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Title: Central European Law Conference for Students, Strengthening the Rule of Law in the EU (conference papers)

Date: 31 March – 2 April 2016

Editors: assoc. prof. dr. Janja Hojnik, mag. Natalija Orešek

First published 2016 by
University of Maribor, Faculty of Law
Mladinska ulica 9, 2000 Maribor, Slovenia
www.lexonomica.press, info@lexonomica.press
www.celcos.eu, organising.team@celcos.eu

CIP - Kataložni zapis o publikaciji
Univerzitetna knjižnica Maribor

34:33(082)

Central European Law Conference for Students, Strengthening the Rule of Law in the EU (conference papers) ; urednica Janja Hojnik - V Mariboru : Pravna fakulteta, 2016

70 izv.

ISBN 978-961-6399-79-1
1. Janja Hojnik
COBISS.SI-ID 86260737

Price: free copy

LEXONOMICA PRESS

Strengthening the Rule of Law in the EU

(conference papers)

Editor:
dr. Janja Hojnik

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CENTRAL EUROPEAN LAW CONFERENCE FOR STUDENTS,
STRENGTHENING THE RULE OF LAW IN THE EU
(CONFERENCE PAPERS)

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Editorial

JANJA HOJNIK

Despite its small size and limited personnel Faculty of Law University of Maribor has almost a quarter of century experience in teaching EU Law. Long before Slovenian Accession to the EU professors and teaching assistants of our Faculty of Law had been making endeavours to broaden EU law courses among the students and had been applying for the national as well as European projects supporting teaching and research excellency in the field of EU law. In this respect Jean Monnet activities played the central role in bringing EU law contents closer to our students. Nevertheless, our current project, Jean Monnet Project 2015-2016, reaches not only law students of University of Maribor but students of a wider Central and South-East European Region, as well as students from other European universities that have become attracted by the idea and the objectives of the project.

The Central European Law Conference for Students is an ambitious project aiming to create a central and south-eastern European forum addressing questions of EU law in a systematic way. The main goal of the conference is to discuss topical issues of EU law relevant for the EU as a whole and to send out a strong message about the importance of EU law in establishing rule of law in central and south-eastern European countries. The conference is conceived so as to bring together the most committed of students as well as first-class professors of EU law, judges, prosecutors and policy-makers at the national and EU level. It is conceived as a new way of broadening knowledge of EU law for students accentuating excellency in presentation and argumentation. Together with academics and holders of judicial and political power, students will be discussing and refining their visions and proposals about the future of the EU legal system in selected topical areas. The conference presents a unique opportunity for students to interact and engage in discussion with one another as well as with distinguished scholars and practitioners involved in European affairs. Furthermore, the conference should give students the opportunity to be a part of and contribute to a project creating a future plan of action for the EU.

The main objectives of the conference are:

- to develop a vision for the European Union legal system concerning its system of judicial protection, particularly in relation to human rights, migration, market regulation, consumer, environment and data protection systems, EU civil

CORRESPONDENCE ADDRESS: Janja Hojnik, PhD, Associate Professor, University of Maribor, Faculty of Law, Mladinska ulica 9, 2000 Maribor, Slovenia, email: janja.hojnik@um.si.

DOI 10.4335/978.961.6399.79.1.01
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

procedures, minimum standards for criminal procedures as well as democracy and rule of law in EU Member States and candidate countries;
- to enter into a debate with distinguished professors, current and former EU policy-makers, representatives of the European Commission and with supra-national and national judges and other professionals with vast experience in various topics of EU law and policy;
- to form a cross-border student brain-trust in Central Europe which will continue the debate on topical issues of EU law;
- to dedicate students' originality, resourcefulness and time to build ideas for the future legal system of the European Union.

Also, it is hoped that the conference will be an invaluable opportunity for the students to work with a diverse group of individuals, that is culturally as well as linguistically very divers, which would naturally broaden the students' horizons as they will be exposed to the various points of view and information that each person will bring to the table. The fact that they will have both a professor who is an expert in the field of their choice, and an experienced EU lawyer or policy maker there to give them feedback and to help them further develop their ideas will be a particularly important feature of the conference - in addition to the experience and the possible connections to be made. We hope that the conference will present a unique opportunity for students to interact and engage in a discussion with students and with the distinguished scholars and practitioners interested in European affairs.

CENTRAL EUROPEAN LAW CONFERENCE FOR STUDENTS,
STRENGTHENING THE RULE OF LAW IN THE EU
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What is the Real Fundament of Fundamental Rights´ Protection?

KATEŘINA ŠTĚPÁNOVÁ

Abstract The article is based on the CJCE opinion 2/2013 changing radically the actual tendencies in the area of human rights´ protection in Europe. To provide better comprehension of the consequences of the opinion, the author presents the actual situation concerning the access of an individual applicant to the European Courts, concretely the European Court of Human Rights in Strasbourg and the Court of Justice of the European Union seated in Luxembourg. The text consequently considers new possibilities how to face the overload of the European Court of Human Rights and bring individuals a broadest access to this court.

Keywords: • Access of individuals to the Court of Justice of the European Union and the European Court of Human Rights • Court of Justice of the European Union opinion 2/13 • Individual applicant • Overload of the European Court of Human Rights

CORRESPONDENCE ADDRESS : Kateřina Štěpánová, Department of International and European Law, Faculty of Law, Palacký University, Olomouc, Czech Republic, email: katerina.stepanova@post.cz.

DOI 10.4335/978.961.6399.79.1.02
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Access to justice of an individual applicant is a crucial fundamental right and a *conditio sine qua non* for the real achievement of fundamental rights´ protection. Its protection is declared by all of the core fundamental rights catalogues. However, its practical application faces a number of challenges in the interdependent national, European and international legal systems. The article focuses especially on the *jus standi/locus standi* of an individual under the systems of protection of human rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms[1] adopted under the auspices of the Council of Europe (hereinafter referred to as the "Convention") and the Charter of Fundamental Rights of the European Union[2] (hereinafter referred to as the "Charter").

In accordance with the famous ECtHR´s decision[3], we shall point out that the guarantee of the right of access to justice is not intended to be theoretical and illusory but rather practical and effective.

For those reasons and to overcome the labyrinthine of fundamental rights´ systems of protection in Europe, the accession of the European Union to the Convention was envisaged. Notwithstanding, the Court of Justice of the European Union (Court of Justice) in his well-known opinion 2/13[4] rejected this idea.

The reasoning of the Court of Justice may have surprised some, but for the author of this paper the message sent by Luxembourg's jurisdiction might be interpreted as a decision *in favorem* of the individual applicant.

The complexity, unpredictability and practical application of the right of access of an individual applicant to the European Courts applying the above mentioned human rights catalogues would probably hardly be solved by the accession of the European Union to the Convention.

The overloaded European Courts would undoubtedly become even more overwhelmed. And what is about the individual applicant? Would not he/she get lost in the European legal Babel bound by the procedural and formal requirements for an individual application?

The following idea might give a heretical impression, but the author of this article claims that the rejection of the European Union accession to the Convention is a rational decision that could preserve, further develop and even strengthen the standard of fundamental rights´ protection in the *sui generis* legal system in Europe[5].

2 Access to individuals to the Court of Justice

As far as the Luxembourg's system of protection of human rights is concerned, it is important to stress that the Charter is one of the most modern and vastest human rights catalogues ever. It has become legally binding on the European Union institutions and

the national governments with the entry into force of the Treaty of Lisbon and constitutes a part of the European Union primary law.

Despite the broad fundamental rights catalogue incorporated into the Charter taking into account the social and technical progress of the society, and its auspicious declarations, it remains unfortunately incredibly difficult for an individual applicant to have his/her case heard in Luxembourg.

The Charter is being often criticized from the point of view of the restricted juridical protection of an individual and limited access of individuals to the Luxembourg's justice, even in the case of breach of individual and guaranteed right. The individual petitioner is still regarded as a non-privileged applicant with a very restricted right to lodge an application before the Court of Justice. The *locus standi* of an „European individual" is thus conditioned by the existence of a very specific relation between the individual and the legal act in question reflected in the terms of „the direct and individual concern"[6]. This right is further limited by the scope of acts that might be contested defined in the art. 263 TFEU[7].

The role of individuals as non-privileged petitioners was broadly discussed in the case-law of the Luxembourg's court[8] as well as in the legal doctrine.[9] Unfortunately, the approach of the Court of Justice still remains very strict even after the revision of the former art. 230 par. 4 of the TEC[10], to the actual art. 263 par. 4 TFEU.

The key role in the interpretation of the right of individual access shall be played by the Court of Justice and its case-law. In actuality, relying on the preliminary ruling or on a possible „evolutive interpretation" of the term „direct and individual concern" in the context of the ambiguous term of „regulatory act" does not reinforce the legal safety of the individual applicant before the Court of Justice.

3 Access of individuals to the European Court of Human Rights (ECtHR)

With all of the criticisms we may express towards the Strasbourg's system of protection of fundamental rights mentioned below, this jurisdiction is unquestionably and in fact the only supranational jurisdiction in Europe that guarantees an individual's direct access to the court, the real *jus standi* in the field of the fundamental rights protection.

The individual person is considered by this court as a real subject of the international law of human rights having a full procedural capacity. According to Professor Cançado Trindade, former president of the Inter-American Court of Human Rights and actual judge of the International Court of Justice, the „old ideal if international justice was finally materialized"[11].

The other side of the coin related to the broad individual access to the ECtHR is represented especially by its long-lasting and extreme overload (*e.g.* even in comparison with the Court of Justice).

Notwithstanding, the actual Court's statistics for 2015[12] show close like last year a lower number of incoming cases allocated to a judicial formation. Also, the number of pending cases before judicial formations has decreased significantly[13].

It is debatable if this actual „positive" trend correlates with the improvement in the ECtHR's effectiveness or with the mechanism of decisions on admissibility connected with the Protocol No. 14 and its new admissibility criteria known as the „significant disadvantage"[14] or the amendment of the Rules of Court[15] that were put into practice in order to face the mentioned overload.

Even according to the Court's statistics, the key role in its improvement is played by the new approach to Rule 47 of the Rules of Court, which determines what applicants are required to do for their application to be allocated for judicial decision. In the light of this amendment, an increase of almost 30 % can be seen as far as the administrative decisions on decline of an individual application are concerned. The fact that 32.400 of applications have been disposed of „administratively" in 2015 cannot be overseen!

According to the article 47 par. 5 of the Rule of Court, failure to comply with the formal requirements of an individual application will result in the application not being examined by the Court, *i.e.* will be decided administratively without the judicial approach.

The author of this article considers the new approach of the ECtHR as potentially malicious *vis-à-vis* the individual applicant. From the practical point of view of the individual applicant, the consequences of this disposition may be seen as fatal. An individual application not respecting very strict formal requirements is not being examined by a judicial formation and is disposed of by an employee of the ECtHR´s Greffe. Formal insufficiencies of the application can of course be redressed, but time needed for the related administrative communication does not suspend the period of six month after the final national decision required for filing the formally proper application by the article 35 par. 1 of the Convention.

Thus, the applicant can face a very disappointing situation to see, after several years of national procedures, his/her affaire examined by an international court of human rights by a single letter stating that the court will not deal with the application due to basic formal insufficiencies (*e.g.* the lengths of the exposé of facts, formal errors in filling in the application form).

Despite of the aforesaid, it shall be stressed that the Strasbourg's system of human rights still remains the most effective one and guarantees to individuals the real *jus standi*. This system tries to deal with its noticeable overload, as was stated above and supported by the Court's statistic.

On the other hand, some of the efforts of ECtHR to face its overload may unfortunately bring a risk of deprivation of the individual applicant´s right to access to justice. The example could be the Protocol No. 15 which is now being ratified. It reduces from six

to four months the time-limit within which an application may be made to the Court following the date of a final domestic decision.

Thus, the author brings forth an idea to create a „national institution of instruction and pre-examination of individual applications", as a possible partial solution to the Court's overload.

4 „National institution of instruction and pre-examination of individual applications"

This national institution would primarily instruct applicants *in abstracto* about the admissibility criteria and other formal requirements of an individual application, as well as give concrete advice in pending cases.

The main objective of the institution would be to propagate awareness about individual access to justice and cultivate legal knowledge of the specific procedure before ECtHR.

The purpose of this institution would be to pre-examine individual applications in accordance with the Article No. 34 and 35 of the ECHR, *i.e.* the requirement for an individual application and the admissibility criteria.

Last but not least, this institution could become the first line of defence against delayed or ill-founded applications and chronic complainers, thus relieving the ECtHR of excess applications.

Some may argue that this national institution might place further obstacles on the road of an individual toward the European justice and might be seen as a backward step. The author of this article shall decline this idea.

On the contrary, this national institution would be bound by strict and short procedural deadlines in order to prevent excessive prolongation of the procedure. The suspension of the period of six month after the final national decision required for filing the application could also be considered during this procedure of pre-examination by this national institution

The institution could be composed of government officers, ECtHR agents, non-governmental organisations´ representatives and members of the national Bar Associations with comparable rights in order to guarantee its plurality and independence.

In this context, the author points out that this kind of procedure already exists in some national legal systems. For example, under the Czech national law and in the case of complaints concerning the length and compensation of procedures, the applicant shall first seek a remedy on the national level. Without this step, the individual application would likely be declared inadmissible by the ECtHR[16].

The Czech law performs this role through the Act No. 82/1998 Coll., on the State liability for damages caused by the exercise of public power. Before its amendment, the ECtHR[17] did not consider the procedure under this Act to be an effective measure, but after the amendment No. 160/2006 Coll. the participants were allowed to seek non-material damage and the ECtHR reconsidered its position on this legal question[18].

It is important to mention that according to the procedure presupposed by this Act, the applicants address their claim for satisfaction to the Ministry of Justice which is bound by strict time-limits and is obliged to decide on the individual petition in the delay of six month. If the decision is disadvantageous to the applicant, there is a possibility to lodge a judicial claim.

The ECtHR dealt with this type of national procedure in details in its decision Vokurka v Czech Republic[19]. According to the ECtHR, the Czech legal remedy differs from procedures in other member states to the Convention especially by the fact that the competent body is a non-judicial organ. The ECtHR evaluated this procedure as being an effective one due to the fact that this pre-examination of the application prevents the overload of the civil courts, with the possibility to make use of judicial way in the case of a disadvantageous decision of the administrative body.

The claim under this Act has become one of the domestic remedies that must be exhausted according to the admissibility criterias. According to the ECtHR this legal remedy shall be considered as an effective and accessible legal remedy in case of excess of adequate length of judicial proceedings under the article 6 par. 1 of the Convention. It is necessary to exhaust all the domestic measures before submitting an individual application to the ECtHR, as it is the last legal remedy against the consequences of delays in proceedings.

According to the author, the presented idea of a national institution of pre-examination could particularly contribute to accelerate the decisional process before the ECtHR. There would be a possibility of amicable settlement of the claim already on national level even before lodging the individual complaint before the Strasbourg´ court.

5 Conclusion

To conclude, it is important to stress that it does not matter which way the legislators, European Courts and other concerned competent bodies deal with opinion 2/13 and its consequences on the right of access of individuals to the European justice. It might be the revision of fundamental treaties or a revolutionary jurisprudence or even an avant-garde solution, maybe the one suggested in this paper.

It is however indispensable to struggle for a broadest *jus standi/locus standi* of individuals before the jurisdictions in Europe. The author seeks effective and non-illusory protection of fundamental rights for all Europeans!

Notes

[1] Drafted in 1950 by the Council of Europe, the Convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members.

[2] Published in the Official Journal of the European Communities, 18 December 2000 (2000/C 364/01). The Charter became legally binding when the Treaty of Lisbon entered into force on 1 December 2009, as the Treaty confers on the Charter the same legal value as the Treaties.

[3] See Airey v Ireland App no 6289/73, (ECtHR, 1979).

[4] Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454.

[5] See also Štěpánová, Kateřina, *Posudek Soudního dvora Evropské unie č. 2/2013 z pohledu individuálního stěžovatele: tragédie nebo vysvobození?* Acta Iuridica Olomucensia, 2015, Vol. 10, No. 1, 63–77.

[6] See the art. 263 parc. 4 TFEU Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

[7] *Ibid.*

[8] See e.g. Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002], Case T-177/01 *Jégo-Quéré v Commission* [2002], C-263/02 P - *Commission v Jégo-Quéré* [2004], Case T-18/10, *Inuit Tapiriit Kanatami and others v European Parliament and Council* [2011].

[9] In the Czech legal doctrine, see e.g. Šišková, Naděžda, *Dimenze ochrany lidských práv v EU*, 2. edition, Linde, Prague, 2008; Bobek, Michal, *Individuální žalobci před Evropským soudním dvorem; několik zamyšlení nad aktuálním vývojem*, PR - příloha Evropské právo 6/2003, 1-8. See also Mazák, Ján, *Locus standi v konaní o neplatnosť: od Plaumannovho testu k regulačným aktom*, Právník, 2011, vol. 3, 219-231; De Witte, Floris, *The European Judiciary after Lisbon. Maastricht Journal of European and Comparative Law*, 2008, vol. 15, no. 1, 47 a 48; Schode, Ferrit, *La reforme du contentieux communautaire du point de vue des droits du particulier*, EUI and NYU Input, 2005, vol. 41, no. 5-6, 679.

[10] See the art. 260 par. 4 TEC Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

[11] See in details Cançado Trindade, Antonio A, *Le droit international pour la personne humaine*, Paris, Pedone, 2011, 141.

[12] Analysis of statistics 2015, published in January 2016, www.echr.coe.int.

[13] *Ibid.*

[14] See article 35 par. 3 point 3 (b) of the Convention according to which the applicant has to prove that he/she has suffered an important disadvantage in order to justify its application.

[15] The amendment of the art. 47 par. 1 entered in to force on 1st January2014, according to this provision Failure to comply with the requirements set out in paragraphs 1 to 3 of this Rule will result in the application not being examined by the Court.

[16] See the procedure envisaged by the Czech Act No. 82/1998 Coll., on the State liability for damages caused by the exercise of public power.

[17] Hartman v Czech Republic (2003) App no 53341/99 (ECHR, 10 July 2003).

[18] Vokurka v Czech Republic (2007) App no 40552/02 (ECHR 16 October 2007).

[19] *Ibid.*

Statutes

Czech Act No. 82/1998 Coll., on the State liability for damages caused by the exercise of public power

EU legislation and cases

Art. 230 par. 4 TEC
Art. 263 par. 4 TFEU
Case T-18/10, *Inuit Tapiriit Kanatami and others v European Parliament and Council [*2011]
Case T-177/01 *Jégo-Quéré* v Commission [2002]
C-263/02 P - *Commission v Jégo-Quéré* [2004]
Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002]
Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454

European Court of Human Rights

Convention for the Protection of Human Rights and Fundamental Freedoms Hartman v Czech Republic (2003) App no 53341/99 (ECHR, 10 July 2003)
Vokurka v Czech Republic (2007) App no 40552/02 (ECHR 16 October 2007)
Rule of Court

References

Cançado Trindade, A. (2011) Le droit international pour la personne humaine (Paris: Pedone)
Šišková, N. (2008) Dimenze ochrany lidských práv v EU, 2. edition (Prague: Linde) 2008
Bobek, M. (2003) Individuální žalobci před Evropským soudním dvorem; několik zamyšlení nad aktuálním vývojem, PR - příloha Evropské právo 6/2003, p. 1-8.
De Witte, F (2008) The European Judiciary after Lisbon, Maastricht Journal of European and Comparative Law, 2008, vol. 15, no. 1, p. 47-48
Mazák, J. (2011) Locus standi v konaní o neplatnosť: od Plaumannovho testu k regulačným aktom, Právník, vol. 3, p. 219-231
Schode, F. (2005) La reforme du contentieux communautaire du point de vue des droits du particulier, EUI and NYU Input, vol. 41, no. 5-6, p. 679.
Štěpánová, K. (2015) Posudek Soudního dvora Evropské unie č. 2/2013 z pohledu individuálního stěžovatele: tragédie nebo vysvobození? Acta Iuridica Olomucensia, Vol. 10, No. 1, p. 63–77
Analysis of statistics 2015, January 2016, <www.echr.coe.int>, accessed 13 February 2016

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Relationship between the European Court of Human Rights and the Court of Justice in Light of Accession of European Union zo the European Convention on Human Rights

DINO GLIHA

Abstract Question of the accession of the European Union to the European Convention on Human Rights has always been a controversy subject of discussion. That especially after the CJEU gave its Opinion 2/13 in which it strongly criticised the envisaged draft agreement that was created by the representatives of the Council of Europe and European Union. Most of the CJEU's objections have been argued that the draft agreement is incompatible with specific characteristics of EU and represent threat to the autonomy of EU. Although, CJEU's opinion almost completely undermined the whole process, the idea of accession, in order to create a coherent and fully functional system of the protection of human rights in Europe, still prevails.

Keywords: • accession • CJEU • ECtHR • European Convention on Human Rights • Opinion 2/13

CORRESPONDENCE ADDRESS : Dino Gliha, University of Zagreb, Faculty of Law, Croatia email: dino.gliha@hotmail.com.

DOI 10.4335/978.961.6399.79.1.03
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Relationship between the European Court of Human Rights (hereinafter "ECtHR") of the Council of Europe on the one side and the Court of Justice of the European Union (hereinafter "CJEU") on the other, represents an interesting legal as well as political question. It gradually gained importance with the development of the European Union (hereinafter "EU") and expansion of EU's powers in the area of the protection of human rights and fundamental freedoms. One, and potentially the most, important moment, concerning their relationship, was signing of the Treaty of Lisbon on 13 December 2007 by which the Member states of the EU accepted the concept of accession of the European Union towards the European Convention of Human Rights (hereinafter "the accession").

Seven years after the Treaty of Lisbon has entered into force, EU still has not acceded to the European Convention of Human Rights and fundamental freedoms[1] (hereinafter "the Convention") while relationship between the ECtHR and the CJEU continued to develop in its specific way through case law and cooperation of these two courts.

The purpose of this paper is to present former development of the relationship between ECHR and CJEU and to encourage further discussion regarding the accession and its influence on the relationship between the two courts *pro futuro*.

2 Current relationship between the European Court of Human Rights and the Court of Justice

Before entering into further analysis of the subject, it is important to stress the fact that there is no direct legal connection between the ECtHR and the CJEU. But throughout the last half a century the two Courts developed a specific type of relationship. The beginning of that process was initiated in 1969, when the CJEU started to interpret fundamental human rights as part of law of the Community.[2] Although the recognition of fundamental rights in the CJEU's practice was based on the arguments of German *Verwaltungsgericht*,[3] from the Stauder judgement on, the CJEU extended its competence on the area of jurisdiction of the ECHR.[4]

Having established the need to develop a system for the protection of fundamental rights, the Community decided not to develop its own specific rules on that matter. Instead it decided to provide protection of their citizens through the case law of the CJEU in accordance with the Convention and its interpretations. However, it was not before 1994 that the CJEU had explicitly referred to the jurisprudence of the ECtHR. In case P. v S. and Cornwall County Council[5] the CJEU referred to the ECtHR judgement in the case of Rees v. United Kingdom, concerning the definition of the term transsexual.[6]

From that moment on, the relationship and coordination between the two Courts started to increasingly intensify. Accordingly, when in 2000 the EU finally decided to enact its

own document on human rights, many articles of the Charter of Human Rights[7] corresponded to those of the Convention. Also in its case law, the CJEU continued to follow and refer to the ECtHR's interpretation of human rights and fundamental freedoms.

Throughout the years of their parallel judicial activity, the ECtHR and the CJEU tacitly developed an informal and complex sui generis system based on their cooperation and relative compatibility. The CJEU has accepted to follow the Convention's system of human rights and fundamental freedoms and the ECtHR's interpretation of the Convention, while the ECtHR has been seeking to avoid potential judicial conflicts by refraining from making judgments that could obstruct the exclusive jurisdiction of the CJEU over EU law.[8] Although the system is unquestionably functional, it has some major deficiencies which arise primarily from lack of their legal connection. Two of extensively discussed examples that were instrumental in defining the relationship between the ECtHR and the CJEU and their potentially overlapping jurisdiction are the ECtHR judgements in Matthews[9] and Bosphorus.[10] In the case of Matthews the ECtHR ruled that the transfer of competence from an EU Member State to the EU does not negate States responsibility under the Convention.[11] The violation was rooted in the EC Act on Direct Elections of 1976, concerning the Gibraltarians right to vote in elections for the European Parliament. The case of Matthews was the first case in which the ECtHR held that a Member State of the European Union was in breach of the Convention brought about by EU law. On the other hand, in the case of Bosphorus the ECtHR ruled that the Contracting Parties to the Convention were not prohibited from transferring sovereign power to an international organisation but that they nevertheless remained responsible for all acts and omissions of their organs regardless whether the act or omission was a consequence of domestic law or of the necessity to comply with their international legal obligations. Also in that case, the ECtHR created a well-known presumption, the so called Bosphorus presumption. According to it, it is presumed that, if equivalent protection of fundamental rights is considered to be provided by the organisation,[12] a State has acted in compliance with the Convention, where the state does no more than implement legal obligations following from its membership of the organisation.[13] The main difference between the two cases is that in Matthews the violation could be directly found in EU primary legislation, i.e. the treaties, while in Bosphorus it was in secondary legislation, i.e. an act adopted by the organisation itself.[14] Here it is important to mention that in the case of EU primary law it is much easier to establish direct liability of a Member State than when issues relating to EU secondary law are at question since the treaties are, unlike EU legislation, the result of the Member States' own legislation (they are ratified by Member State Parliaments).[15]

Besides that, too often (not in numbers but in importance) the two courts' provide divergent interpretations on the same matter that in some cases can be decisive for final resolution of a given case.[16] Example for that are cases Hoechst[17] and Niemietz[18] concerning the question of extension of Article 8 of the Convention (right to respect for private and family life) to companies. In the case of Hoechts the CJEU held that the protective scope of the right to respect for private and family life was concerned with

the development of a person's personal freedom and did not apply to business.[19] Later on, the ECtHR ruled that certain professional or business activities or premises derived protection from Article 8 of the Convention.[20] Also, in the case of Orkem[21] the CJEU held that an undertaking could not be said to have a right not to gain evidence against itself, while in Funke[22] the ECtHR recognised a right to remain silent and not to contribute to incriminate oneself. Same as in the case of Wilhelm[23] where the CJEU allowed cumulative domestic penalties and the case of Gradinger[24] where the ECtHR ruled that cumulative administrative and criminal proceedings were in breach of Article 4 of Protocol No. 7 to the Convention.[25]

Despite good efforts, mutual continuous harmonisation and coordination between the two courts seems problematic as shown by numerous cases and the fact that these two courts are two completely different institutions with different infrastructure and somewhere even with different constitutional positions and legal status.[26] Taking that into consideration, accession of the EU towards the Convention and disburdening the CJEU of some human rights cases could be the right solution, which is further discussed infra.

