or even requiring lawmakers to take action, i.e., to pass new legislation or amend existing laws", Gallo, D.; Paladini, L.; Pustorino, P., *Same-Sex Couples before National, Supranational and International Jurisdiction*, Springer Science & Business Media, 2013, p. 4

the Constitution of the Foster Care Act.[124] This refers to the case in which the request[125] and the proposals refer to the situation that does not reflect an omission but expresses the will of the legislator i.e. its legislative concept that does not allow same-sex partners to foster care, whereby it excludes them from the possibility to "participate" in certain procedures before competent bodies. The main objection is that because same-sex life partnerships, defined by the Life Partnership Act as a family life union, are included in the scope of family life, and there is no reason to differentiate them from a foster family under the Foster Care Act. This means that exclusion of family members of same-sex partners from the use of foster care service constitutes discrimination based on sexual discrimination.

The Court found that this produced a discrepancy in the legal order because of general discriminatory effects on one social group defined by the specific form of family union in which they lived, and which was conditioned by their sexual orientation. The Constitutional Court rejected the request on the merits, did not accept the proposals, but expressed in its reasoning a position which, in terms of Article 31(1), (2) and (3) of the Constitutional Act on the Constitutional Court of the Republic of Croatia[126] obliges bodies directly applying the Foster Care Act to interpret and apply it by using the teleological method, in accordance with the Constitution and international instruments binding on the Republic of Croatia. This standpoint aimed mainly at contributing to the interests of foster care beneficiaries and avoiding discontinuity of the foster care procedures for socially vulnerable persons. Thereby the Court decided on the case in a way that is quite rare in its practice.[127]

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124 See note 40

125 It is interesting to note that the request for an assessment of the constitutionality of Article 9, point 3, Article 11(3) and Article 13(2) of the Foster Care Act was filed by 33 members of Croatian Parliament, members of the political group of Social Democratic Party, which makes the request admissible since these members make 1/5 of the total number of 151 members of the 9th term of the Croatian Parliament

126 Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette Nos. 99/99, 29/02 and 49/02

127 Thus, for example, the German Federal Constitutional Court proceeds in specific situations where the legislator excluded certain individuals or social groups from the effects of the law, i.e. in cases where the act of the legislator towards a particular individual is seen as an omissions. The persons feeling discriminated before the law have the opportunity to oppose such actions of the legislator, and by provisions of Article 3, paragraph 1 of the Basic Law, demand elimination of a constitutionally unacceptable situation. A special feature here is the content of the operative part of the Court's decision on the substance. In such situations, the Federal Constitutional Court, given the specific nature of the disputed situation and in the interest of the appellant of the constitutional complainant, refuses to declare the relevant law null and void, leaving the legislator the opportunity to eliminate constitutionally unacceptable inequality of citizens, either by abolishing conflicting privileges or by granting the privileges to the deprived individuals. The court performs its function here by declaring the unconstitutionality of a law

First of all the author welcomes the decision, but disagrees with the form in which it was made, and is minded to agree with the dissenting opinion of two judges of the Constitutional Court.[128] In the author's view, the decision rendered is not acceptable and it was necessary to repeal the challenged provisions, even though the whole Foster Care Act except deliberate withholding, i.e. omission of same-sex couples from the Law is in accordance with the Constitution. Indeed, the Foster Care Act does not explicitly prohibit persons living in a life partnership from participating in foster care service, but the fact is that the acts of the legislator (knowingly) contributed to legal uncertainty by introducing doubts about the achievements of the equal position of persons living in a life partnership, which was recognized directly by the Life Partnership Act, the Gender Equality Act and the Anti-discrimination Act. In the author's view, the decision did not sufficiently eliminate discriminatory effect of the provision caused by the practice of the legislature itself,[129] although in practice the decisions of judicial and administrative bodies prohibits the application of the impugned provision in a way that would allow discrimination against persons in a life partnership and thus removes further legal uncertainty related to the application of the impugned provision. Therefore, this decision preserves the minimum respect for the dignity of persons of the same-sex orientation as established by the decisions of the ECtRH. Based on this decision, same-sex (life) partners will therefore have access to the active participation in providing public foster care services same as heterosexual partners, but they could be rejected same as heterosexual partners, who do not fulfil the conditions required by the Foster Care Act.

In light of the above, and in particular regard to only a few decisions of the Constitutional Court directly concerning the rights of persons of same-sex orientation, the conclusion is that the Constitutional Court has made a visible turn in the protection of the the rights of persons of same-sex orientation, especially the same-sex couples' rights. Unlike previously examined case (*Pajić* case), where the Constitutional Court failed to recognize discrimination and take into account relevant practice at that time and established standards of the ECtRH and CJEU, the Foster Care Act case, definitely outlines the constitutional standpoints that are significant improvements of its practice indicating that it shall ensure equal

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if it finds that equality principle before the law in a particular case has been violated, see e.g. BVerfGE 25, 236 (253); 57, 335 (346)

128 See dissent opinions of two judges of the Constitutional Court Lovorka Kušan and Goran Selanec in the Decision of the Constitutional Court No U-I-144/2019 and Others, 29.01.2020

129 See the Aliens Act (notes 101 and 103), which has also caused different treatment based on sexual orientation between persons in a similar situation by tacitly excluding same-sex couples from the concept of "family", and which had to be amended

opportunity for active participation in providing public foster care services, regardless of the sexual orientation of potential foster persons.