3 Legal basis for the accession of the european union towards the European Convention on Human Rights

The idea of accession of the European Union to the European Convention of Human Rights and Fundamental Freedoms originates in 1974 after France, as the then last EU member, had ratified the Convention.[27] Parallely, German Bundesverfassungsgericht criticised the level of protection of human rights in the European Economic Community in its well-known judgement Solange I.[28] Although the European Commission encouraged the idea of accession, and twice tried to convince the Council of its validity, it was not until 1994 that the Council had requested a legal opinion of the CJEU on the matter. In its Opinion 2/94 of March 1996,[29] the CJEU concluded that the legal regulation of that time lacked legal basis that would have allowed accession of EU to the Convention.[30] [31]

On the part of the EU, status quo like that obtained until 2007 when legal basis for accession was provided in the Treaty of Lisbon. But that does not mean that in the meantime the debate on accession had completely stopped. First the Steering Committee for Human Rights (CDDH) adopted at its 53rd meeting in June 2002 a study on the legal and technical issues that would have to be addressed by the Council of Europe in the event of possible accession by the EU to the Convention.[32] Then, in 2004 the Council of Europe (hereinafter "CoE") adopted Protocol No. 14 to the Convention[33] (entered into force on 1 June 2010), which amended Article 59 of the Convention so as to allow the EU to accede to it. The entry into force of the Treaty of Lisbon in December 2009 and of Protocol No. 14 to the Convention in June 2010 both created the necessary legal preconditions for the accession.

Under Article 6(2) of the Treaty on European Union[34] (hereinafter "TEU") the European Union obliges itself to accede to the Convention with restriction that such accession would not affect Union's competence as defined in the Treaties.[35] Even though that was only one step closer to eventual accession, with that kind of imperative formulation the European Union took a clear obligation to accede to the Convention. If it fails to fulfill its obligation, from a strictly formally point of view, that could be grounds for an action for failure to act before the CJEU.[36]

After the Treaty of Lisbon and Protocol No. 14. to the Convention entered into force, both providing a legal basis for accession of EU to the Convention, the further process of accession requires the accession agreement. Firstly, negotiators from the European Union and the Council of Europe should draft an agreement on accession. After draft agreement is finalised, it is supposed to be submitted to the CJEU for its opinion. If the CJEU's opinion is positive, the draft would then require the unanimous approval of the EU's member states, the support of the European Parliament (with a two-thirds majority), and would then need to be ratified by parliaments in the Council of Europe's 47 member States.[37] If only one of the steps listed above is missing, the accession will not be achieved.

Seven years after the Treaty of Lisbon has entered into force, there was only one concrete attempt of achieving accession. But that try was stopped already at the phase before the CJEU (more on that matter will be discussed further).

4 Draft agreement on the accession on of the European union to the Convention for the protection of human rights and fundamental freedoms

Fifth negotiation meeting between the Steering Committee for Human Rights (hereinafter "the CDDH"), ad hoc negotiation group,[38] and the European Commission representatives on the accession of the European Union to the European Convention on Human Rights was held in Strasbourg between 3 and 5 April 2013. As a result of that meeting, negotiators drafted a text of the agreement on the accession of the European Union to the European Convention on Human rights (hereinafter "the draft agreement") that was supposed to be an integral part of both the Convention law and EU law.

The draft agreement was published in the final report to CDDH together with all of the other documents made within negotiations between two sides. All of drafted documents form a package and are equally necessary for the accession of the EU to the Convention. They are: draft agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms,[39] a draft declaration by the EU,[40] a draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party,[41] a draft model of a memorandum of understanding[42] and a draft explanatory report to the Accession Agreement.[43]

As said in the Preamble, the main idea of the drafted agreement was to ensure the coherent system of human rights in Europe. Having that in mind, the draft agreement consists of Preamble and twelve articles which also include proposals for amendments to the Convention, necessary for the whole process of accession. It is structured in a following manner: the scope of the accession and amendments to Article 59 of the Convention (art 1), reservations to the Convention and its protocols (art 2), co-respondent mechanism (art 3), inter-party cases (art 4), interpretation of Articles 35 and 55 of the Convention (art 5), election of judges (art 6), participation of the EU in the meetings of the Committee of Ministers of the CoE (art 7), participation of the EU in the expenditure related to the Convention (art 8), relations with other agreements (art 9), signature and entry into force (art 10), reservations (art 11) and notifications (art 12).

As seen from the above, the draft agreement is not very extensive but, still, it regulates some of the most important questions concerning the relationship of the EU and the ECtHR. It also introduces few novelties such as the co-respondent mechanism and participation of the European Union in the work of the Council of Europe. Some of the most interesting parts of the draft agreement are going to be analysed in the next chapter having in mind the CJEU's Opinion 2/13.[44]

5 Opinion 2/13

If drafting of the agreement was one step forward towards the accession of EU to the Convention, than CJEU's opinion of the draft agreement was at least two steps backwards. When in December 2014 the CJEU finally gave its long-awaited opinion on submitted draft agreement, probably only few expected such a strongly negative ruling upon the accession of EU to the Convention. Critics of the given ruling were pretty harsh, sometimes even offensive,[45] which was not so surprising given the fact that the CJEU practically put a veto on the possible accession. Before going into further discussion of the CJEU attitude towards the accession, a short summary of the CJEU's opinion will be presented.

After the CJEU has declared that the case was admissible,[46] the Court gave some preliminary points. Firstly it stated that the position of accession was different from time when that Court delivered its Opinion 2/94 since now there was a specific legal basis provided by art 6(2) of the Treaty of Lisbon.[47] Besides that, the CJEU stated that EU had a specific legal status under international law since it was not a State, and emphasised the importance of its specific sui generis system. Also it stressed the importance of ensuring the primacy and direct effect of EU's law.[48]

In the next *meritum* part of the case, the CJEU ruled that the submitted draft agreement was incompatible with the EU law. Explanation for that ruling can be divided into five main reasons.

Firstly, the CJEU found the draft agreement incompatible with the specific characteristics and the autonomy of EU law in three different aspects; question of

higher human rights standards, mutual trust in Justice and Home Affaires matters and application of Protocol 16 of the Convention.[49] Reasoning of all three potential "violations" was quite unconvincing. As regards the human rights standards, the CJEU found Article 53 of the Convention incompatible with art 53 of the Charter since the former provision reserves the power of the Contracting Parties to lay down higher standards of protection of human rights than those guaranteed by the Convention. According to the CJEU's interpretation of art 53 of the Charter, application of national standards for protection of human rights should not compromise the level of protection provided by the Charter or the primacy, unity and effectiveness of EU law. Since the draft agreement had not given a provision that would limit and coordinate Article 53 of the Convention according to art 53 of the Charter, the CJEU found that as a threat to the autonomy of the EU. But here it would be useful to stress that the main purpose and the idea of the whole process of the accession was to create a coherent system that would raise the level of protection of human rights and not limit them.[50] Furthermore, with lack of special provision that would regulate it, the CJEU has found EU's principle of mutual trust endangered with the Convention system of observance of human rights. Although that has never been shown as an issue in the Council of Europe's practice (n.b. all Members States of the EU are also members of the CoE), the CJEU found that as an issue which could upset the underlying balance of the EU and undermine the autonomy of EU law.[51] Also CJEU stated that the draft agreement had failed to rule out the possibility that the application of Protocol 16 to the Convention could affect the autonomy effectiveness of the EU's preliminary ruling procedure under the art 267 Treaty on functioning of the European Union (hereinafter "TFEU").[52] That was because Protocol 16, when ratified, would permit the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of the rights and freedoms guaranteed by the Convention or the protocols thereto. Since it did not provide any mechanism to regulate the relationships between Protocol 16 to the Convention and art 267 TFEU, the CJEU expressed its concern that the ECtHR would rule on the EU issues before consulting the CJEU.[53] [54]

Secondly, the CJEU ruled that the draft agreement had violated art 344 TFEU as being contrary to art 3 of Protocol 8.[55] According to that provision "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 therein" and the ECtHR was not explicitly excluded as being a forum of settling disputes between Member States on matters concerning EU law.[56]

Thirdly, the draft agreement has introduced the so called co-respondent system which represents a new type of procedure where one Contracting Party has a status somewhere between being a party and an intervener.[57] The draft agreement has set up three situations in which it could be used: where an application is directed against one or more Member States of the EU, when the EU may become a co-respondent to the proceedings; when an application is directed against the EU, when an EU Member State may become a co-respondent to the proceedings; and where an application is directed against both the EU and one or more Member States, in which case the status of any of

respondents may be changed to that of co-respondent from previous two situations. The CJEU found the problematical several aspects of newly introduced co-respondent system, primarily those concerning the interference of the ECtHR with the division of power between the EU and its Member States.[58] Firstly, the ECtHR would be given the power to interpret EU law when assessing the admissibility of applications lodged before it. Secondly, rulings by the ECtHR on joint responsibility of the EU and its Member States could impinge on Member States reservations to the Convention. And lastly, with the power to allocate responsibility for breach between the EU and a Member State, the ECtHR would be given the power to rule on EU law.[59] The CJEU found such a concept unacceptable and contrary to the specific characteristics of the EU law.

Fourthly, the CJEU agreed that prior involvement of the CJEU before the ECtHR was needed for the purpose of ensuring the proper functioning of the judicial system of the EU.[60] However, the draft agreement has not envisaged exclusive competence of the relevant EU institutions to rule upon the question whether the CJEU has already given a ruling on the same question of law as the one at issue in the proceedings before the ECtHR. The CJEU stated that such "omission" would be tantamount to conferring on the ECtHR the jurisdiction to interpret the case-law of the CJEU.[61] Besides that, the CJEU also found problematic that the draft agreement did not permit the CJEU to rule on the interpretation of EU law, but only on its validity.[62, 63]

Finally, under the draft agreement the ECtHR would be empowered to rule on the compatibility with the Convention of certain acts, actions or omissions related to the context of the Common Foreign and Security Policy (hereinafter "CFSP"), which cannot be reviewed in light of fundamental rights. The CJEU maintained that such situation would effectively entrust the judicial review of those acts, actions or omissions to a non-EU body and as such was not in compliance with specific characteristics of EU law.[64]

It could be concluded from the reasoning of the CJEU's opinion that it was primarily guided by the interests of the European Union as such, and not by the interests of its citizens. It might even be said that the entire opinion lacks proper argumentation because the CJEU focused on prejudging potential problems with possible accession concerning the autonomy of the EU and specific characteristics of its law. On the contrary, the role of the CJEU in the process of accession was supposed to be to evaluate the quality of the envisaged draft agreement and also to provide suggestions for improvement of the next draft.

6 Some thoughts on coherent system for human rights protection in Europe

The main idea of the whole story of the accession of the EU to the Convention has been to improve the level of the protection of fundamental rights in Europe. In the EU, currently there are two different coexisting judicial systems for the protection of human rights that do not have any formal legal connection. It is true that they have developed some kind of informal and complex sui generis system based on their cooperation and relative compatibility. Although that system has shown to be functional, that should not be enough because, as said above, there are still some major differences in their judgments and interpretations that create legal uncertainty and generally decrease the level of the protection of human rights in Europe. The idea of accession of the EU to the Convention, if carried out properly, seems like a good solution to prevail deficiencies in existing dual system in the territory of European Union.

By means of Opinion 2/13, the CJEU, as the EU judicial body, significantly aggravated the whole process of accession. The purpose of the CJEU was to evaluate the draft agreement from the perspective of EU law and, also, to provide some proposals for improvement of agreement. Instead, the CJEU acted like an EU negotiator that put on an ultimatum, even though the authorised EU's representatives equally participated in drafting of the proposed agreement.

It is clear that some of the CJEU's reasoning in Opinion 2/13 is justified and even necessary. The proposed draft agreement would certainly profit from more detailed provisions on regulating post-accession relationship between the ECtHR and the CJEU when ruling on human rights issues. Regardless of that, however, the CJEU's ruling gives a strong appearance of subjectivity and it also entered into some questions that might have been out of its competence to give opinion on. For instance, the CJEU's deciding upon the question of compatibility appears completely unnecessary because the CJEU has already ruled on that matter in the Melloni case.[65] Besides that, when looking at the CJEU's explanation of that question it seems as if it was not motivated by a desire to improve protection of human right but quite the opposite to strengthen the Union. Incompatibility of the draft agreement with art 3 of Protocol 8 is justified. The ECtHR should be explicitly excluded as potentially being a forum of settling disputes between Member States on matters concerning EU law. Still the CJEU could have given some proposals on how to properly regulate that matter instead of only criticising it. Co-respondent mechanism is a new institute and, as such it, it may be better regulated than how it was presented in the draft agreement. But, again, when criticising it the CJEU could have been focused more on giving proposals on how to improve proposed mechanism in lieu of searching its elements that would potentially jeopardise the EU's superiority. The CJEU's objections of prior involvement of the CJEU before the ECtHR are not constructive. Again, threatened by the potential ECtHR's interference in any matter in connection with EU law, the CJEU suggests to include EU institutions to rule upon the question whether the CJEU has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR. Inclusion of other institutions would only complicate and slow down the procedure before

ECtHR. Also it would possibly endanger independence of the ECtHR to freely decide upon human rights matter hence is in a way disrespecting for the eligibility of ECtHR judges. Same goes and for CJEU's objection on the ECtHR competence to rule upon CFSP matters which is a political question and such should not even be discussed in CJEU's opinion.

Regarding all of the CJEU's objections, in some of them the Court insists on primacy of EU Courts and other institutions over the ECtHR and also on priority of EU law over the protection of human rights.[66] For the purpose of creation of a complete and truly functional system of human rights in Europe that is unacceptable. The European Union is primarily an economic union of sovereign States and not the protector of human rights. For that cause the Council of Europe has created and 47 Member States (including 28 EU Member States) have accepted and ratified the European convention on human rights and European Court of Human Rights, as a protector and interpreter of the Convention and rights guaranteed by it. It is true that through years with development and expansion of the EU and its powers, the EU has recognized the need for protection of fundamental rights and even in a later phase created a document of guaranteed rights. But that is what also created parallelism of systems for protection of human rights on the area of EU.

Now when human rights in EU are recognised and secured with proper legal instruments, next step is to unite those two systems, which are already connected, and secure equal level of fundamental rights on the area of all Europe, regardless of institution who decided upon them. Accession of the EU to the Convention seems to be the right way to achieve something like that. With the accession competence for the protection of human rights would be primarily in the ECtHR's jurisdiction, which as a specialised Court seems to be the best forum upon deciding on that matter. With that kind of division of competence, the CJEU would not be subordinated by the ECtHR, which some like to use as an argument contra accession, but the situation is quite the opposite. It would be disburdened by the human rights matters so it could focus more on other question of higher importance for the interests of the EU and its Member States. Concerning that, accession of EU to the Convention could be a strong integrating factor for the EU, which is especially important nowadays when Union is struggling and further expansion of powers only weakens it.

7 Instead of a conclusion

All relevant issues considered, at the moment it is not likely that the European Union will fulfill its obligation under the Treaty of Lisbon and accede to the Convention. Given the complex ambience and variety of different interests inside the EU I do not at all find it surprising.

Nevertheless, the desire to create a coherent and fully functional system of the protection of human rights in Europe still prevails, even if its realisation has been postponed. Accession of the EU to the Convention could be the key factor in achieving

that goal. In order to do so it is needed to analyse the former draft agreement in every detail and to create an improved document on its foundation. New draft agreement should be well balanced between the Convention law and the EU law with its primary purpose of creating a coherent and effective human rights system in Europe. Criticism and arguments from CJEU's Opinion 2/13 should surely be taken into consideration, but not literally and exclusively.

Quality recreation of agenda on the accession of the European Union to the European Convention on Human Rights is the first step towards that goal, followed by the thorough discussion and detailed analysis on that matter. Such an approach, despite all conflicts of interest and complexity of the whole process, would be much more sincere and would provide a good basis for the process of accession to succeed and for Europe to have one coherent and efficient system for the protection of human rights.

Notes

[1] Council of Europe, European Convention for the Protection of Human Rights and Fundamental freedoms, as amended by Protocols No 11 and 14, 4 November 1950, ETS 5
[2] Case C-29/69 Stauder v City of Ulm [1969] ECR-419, para 8
[3] Case C-29/69 Stauder v City of Ulm [1969] ECR-419, pp 421
[4] Sybe A. de Vries "EU and ECHR: Conflict or Harmony?" Utrecht Law Review Vol 9, Iss 1 78
[5] Case C-13/94 P. v S. and Cornwall County Council [1996] ECR I-2143, para 16
[6] Rees v. United Kingdom, no. 9532/81 (ECHR, 17 October 1986), para 38
[7] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, OJ 2012/C 326/02
[8] Viktoria Tsvetanova, "The EU's Accession to the ECHR: The Courts' Relationship Prior to Accession" (6 January 2014) The GULS Law Review <http://www.gulawreview.org/entries/eu/the-eu's-accession-to-the-echr-the-courts'-relationship-prior-to-accession> accessed 19 February 2016
[9] Matthews v. the United Kingdom App no. 24833/94 (ECHR, 18 February 1999)
[10] Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland App no. 45036/98 (ECHR, 30 June 2005)
[11] *Matthews v. the United Kingdom* App no. 24833/94 (ECHR, 18 February 1999) para 32
[12] Equivalent protection of fundamental rights as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.; Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland App no. 45036/98 (ECHR, 30 June 2005) para 155
[13] Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland App no. 45036/98 (ECHR, 30 June 2005) para 156
[14] Tobias Lock, "Beyond Bosphorus: the European Court of Human Rights' Case law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights" Human Rights Law Review Vol 10 (2010) 529, 531
[15] Kathrin Kuhnert, "Bosphorus – Double standards in European human rights protection?" Utrecht Law Review Vol 2, Iss 2 (December 2006) 177, 182
[16] See Brid Moriarty "EC Accession to the ECHR" Hibernian Law Journal Vol 3, No 1 (2002) 13, 22
[17] Joined cases C-46/87 and C-227/88 *Hoechst AG v Commission of the European Communities* [1989] ECR-2859
[18] *Niemietz v. Germany* App no 13710/88 (ECHR, 16 December 1992)

[19] Joined cases C-46/87 and C-227/88 Hoechst AG v Commission of the European Communities [1989] ECR-2859, para 18
[20] *Niemietz v. Germany* App no 13710/88 (ECHR, 16 December 1992) para 33
[21] Case C-374/87 *Orkem v Commission* [1989] ECR-3283, para 30
[22] *Funke v. France* App no. 10828/84 (ECHR, 25 February 1993) para 44
[23] Case C-14/68 *Wilhelm v Bundeskartellamt* [1969] ECR-1,
[24] *Gradinger v Austria* App no 15963/90 (ECHR, 23 October 1995)
[25] Council of Europe, Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, ETS 117
[26] See Emilio de Capitani "EU accession to the ECHR: A parliamentary perspective" The Italian Yearbook of International Law Online Vol 20, Iss 1 (2010) 87, 88
[27] Benedikt Pirker, Stefan Reitemeyer, "Zum Gutachten 2/13 des EuGH über den Beitritt der EU zur EMRK: Ein Schritt vor und zwei zurück" (2015) Jusletter <http://jusletter.weblaw.ch/juslissues/2015/795.html> accessed 21 February 2016
[28] BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß (29 May 1974)
[29] Case 2/94 Opinion pursuant to Article 228(6) of the EC Treaty (Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms), [1996] I-1759
[30] Ibid. para 6
[31] See Simone White "The EU's Accession to the Convention on Human Rights: A New Era of Closer Cooperation Between the Council of Europe and the EU?" New Journal of Criminal Law Vol 1, Iss 4 (2010) 433, 434
[32] Document CDDH(2002)010 Addendum 2 <http://www.coe.int/t/dghl/standardsetting/cddh/Meeting%20reports%20committee/53rd_en.pdf> 28 August 2002
[33] Council of Europe, Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 13 May 2004, CETS 194
[34] Consolidated Version of the Treaty on European Union [2008] OJ 326/13
[35] Protocol No. 8 to the Treaty of Lisbon set out some further requirements for the conclusion of the Accession Agreement such as that the agreement relating to the accession shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to the specific arrangements for the Union's possible participation in the control bodies of the European Convention and the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate, also shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof and finally that nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union; Protocol (No 8) relating to article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> 6655/1/08 REV 1
[36] Jean Paul Jacque, "The accession of the European Union to the European Convention on human rights and fundamental freedoms" Common Market Law Review Vol 48 (2011) 995
[37] Andrew Gardner, "Breakthrough in EU bid to join Council of Europe" (European voice, 5 April 2013)

[38] On 26 May 2010, the Committee of Ministers of the Council of Europe gave ad hoc mandate to its Steering Committee for Human Rights (CDDH) to elaborate, in co-operation with the European Commission, the necessary legal instrument for the accession. The CDDH entrusted the informal working group CDDH-UE with this task. It was composed of 14 experts from the Council of Europe member states (7 from EU member states and 7 from non-EU member states). On 14 October 2011, the CDDH transmitted a report to the Committee of Ministers on the work done by the CDDH-UE, and the draft legal instrument in appendix. Given the political implications and some of the issues that were raised, on 13 June 2012, the Committee of Ministers instructed the CDDH to pursue negotiations with the EU within the ad hoc group "47+1" and to finalise the legal instrument dealing with the accession modalities.; Steering Committee for Human Rights (CDDH), Ad hoc terms of reference concerning accession of the EU to the Convention given to the CDDH by the Ministers' Deputies during their 1085th meeting (26 May 2010) CDDH(2010)008; Steering Committee for Human Rights (CDDH), Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights CDDH(2011)009;

[39] Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European commission on the accession of the European union to the European convention on human rights, final report, 47+1(2013)008rev2 (10 June 2013) 4

[40] Draft declaration by the European Union to be made at the time of signature of the Accession Agreement, Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European commission on the accession of the European union to the European convention on human rights, final report, 47+1(2013)008rev2 (10 June 2013) 13

[41] Draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the European Union is a party, Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European commission on the accession of the European union to the European convention on human rights, final report, 47+1(2013)008rev2 (10 June 2013) 14

[42] Draft model of memorandum of understanding between the European Union and X (State which is not a member of the European Union), Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European commission on the accession of the European union to the European convention on human rights, final report, 47+1(2013)008rev2 (10 June 2013) 15

[43] Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European commission on the accession of the European union to the European convention on human rights, final report, 47+1(2013)008rev2 (10 June 2013) 16

[44] Case 2/13 Opinion pursuant to Article 218(6) of the TFEU (Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms), [2014] I-2454

[45] Jep Odermatt "A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights" International Law and Politics Vol 47 (2015) 783, 791; Christoph Krenn "Autonomy and Effectivness as Common Concerns: A Path to ECHR Accession After Opinion 2/13" German Law Journal Vol 16, No 1 (2015) 148

[46] CJEU Opinion 2/13 para 71

[47] Ibid. para 153

[48] Ibid. para 167

[49] Council of Europe, Protocol 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2 October 2013, ETS 214

[50] Ibid. paras 186-190

[51] Ibid. paras 191-195
[52] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ 326/47
[53] CJEU Opinion 2/13 para 196-199
[54] See Piet Eeckhout "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky" Fordham International Law Joural Vol 38, Iss 4 (2015) 955, 971
[55] Protocol No 8 Relating to Art 6(2) on the Accession of the Union to the European Convention on Human Rights and Fundamental Freedoms [2012] OJ 326
[56] CJEU Opinion 2/13 paras 201-214
[57] See Paul Gragl, The Accession of the European Union to the European Convention on Human Rights (Hart Publishing, 2013) 138
[58] Ibid. paras 215-235
[59] Steve Peers "The EU's accession to the ECHR: The Dream Becomes a Nightmare" German Law Journal Vol 16, No 01 (2016) 213, 215-216
[60] See opposite Benedetto Conforti "Comments on the accession of the European Union to the ECHR" The Italian Yearbook of International Law Online Vol 20, Iss 1 (2010) 83,86
[61] CJEU Opinion 2/13 para 236-241
[62] Steve Peers *op. cit. supra* note 59, 216
[63] See Noreen O'Meara "A More Secure Europe of Rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR" German Law Review Vol 12 No 10 (2011) 1813,1820
[64] CJEU Opinion 2/13 para 249-257
[65] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECR I- para 60
[66] Steve Peers *op. cit. supra* note 59, 218

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Case C-2/13 Opinion pursuant to Article 218(6) of the TFEU (Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms), [2014] I-2454
Case C-399/11 Stefano Melloni v Ministerio Fiscal [2013] ECR I
Case C-13/94 P. v S. and Cornwall County Council [1996] ECR I-2143
Case C-2/94 Opinion pursuant to Article 228(6) of the EC Treaty (Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms), [1996] I-1759
Case C-374/87 Orkem v Commission [1989] ECR-3283
Joined cases C-46/87 and C-227/88 Hoechst AG v Commission of the European Communities [1989] ECR-2859
Case C-29/69 Stauder v City of Ulm [1969] ECR-419
Case C-14/68 Wilhelm v Bundeskartellamt [1969] ECR-1
Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland App no. 45036/98 (ECHR, 30 June 2005)
Matthews v. the United Kingdom App no. 24833/94 (ECHR, 18 February 1999)
Gradinger v Austria App no 15963/90 (ECHR, 23 October 1995)
Funke v. France App no. 10828/84 (ECHR, 25 February 1993)
Niemietz v. Germany App no 13710/88 (ECHR, 16 December 1992)
Rees v. United Kingdom, no. 9532/81 (ECHR, 17 October 1986)
BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß (29 May 1974)

Legislation and other official sources

Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ 326/47

European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, OJ 2012/C 326/02

Protocol (No 8) relating to article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> 6655/1/08 REV 1

Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European commission on the accession of the European union to the European convention on human rights, final report, 47+1(2013)008rev2 (10 June 2013) 4

Draft declaration by the European Union to be made at the time of signature of the Accession Agreement, Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European commission on the accession of the European union to the European convention on human rights, final report, 47+1(2013)008rev2 (10 June 2013) 13

Draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the European Union is a party, Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European commission on the accession of the European union to the European convention on human rights, final report, 47+1(2013)008rev2 (10 June 2013) 14

Draft model of memorandum of understanding between the European Union and X (State which is not a member of the European Union), Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European commission on the accession of the European union to the European convention on human rights, final report, 47+1(2013)008rev2 (10 June 2013) 15

Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European commission on the accession of the European union to the European convention on human rights, final report, 47+1(2013)008rev2 (10 June 2013) 16

Council of Europe, European Convention for the Protection of Human Rights and Fundamental freedoms, as amended by Protocols No 11 and 14, 4 November 1950, ETS 5

Council of Europe, Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, ETS 117

Council of Europe, Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 13 May 2004, ETS 194

Council of Europe, Protocol 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2 October 2013, ETS 214

Document CDDH(2002)010 Addendum 2 <http://www.coe.int/t/dghl/standardsetting/cddh/Meeting%20reports%20committee/53rd_en.pdf> 28 August 2002

Steering Committee for Human Rights (CDDH), Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights CDDH(2011)009

Steering Committee for Human Rights (CDDH), Ad hoc terms of reference concerning accession of the EU to the Convention given to the CDDH by the Ministers' Deputies during their 1085th meeting (26 May 2010) CDDH(2010)008

References

Emilio de Capitani "EU accession to the ECHR: A parliamentary perspective" The Italian Yearbook of International Law Online Vol 20, Iss 1 (2010) 87

Piet Eeckhout "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky" Fordham International Law Joural Vol 38, Iss 4 (2015) 955

Andrew Gardner, "Breakthrough in EU bid to join Council of Europe" (European voice, 5 April 2013)

Paul Gragl, The Accession of the European Union to the European Convention on Human Rights (Hart Publishing, 2013) 138

Jean Paul Jacque, "The accession of the European Union to the European Convention on human rights and fundamental freedoms" Common Market Law Review Vol 48 (2011) 995

Kathrin Kuhnert, "Bosphorus – Double standards in European human rights protection?" Utrecht Law Review Vol 2, Iss 2 (December 2006) 177

Tobias Lock, "Beyond Bosphorus: the European Court of Human Rights' Case law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights" Human Rights Law Review Vol 10 (2010) 529

Brid Moriarty "EC Accession to the ECHR" Hibernian Law Journal Vol 3, No 1 (2002) 13

Jep Odermatt "A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights" International Law and Politics Vol 47 (2015) 783, 791; Christoph Krenn "Autonomy and Effectivness as Common Concerns: A Path to ECHR Accession After Opinion 2/13" German Law Journal Vol 16, No 1 (2015) 148

Steve Peers "The EU's accession to the ECHR: The Dream Becomes a Nightmare" German Law Journal Vol 16, No 01 (2016) 213

Benedikt Pirker, Stefan Reitemeyer, "Zum Gutachten 2/13 des EuGH über den Beitritt der EU zur EMRK: Ein Schritt vor und zwei zurück" (2015) Jusletter <http://jusletter.weblaw.ch/juslissues/2015/795.html> accessed 21 February 2016

Viktoria Tsvetanova, "The EU's Accession to the ECHR: The Courts' Relationship Prior to Accession" (6 January 2014) The GULS Law Review <http://www.gulawreview.org/entries/eu/the-eu's-accession-to-the-echr-the-courts'-relationship-prior-to-accession> accessed 19 February 2016

Sybe A. de Vries "EU and ECHR: Conflict or Harmony?" Utrecht Law Review Vol 9, Iss 1 (2013) 78

Simone White "The EU's Accession to the Convention on Human Rights: A New Era of Closer Cooperation Between the Council of Europe and the EU?" New Journal of Criminal Law Vol 1, Iss 4 (2010) 433

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LEXONOMICA PRESS

The Question of Hierarchy in Human Rights Protection in the European Union or Quis Custodiet Ipsos Custodes

PIA RAVTER

Abstract This contribution outlines hierarchical structure of the human rights protection in the European Union in the light of future accession of the European Union to the European Convention of Human Rights. It examines the hieratical position of both courts in the existing system of human right protection with the reference to historical developments and assessments of legislative and judicial practice of the Court of Justice of the European Union, European Court of Human Rights and the national courts. It justifies why the Court of Justice of the European Union cannot have higher or same hierarchical rank of human rights protection as the European Court of Human Rights. At the same time, the contribution tries to propose suitable solutions between the courts to straighten the protection of human rights de lege ferenda.

Keywords: • Human Rights Protection • Court of Justice of the European Union • European Court of Human Rights • Constitutional Courts

CORRESPONDENCE ADDRESS : Pia Ravter, University of Maribor, Faculty of Law, Mladinska ulica 9, 2000 Maribor, Slovenia, email: pia.ravter@gmail.com.

DOI 10.4335/978.961.6399.79.1.04
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

From today's perspective of existence and especially the content and application of human rights in Europe one should acknowledge the absence of any human rights dimension in the treaties by which the European Union (hereinafter: EU) was established.[1] The ambition of this contribution is to outline the hierarchical structure of human rights protection in Europe[2] and analyse the current issue of EU's potential primacy in human rights protection. For this reason, it underlines three main arguments; the historical background of the human rights protection in the EU, the position of the EU law in the national legal order and the judicial protection of a person seeking human rights protection within the territory of the EU. Each argument is supported by current procedural possibilities, provides relevant case-law and the opinions of the scholars which are combined in the reference notes.

The methods used to demonstrate this provision are analysis of human rights policies in the EU. The institutional narratives that have shaped human rights policies, procedure before both international and national courts, review of the case-law and references to opinions of the scholars. Assessment of the hierarchical position of the human rights protection is therefore based on the historical background and the ground of legislative and judicial practice. On this base it also examines various measures which could be eligible for the future accession.

The contribution begins with historical reference, since human rights have long been EU's second concern and have served other economical aspirations. First reference towards the human rights protection was made by the European Court of Justice (after the Treaty of Lisbon: Court of Justice of the European Union, hereinafter: CJEU) in 1969 with its famous *Stauder v City of Ulm*[3] ruling which implemented fundamental human rights in the general principles of Community law[4]. With no legal document of its own, the EU has later referred to a number of international treaties, primarily[5] on the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) and reasoning of the European Court of Human Rights (hereinafter: ECtHR). In 2000 the adoption of the Charter of Fundamental Rights of the European Union (hereinafter: EU Charter) reflected political matters[6] and pressing international affairs[7]. However, the EU Charter was not binding until 2009, when the Treaty of Lisbon entered into force. After the December 2009 the EU is the first international organisation to have two legally binding regional documents for the protection of human rights with the jurisdiction over its territory. Two legal documents with the corresponding subject matter and two different courts which can rule over this provisions. The Treaty of Lisbon, however, also imposed a legal obligation of the EU to accede to the ECHR to establish and guarantee more coherent and harmonious system for protection of human rights in Europe but the recent political negotiations seem to hit a deadlock.

The second and third part of this contribution refer to the procedural and substantive part of the human rights protection in Europe, with the purpose of drawing an outline of the hierarchical position and relationship among the courts. When dealing with the

question of the position of human rights in Europe, one must not forget about the *sui generis*[8] nature of the EU organization and the question of its judicial review. The difficult question of compatibility of sovereignty with autonomous supranational legal orders that have constitutional quality and claim supremacy and jurisdiction reach that penetrates the territorial state[9] need to find its answers in a strongly defined rules of jurisdiction and hierarchical rank of the courts. Considering also the provisions of international law, rules of interpretation and the hierarchy of legal rules within the national legal system as part of *Rechtsstaat*, rule of law principle, it shows the existing hierarchical structure. To evaluate legal prospect of the protection of human rights between two regional courts, the case-law of the CJEU and ECtHR is reviewed. The contribution tries to examine the possible ways of implementation of the accession and the different positions between the courts. For that reason, it focuses on the question of application and jurisdiction of EU law with the comparison to the existing system under the ECtHR. In the last part, it reviews the application of procedure for protection of human rights before both courts and the scope of their judgements.

2 Development of the human rights policy in the EU

While it is hard to imagine the EU as we know it today without any reference to human rights dimension, one cannot suggest that it can be primarily defined as a human rights organisation.[10] In the early case law the CJEU refused to consider the application of human rights standards since the treaties had mainly economic aspirations. In its landmark decision in *Stauder v City of Ulm*[11] the court assumed that the fundamental rights[12] are enshrined in the general principles of EU law but only in *Nold 2* [13] judgment it explained that when safeguarding these rights, it is bound to draw inspiration from constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. However, it has to be noted that, the CJEU only acknowledge this rights while exercising the economic aspirations from the treaties not to safeguard the human rights *per se*. With no legal document on human rights of its own, the CJEU referred to a number of international treaties. Lack of catalogue of fundamental rights in the EU triggered some Member States[14] to challenged the supremacy of EU law. As this subject is also connected with the position of EU law within national legal order this matter is revised in Chapter 3.

Subsequent case law of the CJEU has relied primarily on the ECHR and reasoning of the ECtHR[15]. In the *Johnston v Chief Constable of the Royal Ulster Constabulary*[16] the court noted the special significance of the human rights provisions under ECHR as it is seen as part of European culture and political heritage[17]. One could easily claim that the court silently agreed on the primacy of the ECtHR regarding human rights matters. However, the CJEU did not follow decisions made by the ECtHR without any limitations. It still had to primarily protect the economical aspect of the EU integration. In the cases *Wachauf*[18] and *ERT*[19] the CJEU noted that the nature of this recognized fundamental rights is not absolute, meaning that restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of the market[20]. The reasoning in *ERT* went even further saying that when deciding about

preliminary rulings the CJEU has the power to determine whether the EU rules are in accordance with the ECHR[21].[22] This reasoning is not supported by any legal provision but it follows the goal of coherent practice in protecting human rights within the EU. The wording of these two judgements delivered in 1989, describe the main problem of accession of the EU to ECHR we are facing today – the competing jurisdiction. If there is only one ECHR how is it possible to have two courts which can rule over it? The answer to this question lies in the established rules of jurisdiction. Under the Article 19 of the ECHR the ECtHR is the sole and final arbiter of the Convention, whereas the CJEU was self appointed[23]. To establish legal background for jurisdiction of CJEU to decide upon accordance of the EU law with the human rights, the EU law developed its own set of fundamental rules inside the EU Charter (legally binding only after the Treaty of Lisbon) with the strong reference to the human rights provisions under the ECHR. The EU Charter gave the green light to the CJEU to create its own case law regarding the fundamental rights provisions. This way it established a hybrid system of human rights protection with respect also to the ECHR provisions[24] but enforceable only in a EU matters. In this respect we have to keep in mind that the purpose of the EU Charter is only to support the EU legislation, not to establish a new way of protecting the rights of individuals as this is the case of ECHR, which is additional argument why EU cannot be seen as a human rights organisation.

Following this changes in the European law, the ECtHR still retained the role as the sole and final arbiter of the ECHR.[25] The system under the EU Charter was therefore designed to allow the CJEU to develop fundamental rights subordinate to the EU law. However, it is mandatory that the development of fundamental rights follow the ECHR and the jurisprudence of the ECtHR since the EU has the legal obligation under the Treaty of Lisbon to accede to the ECHR. But the CJEU's unwillingness of Strasbourg court having the final word regarding the human and potentially fundamental rights of the EU, remains a pressing issue. Negative attitude towards accession can be seen from first legal opinion, *Opinion 2/94*[26] from 28 March 1998, about whether it is legally possible for the EU to accede to the ECHR[27] and moreover from the second legal opinion, *Opinion 2/13*[28] from 14 December 2014 about the Final Draft Accession Agreement, which practically made accession unimaginable due to the highly demanding reasoning rendering future accession. In the final opinion ruling, the court stated that the Final Draft Agreement was incompatible with the EU law. The main reason was that the Agreement did not take into account the specific characteristic of EU law. However, the Final Draft Agreement did foresee the situation where the CJEU has the opportunity to make a quick assessment in cases where EU is co-respondent and the CJEU has not yet had the opportunity to assess the compatibility of EU law with the ECHR.[29] It is now clear that the CJEU will not take the subordinate role. Moreover, some of the CJEU's objections insist on either the primacy of the CJEU over the ECtHR, or giving the priority to the EU law over the substance[30] of the rights protected by the ECHR. Such amendments would reconstruct the ECHR and the position of the ECtHR as we know it, in principle, they would also be difficult to agree with[31] and it can even be doubted whether they would be compatible with the human rights' effective protection.

The strength, effectiveness and massive success of the ECtHR, which undoubtedly lies in the right to individual petition, shows that the struggle is real. It would superficial to undermine the power of the ECtHR as it is the most effective way of protecting human rights. Moreover, Article 46 ECHR shows that the decisions of the ECtHR are only binding *inter partes*. Therefore, under the ECHR, the CJEU can only be bound by those decisions to which the EU was a party. It is suggested that the CJEU did not intend the binding nature of such decisions to go further than is required by international law standards. Where the ECtHR finds that the EU has violated the rights guaranteed in the ECHR, the CJEU will be bound by that decision when interpreting provisions of the ECHR in a subsequent case dealing with the same issue. Perhaps the solutions to this difficult task of re-negotiations lie under the EU making reservations under Article 57 ECHR, revised procedure, which would take into account the specific characteristic of EU law and appealing process. Nonetheless one thing is certain, there is still a long road ahead of a successful accession.

Strengthening and harmonization of the protection of fundamental rights in Europe is only possible through the accession of EU to the ECHR for two reasons. Firstly, it is the only way to enhance coherence in human rights protection, where there has been occasional conflict between these two systems. The prime example are the different views adopted by the two courts on the issue of restricting information on abortion services overseas[32]. And secondly, the EU's accession will strengthen the protection of human rights in Europe, by submitting the EU's legal system to independent external control. It will also close gaps in legal protection by giving European citizens the same protection vis-à-vis acts[33] of the EU as they presently enjoy from Member States. However, there are also key consequences to this solution. If we are to submit the EU's legal system to an independent external control, the CJEU has to acknowledge the higher ranking position of the ECtHR. In this situation the ECtHR remains the sole and final arbiter of the ECHR. And this hierarchy results in coherent case law, where only the ECtHR can give final rulings weather the human rights are in accordance with the ECHR and where the CJEU follows such decisions in its own judgements.

3 Position of EU law in national legal order

Since 1945, sovereign equality and human rights have been the core legal principles of the dualistic international system, and both are needed in order to construct a more just version of that system. (Jean L., Cohen , 2010:262)

In theory, the dilemma of sovereignty is that it seems to entail the impossibility of two, even three or more, autonomous legal orders to operate and regulate within the same territory and subject matters.[34] *Kelsn* believed that the this situation endures only when the sovereignty is radically suppressed.[35] Westphalian model of international law suggests that the states are only bound by the rules they consent to[36]. Although EU is a *sui generis* organisation where EU law is defined as a 'new legal order', different from international treaties, it is difficult to accept the idea that such organisation can adjust sovereignty of the Member States solely upon the decisions of its court. The dualistic system which exists between national and EU law has defined rules of jurisdiction.

However, in certain cases the CJEU overstepped its interpretative jurisdiction and addressed the sovereignty of the Member States[37] without any political manifestation of their will through the legislative process. Following *Kelsn's theory*[38], such decisions made by the court narrow the sovereignty of the Member States without previous political consent.

In the past decades some constitutional courts criticized the inadequate protection of fundamental rights[39] and challenged the supremacy of EU law by ruling that EU law has supremacy over ordinary legal acts but not over the constitution[40].[41] It seems that the European law is caught somewhere between the international and constitutional nature.[42] It is not clear weather the EU law has the hierarchical rank of ordinary legal acts or the constitution. In addition, establishing a line for application of the EU law and national law of Member States can at times appear challenging, especially in connection with fundamental rights. The problem lies in the Article 51 of the EU Charter, where provisions are addressed only if the EU law applies, following the principle of subsidiarity. *In concreto,* in 'purely internal' situation the provision of fundamental rights from the EU Charter cannot be applied. Since this matter is strongly connected with reverse discrimination it is revised in the Chapter 4. Within the Member States' hierarchy of legal acts, the provisions under the EU Charter have the same hierarchical rank as the national provisions of rights which are enforced in a non-EU matters. This rank cannot be hieratically higher than the national constitution, even if one disregards the previously mentioned challenges of the supremacy by the national constitutional courts.

An application of the EU law is the condition for the jurisdiction of the CJEU. Existence of jurisdiction is preliminary question, when deciding about the questions of the EU legislation within the Member State. EU law recognizes two situations governed by the principle of subsidiarity. The first one is a 'purely internal' situation, which is lacking any link with EU law and is concentrated only inside a territory of a Member State which is at the same time the state of residence and nationality. In such situation the national law applies and there is no reference to the EU law. The second one is a situation with a 'cross-border element', which establishes a connection with the EU law and when the EU law is applicable. In this situation, the CJEU has a jurisdiction over a matter. However, the role of the CJEU in this respect is not to decide upon the case but rather on the preliminary references regarding the questions of national courts abut the EU legislation.[43] Therefore the CJEU only delivers decisions on fundamental rights which has to be implemented by the national judge responsible of the case concerned. On the other hand, the ECtHR makes a decision only after the national remedies are exhausted.[44] *In concreto,* this means also after when the possible references for preliminary rulings have been made and implemented. The ECtHR in the existing system delivers the decision, after the decision of the CJEU, as the final arbiter of the human rights provisions. Regardless of the interpretation CJEU's on the ECHR or relevant case-law of ECtHR, made in preliminary ruling[45]. In the *Karoussiotis v Portugal*[46] the ECtHR said that the applicants are not precluded if their application was already submitted to another procedure of international investigation or settlement. Through its case-law, the ECtHR has been dealing with the issues relating to the EU

law, so it is possible for the ECtHR to overrule the decision delivered by the CJEU, if it would collide with the provisions under the ECHR and the contracting state would be responsible for such violation. In the 1958, the European Commission ruled in the case *Austria v Italy*[47] that the High Contracting Parties of the ECHR are responsible for any breach of obligations under the treaty although the other treaty may have disabled them from performing its obligation under the first treaty. The acts of the EU cannot be the subject of application to the ECtHR as EU is not yet a party to the ECHR.

From this point, it is difficult to imagine same ranking system of protection of fundamental rights between this two courts. In this sense, the accession agreement would have to reposition the entire system of protection of human rights in Europe. Not only would it require different ranking of the courts within national legislations but also changing the scope of their judgements. On the one hand, the decisions of the ECtHR have currently *inter partes*[48] effect and the ECtHR has a position of a final court. On the other hand, the decisions of the CJEU have *erga omnes* which ensure unity within the EU in everyday legal practice and the CJEU has a position of a preliminary court. Heading towards significant change in the protection of fundamental rights would also affect the equal and predictable procedure before the courts which is an important part of the legal certainty. Moreover, the same ranking courts could not be autonomous, because their case law would be interdependent in order to stay coherent. Pluralist concept of international law which foresees the existence of two or more autonomous and independent legal system is not and cannot be consistent.[49] The loudest argument against establishment of the final hierarchy is that the courts regularly coordinate the law and maintain 'ideological coherence'[50] between the courts, therefor the problem of competence and incoherence is mainly theoretical. But the problem does exist, therefore it can materialize. It would be careless to leave this matter unresolved and unregulated. For the applicant who searches his right in front of international forums this is the final resort. It would be irresponsible to let the settlement to chance because of unresolved question of competence between the courts which materialized from the theory. It is clear, without hierarchy we cannot establish autonomy. Without autonomy who will decide upon jurisdiction? If each court decides upon its own legal framework, we cannot expect coherent practice. However, without coherent jurisprudence we cannot establish legal certainty and without legal certainty we cannot hope for effective remedy which is at the centre of human rights protection.

4 Human rights judicial protection under the ECHR and EU law

Article 34 of the ECHR allows individual applications before the ECtHR to all persons within the territory of Contracting State in connection with Article 35 of the ECHR which sets the admissibility criteria. The possibility of filling an individual complaint before the court is perceived as a great achievement[51] in the field of human rights protection. An application can be lodged only after all domestic remedies have been exhausted, to afford the national courts the opportunity to prevent the alleged violations of the ECHR provisions. This requirement is based on the generally recognised rules of international law[52] and could also be applied *post* accession. In connection with the EU law, this rule could be applied in two ways. Firstly, making the procedural changes in

the EU legislation, making the preliminary reference obligatory for national judges.[53] Secondly, allowing the preliminary decision of the CJEU on the question of compliance of the EU law with the ECHR. This way, ECtHR would remain the final arbiter regarding human rights dimension and the CJEU could preserve the special nature of EU law. But the hierarchical position of the courts would stay the same, meaning that the ECtHR could overrule the decision made by the CJEU. Additional protection of the EU status could provide an appointed judge. According to Article 26 an *ex officio* judge is elected in respect of contracting state. *Ratio decidendi* lies upon the fact that the appointed judge is familiar with the national legal system. In the sense of preserving the *sui generis* nature of the EU, as this was the main objection in the *Opinion 2/*13, the EU judge could have been awarded a special status to secure this provision.

Regarding substantive arguments, the ECtHR is able to declare incompatibility with ECHR, but it cannot declare invalidly. The obligation to enforce judgments is in the domain of the High Contracting Parties to the ECHR. Therefor, the EU would still be the one to decide upon the changes in its law *post* accession. The problem may arise if EU would not have implemented the needed change in its legislation, as the Member States would still be bound by the legislation which is not in accordance with the ECHR. Following the *res interpretata* doctrine this would mean that their legislation would also be in breach of the ECHR. But the jurisprudence of the ECtHR, revised in the Chapter 3, established, that it is possible for the Member State to be responsible for such violations even now. Such situations strongly suggest the need of the EU to participate in proceedings before the ECtHR. Weather with a preliminary ruling before the case is referred to the ECtHR or for the EU to be present before the ECtHR as a co-respondent in cases concerning EU law matters.

Under EU law a person cannot access the CJEU individually. The only applicable procedure for the individual is the reference for a preliminary ruling where the national judge would request the CJEU to clarify a point of interpretation of EU law in order to apply it correctly or to request the CJEU to check the validity of an act of the EU. However, under the Article 267 of the Treaty on the Functioning of the EU only the national courts which act as a final resort and those against whose decision there is no judicial remedy, are obliged to make a reference to the CJEU. There is no guarantee that the national case will be referred to the CJEU. Whether or not the case will be referred to the CJEU is a decision of a national judge. Additionally, even if there is a reference for a preliminary ruling the national judge remains competent for the original case. *In concreto,* the national judge is responsible for the final decision in the original case. The CJEU has only interpretative function. Without any change in the judicial procedure before the CJEU as to the obligation of referral specific cases to the court, there is little possibility to establish an effective system of human rights protection.

The CJEU acknowledge the special significance of the ECHR in its early case-law of *Johnston v Chief Constable of the Royal Ulster Constabulary*[54], which is revised in the Chapter 2. After EU Charter became legally binding there were some preliminary references regarding the interpretation of this rights in connection with the ECHR. The CJEU relied on the interpretation of the ECtHR and said, that the rights correspond to

those under the ECHR and that they have the same meaning and scope as those laid down by the ECHR[55]. However, it recalled that the provisions under ECHR do not constitute a legal instrument formally incorporated in the EU law.[56] It has also contested, that it has to ensure the necessary consistency between the EU Charter and the ECHR 'without thereby adversely affecting the autonomy of the EU law … and that of the CJEU'.[57] It has therefore designed additional measure to protect the specific nature of EU law and autonomy of the CJEU.

As the judicial practice of the ECtHR on jurisdiction of the ECHR under Article 1 seems to be coherent[58] this is not the case with the judicial practice of the CJEU. The different application of the EU and national law, as revised under the Chapter 3, can lead to different outcomes in similar situations. In a 'purely internal' situation, the applicable law is national law, which can sometimes be less favourable than the EU law. This situations is known as reverse discrimination.[59] It is a phenomenon where discriminated against are the nationals not the foreigners. However, such situation cannot survive in the long run, they have to be eliminated with harmonization of legislation. The main problem of reverse discrimination in this context is not the situation *per se*, but a new jurisdiction test[60] the CJEU established in the *Zambrano* case[61] to avoid such situations. It opened a third option[62] for establishing jurisdiction over EU law, which does not have its base in the legislation, making a 'purely internal' situation in exceptional circumstances an EU matter. This third option could solve the problem of reverse discrimination filling in the void with directly applicable primary sources of the EU law. But the reasoning in *Zambrano* was to vague and quickly omitted with *Dereci*[63] and *McCarthy*[64]. In addition, the CJEU used the new jurisdiction test only in conjunction with the rights regarding European citizenship without any reference to human rights dimension. It excluded the provisions of the EU Charter which remained enforceable only with the 'cross-border' element.[65] The oxymoron of the EU law lies within the existence of reverse discrimination in the system which has the provision of non-discrimination and equal treatment but where at the same time such provisions cannot be always met. Confusing and unclear practice regarding jurisdiction prevents the predictable procedure before the courts which is an important part of the legal certainty.

5 Conclusion

This brief contribution has hopefully achieved its purpose of outlining the hierarchical structure of human rights protection in Europe and answering the question of why the EU cannot have the primacy in human rights protection. It has underlined three main arguments; the historical background of the human rights protection in the EU, the position of the EU law in the national legal order and the judicial protection of a person seeking human rights protection within the territory of the EU. Each argument is supported in procedural and substantive way, provides relevant case-law and the opinions of the scholars which are combined in the reference notes.

Historical background raised substantial criticism with the expansion of EU powers in the human rights field. Most importantly, in the early case-law the CJEU refused to consider human rights, since the union had mainly economic aspiration. The Member

States challenged the supremacy of the CJEU in the way, that they will not follow the decision of the CJEU, if it would breach their constitutional doctrine. Therefor, for most EU Member States, the EU law has primacy over ordinary norms, but cannot conflict with constitution. Finally, the protection of fundamental rights is still tied with the application of EU law, which requires the 'cross-border element'. This means, that it cannot provide adequate human rights protection to individuals out of its scope of jurisdiction. For this reason, it cannot have the primacy over human rights protection.
It has been established that within a territory there can only exist one system of protection of human rights. From the individual perspective there cannot exist two different legal norms which regulate the same matter. [66] Which is why, other systems have to subordinate to the one existing system of human rights that offers the broadest protection *ratione personae* to establish coherent practice. Pluralist concept of international law which foresees the existence of two or more autonomous and independent legal system is not and cannot be consistent.[67] *Tertium non datur.* The dualistic system which exists between the Member States and EU has a defined rules of jurisdiction, because the legal norms have the same hierarchical rank. However, in certain decisions the CJEU overstepped its interpretative jurisdiction addressing the preserved sovereignty of the Member States. This is especially troublesome at this time, when the Member States are trying to retain their sovereignty. Fundamental rights under the EU law and human rights under the ECHR have a different scope of jurisdiction *ratione personae*. Therefor, they cannot have the same hierarchical rank because the scope of protection of the EU law is narrower. The new accession agreement will have to either completely reposition the hierarchy and procedure of human rights protection or implement certain procedural reforms, which will represent a massive case load on the CJEU. Keeping in mind that important part of legal certainty is also equal and predictable procedure before the court. Only this way we can ensure the existence of legal certainty, which is the core element of the rule of law.[68] However, given the long birth of Final Draft Accession Agreement and the controversy of the *Opinion 2/13* we are still very far from reaching the solution.

One of the corner stones in the protection of human rights is the right to individual petition, which is recognised under the ECHR. In the final chapter, the path of individual before the both courts is revised, since individual is the one protected with the provisions of human rights law. Currently, there is no possibility of individual petitioning before the CJEU. This reform is not suggested in this contribution, since the CJEU would probably face the same destiny as ECtHR did. But some other reforms are suggested. The responsibility of the EU is that it needs to ensure an effective functioning of the common legal order and political entity of the union. It needs to find a way which will respect the legal and political systems of Member States, who will remain voluntary companions on the common European path.[69] For the purpose of developing human rights policies, the EU should be inclined towards searching the solutions *de lege ferenda* rather than refraining from them. In this context there should be more deployment of the European Parliament as a legislator not so much the CJEU. However, only time will tell which direction the EU and ECHR negotiators will take to protect the autonomy of human rights protection in Europe.

Notes

[1] See also Williams, A. (2005) EU Human Rights Policies; A Study and Irony, Oxford University Press, p. 5, Douglas-Scott, S. (2011) The European Union and Human Rights after the Treaty of Lisbon, Human Rights Law Review 11:4, p. 646, Rosas, A. (2011) Is the EU a Human Rights Organisation?, Center for the Law of EU External Relations, First Annual Cleer Public Lectore, Cleer Working Papers 2011/1, p. 3.

[2] This contribution focuses on the European Union so the term Europe is used in connection with the Member States of the European Union to which the fundamental provisions of the EU law apply.

[3] Case of Stauder v Stadt Ulm, C-29/69, judgement from 12 November 1969.

[4] Ibid, §7.

[5] In the case of Rutili v Ministre de l'Intérieur, C-36/75, judgment from 28 October 1975 the Court indicated the special status of ECHR.

[6] See: Alston, P. and Weiler, J. H. H. (1998) An 'Ever Closer Union' in Need of a Human Rights Policy, European Journal of International Law, p. 659-700.

[7] See: Williams, A. (2004) EU Human Rights Policies; A Study in Irony, Oxford University Press, p. 17-40.