After the Constitutional Court gave an opinion on the definition of marriage as a union between a man and a woman in its Communication on the Citizens' Constitutional Referendum on the Definition of Marriage and after its decision about Foster Care Act, but also other decisions concerning persons of the same sex orientation[130], it marked a turning point on this issue. Therefore, the Constitutional Court's decision is of practical importance, it is far-reaching and significant in terms of contributing to the upgrading of the constitutional law doctrine of the Constitutional Court.

6. CONCLUSION

This highly sensitive issue touching particularly upon the socio-political and socio-cultural values of states has been the subject of intense and in no case simple and easy discussions, which is best indicated by the overview of the national jurisdiction and case law of two European Courts.

The analysis regarding the legal recognition of same-sex relationships and protection of same-sex couples indicates to the conclusion that the road in its evolution was long, but there is no doubt that it has been the road leading towards equality. As it currently stands, on the one hand an increasing number of EU Member States have opened civil marriage for same-sex couples and most Member States provide some form of formal recognition of same-sex relationships, but on the other hand a number of Member States have sought to define marriage as a union exclusively between a man and a woman in their Constitution or in domestic legislation. Therefore, there are still differences in national jurisdiction regarding this issue so that European and international law make efforts to harmonize it by providing adequate answers and clear legal standards to very complex situations. The CJEU and the ECtRH have been successful in doing so and they have managed to establish standards, although each within the limits of their competence. Both European courts undoubtedly have a key role to play in further development of equality of same-sex relationship in Europe, and their case-law and practice are prime examples and an indicator of the achievement when two European courts agree and take the same views on protecting the same issue.

The ECtHR's case law shows growing jurisprudence on non-discrimination of same-sex couples and its decisions now establish the positive obligation of the

[130] See note 110

States to ensure specific legal framework providing for the recognition and protection of same-sex unions and their family life. However, the Court's case-law on the right of same-sex couples to marry (Article 12 on the Convention), in contrast with its dynamic interpretation of Article 12 has, for now remained static.

The CJEU case law shows a consistent and non-discriminatory application to EU citizens, irrespective of their sexual orientation. In the current maximum of its case law, in *Coman* case, the CJEU could have offered a better protection than the one provided by the Convention. It could have done that by framing the issue as a question of fundamental rights rather than question of internal market law and yet the aim has been achieved, but there would be definitely an additional line of argumentation if the CJEU relied on the rules of fundamental rights. Consequently, based on the CJEU case law, same-sex spouses currently enjoy more rights than informal cohabitations of heterosexual partners.[131] It remains, therefore, to see how the CJEU would resolve plentiful issues in future cases, e.g. same-sex partnerships (registered or unregistered) or if a same-sex marriage has been contracted outside the EU. Because of the *Coman case* effect and the fact that a 'spouse' in the Directive 2004/38 is gender-neutral, Croatia (also Bulgaria, Hungary, Latvia, Lithuania, Poland and Slovakia), regardless of what their constitutions are said to mandate, will have to honour same-sex marriages for the purposes of free movement or it is up to the Commission to ensure that.

The purpose of this paper was to provide an answer to the question how the EU and Conventional law standards that have been established regarding the legal recognition of same-sex relationships and protection of same-sex couples influenced a national constitutional standard. The research has led to the conclusion that the two European Courts' case law regarding this issue has a significant influence on the Constitutional Court. The practice[132] of the Constitutional Court is a clear indication that it has been observing the changes in social attitudes taking into account the national identity of the Republic of Croatia in accordance with its social, political and legal circumstances so that these tendencies have been viewed as a major development in its recent practice. Regardless of the amendment to the Croatian Constitution of a marriage that excludes the possibility of entering into same-sex marriages, the Constitutional Court shows, especially in its opinion on the definition of marriage and through recent practice, that has marked a turning point, whose reasons and effects could and definitely will considerably influence the evolution of the issue in the years to come.

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131 See Case Banger, note 82

132 See e.g. Decisions of the Constitutional Court Nos. U-I-6111/2012, 9.10.2019; U-III-557/2019 11.09.2019, etc., [www.usud.hr], accessed 10.11.2019 and note 40

In conclusion, it can be said that at present, the judicial competence, rather than the legislative competence is a key objective of the EU achievement of the internal market and the free movement of citizens regarding same-sex couples. The same applies to the ECtRH, which through its case law establishes the positive obligation of the States to ensure a specific legal framework providing for the recognition and protection of same-sex unions and their family life. Overall, it has to be concluded that it is also a key objective at the Croatian national level shown through the constitutional framework and therefore the Constitutional Court's decision is of practical importance, it is far-reaching and significant in terms of contributing to the upgrading of the constitutional law doctrine of the Constitutional Court, which by its recent practice in this issue has expressed its affiliation with the Central European constitutional orders such as German or Austrian legal circle.

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ISBN 978-953-8109-33-1