[8] Some scholars deny the right to such status. See: Accetto, M. (2006) Razvoj ideje federalizma in samostojnosti članic v Evropski uniji: Primerjava z ameriškim in nekdanjim jugoslovanskim modelom, doctoral thesis, Pravna fakulteta v Ljubljani, Ljubljana, p. 232-236.

[9] See: Cohen, J. L. (2010) Sovereignty in the context of globalization: A constitutional pluralist perspective, in Besson, S. and Tasioulas, J., (eds.), The Philosophy of International Law, Oxford University Press, p. 261-263.

[10] See: Douglas-Scott, S. (2011) The European Union and The Human Rights after the Treaty of Lisbon, Human Rights Law Review, 11:4, p. 646.

[11] Case of Stauder v Stadt Ulm, C-29/69, judgement from 12 November 1969, §7.

[12] The preference for the notion of fundamental rights rather than human rights when referring to EU law comes from the later development of the rights. See also: Rosas, A. and Armati, L. (2010) EU Constitutional Law: An Introduction, Oxford/Portland, Hart Publishing, p. 147.

[13] Case of Nold KG v Commission, C-4/73, judgment from 14 May 1974, §12 and 13.

[14] Internationale Handelgesellschaft v Einfuhr – und Vorratstelle für Getreide und Futtermittel, 1974 (also known as Solange I) and Frotini v Ministero delle Finanze, 1974.

[15] The most significant is case of Connolly v Commission, C-274/99, judgement from 6 March 2001, §39-42, §49-56, because it contains general remarks on the freedom of expression in an employment relationship.

[16] Case of Johnson v Chief Constable of the Royal Ulster Constabukary, C-222/84, judgement from 15 May 1986, §18.

[17] See also: Douglas-Scott, S. (2015) Autonomy and Fundamental Rights: The ECJ's Opinion 2/13 on Accession of the EU to the ECTHR, EUROPARÄTTSLIG TIDSKRIFT (Swedish European Law Journal) special edition 2016, Festschrift for Ulf Bernitz (eds. J Paju, A Ward, P Watson), 20 March 2015, p. 2.

[18] Case of Wachauf v Bundesamt für Ernährung und Forstwirtschaft, C-5/88, judgement from 13 July 1989, §17-19.

[19] Case of ERT v DEP, C-260/89, judgement from 18 June 1989, §41-45.

[20] Case of Wachauf, §18 and ERT §42.

[21] Recent case-law is more careful in this respect. See: Case of Åkerberg Fransson, C-617/10, judgement from 26 February 2013, §44.

[22] Case of ERT §42-44.

[23] Case of Wachauf, §18 and ERT §42.

[24] CJEU remains national judges to keep in mind the Conventional provisions. For example, see: Case of Dereci and Others, C-256/11, judgement from 15 November 2011, §29, Joined Cases M. E. and Others, C-411/10 and C-493/10, judgement from 21 December 2011, §62 and §88, Joined Cases N. S., C-411/10 and C-493/10, judgement from 21 December 2011, §80.

[25] Article 19 ECHR.

[26] Opinion 2/94, Opinion of the Court from 28 March 1996.

[27] In Opinion 2/94 the CJEU advised against accession, because the Community (after the Treaty of Lisbon: European Union) has no competence to accede to the Convention. EU is not a state therefore there is no legal basis for the accession. Discussed since the late 1970s, the accession became a legal obligation under the Treaty of Lisbon, which entered into force on 1 December 2009 (see its Article 6, paragraph 2). The legal basis for the accession of the EU is provided for by Article 59, paragraph 2 ECHR ("the European Union may accede to this Convention"), as amended by Protocol No. 14 to the ECHR which entered into force on 1 June 2010.

[28] Opinion 2/13, Opinion of the Court from 18 December 2014.

[29] Draft Agreement on EU Accession to ECHR, available at: http://echrblog.blogspot.com/2011/09/draft-agreement-on-eu-accession-to-echr.html (last accessed: 14. 3. 2016).

[30] This demands also reflect in the EU Charter under Article 52 and from the recent case-law, where the CJEU contests that it has to ensure the necessary consistency between the Charter and the ECHR 'without thereby adversely affecting the autonomy of the Union law and ... that of the CJEU'. See: Case of N., C-601/15 P, judgement from 15 February 2016, §47.

[31] See also: Douglas-Scott, S. (2015) Autonomy and Fundamental Rights: The ECJ's Opinion 2/13 on Accession of the EU to the ECTHR, EUROPARÄTTSLIG TIDSKRIFT (Swedish European Law Journal) special edition 2016, Festschrift for Ulf Bernitz (eds. J Paju, A Ward, P Watson), 20 March 2015, p. 2.

[32] Case of Society for the Protection of Unborn Children Ireland v Grogan and Others, C-159/90, judgement from 4 October 1991 and Case of open Door and Dublin Well Woman v. Ireland, app. no. 14234/88, judgement from 29 October 1992.

[33] See also: Bartolini, S. and Biondi, A. (2016) Life as Human Rights Court: Challenges and Developments in the EU Courts Activity in 2014, European Public Law, Kluwer Law International, Volume 22, introduction.

[34] Cohen, J. L. (2010) Sovereignty in the context of globalization: A constitutional pluralist perspective, in Bensson, S. and Tasioulas, J., (eds.), The Philosophy of International Law, Oxford University Press, p. 263.

[35] See: Kelsn, H. (1961) General Theory of Law and the State, Harvard University Press, p. 325-388.

[36] Also according to Vienna Convention on the Law of the Treaties, a state cannot be bound by a treaty without its consent.

[37] Coppel, J. and O'Neill, A. (1992) The European Court of Justice: taking rights seriously, The Journal of Legal Studies, Vol. 12, Issue 2, July 1992, p. 227-239.

[38] See: Kelsn, H. (1961) General Theory of Law and the State, Harvard University Press, p. 387.

[39] The well know decision Solange I, Internationale Handelgesellschaft v Einfuhr – und Vorratstelle für Getreide und Futtermittel, ruling of the German Constitutional Court in 1974.

[40] Internationale Handelgesellschaft v Einfuhr – und Vorratstelle für Getreide und Futtermittel, ruling of the German Constitutional Court in 1974 (also known as Solange I), Wunsche Handelsgesellschaft, 2 BvR, 197/83, ruling of the German Constitutional Court in 1986 (also known as Solange II), Frotini v Ministero delle Finanze, ruling of the Constitutional Court of Italy, number 170/1984, R v Secretary of State for Transport, ex p Factortame Ltd, ruling of the Supreme Court of United Kingdom in 2014.

[41] See: Accetto, M. (2007) Sodni federalizem Evropske unije, Uradni list Republike Slovenije, p. 21 and Smith, G. (1990) The European Court of Justice: Judges or Policy Makers, The Brudges Group: London, p. 5.

[42] See: Accetto, M. (2006) Izgradnja Evrope; od razvoja ideje Evrope do njene ustavne prihodnosti, Uradni list Republike Slovenije, p. 178.

[43] See: Chapter 4.

[44] Article 35/1 of the ECHR. The requirement for the applicant to exhaust domestic remedies is normally determined with the reference to the date on which the applicant was lodged with the court, subject to exceptions which may be justified by the particular circumstances of the case.

[45] The CJEU interprets the ECHR and case-law of the ECtHR in connection with the provisions under the EU Charter. See case of PPU – N., C-601/15 PPU, from 15 February 2016, §78-81, case of PPU – Lanigan, C-237/15, from 16 Juli 2015, §56 and 57.

[46] Karouissotis v Portugal, app. no. 23205/08, judgement from 1 February 2011.

[47] Austria v Italy, app. no. 788/60, decision of the Commission of 11 January 1961.

[48] Article 46 of the ECHR – Binding force and execution of judgements of the European Convention on Human Rights.

[49] See: Kelsn, H, (1961) General Theory of Law and the State, Harvard University Press, p. 387.

[50] The term was used in Bengotexea, J. (2014) Rethinking EU Law in the Light of Pluralism and Pratical Reason, in Maduro, M., Tuori, K. and Sankari, S. (eds.), Transnational Law: Rethinking European Law and Legal Thinking, Cambridge University Press, p. 145 and 147. See also: Groussot, X., Hette, J. and Pettursson, G. T. (2016) General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union, Studies of the Oxford Institute of European and Comparative Law, Hart, p. 17-18.

[51] See also: Walter, C. (2007) History and Development of European Fundamental Rights and Fundamental Freedoms in Dirk, Ehlers, (ed.), European Fundamental Rights and Freedoms, De Gruyter Recht Berlin, Germany, p. 12, Mullerson, R. (1993) The Efficiency of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR, in Arie, Bloed, et. al. (eds.), Monitoring Human Rights in Europe; Comparing International Procedures and Mechanisms, The International Helsinki Federation for Human Rights, Martin Nijhoff Publishers, p. 26.

[52] De Wilde, Ooms and Versyp v Belgium, app. no. 2832/66, 2835/66, 2899/66, from the 18 June 1971, §55.

[53] Such provision would also enhance the knowledge and use of EU law in national sphere but would also burden the CJEU.

[54] Case of Johnson v Chief Constable of the Royal Ulster Constabukary, C-222/84, judgement from 15 May 1986, §18.

[55] Case of PPU – N., C-601/15 PPU, from 15 February 2016, §34-36 and 44-45, case of PPU – Lanigan, C-237/15, from 16 July 2015, §56 and 57. See also: Article 52/3 of the EU Charter.

[56] Case of Åkerberg Fransson, C-617/10, judgement from 26 February 2013, §44, and Inuit Tapiriit Kanatami and Others v Commission, C-398/13 P, judgement from 3 September 2015, §45.

[57] Case of N., C-601/15 P, judgement from 15 February 2016, §47.

[58] Theoretical view differs only regarding extraterritorial jurisdiction of the ECHR. See also: Besson, S. (2012) The extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to, Leiden Journal of International Law, Volume 25, Issue 04, p. 857-884, Miller, S. (2009) Revising Extraterritorial Jurisdiction: A Territorial Jurisdiction for Extraterritorial Jurisdiction under the European Convention, European Journal of International Law, Volume 20, Issue 4, p. 1223-1246,

Milanovič, M. (2011) Extraterritorial Application of Human Rights Treaties; Law, Principles, and Policy, Oxford University Press, p. 118-227.

[59] See also: Lenaerts, K. and Van Nuffel, P. (2011) European Union Law, 3. ed., London: Sweet & Maxwell : Thomson Reuters, p. 174 and Walter, A. (2008) Reverse discrimination and family reunification, Nijmegen in Osnabruck, p. 1.

[60] See also: Stanislas, A. and Van Elsuwege, P. (2012) Analysis and Reflections Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*, European Law Review, 37, p. 176-190, Kochenow, D. (2011) A Real European Citizenship; A new jurisdiction Test; A novel Chapter in the Development of the Union in Europe, Columbia Journal of European Law, Vol. 18, No., p. 56-109, Tryfonidou, A. (2012) Redefining the Outer Boundaries of the EU Law: The Zambrano and McCarthy Rulings, 18 European Public Law, Issue 3, p. 493-526.

[61] Case of Ruiz Zambrano, C-34/09, judgement from 8 March 2011.

[62] See Hailbronner, K. and Thym, D. (2011) Annotation, *Case C-34/09*, Gerardo Ruiz Zambrano v. Office national de l'emploi, 48 Common Market Law Review.

[63] Case of Dereci in drugi, C-256/11, judgement from 29 September 2011.

[64] Case of McCarthy, C-434/09, judgement from 5 May 2011.

[65] Article 5 of the Charter of Fundamental Rights of the European Union.

[66] See: Accetto, M. (2007) Sodni federalizem Evropske unije, Ljubljana, Uradni list Republike Slovenije, p. 32.

[67] See: Kelsn, H. (1961) General Theory of Law and the State, Harvard University Press, p. 387.

[68] See: Pavčnik, M. (2009) Narava pravne države in njene prvine v: Pravna država, Ljubljana, GV založba, p. 30.

[69] See: Accetto, M. (2007) Sodni federalizem Evropske unije, Ljubljana, Uradni list Republike Slovenije, p. 25.

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Case of Stauder v Stadt Ulm, C-29/69, judgement from 12 November 1969.
Case of Nold KG v Commission, C-4/73, judgment from 14 May 1974.
Case of Rutili v Ministre de l'Intérieur, C-36/75, judgment from 28 October 1975.
Case of Johnson v Chief Constable of the Royal Ulster Constabukary, C-222/84, judgement from 15 May 1986.
Case of ERT v DEP, C-260/89, judgement from 18 June 1989.
Case of Wachauf v Bundesamt für Ernährung und Forstwirtschaft, C-5/88, judgement from 13 July 1989.
Case of Society for the Protection of Unborn Children Ireland v Grogan and Others, C-159/90, judgement from 4 October 1991.
Opinion 2/94, Opinion of the Court from 28 March 1996.
Case of Connolly v Commission, C-274/99, judgement from 6 March 2001.
Case of Ruiz Zambrano, C-34/09, judgement from 8 March 2011.
Case of Dereci and Others, C-256/11, judgement from 29 September 2011.
Case of McCarthy, C-434/09, judgement from 5 May 2011.
Case of M. E. and Others, C-411/10 and C-493/10, judgement from 21 December 2011.
Case of N. S., C-411/10 and C-493/10, judgement from 21 December 2011.
Case of Åkerberg Fransson, C-617/10, judgement from 26 February 2013.
Opinion 2/13, Opinion of the Court from 18 December 2014.
Case of PPU – Lanigan, C-237/15, from 16 July 2015.
Case of Inuit Tapiriit Kanatami and Others v Commission, C-398/13 P, judgement from 3 September 2015.
Case of PPU – N., C-601/15 PPU, from 15 February 2016.

ECtHR

Austria v Italy, app. No. 788/60, decision of the Commission of 11 January 1961.
De Wilde, Ooms and Versyp v Belgium, app. No. 2832/66, 2835/66, 2899/66, from the 18 June 1971.
Case of open Door and Dublin Well Woman v. Ireland, app. no. 14234/88, judgement from 29 October 1992.
Karouissotis v Portugal, app. No. 23205/08, judgement from 1 February 2011.

Legal documents

Council of Europe, 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: http://www.refworld.org/docid/3ae6b3b04.html (accessed 9 May 2016)
European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, available at: http://www.refworld.org/docid/3ae6b3b70.html (accessed 9 May 2016)
European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: http://www.refworld.org/docid/52303e8d4.html (accessed 9 May 2016)
United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: http://www.refworld.org/docid/3ae6b3a10.html (accessed 9 May 2016)

Other

Internationale Handelgesellschaft v Einfuhr – und Vorratstelle für Getreide und Futtermittel, ruling of the German Constitutional Court in 1974 (also known as Solange I).
Wunsche Handelsgesellschaft, 2 BvR, 197/83, ruling of the German Constitutional Court in 1986 (also known as Solange II).
Frotini v Ministero delle Finanze, ruling of the Constitutional Court of Italy, number 170/1984, R v Secretary of State for Transport, ex p Factortame Ltd.

References

Accetto, M. (2006) Izgradnja Evrope; od razvoja ideje Evrope do njene ustavne prihodnosti, Ljubljana, Uradni list Republike Slovenije.
Accetto, M. (2006a) Razvoj ideje federalizma in samostojnosti članic v Evropski uniji: Primerjava z ameriškim in nekdanjim jugoslovanskim modelom, doctoral thesis, Ljubljana, Pravna fakulteta v Ljubljani.
Accetto, M. (2007) Sodni federalizem Evropske unije: Primerjava z ameriškim in nekdanjim jugoslovanskim modelom, Ljubljana, Uradni list Republike Slovenije.
Allott, P. (2003) Epilogue: Europe and the Dream of reason, see Weiler, J. H. H. and Wind, M. (eds.), European constitutionalism beyond the State, Cambridge, Cambridge University Press.
Alston, P. and Weiler, J. H. H., (1998) An 'Ever Closer Union' in Need of a Human Rights Policy, European Journal of International Law.
Bartolini, S. and Biondi, A. (2016) Life as Human Rights Court: Challenges and Developments in the EU Courts Activity in 2014, European Public Law, Kluwer Law International, Volume 22.
Bengotexea, J. (2014) Rethinking EU Law in the Light of Pluralism and Pratical Reason, in Maduro, M. Tuori, K. and Sankari, S. (eds.), Transnational Law: Rethinking European Law and Legal Thinking, Cambridhe University Press.
Besson, S. (2012) The extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to, Leiden Journal of International Law, Volume 25, Issue 04.

Cohen, J. L. (2010) Sovereignty in the context of globalization: A constitutional pluralist perspective, in Besson, S. and Tasioulas, J., (eds.), The Philosophy of International Law, Oxford University Press.

Coppel, J. and O'Neill, A. (1992) The European Court of Justice: taking rights seriously, The Journal of Legal Studies, Vol. 12, Issue 2, July 1992.

Douglas-Scott, S. (2011) The European Union and Human Rights after the Treaty of Lisbon, Human Rights Law Review 11:4.

Douglas-Scott, S. (2015) Autonomy and Fundamental Rights: The ECJ's Opinion 2/13 on Accession of the EU to the ECTHR, EUROPARÄTTSLIG TIDSKRIFT in Paju, J., Ward, A. and Watson, P. (eds.) Festschrift for Ulf Bernitz, special edition 2016, Swedish European Law Journal.

Groussot, X., Hette, J. and Pettursson, G. T. (2016) General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union, Studies of the Oxford Institute of European and Comparative Law, Hart.

Hailbronner, K. and Thym, D. (2011) Annotation, *Case C-34/09*, Gerardo Ruiz Zambrano v. Office national de l'emploi, 48 Common Market Law Review.

Lenaerts, K. and Van Nuffel, P. (2011) European Union Law, 3. ed., London, Sweet & Maxwell : Thomson Reuters.

Kelsn, H. (1945) General Theory of Law and the State, Harvard University Press.

Kochenow, D. (2011) A Real European Citizenship; A new jurisdiction Test; A novel Chapter in the Development of the Union in Europe, Columbia Journal of European Law, Vol. 18, No. 1.

Milanovič, M. (2011) Extraterritorial Application of Human Rights Treaties; Law, Principles, and Policy, Oxford University Press.

Miller, S. (2009) Revising Extraterritorial Jurisdiction: A Territorial Jurisdiction for Extraterritorial Jurisdiction under the European Convention, European Journal of International Law, Volume 20, Issue 4.

Mullerson, R. (1993) The Efficiency of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR, in Bloed, A. et. al. (eds.), Monitoring Human Rights in Europe; Comparing International Procedures and Mechanisms, The International Helsinki Federation for Human Rights, Martin Nijhoff Publishers.

Pavčnik, M. (2009) Narava pravne države in njene prvine v: Pravna država, Ljubljana, GV založba.

Rosas, A. and Armati, L. (2010) EU Constitutional Law: An Introduction, Oxford/Portland, Hart Publishing.

Rosas, A. (2011) Is the EU a Human Rights Organisation?, Center for the Law of EU External Relations, First Annual Cleer Public Lectore, Cleer Working Papers 2011/1.

Smith, G. (1990) The European Court of Justice: Judges or Policy Makers, London, The Brudges Group.

Stanislas, A. and Van Elsuwege, P. (2012) Analysis and Reflections Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*, European Law Review, 37.

Tryfonidou, A. (2012) Redefining the Outer Boundaries of the EU Law: The Zambrano and McCarthy Rulings, 18 European Public Law, Issue 3.

Walter, A. (2008) Reverse discrimination and family reunification, Nijmegen in Osnabruck.

Walter, C. (2007) History and Development of European Fundamental Rights and Fundamental Freedoms in Ehlers, D. (ed.), European Fundamental Rights and Freedoms, Germany, De Gruyter Recht Berlin.

Williams, A. (2005) EU Human Rights Policies; A Study and Irony, Oxford, Oxford University Press.

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STRENGTHENING THE RULE OF LAW IN THE EU
(CONFERENCE PAPERS)

LEXONOMICA PRESS

Mobility and Legal Migration of Third Country Nationals within EU – Myth or Reality?

SIMONA SOBOTOVIČOVÁ

Abstract Migration and mobility are now firmly at the top of the European Union's (EU) political agenda. The principle of free movement of persons within EU is under pressure. There is a significant "Europeanization" of legal migration policy linked to the free movement and residence rights. Since now younger and highly educated people tend to migrate more in other countries to pursue their professional career. There is no more sense to deal with legal migration flows at national level, as Europe is part of a globalized and interconnected world where international mobility is expected to increase. Without question, a single economic market works best when its workers and citizens are mobile.

Keywords: • Free movement • "Hotspots" • legal migration • mobility rights • third country nationals

CORRESPONDENCE ADDRESS : Simona Sobotovičová, Department of Administrative Law, Constitutional Law and Philosophy of Law University of the Basque Country (UPV/EHU), San Sebastián, Spain and Université de Pau et des Pays de l'Adour (UPPA), Bayonne, France; Paseo Manuel de Lardizabal, 2; 20018, Donostia-San Sebastián, España, email: simona.sobotovicova@ehu.eus.

DOI 10.4335/978.961.6399.79.1.04
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

By 2060 there will be only 2 persons aged 15-64 for every person over 65, compared to 4 today[1]. The EU is faced with so many new challenges in migration phenomenon. The importance of attracting talents and skills, while trying to meet the labour in Europe demand is acknowledged as the EU deals with many challenges, an ageing population, global competitiveness and growth, among others. The current EU legislation after entry into force of Lisbon Treaty is facing new challenges in the field of the Area of Freedom, Security and Justice. Due to lack of common legal EU migration policy, the legal migrants must deal with many obstacles and conditions once they decide to enter into EU territory. As an area of 28 countries with more than 500 million inhabitants, the EU is currently the world's best research laboratory on legal, transnational migration. Keeping in mind demographics and our ageing population, the EU must be more attractive for foreign talent. The EU must provide legal channel to make it easier for highly skilled migrants to come work and settle in the European territory. The EU also wants to make our continent more attractive for students, researchers and seasonal workers[2]. The current EU legal migration policy, full of obstacles and conditions is based mainly on the following three questions: *Who you are? What you can offer to us? Why you want to live and work in EU?* The present paper discuss below all these questions. The large part of the current into EU migration flows are characterized by the search for economic survival, accompanied by substantial "brain drain" phenomena. The data from last enlargement show that EU Member States are increasingly attractive to two types of migrants: a larger, better-educated, better skilled group, and a smaller, but not insignificant, uneducated, unskilled group of people[3]. On the other hand, in recent times, we are witnesses of some EU Member States potential practice to avoid the long and no comprehensible procedure of legal migration, thanks to the "HotSpots" registration at the EU borders.

So, which kind of migration policy offers the EU to attract the third country nationals to establish the European market as their work destination? The article brings together an overview of current EU legal and policy documents relating to the entry and/or stay of third country nationals in the EU, without entering into further details of every Member State national regulation, pointing out that decision as a challenge or as an opportunity for these citizens. Apart of many other research questions, the aim of the presented paper is to discuss briefly the answers to following questions. Do the third country nationals enjoy any rights to entry and reside in the territory of the EU legally? Does the EU guarantee the intra-EU mobility rights for non-EU citizens once they are legally established within EU? Is there any potential link between the current legal migration challenges and "Hotspots".

2 The rights of third country nationals in accordance with EU law to enter and reside in the EU

The legal migration into EU is closely linked to the free movement and residence rights under EU law. The European Council at Thessaloniki in June 2003[4] reaffirmed that,

there is a marked need for a more structured EU policy, which will explore legal migration channels, among others[5]. Some years later, the European legislator established as one of the EU priorities, the effective and efficient access to Europe for businessmen, tourists, students, scientists, workers, etc.[6]. One example of the previous citation is the perspective of liberalisation of the visa regime with many third countries. Besides many legal improvements related to the visa liberalisation, the legal entry and stay of third country nationals in EU depend on many factors, conditions and requirements. When we speak about the free movement of persons in EU territory, as the main achievement of European integration in the Area of Freedom, Security and Justice, we refer to different facts. We normally associate the EU with the possibility to travel, work and live "freely" within the EU. The current EU law distinguishes between different categories of persons regarding the free movement in EU. For this reason, the fundamental right of free movement and residence under EU law is regulated in different legal provisions[7]. The Treaty on European Union (TEU) provides that "*The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured…*"[8]. The former article mentions the free movement of persons without any more details on "types of persons". Under the EU law, there is very clear differentiation between the third country nationals and the European citizens[9], when they decide to enter and/or reside legally in EU territory[10]. Today, the third country nationals count with the "theoretical" free movement right[11]. We see below, why "theoretical". But not all the third country nationals or familiarly known as immigrants, are allowed to be addressees of free movement rights, only the "legal immigrants"[12]. The greater scope of rights and conditions for third country nationals to entry and reside in the EU, and, the extent of the rights to these nationals who are established legally in the EU territory, should represent the key role in guarantying the integration of third country nationals in European territory[13].

Once the third country nationals decide to enter into EU territory legally, they must comply with the general EU regulation and the legal provisions of each Member State in particular. The first observation to point out is, that we must differ between third country nationals who decide to enter into Schengen Area[14] or not. Under Schengen Borders Code[15], for stays not exceeding three months per six month period, the entry conditions for third country nationals shall be the following: possession of a valid travel document or documents authorising them to cross the border, justification of the purpose and conditions of the intended stay, and sufficient means of subsistence, among others[16]. These stays are called as a "*travel stays*". Bearing in mind that only short-term visas have been integrated at the EU level and only to the Member States that joined the Schengen Area. So, the legal entry into the territory of the Schengen Area at EU level is guaranteed for the "*travellers*" and not for workers, neither students. Turning back to the main purpose of this paper, most of the third country nationals do not associate the EU with short holidays but mainly the EU is seen as their work destination.

Nowadays, the hot issue to be resolved by EU legislation in the field of legal migration is not dealing only with the entry to the EU territory but mainly is dealing with the legal stay of third country nationals in the EU. As we mentioned above, the third country

nationals have the right to reside legally in the EU for more than three months. While there are, clearly, complex factors at play in any decision to migrate, the primary reason given by most persons is work. Further, the family reunification is the second most important cause of migration flows[17]. These legal stays depend on plenty of conditions and limitations. There are only some of the "*privileged categories of persons*" invited to stay legally for more than three months in EU territory. This stay is not even more the EU policy competence but it depends on every Member State legal provisions. So, the EU only establish "limited" framework to deal with the legal stay in EU. For this purpose, every third country national has to respond the following question: *Who you are*?, or better said *Which is your legal status?* If you are worker, then due to plenty of Directives, we have to ask you: *Which kind of worker are you?* The categories for the third country nationals' workers to entry and reside legally in the EU are: *Highly qualified workers*, or "EU Blue Card" holders[18]. The Blue Card Directive provides a scheme for attracting highly qualified third country nationals (brains), but it is underused in order to improve the EU's skilled labour migration policies[19]. *Seasonal workers*[20]. *Intra-corporate transferees (ICTs) of as managers, specialists or trainee employees* represent other third country nationals work Directives[21]. There is into force still the single permit for *non-EU workers* legally residing in an EU state Directive[22], which offer the possibility for third-country national to apply to reside in a Member State for the purpose of work[23]. The second category of the privileged third country nationals represents the *Students, pupil exchange, unremunerated training or voluntary service*[24], and *Researchers*[25]. Turning back to the categories of third country nationals allowed to reside in the EU territory for more than three months, we must mention the *long-term residents*[26]. The long-term residents obtain the residence permit issued by the Member State upon the acquisition of long-term resident status[27]. The last category of third country nationals who can reside in the EU legally are the family members. For this purpose, we must distinguish between rights to family reunification members of non-EU nationals who reunite with non-EU national family members, on one hand. On the other hand, there is a right to family reunification of EU citizens with non-EU family members[28].

Besides the personal scope and regulation provided in the Directives mentioned above, we must take into account that the Member States are the responsible to concrete the legal status of the third country nationals residing legally in the EU due to the lack of EU common legislation. We can affirm that, this EU policy represents *very "selective group of interest"* policy which invites the Members States to clarify and make final decision of this *"selection of persons"*. In practice, the third country nationals must tackle with different conditions and limitations in every Member State they wish to live and/or work.

3 (Non) existent intra-eu mobility rights of third country nationals within EU

The free movement of people in EU has been one of the biggest achievements of European integration. However, this integration is not happening in the same direction for all addressees of this fundamental right. The free movement and residence right

within the EU is not limited only to enter and stay in European territory, its scope is wider. This includes also the intra-EU mobility. Does the EU guarantee to third country nationals' the intra-EU mobility rights once they are legally established in EU? The best answer for the previous question is, it depends. The mobility of third country nationals, within the EU borders is of strategic importance once they enter legally into EU territory. It applies to a wide range of people, to short-term visitors, tourists, students, researchers, business people or visiting family members[29]. Highly mobile economic migrants typically improve the allocation of production factors, most notably human capital. The mobile migrants often act as agents of knowledge transfer, international trade, and pools of skilled immigrants may attract high-tech investments[30]. The implications of this reality, together with the contemporary challenges facing Europe's external borders, have placed significant stress on free movement within EU territory. The current EU market is a market without internal frontiers where the companies demand the mobility between their employees. However, given the reality of increased human mobility, further efforts are required to be ensured[31]. After the analysis of the necessity to extend the employment opportunities to the third country nationals, the EU law needs to provide legal instruments to grant as well to all non-EU nationals' mobility rights within EU. The third country nationals benefit from free intra-EU mobility only in *"theory".* Only few EU law provisions regulate the intra-EU mobility of third country nationals. The EU Blue card holders enjoy the possibility to move to a Member State other than the first Member State for the purpose of highly qualified employment after legal residence in a first Member State for a minimum period of 18 months before moving to a second Member State, and in order to do so, they must apply for another EU Blue Card. For the seasonal workers there are no provisions on movement within EU. The first Directive which clearly establishes the Chapter called Intra-EU mobility is the Intra-corporate transferees (ICTs) Directive[32]. The long-term residents may reside in a second Member State (exceeding more than three months) only if they comply with requirements establish in Directive and in every Member State national regulation[33]. The researchers from third countries benefit from facilitated entry and stay in a second Member State if the period of mobility does not exceed three months. If yes, they may comply with a lot of specific conditions limited to a specific research post[34]. Due to students, the conditions for student mobility are subject to strict limitations[35].

As the procedures for access to the limited number of opportunities for legal migration are often non-transparent and over-bureaucratic, the EU must count with new legal improvements. As a consequence, many migrants turn to informal intermediaries, often with links to organised crime. The EU must count with wider concept of mobility. Without question, a single economic market works best when its workers and citizens are mobile[36]. Furthermore, the free mobility can be expected to raise potential growth in the EU as a whole[37]. However, the EU needs to look at how to marry many limitations with the collective needs of the EU economy and with the Member States interests.

4 The potential link between "Hotspots" and legal migration into EU

The future EU immigration and asylum policies have to face many challenges, among others, its impending demographic crisis in Europe[38]. The current migration crisis does not concern only the issues related to the borders protection. More than half of the asylum seekers coming to Europe are not fleeing from war and northern Africans but they are leaving their home countries for economic reasons, says Frans Timmermans[39]. Many economic migrants[40] are skilled, they count with professional experience and good educational background. This led some authors to think that there could be a link between the current European Agenda on Migration legal migration topic on one hand, and the establishment of "Hotspots" on the other. One priority of the mentioned above Agenda on Migration is based on maintaining a Europe in demographic decline as an attractive destination for migrants, notably by modernising and overhauling the Blue Card scheme, by reprioritising our integration policies, and by maximising the benefits of migration policy to individuals and countries of origin, including by facilitating cheaper, faster and safer remittance transfers[41]. Further, one of the four pillars to better manage migration is creating a new policy on legal migration, which will, among others, reflect on the development of an "expression of interest system" which would use verifiable criteria to automatically make an initial selection of potential migrants[42]. And, on the other side, we have the "Hotspots" which represent an example of immediate action presented by the European Agenda on Migration. The main approach of these "hot" establishments is to help to fulfill the obligations under EU law and swiftly identify, register and fingerprint incoming migrants[43]. This is the official definition of "Hotspots" provided by the European Commission.

Besides definitions given by European Commission, there is other expression for migrants who are seeking for better life conditions called selective or targeted immigration. The selective immigration is a form of immigration in which the host country unilaterally selects the foreigners to be allowed to enter on the basis of certain criteria (e.g. a shortage of skilled labour in certain areas)[44]. Many of the current EU policies using one term or the other try to find an answer to reach the EU market interests. Some of the authors concern that the "Hotspots" may represent one way how to reach the aims provided in European Agenda. Bearing in mind all the conditions and requirements for third country nationals when they decide to stay in EU legally, we discuss the following. On one hand, there are many asylum seekers with work experience, knowledge of languages and professional experience. On the other, there is a need to fulfill the shortages in European single market to maintain the sustainable growth in EU. For these reasons, there are many potential similarities how to interpret these "new, hot register offices". The Director of the United Nations High Commissioner for Refugees (UNHCR), Antonio Gutiérrez, assumed this differentiation of persons approving the launch of "Hotspots" saying that "*those asylum seekers who do not deserve international protection and who cannot benefit from the conditions involved in legal migration must be helped to return quickly to their home countries , while respecting human rights*"[45]. It could be very interesting to know what the "conditions involved in legal migration" really mean. Following the words of Claude Calame[46], "*the Hotspots will be the main centres where an economic migrant will be*

separated from the real asylum seekers". As in these centres, the officers have to identify the nationality, the language and the level of professional experience, among others of every asylum applicants, maybe they work as hidden recruitment officers[47]. Taking into account, that the EU interests are mainly "economic" it could be said that the "Hotspots" offer the double function of legal control on one side and the selection of economic migrants on the other. For now, we just might to believe the words of Matteo Renzi saying that *"the humanitarian aid cannot become a question of market"*[48].

5 Conclusions

Globalisation, demographic change and societal transformation are affecting the EU, its Member States and countries around the world. Without any doubt, the legal migration from third countries into EU represents one of the main policies which must be taken into account at European level. The free movement of persons to and within the EU is directly related to the creation of new European framework on legal migration. This research article presented an overview of the current EU legislation dealing with the entry, legal stay and intra-EU mobility rights of the third country nationals within EU territory. Other aim of the presented article is to highlight the potential link between the current measure to deal with the migration crisis, the "Hotspots" and the demand for qualified third country nationals. As we observe in this article, the EU has only very limited competence in the field of legal migration pointing out, that this policy field depends on each Member State interests and benefits. This present the conflicting area to achieve the goals of European internal single market without any borders. Jean Monnet said, *"Nous ne coalisons pas des États, nous unissons des hommes"*[49]. In this study we can see the opposite of the former citation, as the European legislator still differentiate between who are "Europeans" and who in many policy fields. By this I mean that we are still witnesses of very selective policy of different categories of persons. Due to the lack of a common, comprehensive mobility policy in EU, the third country nationals must fight with many challenges to comply with all conditions and requirements set up in each Member State. Migration and mobility is about freedom. It is about giving each and every individual the opportunity and the ability to influence his or her life situation, economically and socially. As we observe in the present article, only very few selective groups of third country nationals, mainly if they are "attractive and interesting for EU" may count with the opportunity to try making their life better and finding some solutions to their economical problems in EU legally. The current opportunities brought by migration and by mobility leave significant areas of discretions to regional, national and local levels of Member States. But, the free movement is "free" only for third country nationals for a short time in Schengen Area.

Finally, as some relevant policy recommendations, I suggest the following. It is best known that mobility rights have economic and social benefits for the individuals and for the Member States, addressing unemployment and supporting growth at EU level. The EU must count with wider concept of mobility rights of all persons, including the third country nationals. The EU must count with more competences to establish harmonize legal body to solve the dilemma which was neatly summarized by Swiss author Max

Frisch: "*We asked for workers, but human beings came*". To manage mobility in a secure environment, the EU needs to continue its prioritised dialogue and cooperation with third countries through (non)existent, unique, comprehensive and common EU migration policy offer. The future framework should be simplified, clearly distinguishing EU and third countries objectives beside any potential hypotheses. The legal migration policy should be developed within a coherent EU framework, taking into account the legal, political, economic, social and cultural diversity of Member States. There is a need to create a unique, personal status of "resident in EU" beside the nationality.

Notes

[1]Active ageing report, (*Special Eurobarometer 378*, January 2012) <ec.europa.eu/public_opinion/archives/ebs/ebs_378_en.pdf>

[2] Keynote Speech by Commissioner Avramopoulos at the 2016 Harvard European Conference: *Europe at the Crossroads of the Migration and Security Crises*, (Cambridge, MA, 20 February 2016)< http://europa.eu/rapid/press-release_SPEECH-16-365_en.htm>

[3] Basham, P. (2013) 'Home, sweet home? Balkan Migration, the EU & Liberal solutions', A Democracy Institute Economic Risk Series Paper. <file:///C:/Users/793543/Downloads/DI+EU+migration+paper.pdf> accessed 12 May 2015. The Commission will present a new Labour Mobility Package and a new Initiative on Skills in 2015, but even with a determined effort over the medium and long term we are unlikely to be able to fully match the needs. Both initiatives are already envisaged in Annex 1 to the Commission's work programme for 2015.

[4] *See*, Thessaloniki European Council (Presidency Conclusions 19 and 20 June 2003) 2

[5] Supra note 5, at 3

[6] An open and secure Europe serving and protecting citizens (the Stockholm programme 2010/C 115/01)

[7] The regulation of free movement and residence in the EU law we find in the following provisions. The article 3(2) of the TEU, the articles 20(2) (a), 21(1) and 67 of the Treaty on the Functioning of the European Union, (TFEU). The article 21 of the TFEU refers to the free movement and residence of the European citizens. Next, the Title V of the TFEU, the Area of Freedom, Security and Justice, in chapters I and II, the articles 76 – 80 as well establish the legal provisions for free movement and residence within the EU for third country nationals.

[8] *See*, the article 3 (2) of the TEU

[9] According to article 20 of the TFEU, every person holding the nationality of a Member State shall be a citizen of the Union

[10] The possibility of third country nationals to move and reside freely in EU depends on many factors, mainly of the legal status of third country national. According to the article 77(2) of the TFEU, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: (c) the conditions under which nationals of third countries shall have the *freedom to travel within the Union for a short period*

[11] Under the EU terminology, the third country nationals are the persons, who are not holders of nationality of any Member State of the EU regarding every Member State national law provisions. Third country national means any person who is not a Union citizen within the meaning of the article 20 (1) of the TFEU. So, the nationality represents the main core for this reason, and the States are still the main actors in this policy. *See*, Blázquez Rodríguez, I. (2003) *Los nacionales de terceros países en la Unión Europea* (Universidad de Córdoba) p. 44

[12] Le Bris, R.F (1994) 'L'étranger et ses métamorphoses: quelques considérations contemporaines', L´ Internationalisation du Droit 242. *See* also, Ruiloba Alvariño, J. (1999)

'¿Hacia un status jurídico armonizado de los nacionales de terceros Estados en la Unión Europea? ', La armonización legislativa de la Unión Europea ,p.206

[13] Pérez Vera, E. (1996) *Citoyenneté de l'Union Européenne, nationalité et condition des étrangers* (*R. des C.* No 261) p. 397

[14] Some third country nationals may enjoy the visa-free travel status entry into Schengen Area. *See* more about Schengen Area <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm>

[15] European Parliament and the Council Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105

[16] Article 5 (1) of the European Parliament and the Council Regulation (EC) 562/2006.

[17] Petrovic, M.; Benton, M. (2013) 'How free is free movement? Dynamics and drivers of mobility within the European Union' (*Migration Policy Institute Europe*, March) <file:///C:/Users/793543/Downloads/MPIEurope-FreeMovement-Drivers.pdf> accessed 20 April 2015

[18] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155

[19] *See, A European Agenda on Migration*, (European Commission, COM(2015) 240 final, 13 May 2015) 15 The Blue Card Directive already provides such a scheme, but in its first two years, only 16,000 Blue Cards were issued and 13,000 were issued by a single Member State. The Commission launched a public consultation on future of the Blue Card Directive. A review of the Directive will look at how to make it more effective in attracting talent to Europe. The review will include looking at issues of scope such as covering entrepreneurs who are willing to invest in Europe, or improving the possibilities for intra EU mobility for Blue Card holders

[20] Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94

[21] Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intracorporate transfer [2014] OJ L 157. Regarding article 3(c) *intra-corporate transferee* means any third-country national who resides outside the territory of the Member States at the time of application for an intra-corporate transferee permit and who is subject to an intra-corporate transfer

[22] Directive 2011/98/EU of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L 343

[23] Article 1 (1)(a) of Directive 2011/98/EU

[24] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. Currently this Directive is under revision[2004] OJ L 375

[25] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289

[26] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents [2004] OJ L 16

[27] Article 2 (g) of the Directive 2003/109/EC

[28] Directive 2004/38/EC 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 [2004] OJ L 158

[29] The mobility means a much broader concept than migration. Mobility and visa policy are interlinked and around 11 million visas were granted by the Member States issuing Schengen visas in 2009. *See* more, *The Global Approach to Migration and Mobility* (European Commission COM (2011) 743 final, Brussels, 18 November 2011) 3

[30]Kahanec, M.; Zaiceva, K.; Zimmermann, K. (2009) 'Lessons from Migration after EU Enlargement Free University of Berlin', Discussion Paper No. 4230 <http://ftp.iza.org/dp4230.pdf> accessed 18 May 2015

[31] *See*, supra note 18

[32] Third-country nationals who hold a valid intra-corporate transferee permit issued by the first Member State may, on the basis of that permit and a valid travel document and under the conditions laid down in Directive, enter, stay and work in one or several second Member States. Article 20 and following of the Directive 2014/66/EU

[33] Article 14 of the Directive 2003/109/EC. Mobile third country national long-term residents must apply for a residence permit to reside in a second Member State, whereas EU citizens need only to register their right to stay for more than three months

[34] Article 13 of the Directive 2005/71/EC. There are no mobility provisions for the family members of researchers

[35] Article 8 of the Directive 2004/114/EC. The new proposal for Directive on Students and Researchers, now under negotiation by the co-legislators, aims to give these groups new mobility and job-seeking opportunities.

[36] Supra note 2

[37] *See*, among others, Koikkalainen, S. (2011) 'Free Movement in Europe: Past and Present', (*Migration Policy Institute Europe*, April 2011)<http://www.migrationpolicy.org/article/free-movement-europe-past-and-present> accessed 18 May 2015

[38] Andrade García, P.; Martín, I. (2015) 'EU Cooperation with third countries in the field of migration' (*Directorate General for Internal Policies*, October 2015) <www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf> accessed 16 November 2015

[39] Read more at DutchNews <60% of refugees are economic migrants: Dutch EU commissioner http://www.dutchnews.nl/news/archives/2016/01/60-of-refugees-are-economic-migrants-dutch-eu-commissioner/>

[40] Find more about the economic migrants at Guild, E. (2009) Security *and migration in the 21th century* (Polity Press, Cambridge) p 140

[41] Managing migration better in all aspect at it is stated in A European Agenda on Migration, supra note 20

[42]European Agenda on Migration 2015, European Commission, <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/summary_european_agenda_on_migration_en.pdf>

[43] *See*, The Hotspot approach to managing exceptional migratory flows, European Commission, <: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf>

[44] Migration, Key terms in 23 languages (General Secretariat of the Council, February 2013) 34, <file:///C:/Users/793543/Downloads/QC3013223ENC%20.pdf>

[45] *See*, Maldonado, C. (2015) 'Hot spots: la fórmula para contener el flujo de refugiados tiene diferentes interpretaciones' *Euronews* (Madrid 21 September 2015) <http://es.euronews.com/2015/09/21/hot-spots-la-formula-para-contener-el-flujo-de-refugiados-tiene-diferentes/>

[46] Calame, C. (2015) 'Vague de réfugiés» et «crise des migrants»: les lourdes responsabilités européennes', (*Mediapart,* 8 September 2015) <https://blogs.mediapart.fr/claude-calame/blog/080915/vague-de-refugies-et-crise-des-migrants-les-lourdes-responsabilites-europeennes> accessed 4 February 2016

[47] Borra, A. (2015) 'Sobre la «crisis de los refugiados» o la vida en peligro' (Rebelión, 18 September 2015) < http://www.rebelion.org/noticia.php?id=203445> accessed 5 February 2016

[48] Ordaz, P. (2015) 'Italia niega a los países receptores de refugiados que los seleccionen 'in situ' , *El País* (Roma, 4 October 2015)< //internacional.elpais.com/internacional/2015/10/04/actualidad/1443994476_751154.html>
[49] Jean Monnet Discours (Washington 30 avril 1952)

References

Andrade García, P.; Martín, I. (2015) 'EU Cooperation with third countries in the field of migration' (*Directorate General for Internal Policies*, October 2015) <www. europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf> accessed 16 November 2015

Basham, P. (2013) 'Home, sweet home? Balkan Migration, the EU & Liberal solutions', A Democracy Institute Economic Risk Series Paper. <file:///C:/Users/793543/Downloads/DI+EU+migration+paper.pdf> accessed 12 May 2015

Blázquez Rodríguez, I. (2003) *Los nacionales de terceros países en la Unión Europea* (Universidad de Córdoba)

Borra, A. (2015) 'Sobre la «crisis de los refugiados» o la vida en peligro' (Rebelión, 18 September 2015) < http://www.rebelion.org/noticia.php?id=203445> accessed 5 February 2016

Calame, C. (2015) 'Vague de réfugiés» et «crise des migrants»: les lourdes responsabilités européennes', (*Mediapart*, 8 September 2015) <https://blogs.mediapart.fr/claude-calame/blog/080915/vague-de-refugies-et-crise-des-migrants-les-lourdes-responsabilites-europeennes> accessed 4 February 2016

Guild, E. (2009) Security *and migration in the 21st century* (Polity Press, Cambridge)

Kahanec, M.; Zaiceva, K.; Zimmermann, K. (2009) 'Lessons from Migration after EU Enlargement Free University of Berlin', Discussion Paper No. 4230 <http://ftp.iza.org/dp4230.pdf> accessed 18 May 2015

Koikkalainen, S. (2011) 'Free Movement in Europe: Past and Present', (*Migration Policy Institute Europe,* April 2011)<http://www.migrationpolicy.org/article/free-movement-europe-past-and-present> accessed 18 May 2015

Le Bris, R.F (1994) 'L'étranger et ses métamorphoses: quelques considérations contemporaines', L´ Internationalisation du Droit 242

Maldonado, C. (2015) 'Hot spots: la fórmula para contener el flujo de refugiados tiene diferentes interpretaciones' *Euronews* (Madrid 21 September 2015) <http://es.euronews.com/2015/09/21/hot-spots-la-formula-para-contener-el-flujo-de-refugiados-tiene-diferentes/>

Ordaz, P. (2015) 'Italia niega a los países receptores de refugiados que los seleccionen 'in situ' , *El País* (Roma, 4 October 2015)< //internacional.elpais.com/internacional/2015/10/04/actualidad/1443994476_751154.html>

Pérez Vera, E. (1996) *Citoyenneté de l'Union Européenne, nationalité et condition des étrangers* (*R. des C*. No 261)

Petrovic, M.; Benton, M. (2013) 'How free is free movement? Dynamics and drivers of mobility within the European Union' (*Migration Policy Institute Europe,* March) <file:///C:/Users/793543/Downloads/MPIEurope-FreeMovement-Drivers.pdf> accessed 20 April 2015

Ruiloba Alvariño, J. (1999) '¿Hacia un status jurídico armonizado de los nacionales de terceros Estados en la Unión Europea? ', La armonización legislativa de la Unión Europea

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(CONFERENCE PAPERS)

LEXONOMICA PRESS

Balancing Fundamental Rights and Migration Management in the External Dimension of the EU Migration Policy

CHLOÉ BRIÈRE

Abstract Does the European Union ensure an appropriate balance between migration control and the protection of migrants' fundamental rights? The present contribution addresses this question in the context of the EU's efforts to externalise its migration policy and to cooperate with third countries. Its competences, and the measures adopted on their basis, partially integrate fundamental rights' considerations. Recent measures justified by the current situation complement the long-term comprehensive efforts carried out in specific regional frameworks. However, these evolutions do not seem to change the (in)balance in favour of migration control to the detriment of the protection of fundamental rights.

Keywords: • fundamental rights • migration management • migration policy • EU

CORRESPONDENCE ADDRESS : Chloé Brière, Centre of European Law, Université Libre de Bruxelles (ULB), Brussels, Belgium, email: cbriere@ulb.ac.be.

DOI 10.4335/978.961.6399.79.1.05
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Between January 1st and May 3rd 2016, more than 180 000 persons crossed the Mediterranean to enter Europe, and around 1357 deaths at sea have been recorded by the IOM.[1] Labelled by the Commission as the "refugee crisis", this situation refers to the migration of thousands of persons mainly from war zones, such as Syria or Iraq, but also from areas where economic and social opportunities were lacking. The unprecedented flows of refugees and migrants follow among others the Western Balkans' route, which became the focus of the challenge faced by Europe, with over 650 000 people crossing from Turkey to Greece in 2015, most travelling up through the Western Balkans to Central and Northern Europe.[2] In this context, migration issues have marked the political agendas all over Europe during the last few months,[3] and the external borders of the European Union and their management have received a lot of public attention. Whereas the EU institutions attempt to organise a common European answer to the challenges brought up by the situation, tensions arise with certain Member States pleading in favour of national solutions and contesting the legality of EU initiatives, e.g. the case introduced before the European Court of Justice by Hungary (C-647/15) against the "Relocation Decision".[4] Despite the sensitive context, the Commission stresses the importance of adopting measures realising a delicate balance in order to uphold the EU's international commitments and values, while securing its borders and at the same time creating the right conditions for its economic prosperity.[5] The desire to control and manage borders cannot indeed be achieved at the detriment of the protection of fundamental rights of migrants and refugees, and requires a comprehensive approach to ensure border management in compliance with the protection of fundamental rights of migrants, and especially of those in a vulnerable situation.[6]

The European Union and its Member States have developed important instruments and mechanisms in the field of migration, which have been criticised for focusing on stopping irregular migration through the strengthening of external borders controls, and for positioning irregular migration within the realm of criminality and security.[7] Measures aimed at addressing irregular migration and at combating transnational organized crime, play an essential part in this regard. These measures may participate in the protection of migrants' rights, as they allow for the detection of victims of crime, and for the reception of assistance, protection and compensation for the harm they suffered. Nevertheless, fundamental rights of migrants[8] and their legal guarantees aiming at protecting them from harm, discrimination and violations of their rights [9] are considered as not being sufficiently implemented.

These critics on the precedence given to security and migration control considerations extend also to the external dimension of the EU migration policy. The latter has been considered as a political priority since the early 2000's[10] and remains of crucial importance today.[11] The EU institutions and the Member States have indeed constantly developed and adapted tailor-made packages of incentives, in order to ensure cooperation from third countries, especially those considered as strategic partners

because of their geographic proximity or their status of countries of origin and/or transit.

The present paper aims at assessing whether the European Union ensures an appropriate balance between migration control and the protection of migrants' fundamental right in the context of the externalisation of its migration policy and its efforts for ensuring cooperation from third countries in this field. To that end, a first part will be devoted to the legal competences at the disposal of the EU to conduct this external policy (I). In the second and third part we will discuss the content of the measures (II.), and the frameworks in which they are traditionally promoted (III.) In conclusion, we will discuss the emergency measures adopted in the last few months.

2 Enhanced external competences for the externalisation of the EU's migration policy

Whereas the European Union's intention is well established concerning its desire to develop the external dimension of its migration policy, the achievement of this objective depends to a large extent on the existence and the scope of its external competences. Like in internal matters, the external action of the Union is strictly framed by the principle of conferral of competences enshrined in Article 4 TEU, obliging the Union to continuously give precedence to considerations of competence over considerations of effectiveness (De Baere, 2008: 10).

The EU institutions can rely on two types of competences: express competences foreseen in Treaty provisions on the one hand, and implied competences on the other hand.

Concerning the first type of competences, the entry into force of the Treaty of Lisbon introduced two new express external competences in the field of the Area of Freedom, Security and Justice (AFSJ). Article 78 §2 g) TFEU foresees the possibility of partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum, subsidiary or temporary protection. Article 79 § 3 TFEU provides for the conclusion of agreements "for the readmission to their countries of origin or provenance of third-country nationals who do not or who do no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States". This express competence acknowledges the role taken by the EU institutions, which had already received the mandate to negotiate such agreements, and concluded on the basis of the doctrine of implied powers readmission agreements with third countries. Although these two provisions do not create new competences, and "are in fact only a codification of existing practices" (Monar, 2012: 26), their explicit insertion in the Treaty establishes even further the importance of EU actions in the external dimension of migration control.

The second type of external competences, i.e. the implied competences, finds its origins back at the time when EU treaties did not contain many provisions on the external dimension of the European integration process, and when the Court of Justice exploited

the embryonic legal framework to read external competences into the Treaties. Luxembourg judges notably introduced with the ERTA case (C-22/70)[12] the doctrine of implied powers, which has been constantly developed ever since (Eeckhout, 2012: p. 70 – 119). The Treaty of Lisbon even codified this doctrine in its Article 216 TFEU, which provides that the "Union may conclude an agreement with one or more third countries or international organisations (…) where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties (…)". This provision, read together with Article 3 § 2 TEU, confers to the EU an implied external competence for the realisation of the AFSJ. As a consequence, the European Union may under certain conditions be competent to enter into international agreements on migration and/or the fight against transnational crime.

Most of the legislative instruments adopted within the framework of the Union's migration policy concern non-EU citizens, i.e. third-country nationals already present in the Union's territory or willing to join this territory. "One can say that they form an externally-oriented policy of the EU, even if it mostly consists of the adoption of internal legislation" (Eeckhout, 2012: Loc. 5435). Measures such as the Directive on residence permits for victims of trafficking (OJ L 261, p. 19), the Employers' Sanctions Directive (OJ L 168, p. 24,) and the Seasonal Workers Directive (OJ L 94, p. 375) are relevant examples of that trend. One could also refer here to the rules adopted within the Common European Asylum System.[13]

These instruments share common characteristics: they target directly third-country nationals, they are *de facto* inapplicable to Union's citizens, and they aim at establishing common rules, binding upon Member States, and at realising to a certain extent a harmonisation of national legislations. They also participate in the protection of migrants' fundamental rights, since they help to prevent their labour exploitation, and provide them assistance once they are identified as exploited workers.[14] However, the degree of harmonisation they reach is limited, and it only amounts to a minimum harmonisation. The Member States remain authorised to adopt or maintain more favourable provisions.[15] Nevertheless, in theory, the existence of common rules could potentially trigger the recognition of AETR-type of implied powers (Eeckhout, 2012: Loc. 5465) at the condition that provisions of international agreements could affect these common rules or alter their scope.

In practice, only the rules contained in the Seasonal Workers Directive may be affected by external agreements, a possibility that has been recognised in the text of the directive itself.[16] The European Union could thus potentially claim the recognition of an external competence to conclude such provisions, but its competence would remain parallel to the competence of the Member States, which have under Article 79 § 4 TFEU retain their right "to determine volumes of admission of third country nationals coming from third countries to their territory on order to seek work".

In the field of judicial cooperation in criminal matters, the European Union is internally competent to adopt rules approximating substantive and procedural criminal law (Art. 82 § 2 and 83 § 1 TFEU), and these internal competences could be invoked for the

recognition of two types of implied external competences, i.e. when the agreement is necessary in order to achieve one of the objectives referred to in the Treaties or when the provisions of an agreement come within the EU's substantive powers. It can be argued that the enhanced action potential on common rules, notably the approximation of substantive criminal law on human smuggling and trafficking, could, via the strengthening of the internal EU acquis, provide a stronger common platform for mutual legal assistance agreements with third-countries (Monar, 2012: 26). A similar reasoning applies in the field of police cooperation, where implied external competences may be recognised on the basis of Article 87 TFEU. To support that claim, it is worth noting that the Commission proposed the conclusion of several external agreements dealing with policing and criminal law issues.

Although most of its external competences remain based on implied powers and are shared with the Member States, it is undoubted that the European Union possesses competences to engage with third countries in order to develop the external dimension of its migration policy. Explicit provisions in the TFEU reveal the consensus among Member States on the need of a common external policy in this field, and the importance of cooperation and partnerships with third countries.

3 External measures: when migration control takes over prevention and protection

The EU institutions and the Member States have always been pursuing the objective to involve third countries in the EU's efforts to fight irregular migration, and they are to that end promoting the adoption and/or implementation of a large range of measures that would potentially impact on migration flows.

A first category encompasses measures aiming at externalising migration control. These measures are so multi-faceted that they can be themselves divided in two sub-categories. On the one hand classical migration control instruments are "exported" to sending or transit countries outside the EU, which are for instance invited to transpose and implement the EU acquis in the field of migration. The main "exported" measures aim to strengthen border control, to improve the fight against irregular migration, smuggling and trafficking in human beings, or to develop capacity-building systems and migration management in transit countries (Boswell, 2003: 622). Capacity building projects are considered necessary to improve border and migration services in third countries, and to support their compliance with international standards in the fields of asylum and international protection. Fundamental rights of migrants and refugees may then be protected as they wait for a prompt and motivated decision on their status, while being accommodated in reception centres complying with international standards. On the other hand, the EU measures encompass a series of provisions for facilitating the return of asylum seekers and illegal migrants to third countries. The instruments used in this regard are the readmission agreements signed with third countries, and committing them to readmit irregular immigrants who had passed through their territory into EU countries, or are their nationals. These instruments are accompanied by the elaboration of a list of safe countries to which EU Member States can return asylum seekers, either

as nationals or as persons who transited through. It could be argued that some measures of migration control, in particular those against smuggling of migrants and trafficking in human beings, pursue a dual objective of fighting against crime and protecting fundamental rights of the victims, but they do not alter the fact that they place migration in the realm of security, where the main concern may not be the protection of migrants' fundamental rights.

The second category of "exported" measures is composed of those following a logic of prevention, and adopted in various fields, such as development policy, trade, etc. They aim at improving the political, social and economic situation in third countries, in order to "influence the factors forcing or encouraging migrants and refugees to travel to the EU" (Boswell, 2003: 624). As the Commission has indeed recently stressed, "civil war, persecution, poverty and climate change all feed directly and immediately into migration, so the prevention and mitigation of these threats is of primary importance for the migration debate".[17] Prevention measures can be considered as being in favour of the protection of fundamental rights of migrants and refugees, since they aspire to address the problem of migration control in a way that would not jeopardise the rights and freedoms of migrants and refugees.

In abstract terms, one could conclude that some elements included in the measures "exported" to third countries support the identification of a balance between migration control and the protection of migrants and refugees' fundamental rights. Some measures may indeed have an indirect role in their protection, and whereas the impact of long-term measures, such as prevention or capacity-building measures may be difficult to apprehend, this does not imply that they have no influence at all. The role of EU institutions and Member States is in this regard crucial to ensure constant monitoring of their implementation, as well as to provide sufficient incentives to stimulate cooperation from third countries.

4 Regional frameworks as comprehensive tools to promote cooperation

The EU institutions soon realised that the process of externalisation of the migration policy, and in particular of border management, should be conducted in a coherent way. For that reason, regional frameworks of cooperation have been the preferred forums for such externalisation efforts, as they encompass a wide range of policy fields, allowing for comprehensive and integrated actions. Regional frameworks such as the pre-accession policy, and more particularly the Stabilisation and Association Process, or the European Neighbourhood Policy, are particularly important for the externalisation of measures of migration control. These countries constitute, in a sense, the Union's external "glacis" when it comes to preventing crime and migration challenges from reaching and crossing the EU's external borders (Monar, 2012: 62). As a consequence, developing cooperation with them has been considered as a priority. Furthermore, in its relations with the countries participating in these frameworks, the European Union can also rely on a new form of leverage based on policy conditionality: the prospect of visa-free travel (Trauner, 2009) which constitutes a very relevant issue for the daily life of the populations, and for the public authorities of the countries concerned. As a mean of

pushing for further reforms, the European Union conditions the opening and the conduct of negotiations for visa facilitation agreements to the guarantee of smooth functioning visa facilitation and readmission practices, together with evident efforts to fight corruption, improve cross-border police cooperation and border control (Trauner, 2009).

For the countries participating in the Stabilisation and Association Process, i.e. countries from the Western Balkans, their cooperation with the EU in migration matters has been a political priority since the Thessaloniki Declaration in 2003, in which the EU encourages cooperation with and/or between these countries "in order to cope effectively with illegal migration flows originating in or transiting through Western Balkans".[18] The European Partnerships concluded with each SAP country reaffirmed the importance of such cooperation and contained specific and individualised measures relating to border control, asylum and migration.[19] Some of these measures have been transformed into legally binding obligations through their insertion in the Stabilisation and Association Agreements.[20] Cooperation is foreseen for the drafting of legislation, the enhancement of the capacity and efficiency of the institutions, and the training of staff and border management. Provisions on prevention and control of illegal immigration and readmission are also present, but they foresee mainly the obligation to readmit any national illegally present on the territory of a SAP or EU country.[21] Fundamental rights considerations are also present: it is for instance provided that in the area of asylum, cooperation shall focus on the implementation of national legislation to meet the standards of the Geneva Convention, to ensure the respect of the principle of non-refoulement as well as other rights of asylum seekers and refugees. Furthermore capacity building projects are funded through the Instrument for Pre-Accession.[22]

The progresses of each country are carefully monitored every year, through the publication of annual reports, sometimes complemented by other sources, e.g. reports from the IOM, or the UNHCR, and/or civil society organisations. For instance, concerning the Former Republic of Macedonia, the Commission invited the country, considered as moderately prepared for implementing the acquis in the AFSJ, to strengthen capacity, especially for the early identification of the migrants needing protection, vulnerable groups and minors, to ensure effective border management and to step up action against people smuggling and trafficking as a high priority.[23] This example illustrates the attention granted to both measures of migration control and measures in favour of migrants and refugees' rights.

Countries participating in the European Neighbourhood Policy are also considered as important partners in the field of migration. When it was launched in 2004, the European Neighbourhood Policy was seen as a possibility to "help the Union's objectives in the area of Justice and Home Affairs", since the countries "are facing increased challenges in (this) field, such as migration pressure from third countries, trafficking in human beings and terrorism".[24] In 2015, a review of this policy was conducted. The EU institutions insisted the necessity of a proactive engagement with partners in the neighbourhood to address root causes of cross-border threats, to contribute to securing common borders, and to tackle cross-cutting migration related

security challenges, such as smuggling of migrants, trafficking in human beings, social cohesion and border protection/management.[25] The future policy contains measures to promote the protection of the migrants' fundamental rights, as the EU institutions stress for instance that the EU should assist partner countries in developing their asylum and protection systems to ensure that their human rights are protected.[26] However, despite the latter measures, migration still remains very much within the realm of security.

Within the European Neighbourhood Policy, a specific instrument, the Mobility Partnerships, has been developed with the aim to address migration issues in a comprehensive way. Although most of these partnerships have been concluded with countries participating to the ENP,[27] they are open to other third countries[28] and they aim at promoting sustained cooperation with third countries along the migration routes towards the EU. They provide for a politically agreed, although not legally binding, framework for the coordination and monitoring of external actions, to be conducted by the EU institutions, the Member States and each third country concerned. The objective of tackling irregular migration is for instance addressed, and partner countries are expected to commit themselves to take "specific measures and initiatives seriously to combat migrant smuggling and human trafficking, in line with the Council of Europe Convention (… and) the relevant protocols of the UN Convention on transnational organised crime".[29]

The Mobility Partnerships are also pursuing objectives in favour of the protection of fundamental rights of migrants and refugees. They aim for instance at combating irregular migration and promote an effective return and readmission policy, while the countries concerned ought to respect fundamental rights, the relevant legislation, to ensure the dignity of the people concerned, and to comply with duly ratified international instruments concerning the protection of refugees.[30] In that regard, the EU institutions and Member States commit themselves to support the strengthening of legislative and institutional framework for asylum, in accordance with international standards, and to promote the capacities of national authorities responsible for asylum procedures through technical support and close cooperation with the relevant EU bodies and agencies, and the UNHCR. The increase in the capacities of civil society organisations, particularly of those involved in the protection of the most vulnerable groups, is also envisaged.[31] A specific fund has been established to support the efforts of ENP countries,[32] notably to support the creation of conditions for the better organisation of legal migration and the fostering of well-managed mobility of people.[33] However, the monitoring of the efforts carried out by each participating country varies a lot depending on the stage of its cooperation with the EU. For instance, the Commission initiated a Dialogue on Migration, Mobility and Security with Lebanon only in December 2014. Furthermore, despite the allocation of EUR 459.4 million to the country to support refugees from Syria and vulnerable communities, the country continued to lack an adequate legal framework in line with international standards providing protection and assistance to people in need of international protection.[34]

In both frameworks, despite the financial support provided and the regular monitoring of each country's achievements, it is very likely that the impact of the EU's

externalisation efforts, if any, will only be noticeable in the long-term. The influence of the EU's actions is also difficult to detect in the field of the protection of migrants' fundamental rights, as in many countries of these regions, the political priority may be to prevent the irregular migration of nationals abroad, rather than ensuring international protection to vulnerable migrants. This creates an additional difficulty for the EU, which needs to find proper incentives to ensure sustainable and permanent changes in national policies, legislations and practices. However, such context is not particularly adapted to solve the additional difficulties and urgent challenges arising in the management of the current refugee crisis.

5 Conclusion

The recent crisis, unprecedented by the scale of the migration flows, has transformed drastically the context in which the EU's externalisation efforts and cooperation with third countries take place. A series of measures, dictated by emergency, has been adopted since last summer. In order to address the particular situation in the countries forming part of the Balkan Route, an Action Plan has been agreed in October 2015,[35] and it includes a wide range of measures. Although concerns about migrants and refugees' fundamental rights were expressed, and the participating States committed themselves to increase their capacity to provide temporary shelter, rest, food, health, water and sanitation to all in need, many measures implemented a more "criminal and/or security approach" to the situation. The action plan also provided for measures on information exchange and coordination, especially to foster the fight against smuggling. It also included measures relating to border management, and especially return and readmission of migrants not in need of international protection. Their analysis reflects the duality of the EU's and countries' efforts, encompassing both repression of irregular migration and protection of those in need.

The reports about the implementation of these objectives support the conclusion that the priority remains placed on the security dimension.[36] The national authorities have adopted strict principles concerning border management: the principle that – as long as there was a prior non-refoulement and proportionality check – countries could refuse entry only to individuals who did not express a wish to apply for international protection and the principle of "no registration, no rights". In practice their implementation led to a *de facto* nationality based approach of refusing entry to all those who are not of certain nationalities (Syrian or Iraqi). Similarly, the importance of return as one of the essential components of effective migration management has been underlined in different contexts, and the Commission notes that more needs to be done, as the number of return is not increasing, and searches to obtain the support of key third country partners.

Furthermore, since the adoption of these reports in December 2015, the situation has evolved: in early March, the European Council acknowledged the closure of the Western Balkans Route, i.e. the closure of the borders of the countries located on this route (Macedonia, Croatia and Slovenia), by stating that "irregular flows of migrants along the Western Balkans route have now come to an end".[37] This decision had and

still has an huge impact on the fundamental rights of the migrants, as many of them (more than 53 000) are now stranded in Greece.[38]

The cooperation between the European Union and Turkey has also changed in the last months. Turkey distinguishes itself as the EU also seeks its cooperation in stemming the influx of people into Europe,[39] despite the concerns voiced about fundamental rights' violations in the country.[40] The launch of a refugee facility for Turkey, designed to support humanitarian assistance to refugee camps in Turkey, with the hope that better conditions in Turkish camps will mean that fewer people risk the perilous sea crossing from Turkey to Greek islands,[41] illustrates the political priority given to the reduction of migration flows into Europe, which remain very much perceived as a security threat. The "conclusion" on 18 March 2016 of an agreement between the European Union and Turkey further illustrates this trend.[42] In order to "break the business model of the smugglers", the return of irregular migrants to Turkey is one of the priorities, and one of the first actions to be implemented.[43] The protection of migrants' fundamental rights is taken into account, as all of them "will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement". Nevertheless, human rights advocates and organisations have expressed reserves about this agreement. For instance, the UNHCR urged for immediate safeguards to be in place before any returns begin,[44] and expressed concerns about the return of migrants despite their intention to apply for asylum.[45]

In definitive, the balance seems to tilt sharply in favour of migration control to the detriment of the protection of migrants and refugees' fundamental rights. Such conclusion is reinforced by the fact that although all countries have made significant efforts to increase their capacity to provide temporary shelter, less than half the figure of 50 000 reception places committed has been created so far. Many countries only established short-term places (up to 24 hours), which reflect a "transit" philosophy,[46] and many of the countries, being EU Member States and third countries, located on the main migration routes fail to comply with international standards. Whereas the national governments invoke exceptional circumstances and unprecedented flows of people, the EU institutions face the unexpected challenge to have to monitor actions carried out within and outside the EU in a particularly sensitive context.

Notes

[1] IOM, Mediterranean Update, Migration Flows Europe: Arrivals and fatalities, 3 May 2016, available at: http://missingmigrants.iom.int/mediterranean-migrant-arrivals-2016-184546-deaths-1357, lastly accessed on May 5th.

[2] Commission, 'Report on the follow-up to the Leaders' Meeting on refugee flows along the Western Balkans Route', COM (2015) 676.

[3] See for instance the example of Austria, where in the first-round presidential vote, the leader of the extreme-right party has obtained the higher score (http://www.theguardian.com/world/2016/apr/25/austrian-far-right-partys-triumph-presidential-poll-turmoil-norbert-hofer, lastly accessed on May 5th), and a bill has been adopted shortly after, allowing the government to declare a state of emergency – including the examination and potential rejection of asylum claims at the border – if the migrant numbers suddenly rise

(http://www.thelocal.at/20160427/austria-considers-rejecting-most-migrants-amid-far-right-surge, lastly accessed on May 5th).

[4] The contested Decision is Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 248, p. 80).

[5] Commission, 'A European Agenda on Migration' (Communication), COM (2015) 240.

[6] The latter are often categorised in different groups, such as unaccompanied or separated children, migrants in irregular situation, smuggled migrants, or victims of human trafficking. These categories do not reflect the complex reality, as people may simultaneously fit into several categories, or change from one to another in the course of their journey.

[7] UN General Assembly 'Regional Study: management of the external borders of the EU and its impact on the human rights of migrants' *(*Report of the Special Rapporteur on the Human Rights).

[8] The most known measures are the principle of *non-refoulement*, which forbids returning a person to a situation of persecution or danger (UN High Commissioner for Refugees 'Note on the Principle of Non-Refoulement' (1997)) and the prohibition of arbitrary and collective expulsions, that entitles every non-national to an individualised examination before his or her removal (UN High Commissioner for Human Rights, *Intervener Brief before the ECHR in the N.D. and N.T. v. Spain*, Applications N° 8675/15 and 8697/15).

[9] International instruments include the Geneva Conventions on refugees, or the Convention on the protection of the rights of all migrant workers and members of their families. Regional instruments include the European Convention on Human Rights as amended by the Protocols N°11 and 14 and the EU Charter of Fundamental rights (Article 18 and 19).

[10] European Council, Presidency conclusions, Tampere, SN 200/99, 15–16 Oct. 1999; European Council, Presidency conclusions, Laeken, 14–15 Dec. 2001, SN 300/1/01 REV 1; European Council, Presidency conclusions, Seville, 21–22 June 2002, SN 200/1/02 REV 1.

[11] Commission, 'A European Agenda on Migration' (n 4) 7: "migration should be recognised as one of the primary areas where an active and engaged EU external policy is of direct importance to EU citizens".

[12] Case 22/70 *Commission v. Council* [1971] ECR I - 263.

[13] Asylum Procedures Directive (OJ L 180, p. 60), Reception Conditions Directive (OJ L 180, p. 96) Qualification Directive (OJ L 337, p.9), Dublin Regulation (OJ L 180, p. 31) and EURODAC Regulation (OJ L 180, p. 1). The Commission has proposed on 4th May 2016 a package of instruments, aiming at reforming the Dublin System, which contains proposals for a recast of the Dublin Regulation (COM (2016) 270) and of the EURODAC regulation (COM (2016) 272). The package also contains a proposal to transform the European Asylum Support Office (EASO) into an EU agency for Asylum (COM (2016) 271).

[14] For more details, see EU Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union, States' obligations and victims' rights,* 2015, 104 pages at p. 30.

[15] Article 4 of Directive 2004/81; Preamble, point 4 of Directive 2009/52/EC and Article 4 § 1 a) and b) Directive 2014/36/EU.

[16] Article 4 § 1 a) and b) indeed provides that more favourable provisions can be agreed upon in bilateral or multilateral agreements concluded either between the Union, between the Union and its Member States or between one or more Member States on the one hand, and one or more third countries on the other hand

[17] Commission, 'A European Agenda on Migration', COM (2015) 240, p. 7.

[18] Council 'The Thessaloniki Agenda for the Western Balkans – Moving towards European integration' (Conclusions), 10369/03 (Presse 166).

[19] For instance, Bosnia and Herzegovina was invited to provide adequate staffing for the migration services, or to ensure that reception centres meet international standards and assume full ownership of their financing and management.

[20] Article 75 SAA FYROM; Article 80 SAA Albania; Article 82 SAA Montenegro and Article 82 SAA Serbia
[21] Article 76 SAA FYROM; Article 81 SAA Albania; Article 83 SAA Montenegro and Article 83 SAA Serbia
[22] Council Regulation 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), *OJ* L 210, 31.07.2006, p. 82 – 93, now replaced by Regulation (EU) No. 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument for Pre-Accession Assistance, *OJ* L 77, 15.03.2014, p. 11 – 26
[23] Commission 'FYROM Report 2015', SWD (2015) 212, p. 61.
[24] Commission 'European Neighbourhood Policy - Strategy Paper' (Communication), COM (2004) 373.
[25] Commission and High Representative, 'Review of the European Neighbourhood Policy' (Joint Communication), JOIN (2015) 50, p. 12 – 13. See also ibid, p. 17.
[26] Ibid, p. 17.
[27] Mobility partnerships have been concluded with Armenia, Azerbaijan, Georgia, Jordan, Moldova, Morocco and Tunisia.
[28] Participating countries are selected according to strict criteria "The eligibility criteria applied were the geographical balance between Eastern Europe and Africa, the importance of migration flows from or through the country to the EU, the readiness to cooperate on readmission and fight against illegal migration, the interest of EU Member States to cooperate with the country in question and its interest to enter such a partnership" – Commission 'Mobility partnership as a tool of the Global Approach to Migration', SEC (2009) 1240.
[29] Commission 'Circular migration and mobility partnership between the European Union and third countries' (Communication), COM (2007) 248.
[30] See as an example, Joint Declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States, 3 June 2013, Doc. No. 6139/13, p. 4.
[31] Ibid. p. 10.
[32] Regulation 16/38 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, *OJ* L 310, 09.11.2006, p. 1 – 14, now replaced by Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument, *OJ* L 77, 15.03.2014, p. 27 – 41.
[33] Regulation (EU) 232/2014, Article 2 § 2 c)
[34] Commission and High Representative for Foreign Affairs, 'Implementation of the ENP in Lebanon, Progress in 2014, SWD (2015) 68, p. 11.
[35] Leaders representing Albania, Austria, Bulgaria, Croatia, FYROM, Germany, Greece, Hungary, Romania, Serbia and Slovenia were present. Source: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/western_balkans_route_state_of_play_report_en.pdf.
[36] Commission 'Report on the follow-up to the Leaders' Meeting on refugee flows along the Western Balkans Route' COM (2015) 676.
[37] Statement of the EU Heads of State or Government, 7 March 2016, available at: http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/, lastly accessed on May 5th.
[38] Source: http://www.ekathimerini.com/208353/article/ekathimerini/news/more-than-53700-migrants-and-refugees-stranded-in-greece, lastly accessed on May 5th.
[39] European Council, Conclusions of 15 October 2015, EUCO 26/15
[40] See for instance, Amnesty International, *Europe's gatekeeper, unlawful detention and deportation of refugees from Turkey*, Dec. 2015, 14 pages.
[41] Eszter Zalan, *EU finalises €3bn fund for Turkey refugees*, EU observer, 3 February 2016, https://euobserver.com/migration/132126.

[42] Text of the statement available at : http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/, lastly accessed on May 5th.
[43] Commission, 'First Report on the progress made in the implementation of the EU-Turkey Statement' (Communication), COM (2016) 231, p. 4.
[44] http://www.unhcr.org/56fe31ca9.html
[45] Source : http://www.theguardian.com/world/2016/apr/05/greece-deport-migrants-turkey-united-nations-european-union?CMP=share_btn_tw, lastly accessed on May 5th. See also Human Rights Watch, https://www.hrw.org/news/2016/04/19/eu/greece-first-turkey-deportations-riddled-abuse, lastly accessed on May 5th.
[46] Commission 'Report on the follow-up to the Leaders' Meeting on refugee flows along the Western Balkans Route' COM (2015) 676.

References

Christina Boswell, The 'external dimension' of EU immigration and asylum policy (2003) *International affairs*, N° 79, Issue 3, p. 619 – 638.
Marise Cremona, Jorg Monar, and Sarah Poli (eds.), *The external dimension of the European Union's Area of Freedom, Security and Justice*, College of Europe Studies vol. 13, Peter Lang, 2011.
Geert De Baere, *Constitutional Principles of EU External Relations*, OUP, 2008.
Piet Eeckhout, *EU external relations law*, 2nd edition, OUP, 2012.
Jorg Monar, *The External Dimension of the EU's Area of Freedom, Security and Justice, Progress, potential and limitations after the Treaty of Lisbon*, Swedish Institute for European Policy Studies, 2012.
Florian Trauner, "Deconstructing the EU's Routes of Influence in Justice and Home Affairs in the Western Balkans" (2009) *Journal of European Integration,* Volume 31, Issue 1, p. 65 – 82.

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Refugee Migration Crisis or Benefit to the European Union?

TAMUNA BERIDZE

Abstract For last 2 years the EU has been the destination to the asylum seekers and the refugees. Therefore new challenge to the EU has been introduced, as new challenges such as job welfare and the protection of the Human Rights have arisen. The paper discusses the challenges which arose to the EU in terms of Human Rights protection and Economic Impact and how will they influence the future of the EU.

Keywords: • refugee migration • asylum • economic impact • EU

CORRESPONDENCE ADDRESS : Tamuna Beridze, Student at Ivane Javakhishvili Tbilisi State University (TSU) and Eotvos Lorand University, Budapest, email: tk.beridze@gmail.com.

DOI 10.4335/978.961.6399.79.1.06
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Legal obligation on the countries to provide refugees with the shelter

In the following proposal several issues will be addressed, which mainly are concerned with the migration problems in terms of the refugees. As being the refugee is one of the types of migration. The term "migrant" is seen as an umbrella term for all three groups (Asylum seeker, Refugee, economic migrant), (Park, 2015). With the current events which took place all around the world especially Europe I believe it is a crucial topic to be addressed, weather what is going to be the impact of the refugee float in European Union, which will be attended by many illegal border-crossing of the persons who are not asylum seekers, is it going to have the effect on the economy of the EU? What can the EU do in order to provide better service to the refugees, in this context the right of education, which is one of the basic human rights is discussed?

To start with, the current situation in Syria has led more than 4 million people leave the country and seek for help in the other countries. Being forced to leave the land you have been born and are used to, where you have placed future hopes and maybe in some cases built home or just started to, is one of the most terrifying event that comes to my mind, if I imagine it. Forced to leave with/without the family and face an uncertain future, where the death might be the promised land, is the sad risk which this many people undertake.

European Union has taken the obligation in front of the International society to help the people in need, who are under threat for their political, religious or other believes. According to Dublin regulation the migrants have to seek for asylum in the country where they have entered first. In practice, however, many of these frontline countries have already stopped enforcing Dublin and allow migrants to pass through to secondary destinations in the north or west of the EU (Park, 2015). This leaves us with the question how effective is the regulation, do we need new tools to ensure proper evaluation of the asylum seekers in order to avoid illegal migration in Europe?
One of the highly regarded opinion which has been discussed lately has been about setting up the offices for the asylum seekers in their own countries, so this way there will not be the problem of people trying to apply for asylum at the place itself which might take up to one year and not able to do anything, which adds to the unclear status of this people, and they are not able to work or support themselves and their families otherwise, which might lead them to commit different crimes, that will become one of the reasons for the bases of the unacceptance and racism from the local communities.
Unfortunately increase of the racism towards the migrants in Europe has been one of the recent tendencies, one of the examples is the growth of the popularity of the Swedish Democratic party from 10 to 25% among the Swedish people, whose ideology is against the migration in the country, which is proven by the report of the Guardian about the youth wing of the SDP, who are very much against the immigration, and do not even want to become familiar with the migrants in their country, they just regard them as the threat without any knowledge. Some states, including Poland, are worried not only about the immediate costs of welcoming refugees, but are also mindful of popular fears that foreign-born Muslims might not easily blend into society or that terrorists could lurk among them (Dahlburg, Condon, 2015). These types of attitudes do not enable the migrants to get engaged in the life of their host country community and

use their capacities fully. And mostly how it works in most countries is that there are the districts where majority of the population are the migrants, even though they might had been living in the country through several generations they are still not regarded as part of the countries community.
However sometimes the people do not realize that immigration is the key factor of the growing economy of the country. Migrants accounted for 47% of the increase in the workforce in the United States and 70% in Europe over the past ten years. Migrants contribute more in taxes and social contributions than they receive in benefits, Labor migrants have the most positive impact on the public purse, employment is the single biggest determinant of migrants' net fiscal contribution, economic growth, migration boosts the working-age population, migrants arrive with skills and contribute to human capital development of receiving countries, migrants also contribute to technological progress (OECD, 2014).

However, it is also true that refugees generally are not like the economic migrants and mostly they prefer to stay close to their home lands and the families, in this case in order they not to become the burden to the EU, it would be thoughtful if the EU Mostly to helped the refugees where they are placed, close to their regions, where is mostly where they want to be, and help turkey, Lebanon and Jordan.
On the other hand if the EU, along with the other countries wants to eliminate the illegal float of the migrants, it would be advisable to call for the help of the international community and get the funding for setting up the camps within their countries. Offering education psychological assistance, as they undergo through very difficult times. This is the global issue, greater burden sharing, there is lack of participation from the countries.

Another issue is to look for the ways how people can return to their homes. Humanitarians treat refugees as the short term problems, however they need to be seen as the long term ones. To benefit those countries which host this people. Investing in the post military operations, which will help people to go back, and there will not be any threat, not to become permanently displaced people.

2 Economic impact of the refugee float in the european union countries

In the second part the economic impact on the fleeing of the refugees is briefly discussed. Economic relationships are the ones which are very tricky, as they correspond not vertically rather horizontally in the timeframe, as the social events which take place nowadays will impact the regions not instantly, rather in the long-term run. However the impact in this context is regarded as the positive impact rather, than negative one.

Refugee crisis, is something which of course is not exiting, however this might benefit the growth and the boost of the economic strengthening of the European Union in the long run. With the current events EU member states have shifted their policy towards shutting down the doors to the refugee seekers with the fear that it will affect the economy very much and will become additional burden to the Euro-Economic crisis. Recently Angela Merkel's actions for acting as the advocate of the refugee seekers,

have been very much opposed by the left wing parties in Germany. They have been demanding that the welcoming of the refugees in Germany, will Jeopardize the job welfare of its citizens, however unfortunately, people do not see the long-run impact on the EU economics, rather concentrate on the short-term affects.

3 Short term-consequences

In short-term run the refugees might come as the burden to the countries, taking into account their skills and availability of the knowledge of the native language of the host country. Based on the development of the country different demands might be guaranteed by the market economy, however the refugees might not be able to meet the demand criteria. Another obstacle is that generally refugees do not spread around the country, rather stay in one place which might not be the best condition for applying to different jobs. About the negative impact of refugees, people often refer to already existing statistics from the German history of the refugees. However these statistics have different narrative. Immigrants were a fiscal burden in Germany in part because lots of them are pensioners, who tend to drain the public finances. The new arrivals, in contrast, are young, with a long working life ahead of them (Economist, 2016).

In the short-run, public welfare expenses might rise as integration into and adaptation of the labor market are not given. Most refugees will probably be unemployed, teaching them is costly and the access to integration and labor offers depends on public policies. On the other hand, this effect is smoothed as refugees add to the level of consumption in the country.

4 Long-term impact

BRUSSELS -- The greatest influx of people into Europe in decades is not just a humanitarian emergency, but also a potential stroke of luck for many countries facing the economic threat of an aging population (Dahlbur, Condon, 2015).

It is well-known fact that the population of Europe is aging which will come as the big threat by 2060, which means that there will be less youth workers than the retired people, and this is very big threat for the collapse of the economy. Therefore only several countries realize this threat and try to act tactfully. Countries such as Germany and Sweden.

According to Statistics it will be quite a long time before the countries who are accepting the refugees will benefit from their workforce which can be approximately 15-20 years, however later on, as the new arrivals integrate into the workforce, they are expected to boost annual output by 0.1% for the EU as a whole, and 0.3% in Germany. They should also help (a little bit) to reverse the upward creep of the cost of state pensions as a share of GDP, given their relative youth (Economist, 2016).

However it is noteworthy to mention, that Germany, among the most vocal in welcoming refugees, is also conveniently the country that stands to gain most quickly, as it has a strong labor market with lots of vacancies. By contrast, weaker economies

like Greece and Italy will take years, even decades, to see positive effects as they struggle to create jobs -- though they too face the threat of a demographic time bomb (Dahlbur, Condon, 2015).

In regards to the Central European Countries Czech Republic and Poland refused to take more than 1500-2000 Refugees even given the situation that In 25 years, the country is expected to go from having four people of working age supporting each person 65 or older, down to two (Economist, 2016).

Overall these given numbers are predicted, however they are based on the consequences if the integration of the refugees in the host communities will be successful. It is highly dependent how they will be able to develop their skills to meet the market demands.

5 Conclusion

In conclusion in the paper the issue of the lack of effective enforcement of the Dublin regulation was addressed and suggested the ways how it can be arranged for the European Union to treat the problem of the increased migration. Migration was also discussed in the spectrum of the short-term and long-term economic impacts.

It can me said that in the short-term run the refugee migrants might not only come as the burden to the economy, but their integration with the host countries will be very big challenge, as they are entering the cultures which are very new for them and on the other hand in different locations due to the lack of cultural diversity it will come as the shock to the locals the spontaneous spread of the new culture. However in the Long-run this will benefit the European Union countries, as it will provide the workforce which will be so absent with current birthrate in the near-future.

References

Dahlburg, J.T & Condon, B., (2015, September 21) 'Why Europe Needs Syria's Refugees: A Continent 'In Demographic Decline'. Huffington Post'. http://www.huffingtonpost.ca/2015/09/21/europe-declining-population-refugees_n_8169804.html

Is migration good for the economy? Migration Policy Debates © OECD May 2014.

Park, J., (2015, September 23) Europe's Migration Crisis.

The Economist, (2016, 23rd January), '*For good or ill'*, http://www.economist.com/news/finance-and-economics/21688938-europes-new-arrivals-will-probably-dent-public- Decline'. Huffington Post, (2015, September 21) http://www.huffingtonpost.ca/2015/09/21/europe-declining-population-refugees_n_8169804.htmlfinances-not-wages-good-or

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Is there a Single Market in Agricultural Land?

NEVENA MILOŠEVIĆ

Abstract Efficient agricultural land market plays an important role in development and functioning of the European Union. Since one of the main points of the EU functioning is free movement of capital, it is required that all member states equalise conditions under which domestic citizens and foreign citizens can acquire agricultural land. On the other hand, this question is vulnerable for all countries because it affects their economies and citizens, especially small farmers. This paper deals with a problem present in national policies by which Member States are trying to distinguish foreign citizens from domestic ones by prescribing conditions which are hard to fulfil if potential acquirers are not domestic citizens. Also, this paper explains the consequences of such measures. Firstly, the overview of the EU Policy is given concerning single market of agricultural land in the EU. Then, it will be explained how countries are trying to slow down the process of law harmonisation in this field during accession to the European Union and finally there is a review of selected Member States' legislation.

Keywords: • Agricultural Policy • Agricultural land • Market • EU

CORRESPONDENCE ADDRESS : Nevena Milošević, Faculty of Law, University of Belgrade, Belgrade, Serbia, email: nevena.milosevic.2901@gmail.com.

DOI 10.4335/978.961.6399.79.1.07
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Efficient agricultural land market plays an important role in development and functioning of the European Union. Since one of the main points of the EU functioning is free movement of capital, it is required that all member states equalise conditions under which domestic citizens and foreign citizens can acquire agricultural land. On the other hand, this question is vulnerable for all countries because it affects their economies and citizens, especially small farmers.

All Member States must equalise positions of domestic and foreign citizens in sense of potential acquirers of agricultural land. The EU Treaties only define that all EU citizens must be in the same position, but there is no provision which states that Member States are not allowed to prescribe extra conditions which must be fulfilled by potential acquirer. Hence, the only requirement is that those conditions must be the same for both domestic and foreign citizens.

In this manner legislator has an opportunity to protect domestic citizens and economy by prescribing requirements which potential acquirers, who are not domestic citizens, are not able to fulfil or it would be hard for them to fulfil those requirements. On the other hand, legislator must take care of the EU fundamental rights and avoid breach of such rights.

The purpose of this paper is to present some of the most important national policies' provisions dealing with the question of acquiring agricultural land and to emphasise problems which exist in this field. The question which is to be answered is as follows: Is there a single market on agricultural land or are some of fundamental rights of the EU jeopardised and evaded by domestic legislators?

2 European union policy

The EU Treaties emphasise establishment of a common market and free movement of capital as one of the fundamental elements. Inter alia, agricultural land market and efficient land transition constitute this fundamental principle of the EU.

The first roots of regulating this question we found in The Treaty establishing the European Community[1], well-known as the Treaty of Rome signed in 1957. This Treaty provided for the establishment of a common market, a customs union and common policies. The Treaty states that Member States should establish and progressively approximate the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raise of the standard of living and closer relations between Member States[2]. In Article 3 point (d) it is aimed that for the purpose set out in Article 2 the activities of the Community shall include the inauguration of a common agricultural policy. After this treaty and during the process of development of the EU, many other Treaties confirmed these principles and specified them.

The Treaty Establishing the European Union states that all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited[3].

The Treaty of functioning of the European Union states that any discrimination on grounds of nationality shall be prohibited[4]. By this Treaty it is prohibited to prescribe restrictions on the movement of capital between Member States and between Member States and third countries[5].

3 Process of association and treaties of accession

During the process of association in the European Union all future Member States must harmonize their law with the EU Law. Law harmonisation is divided in 35 chapters, so each can be negotiated separately. One of most important chapter is Chapter 4 – Free Movement of Capital. Member States must pull of almost all restrictions on movement of capital between Member States and third countries[6]. One of the most vulnerable questions in this chapter is exchange of agricultural land. More precisely, equalising conditions for acquiring agricultural land for all EU Member States citizens is one of the most important questions in this Chapter.

Question of acquiring agricultural land is important for all Member States, because it affects directly their economies. Especially, new Member States are in an undesirable position. Normally, new Members States' economies are not as strong as some Member States' economies and these countries are in transitional process, so equalising domestic citizens with other EU citizens can jeopardise their economies, as well as the position of their farmers. For this reason it is not surprising that most future Member States have tried to slow this process, by requesting transitional period during which they could maintain existing restrictions.

Analysing the negotiation process of countries which joined the EU in 2004, it can be concluded that almost all countries asked for transitional period and were granted with it. Transitional period for Czech Republic, Slovakia, Latvia, Lithuania, Estonia and Hungary is 7 years and for Poland is 12 years. Transitional period starts form the day of accession to the EU[7]. As a reason for this period, these countries usually quoted protection of socio-economic agricultural structure of countries from shocks that might arise from the differences in land prices and revenues with the rest of the EU and the problems in local rural markets (J. Swinnen and L. Vranken, 2009: i). On the other hand, there is an example of Slovenia which did not ask for transitional period, but Slovenia used a good mechanism of indirect protection (see below).
Bulgaria and Romania, which accessed the EU in 2007, were also granted with transitional period of seven years[8]. The main reasons quoted for this period were the same as those which were quoted by countries which accessed the EU in 2004 (J. Swinnen and L. Vranken, 2010: 19).

Croatia, which joined the European Union in 2013, was also granted with transitional period. During negotiations Croatia asked for transitional period of 12 years in which foreigners would not be able to acquire agricultural land. As a reason for this period

Croatia quoted economic situation in the country, unresolved property relations, social situation and disadvantage of Croatian citizens comparing to the EU citizens[9]. In Stabilisation and Association Agreement it is quoted that from the day from which this Agreement comes into force foreigners would not be able to acquire agricultural land for 4 years, with the possibility of extension of this period[10]. On the other hand, in the Treaty of Accession of Croatia it is quoted that Croatia may maintain in force the restrictions laid down in its Agricultural Land Act (OG 152/08), for seven years from the date of accession[11].

4 National policies – indirect prohibition for foreigners to acquire the agricultural land

After expiring of transitional period, all Member States must equalize conditions for acquiring agricultural land for both domestic and foreign citizens. Still, there are many methods which are used by legislator for indirect discrimination of foreign citizens. Those methods relate to conditions which must be fulfilled by potential acquirers. Analysing selected legislation, those conditions can be classified in two types of restrictions: one concerning potential acquirer and other concerning a land which is the subject matter of the sale. Also, one of the measures often used for purpose of aggravating acquisition of agricultural land is the role of state authorities in the process of land purchase.

4.1 Personal restrictions

This group of restrictions is related to the potential acquirer. Natural or legal entity must fulfil required conditions in order to acquire the agricultural land. Analysing selected national legislation, some of the most frequently required conditions are experience or education in the field of agriculture, residence or head office on the land or close to it and pre-emptive right established in favour of certain persons.

First group of conditions is present in Slovakian legislation. Namely, the owner of the agricultural land may transfer the land to a buyer who has been active in the food business or performs agricultural activities in the municipality where the agricultural land is placed for at least three years prior to the transfer[12]. Also, this requirement is present in Austrian legislation, more precisely in Austrian state Upper Austria. Potential buyer must prove that he can use agricultural land in proper way. This can be proved if future acquirer has education in the field of agricultural land or at least two years of practical experience in the field of agricultural[13]. In Lithuania, natural person who wants to buy agricultural land must have at least 3 years of experience in the last 1o years in agricultural production and he must be registered as a farmer or have diploma in farmland management. For legal entities who want to buy agricultural land in Lithuania it is required to have at least 3 years of experience in the last 10 years in farmland management (HD Forest, 2014).

The next condition, which is usually required, is related to residence and head office. If natural person wants to buy agricultural land in Switzerland, he must have permanent residence in Switzerland (gATEWAY4you). Also, we find this condition in Austrian

legislation. In state Upper Austria, future owner of the agricultural land must prove that he will use land in proper way. One of the methods to prove this is to have permanent residence on the land or to have permanent residence near the land which is subject matter of sale[14]. In state Styria potential acquirer must establish his residence in Austria in maximum one year from the day when he acquires the land[15]. In Bulgaria, if natural person wants to buy agricultural land, he must have permanent residence in Bulgaria for at least 5 years and legal entities must have their head office registered in Bulgaria for at least 5 years[16]. Concerning this type of conditions, there is one court decision dealing with it. The European Court of Justices' decision in Uwe Kay Festersen Case (C-370/05) determinates that it can be accepted that national legislation containing requirement, which seeks to avoid acquisition of agricultural land for speculative reasons, can be prescribed, but that requirement goes beyond what is necessary to attain such an objective. Namely, Festersen is German who bought agricultural land in Denmark, but he failed to fulfil the obligation of establishing residence on land[17].

Pre-emptive right is often established in favour of certain acquirers. It means that certain persons must be offered to buy land which is the subject of sale before others. One of the most interesting solution is in Slovakian Law on Agricultural land: if someone wants to sell a land parcel, he needs to offer his neighbours first; if none of his neighbours want to buy a land, he must offer it to all land owners in his municipality; if no one in his municipality wants to buy a land he must offer the land to those who have land in municipalities which border with his municipality. If no one wants to buy his parcel, he must offer it to all land owners in the country who deal with agriculture for more than three years. All potential buyers must cultivate agricultural land for at least three years (Schonherr, 2014). Usually, pre-emptive right is established in favour of co-owners, tenants, direct neighbours and state. This type of pre-emptive right is prescribed in Lithuanian law (HD Forest, 2014).

4.2 Land restrictions

This type of restrictions is related to the land which is the subject matter of the sale. By these restrictions legislators are prescribing certain conditions concerning agricultural land parcel, but at the same time they affect future transaction. This group is comprised of the following conditions: agrarian maximum and use of agricultural land for agricultural purposes.

Agrarian maximum in its original form is not being applied in Europe. It is characteristic of Latin America, but it was seriously taken into consideration during drafting Romanian Law on Agricultural Land. Romanian government wanted to prescribe quantitative upper limitation over which no one can acquire agricultural land. It is planned that this limitation amounts to 100 ha[18]. In Europe, upper limitation is frequently used through which extra conditions must be fulfilled or the approval of state authority is needed. In German, depending on state, there is no need for approval by state authority if the subject matter of the sale is a land parcel of an area between 0.25 and 2 ha (Deutsches Notarinstitut, 2012: 1). In Hungary, if potential buyer is not a farmer, he can acquire agricultural land if the parcel is not bigger than 1 ha[19].

In almost every country we can find a request for agricultural land owners to use land for agricultural purposes. This is very practical and a necessary request which prevents acquirers to build, for example, a shopping mall on this agricultural land. For example, in Netherlands' Law on Transaction of Agricultural Land it is requested to make it presumably that future owner will use agricultural land in agricultural purposes. If this requirement is not fulfilled, state authority may forbid contract by which ownership on agricultural land should be transferred[20].

4.3 Authorisation of Statutory Authorities

It is often that Statutory Authorities are included in the process of transfer of agricultural land. Their authorisations are different. In some countries those bodies are included in the process and their consent on agreement is necessary. In other counties these bodies are supervising the agricultural land transfer just to make sure that there are no speculations. Also, structures of the Statutory Authorities are different: it can be an agency, or the competent ministry or any other administrative authority.

In Germany, transfer of agricultural land must be approved by the state authority, established by each state. As mentioned above, States may prescribe the size of agricultural land for which an approval is not required. In addition, an approval is not required if State Government participates in transfer as a seller or as a buyer[21]. In Austria, each state out of nine states decides if there will be a State Authority which will be in charge for this question and what authorisations they possess (Liegenschaftsvertrag, 2013). In Switzerland, the federal law authorises cantons to establish the state authority which will be in charge of giving permission for sale of agricultural land (Bundesamt für Justiz, 2009).

In France, the Agency for protection of agricultural land and rural development is established, which is monitoring transfer of agricultural land. Every transaction must be registered by a notary and reported to the Agency. After that the Agency has two months to decide if transaction will be approved. If Agency concludes that transaction is not in the best interest of it, it will try to negotiate with a seller and a buyer about the transaction, but if there is no agreement between them, Agency can decide to use its pre-emptive right related to the agricultural land which is the subject matter of sale. Reasons for this decision may be: environmental protection, a situation in which there is no agreement on the price, etc (Factor Sales, 2012: 16). In Netherlands, it is required that every contract by which agricultural land is transferred must be approved by the state body *Grondkamer*. If Grondkamer does not provide consent, the agreement will not be valid[22].

5 Conclusion

Ownership on agricultural land is a sensitive question for every country. It affects directly its economy and it can jeopardise their citizens. Even though the European Union established through Treaties a free movement of capital, which includes agricultural land, countries frequently try to avoid this fundamental right of the EU in this case. According to all above mentioned, it can be concluded that de facto in the EU

there is a single market on agricultural land, but de iure there is no such market. Even though all Member States are formally equalising position of domestic and other EU citizens, technically it is not possible or it is rather hard for nondomestic citizens to buy agricultural land in some EU countries.

Notes

[1] Treaty Establishing the European Economic Community, EEC Treaty - original text (non-consolidated version).

[2] Treaty establishing the European Economic Community, art 2.

[3] Consolidated version of the Treaty Establishing the European Union [2002] OJ C 325, art 56 par 1.

[4] Consolidated version of the Treaty on the functioning of European Union [2012] OJ C 326, art 18.

[5] Consolidated version of the Treaty on the functioning of European Union, art 63 par 1.

[6] European Commission, *Chapters of the acquis* < http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis/index_en.htm >

[7] Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia [2003] OJ L 236, ANNEX V, VI, VII, VIII, IX, X, XII and XIV.

[8] Treaty of Accession of the Bulgaria and Romania[2005] OJ L 175, ANNEX VI and VII.

[9] Croatian negotiating position of the Republic of Intergovernmental Conference on Accession of the Republic Croatian European Union for Chapter 4 – Free movement of capital, 10.

[10] Stabilisation and Association Agreement of the Croatia [20 5] OJ L 26, art 49 and 60.

[11] Treaty of Accession of the Croatia [2012] OJ L 112, ANNEX V.

[12] Slovak Law on Acquiring Agricultural property and on Amendments on Certain Laws (Official Gazette of the Republic of Slovakia, Law No 140/2014), art 4 par 1.

[13] State Upper Austria, Law on Land Transfer (Oö. Grundverkehrsgesetz 1994 - Oö. GVG 1994), art 4 par 3.

[14] State Upper Austria, Law on Land Transfer, art 4 par 4.

[15] State Styria, Law on the Implementation of Fundamental Exchange (Grundverkehrsgesetz 2001 - GVG 2001), art 7.

[16] Bulgarian Law on the ownership and Use of Agricultural Land (Official Gazette of the Republic of Bulgaria, No 14/2015), art 3c.

[17] Case C-370/05 Criminal Procedure Against Uwe Kay Festersen, par 33-37, 41, 42, 50.

[18] Profitul Agricol, The Draft Law on Land Was Adopted by the Government < http://www.agrinet.ro/content.jsp?page=1421&language=1 >

[19] Hungarian Law on Agricultural Land Ownership and Transactions (Official Gazette of the Republic of Hungary, year 2013 CXII), art 10, par 1-2. (Originally in Hungarian: 2013. évi CXXII. Törvény a mező - és erdőgazdasági földek forgalmáról)

[20] Netherlands' Law on Transaction of Agricultural Land, art 6 par 2 point g.

[21] German Law on Land Transfer, art 2 par 3 point 2 and art 4 par 1 point 1.

[22] Netherlands' Law on Transaction of Agricultural Land, art 6 par 1.

References

Bulgarian Law on the ownership and Use of Agricultural Land (Official Gazette of the Republic of Bulgaria, No 14/2015) (Originally in Bulgarian: Закона за собствеността и ползването на земеделските земи).

Bundesamt für Justiz, *Acquisition of land by foreigners,* 2009 < https://www.bj.admin.ch/dam/data/bj/wirtschaft/grundstueckerwerb/lex-d.pdf > accessed 23

April 2016 (Text originally in German: *Erwerb von Grundstücken durch Personen im Ausland).*

Case C-370/05 Criminal Procedure Against Uwe Kay Festersen.

Consolidated version of the Treaty Establishing the European Union [2002] OJ C 325.

Consolidated version of the Treaty on the functioning of European Union [2012] OJ C 326.

Croatian negotiating position of the Republic of Intergovernmental Conference on Accession of the Republic Croatian European Union for Chapter 4 – Free movement of capital (Text originally in Croatian: Pregovaračko stajalište Republike Hrvatske za Međuvladinu konferenciju o pristupanju Republike Hrvatske Evropskoj Uniji za poglavlje 4 –Sloboda kretanja kapitala).

Deutsches Notarinstitut, *Allowances in the Law on Land Exchange*, 2012 < http://www.dnoti.de/DOC/2012/Vorkaufsrechte/Freigrenzen_120206.pdf > accessed 21 April 2016 (Text originally in German: Freigrenzen im Grundstücksverkehrsrecht).

European Commission, *Chapters of the acquis* < http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis/index_en.htm > accessed 25 April 2016.

Factor Markets, *Sales Market Regulations for Agricultural Land in EU Member States and Candidate Countries*, 2012, p 16 < http://ageconsearch.umn.edu/bitstream/120249/2/FM_WP14%20CEPS%20on%20Sales%20Market%20Regulations_D15.1_Final.pdf > accessed 24 April 2016.

g ATEWAY4you, Step 2 – Check „LAFE" Eligibility (what can you buy?) < http://www.luijten.ch/ Step–2.html > accessed 24 April 2016.

German Law on Land Transfer, (Text originally in German: Grundstückverkehrsgesetz in der im Bundesgesetzblatt Teil III, Gliederungsnummer 7810-1, veröffentlichten bereinigten Fassung, zuletzt geändert durch Artikel 108 des Gesetzes vom 17. Dezember 2008 (BGBl. I S. 2586)).

HD Forest, *New Law introduced on farmland ownership in Lithuania*, 2014 < http://www.hdforest.com/page10008.aspx?recordid10008=21&redirected=1 > accessed 25 April 2016.

Hungarian Law on Agricultural Land Ownership and Transactions (Official Gazette of the Republic of Hungary, year 2013 CXII) (Text originally in Hungarian: 2013. évi CXXII. Törvény a mező - és erdőgazdasági földek forgalmáról).

J. Swinnen and L. Vranken, Review of the transitional restrictions maintained by Bulgaria and Romania with regard to the acquisition of agricultural real estate (Centre for European Policy Studies, 2010).

J. Swinnen and L. Vranken, Review of the Transitional Restrictions Maintained by New Member States on the Acquisition of Agricultural Real Estate, Final Report (Centre for European Policy Studies, 2009).

Liegenschaftsvertrag, *Grundverkehr Administrative authorization for sales agreement*, 2013< http://www. liegenschaftsvertrag.at/tag/grundverkehr/ > accessed 22 April 2016 (Text originally in German: Grundverkehrsbehördliche Genehmigung für Kaufvertrag).

Netherlands' Law on Transaction of Agricultural Land (Text originally in Dutch: Wet van 26 maart 1981, houdende regeling van het agrarisch grondverkeer).

Profitul Agricol, The Draft Law on Land Was Adopted by the Government < http://www.agrinet.ro/content.jsp?page=1421&language=1 > accessed 22 April 2016 (Text originally in Romanian: Proiectul de lege privind vanzarea terenurilor a fost adoptat de Guvern).

Schonherr, *Slovakia: New rules for acquisition of agricultural land*, 2014 < http://www.schoenherr.eu/knowledge/knowledge-detail/slovakia-new-rules-for-acquisition-of-agricultural-land/ > accessed 25 April 2016.

Slovak Law on Acquiring Agricultural property and on Amendments on Certain Laws (Official Gazette of the Republic of Slovakia, Law No 140/2014) (Originally in Slovakian: Zákon o

nadobúdaní vlastníctva poľnohospodárskeho pozemku a o zmene a doplnení niektorých zákonov).

Stabilisation and Association Agreement of the Croatia [20 5] OJ L 26.

State Styria, Law on the Implementation of Fundamental Exchange (Grundverkehrsgesetz 2001 - GVG 2001) (Originally in German: Gesetz vom 12. Dezember 2001 zur Regelung des Grundverkehrs).

State Upper Austria, Law on Land Transfer (Oö. Grundverkehrsgesetz 1994 - Oö. GVG 1994) (Originally in German: Landesgesetz vom 7. Juli 1994 über den Verkehr mit Grundstücken).

Treaty Establishing the European Economic Community, EEC Treaty - original text (non-consolidated version).

Treaty of Accession of the Bulgaria and Romania[2005] OJ L 175.

Treaty of Accession of the Croatia [2012] OJ L 112.

Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia [2003] OJ L 236.

CENTRAL EUROPEAN LAW CONFERENCE FOR STUDENTS,
STRENGTHENING THE RULE OF LAW IN THE EU
(CONFERENCE PAPERS)

LEXONOMICA PRESS

Searching for a New Momentum of the European Private Company

RENATO KENDA

Abstract Small and medium sized enterprises are vital for a stable and effective European Single Market. In order to facilitate the formation and operation of European Union's small and medium sized enterprises, in 2008 the European Commission presented the Proposal for a Regulation on the European Private Company Statute. Although, the proposal introduced some key features that would significantly improve small and medium sized enterprises' position on the European market, dissention among Member States prevented the legislation of the European Private Company Statute. As there is still a need for the European company form that would aid businesses in the EU area, author researches if there are still some initiatives, that would reinstate the proposal for a European Private Company Statute on the Commission's agenda. The paper systematically presents key factors regarding the European Private Company proposal and concludes, that rare although strong initiatives will not overcome the political and cultural dissention that caused the initial proposal to fail.

Keywords: • European Private Company • Small and medium sized enterprises • Single Member Private-Limited Liability Companies

CORRESPONDENCE ADDRESS : Renato Kenda, University of Maribor, Faculty of Law, Mladinska ulica 9, 2000 Maribor, Slovenia, email: renato.kenda@gmail.com.

DOI 10.4335/978.961.6399.79.1.08
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Effective and stable EU market is mandatory for EU's welfare and prosperity. Such a functional interior market can only exists, if it targets to eradicate all obstacles that prevent national markets to merge into just one, Single Market. Therefore the improvement and simplification of European legislation and regulation, has become a priority. But, first and foremost, flexible company law, aimed at small and medium sized enterprises (SMEs), is vital for modern and integrated EU's Single market.[1]
EU's Single market is dependent on SMEs, that form up to 99,8% of EU's non-financial business economy. It is considered that, they are the single most important factor in job creation and innovation in the EU. Most of these enterprises face immense difficulties doing business abroad, setting up a subsidiary or even joining forces with a foreign enterprise by way of joint venture, is proving to be challenging at least. Only 8% of these enterprises engage in cross-border trade and merely 5% of them own a joint venture or subsidiary abroad.[2]

Horizontal competition between Member states in the field of company law and different regulations regarding formation and operation of SMEs, are slowing down the development of the Single Market. SMEs often don't have knowledge of foreign company law, or financial resources to obtain legal expertise. It could present them less difficulties, if EU provided the framework for such activities. Costs for international expansion would reduce significantly if enterprises would have the possibility to establish a European form of company, independent of national rules.

EU has recognized the problem and proposed several initiatives, such as the European Company statute[3] in order to foster and facilitate EU's businesses. However, most of these initiatives were tailored to the needs of large, strong selling companies, whereas SME's were neglected. After initiatives from business and academic circles, in 1998 Paris's Chamber of Commerce[4] proposed a preliminary proposal for the European Private Company Statute(SPE)[5].

In the following years the proposal was developed and after a positive feasibility study by the Commission, in 2007 the EU Parliament demanded from the Commission to prepare a legislative proposal for the SPE. As a part of the Small Business Act[6], in 2008 the Proposal for a Council Regulation on the Statute for a European private company was presented by the Commission. In 2009 the European Parliament passed a legislative resolution approving the Commission's proposal in an amended version. Subsequently, 8 Presidency compromise proposals have followed, but none have been accepted. After French and Czech's Presidency compromise have failed, in 2009 three subsequent Swedish Presidency compromise proposals have been rejected. The latest compromise solution was presented by Hungarian Presidency on 30 May 2011[7]. It was rejected by Sweden because of different opinions regarding employee participation and Germany, which was of the opinion that an SPE should not be allowed to have its registered office and central administration in different member states. Lacking legislative support, in 2013 the Commission withdraw the proposal for the SPE[8].

Despite the relative failure of the SPE proposal, the Commission proposed another legal form to enhance SMEs. In 2014 a proposal for a Directive on Single-Member Private Limited Liability Companies[9] (SUP) was presented. The Directive aims to make it easier for businesses to establish subsidiaries in other Member States, as subsidiaries often tend to have only one single shareholder.[10] The proposal is still in the process of evaluation by the Committee on Legal Affairs.

At this point the following questions arise, which are addressed in this paper. Is the introduction of the Societas Privata Europea, necessary from the European SMEs' point of view, or are there any alternatives? Secondly, are there still some initiatives that could reinstate the SPE proposal on the Commission's agenda? At first, author presents general outline of the SPE proposal and areas of contention between member states. Secondly, the author briefly presents the proposal for a Directive on SUP as a possible alternative for the SPE. Before the conclusion, author researches potential initiatives to reinstate the SPE.

2 Proposal for the Regulation on the European Private Company

a. Objective of the proposal

The objective of the proposal is closely linked to the abovementioned rationale for the creation of the SPE and is set out in the Explanatory memorandum:[11]

'The initiative creates a new European legal form intended to enhance the competitiveness of SMEs by facilitating their establishment and operation in the Single Market. At the same time, the Statute has the potential to benefit larger companies and groups. The proposal for a Statute for an SPE is adapted to the specific needs of SMEs. It allows entrepreneurs to set up an SPE following the same, simple, flexible company law provisions across the Member States. The proposal also aims to reduce compliance costs on the creation and operation of businesses arising from the disparities between national rules both on the formation and on the operation of companies.'

However, it is important to emphasise, that the proposal does not regulate matters related to labour law, tax law, accounting, insolvency of the SPE, or the contractual rights and obligations of the SPE. These contents will still be regulated by national and existing EU law. Furthermore, the proposal does not require that a cross-border element must be present at the time of the creation of the SPE. Usually entrepreneurs set up businesses in their own Member State before expanding to other countries. Subsequently, this kind of an initial requirement would significantly reduce the potential of the SPE

b. General features of the SPE

The SPE is a limited-liability company with its own legal personality and share capital. Considering the fact, that the SPE is a limited-liability company, its shareholders cannot be liable for a higher amount than they have subscribed for. The shares of the SPE may not be publicly offered or traded, as the SPE is a private company.

Restriction free formation of the SPE, allows it to be set up by one or more founders, such as: natural persons, companies or firms under national law, even Societas Europea,

European Economic Interest Grouping, European Co-operative Society or another SPE may take part in the formation of the SPE.

To provide uniformity on core issues, external relations and flexibility in internal affairs, the proposal delivers a two-stage regulation model. In this way, the legal certainty of the new business form and the diversity of SMEs is accommodated. The two stage structure is much more flexible towards the legal entity and provides a high level of uniformity and legal certainty. The proposal consists of 48 Articles that govern the core issues and an Annex[12] which proscribes the provision tasks that need to be regulated within the Articles of Association. However, matters that are not governed either by Regulation or Articles of Association, are regulated by national law of the Member State in which the SPE has its registered office. This provision applies especially to the obligation of a Member State to set out sanctions for breaches of the Regulation on SPE.

c. Formation of the SPE

The formation is liberally regulated and imposes little obligations on the manner in which the SPE can be established. Therefore a SPE can be set up ex nihilo, by dividing and transforming an existing company, by the merger of entities that already subsist according to the applicable national law, or fit into one of the European supranational business forms.

The proposal stipulates, that the name of the European Private Company should be followed by the abbreviation SPE. Also, the registered office and its central administration or main point of business must be within the EU territory. Nevertheless, in the light of the *Centros*[13] judgement of the European Court of Justice, an entity is not obliged to have its administration and registered office or main point of business in the same Member State. Shareholders can even decide to transfer the registered office into another Member State.

SPE's registration procedure is mostly regulated by the First Company Law Directive, except the requirement to make the registration possible in the electronic form. The registration shall be made into the national register of the Member State in which the company has its registered office and requires only the Memorandum and Articles of Association.

d. Capital

In order to facilitate start-ups, the Regulation deviates from the traditional approaches, that require high minimum of a legal capital in order to ensure creditor safety. Subsequently, the Proposal states, that the capital must be at least 1 euro. According to the Explanatory memorandum, studies have shown, that creditors consider aspects other than capital and that companies have different capital needs depending on their undertakings, therefore making it impossible to determine an appropriate capital suitable for all entities.

Uniform rules protecting SPE's creditors, require that the distribution of the SPE's assets to the shareholders cannot be made if the SPE's assets do not fully cover its

liabilities. Furthermore, a solvency certificate can be signed by the SPE's directors before any asset distribution is made. It ensures that the SPE will pay its debts when they become due.[14]

e. Organisation of the SPE

Provisions regarding internal organisation of the SPE allow a high degree of flexibility on the shareholders, whilst limiting mandatory provisions only to the relationships between the SPE and third parties. This approach significantly varies from the SE statute which establishes numerous mandatory rules that affect the internal structure in order to protect smaller shareholders. The SPE proposal only contains a list of matters regarding internal organisation of the SPE, that have to be covered within Articles of Association. However, the manner in which these issues are regulated is in shareholders' discretion.

All decisions that are not listed in the Regulation or Articles of Association, become the competence of the management body, which is responsible for running the company. A one-or two tier management structure can be opted in the Articles of Association, but if the SPE is subject to employee participation, the chosen management structure has to be able to respect this right. Besides the management body, only shareholders' meeting are mandatory organs to be established. The Regulation imposes on the directors the duty to act in the best interests of the company, their appointment or removal is in the hands of the shareholders. Any breach of directors' duties deriving from the Regulation that result in damage or loss, become the subject of director's liability as established in Article 31.[15] Other liabilities are governed by national law.

f. Employee participation

Provisions related to employee participation are one of the more prominent reasons for the failure of the SPE proposal. The principal issues that lead to tensions among Member States author addresses in section 3.3.

The Commission's proposal does not regulate content related to labour law, except employee participation. Primarily, the Directive on cross border mergers[16] is used on matters regarding employee participation. According to this Directive, the SPE is subject to the employee participation rules of the Member State in which it has its registered office. However, there is an exception to this rule. If the SPE that is subject to employee participation rules, transfers its registered office into another Member State, which has no or a lower level of employee participation rights, or does not provide for the employees situated in other Member States the same rights as before the transfer, a special regime must be applied. In such cases, where at least one third of employees are located in the home Member State, negotiations among representatives of the employees and the management body must take place. If no agreement is made, the participation agreements that exist in home Member State must be maintained.

3 Areas of contention among member states

After the Commission's proposal in 2008, a total of eight Presidency compromise proposals were presented by Presidencies of France, Czech, Sweden and Hungary. All

of these compromise proposals failed to secure unanimity required for the proposal to be legislated. In this section author provides general outline of the principal issues, that lead to tensions among Member States, as set out in the latest Presidency compromise proposal by Hungary[17] in 2011.
In spite of the fact, that a general consensus was achieved on most parts of the proposal, issues regarding the seat of an SPE, minimum capital requirement and employee participation still cause divergent views among Member States.

a. Seat of an SPE

Commission's proposal that the SPE can have its registered office and central administration in different Member States, was supported by several delegations, but vast majority of delegations opposed this proposal and are in favour of prohibiting such separation. Some delegations, would even prefer that national laws entirely govern this area.[18]

The Presidency suggested, that the registered office, central administration and main place of business of the SPE should be in the EU in accordance with applicable national law. Additionally, the compromise proposal proscribes, that Member States must ensure, that SPEs are not used to avoid obligations in the territory of the Member State in which they are established. Germany still found this part of the compromise susceptible to violations, thus not acceptable.

b. Minimum capital requirement

Commission's proposal for a minimum capital requirement of at least 1 euro, was mostly accepted by delegations, on the other hand a few expressed demands for a higher minimum capital. Even a compromised proposal by previous Presidencies, which proposed, that Member States can set a higher minimum capital requirement of a maximum of 8000 euros, was rejected.[19]

The Presidency's proposal on this area, remained hardly unchanged from the previous Presidencies' proposals. The minimum capital requirement remains at least 1 euro, and allows States to set up the capital requirement to a maximum of 8000 euros for SPEs registered in their territory. Additionally, a reference about the minimum capital requirement was proposed to be included in the review clause in Article 48.[20] This part of the compromise proposal was also rejected by Germany, which insists on a higher minimum capital requirement.

c. Employee participation

Employee participation emerged as an issue in the proposal, because of the fact, that different Member States have different traditions in this area. Some delegations expressed concern, that the SPE proposal could cause the loss of rights acquired under national law. On this aspect of the proposal, the issue was of the threshold above which the employee participation rules set out in the proposal should apply.[21]

The Presidency suggested, the introduction of a minimum threshold of 500 employees, who work in a Member State that provides better rights on employee participation, than the Member State where the SPE has its registered office. Sweden rejected the proposal,

observing that the threshold in their country is significantly lower, therefore providing better access to employee participation.

4 Single-Member Private Limited Liability Company, as an alternative to the European Private Company

On 9th of April 2014 the Commission proposed a Directive on Single-Member Private Limited Liability Company, as a new way to facilitate the creation of SMEs across the EU area. After the proposal for a Regulation on the European Private Company was withdrawn, this proposal seems as a new attempt from the Commission to enhance businesses in the EU.

The proposal does not create a new European legal form, instead it asks Member States, to create a national company law form with harmonised core requirements and a common indication, Societas Unius Personae (SUP). Furthermore, the proposal only harmonises areas of national law, that are essential in minimizing the problems that SMEs face while setting up a subsidiary. Other provisions-that are not so relevant and caused tensions in the negotiations on the proposal for the SPE, would remain regulated by national law.[22]

Soon after the proposal was public, supportive and negative opinions about the SUP occurred. Positive opinions mostly derive from business circles, as they deem this new legal form an advantage when creating subsidiaries with single shareholders in other Member States. Especially negative were comments from the European Trade Union Confederation (ETUC), who highly doubt the SUP is an effective substitute for the SPE, as set out in their report:[23]

'Genuine SMEs, especially if they are one person-businesses, normally conduct their activities at local level. Therefore, the added value of an EU intervention for such companies is highly questionable. Furthermore, the ETUC cannot accept that the simplified rules contained in the SUP could be misused by large companies to circumvent more elaborated EU company law forms such as the European Company.'
Furthermore, the confinement to single-member companies, results in a reduced scope of use of this new legal form, opposed to a multi-member company model, such as SPE. Additionally, the proposal should be restricted to SMEs only, as it is not intended to give international corporations the tools to establish subsidiaries with hundreds or thousands of employees.[24]

However, there are also positive aspects of the proposal. The main contribution of the SUP proposal-is reduction in formation costs and a lessening of regulatory burden connected to company formation. The Commission considers, that these factors are more likely to lead to a harmonised result if they are not in the domain of the national law of the Member States. At the same time, in contrast to the SPE proposal, the SUP proposal is in line with the principle of proportionality, as it is limited in scope only to the rudimentary objectives.[25] While the SPE caused tensions among Member States, confronting national sovereignty and the values of a harmonised regime, the SUP opinions among Member States.[26]

5 A new momentum of the European Private Company

In this section, author explores possible initiatives to reinstate the proposal for a Regulation on the SPE, on the Commission's agenda. After years of trying to reach unanimity in the Council, in 2013 the Commission withdraw the proposal for the SPE as a part of the Refit Program[27].

Since 1990's when the idea of the SPE was conceived, it has been legal scholars and other academic circles which kept the project alive through symposiums, literature and scientific essays. Despite the fact, that EU's Impact Assessment survey concluded, that up to 1,15 million SMEs could benefit from this new business form, chambers of commerce and businesses throughout the EU area remained fairly inactive. Therefore, it is not surprising that even though the SPE project was a part of the EU's Company Law Action Plan in 2003, it took another 3 years and a speech from the German chairman of the EU's Legal committee to set the EU's legislative wheels in motion.[28]
The history repeats itself a decade later, as interstate and EU activities regarding European private company, have largely fallen out of popularity. Although, the Commission terminated negotiations and other activities, there are still some strong initiatives which demand, that a European Private Company Statute is established in EU law.

The most prominent initiative comes from The High Level Group on Business Services (HLG).[29] In its 2014 Final report, several recommendations regarding the reinstatement of the SPE are included. The HLG reported, that besides double taxation and cross border insurance, the lack of a European Private Company Statute proves, that administrative and bureaucracy obstacles which exist within the internal market, significantly affect the ability of companies to act cross-border.[30] Especially, technical engineering and architect services dealing with multinational long-term projects, experience legal complexities of operations with enterprises from different countries, thus slowing the development and productivity of this sector.[31] Additionally, the HLG reported, that a European Private Company Statute is necessary in order to remediate the problem of fragmented corporate structures, as the Statute would allow SMEs to become truly European.[32] To sum it all up, the working group recommends, that a European Private Company Statute is established in order to give companies an option of a European corporal structure supplementing existing national structures. Such a corporal structure registered in one of the Member States, must be universally accepted as a legal entity in all other Member States.

6 Conclusions

Since the Commission's withdrawal of the proposal for the Regulation on the European Private Company in 2013, little progress was made on the SMEs' situation. SMEs still face major obstacles when establishing businesses or subsidiaries in other Member States. The initial proposal from the Commission was tailored to the exact needs of SMEs. The compromise proposals that followed later, gradually gave in to the interests of more prominent Member States, that are not willing to sacrifice their traditional

values for the greater good. The legislation that would be the outcome of these interests, would render the SPE not the European company form, but rather a hybrid company structure.[33] Consequently, the outcome the Commission, was initially trying to achieve would ultimately fail, as the SPE would be highly susceptible to the provisions of national legislation of different Member States.

After activities regarding the SPE diminished, a possible alternative emerged in a form of the new company structure named SUP. Opinions, whether SUP is an appropriate substitute for the SPE remain diverged. Nevertheless, author observes, that the SUP could be a suitable alternative for the SPE, more for the smaller companies that usually have only one single shareholder and a possibility for bigger companies to open subsidiaries in other Member States. From the political point of view, the SUP proposal potentially has a far greater chance of reaching unanimity in the Council as opposed to the SPE, considering the fact that it leaves more matters in Member States' discretion. At the same time, EU should be careful, not to allow companies to exploit the new legal form and minimise their obligations under national law or invite them to set up letter box companies. The final step to establish SUP is again in Council's hands.

All in all, the SPE in its primary version would render numerous benefits for the SMEs without considerable disadvantages. In spite of the obvious, rare although strong initiatives such as the HLG report, will not overcome the political and cultural dissension that caused the initial SPE proposal to fail. It seems, that the EU's small and medium sized enterprises are as far from having a completely European company form option, as they ever were.

Notes

[1] Lange, Christian, Societas Privata Europaea: Quo Vadis? - Past, Present and Future of the European Private Company (2010), 1 (63). <http://dx.doi.org/10.2139/ssrn.1649123> accessed 24 Februar 2016.

[2] Guidotti, Rolandino, The European Private Company: The Current Situation (2012), 332(344). German Law Journal, Vol. 13, No. 3, 2012. <http://ssrn.com/abstract=2033025> accessed 22 Februar 2016.

[3] Council Regulation (EC) 2157/2001 on the Statute for a European company (SE) [2008] L 294/1.

[4] Chambre de commerce et d'industrie de Paris.

[5] Proposal for a Council Regulation on the Statute for a European private company (SPE), COM(2008) 396/3.

[6] Small Business Act for Europe, COM (2008) 394.

[7] Proposal for a Council Regulation on a European private company - Political agreement, 2008/0130 (CNS).

[8] The withdrawal of the SPE proposal was announced in the Annex to the Communication on REFIT: Results and Next Steps, COM(2013)685.

[9] Proposal for a Directive of the European Parliament and of the Council on Single-Member Private Limited Liability Companies Brussels, COM(2014)212.

[10] Ahern, Deirdre M., The Societas Unius Personae: Using the Single-Member Company as a Vehicle for EU Private Company Law Reform, Some Critical Reflections on Regulatory Approach (2015). <http://ssrn.com/abstract=2693279> accessed 25 February 2016.

[11] Proposal for a Council Regulation on the Statute for a European private company (SPE), COM(2008) 396/3.

[12] Annex I, (n 5), COM(2008) 396/3.
[13] Case C-212/97, Centros Ltd v Erhvervs- og Selskabsstyrelsen, [1999] ECLI:EU:C:1999:126.
[14] European Private Company-SPE, Forma Company,<www.formacompany.com/en/corporate-administration/societas-privata-europaea.php>acessed 25 Februar 2016.
[15] Article 31, (n 5), COM(2008) 396/3.
[16] DIRECTIVE 2005/56/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on cross-border mergers of limited liability companies, [2005], L 310/1.
[17] Proposal for a Council Regulation on a European private company - Political agreement, 2008/0130 (CNS).
[18] Article 7, (n 17), 2008/0130 (CNS).
[19] Article 19, (n 17), 2008/0130 (CNS).
[20] Article 48, (n 17), 2008/0130 (CNS).
[21] Article 35, (n 17), 2008/0130 (CNS).
[22] European Commission memo, Proposal for a Directive on single member private-limited liability companies, (2014), < http://europa.eu/rapid/press-release_MEMO-14-274_en.htm>.
[23] ETUC position on single-member private limited liability companies, (ETUC 2014), <https://www.etuc.org/documents/etuc-position-single-member-private-limited-liability-companies#.VtNzfvkrLIX>.
[24] OPINION of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, COM(2014) 212 final - 2014/0120 (COD).
[25] AHERN (n 11), P.11.
[26] Single-member private limited liability companies Impact Assessment (SWD (2014) 124, SWD (2014) 123 (summary)) of a Commission proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies (COM (2014) 212.
[27] http://ec.europa.eu/smart-regulation/refit/index_en.htm.
[28] Lange, (n 1), P.30.
[29] High Level Group on Business Services, Final report, (2014).
[30] High Level Group on Business Services, Final report, (2014). p.24.
[31] High Level Group on Business Services, Final report, (2014). p.45.
[32] High Level Group on Business Services, Final report, (2014). p.55.
[33] Sauliaus Katuoka, Vaida Česnulevičiūtė, EUROPEAN PRIVATE COMPANY: PERSPECTIVES OF LEGAL REGULATION (2012), <https://www.mruni.eu/upload/iblock/953/9_Katuoka_Cesnuleviciute.pdf> accessed 26 February 2016.

References

Ahern, Deirdre M., The Societas Unius Personae: Using the Single-Member Company as a Vehicle for EU Private Company Law Reform, Some Critical Reflections on Regulatory Approach (2015). <http://ssrn.com/abstract=2693279> accessed 25 February 2016.
Case C-212/97, Centros Ltd v Erhvervs- og Selskabsstyrelsen, [1999] ECLI:EU:C:1999:126.
Council Regulation (EC) 2157/2001 on the Statute for a European company (SE) [2008]L 294/1.
DIRECTIVE 2005/56/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on cross-border mergers of limited liability companies, [2005], L 310/1.
European Private Company-SPE, Forma Company,<www.formacompany.com/en/corporate-administration/societas-privata-europaea.php>acessed 25 Februar 2016.
ETUC position on single-member private limited liability companies, (ETUC 2014), <https://www.etuc.org/documents/etuc-position-single-member-private-limited-liability-companies#.VtNzfvkrLIX>.
European Commission memo, Proposal for a Directive on single member private-limited liability companies, (2014), < http://europa.eu/rapid/press-release_MEMO-14-274_en.htm>.

Guidotti, Rolandino, The European Private Company: The Current Situation (2012), 332(344). German Law Journal, Vol. 13, No. 3, 2012. <http://ssrn.com/abstract=2033025> accessed 22 Februar 2016.

High Level Group on Business Services, Final report, (2014).

Hojnik Janja, Soodločanje delavcev v evropski zasebni družbi, <www.delavska-participacija.com/priloge/ID090304.doc> accessed 25 Februar 2016.

Jurič D., Marinac S., Societas unius personae-prijedlog direktive o društvima s ograničenom odgovornošću s jednim članom, Zb. Prav. fak. Sveuč. Rij. (2015), <hrcak.srce.hr/file/208296> accessed 25 February 2016.

Lange, Christian, Societas Privata Europaea: Quo Vadis? - Past, Present and Future of the European Private Company (2010), 1 (63). <http://dx.doi.org/10.2139/ssrn.1649123> accessed 24 Februar 2016.

OPINION of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, COM(2014) 212 final - 2014/0120 (COD).

Proposal for a Council Regulation on the Statute for a European private company (SPE), COM(2008) 396/3.

Proposal for a Council Regulation on a European private company - Political agreement, 2008/0130 (CNS).

Proposal for a Directive of the European Parliament and of the Council on Single-Member Private Limited Liability Companies Brussels, COM(2014)212.

Proposal for a Council Regulation on the Statute for a European private company (SPE), COM(2008) 396/3.

Proposal for a Council Regulation on a European private company - Political agreement, 2008/0130 (CNS).

Sauliaus Katuoka, Vaida Česnulevičiūtė, EUROPEAN PRIVATE COMPANY: PERSPECTIVES OF LEGAL REGULATION (2012), <https://www.mruni.eu/upload/iblock/953/9_Katuoka_Cesnuleviciute.pdf> accessed 26 February 2016.

Small Business Act for Europe, COM (2008) 394.

Single-member private limited liability companies Impact Assessment (SWD (2014) 124, SWD (2014) 123 (summary)) of a Commission proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies (COM (2014) 212.

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Swiss Franc Loans and the Development of EU's Current Consumer Protection Framework

LAZAR OBRADOVIĆ

Abstract This paper deals with the development of the EU consumer protection law and policy in financial services and how it could reflect on the Swiss franc loans issue in Central and Eastern European countries. It provides the insight in one developing legal system, the simultaneous emergence of a crisis in it and the after effects. The article further warns about the difficulties when it comes to a non-political resolution and the possible ex post appliance of laws(hence the development timeline). Additionally, it points out the most relevant current elements of consumer protection in financial services and the importance of their knowing among the consumers.

Keywords: • Swiss Franc • consumer protection • EU conumer protection law • EU

CORRESPONDENCE ADDRESS : Lazar Obradović, Faculty of Law, University of Belgrade, Serbia, email: obradovic_lazar@yahoo.com.

DOI 10.4335/978.961.6399.79.1.09
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Opened borders within the EU induced constant need for further integrations. Famous „four freedoms" and the positive effects that they brought in practice called for more cooperation. Estabilishment of the monetary union within the EU initiated further financial cohesion, with the recently formed Banking Union as the newest aftermath. But, before the Banking Union, there were many practical issues and directives that tried to deal with these problems that arose during the integrations. The main target of the text below is to provide more insight when it comes to the consumer protection aspect of the Banking sector integrations and the legal documents that followed it. The further focus will be specificaly on the CHF loans problem in some CEE countries, and the possible qualifications of these loans as the unfair commercial practice under the recently developed legal and institutional mechanisms in the EU.

2 Banking Union

Banking Union is relatively old concept that started being discussed in the theory during 1960s and early 1970s. The European Comission's plan was to set a regulatory and supervisory framework ex ante, rather than ex post(Mourlon-Druol, 2016). But in spite of the soundsnes of idea that Banking Union should precede Monetary Union, the situation developed different way in practice. Limited cross-border capital movements and emergence of neoliberalism in the economic theory during the late 1980s led European Comission to 'prioritize capital liberalization over the harmonization of prudential regulations'(Mourlon-Druol, 2016). But, 'the context radically changed in the 2000s, when the introduction of the single currency unleashed new material and political forces that rendered banking union necessary. The creation of a regulatory and supervisory framework proved impossible ex ante, but necessary ex post'(Mourlon-Druol, 2016).

Multicausal Eurozone crisis and its consequences altogether set a way to creation of series of stability mechanisms in the Banking sector. Those mechanisms comprise Banking Union and are: Single Supervisory Mechanism(SSM)[1], Single Resolution Mechanism(SRM)[2] and Single Rulebook[3] as a set of various financial stability laws[4]. The last mechanism of Banking Union is European Deposit Insurance Scheme(EDIS), a mutual european deposit insurance fund which applies to deposits below 100.000 euros of all banks in the eurozone. All these mechanisms deal indirectly on the consumer protection issues, since they demand discipline among banking sector, which means minimal shocks, predictability and stability both for consumers and banks themselves.

What is important to accentuate is that **concrete actions** in terms of consumer protection remain under the charge of national authorities and outside the scope of the European Central Bank's responsibilities, meaning that if any consumer has complaints, they should address them to the relevant national authority(in most cases – national Central Bank). For example, Central Bank of Ireland has developed its own Consumer Protection Code where it clarifies general principles and articles on which every regulated entity must govern itself, and which are based on the principles of fair

commercial practice. When it comes to **abstract actions**, there are still some powers in the EU's jurisdiction. European Banking Authority(EBA) is responsible for promoting transparent, fair and simple internal market for consumers in financial products and services all across the EU. Tasks and roles that comprise EBA's jurisdiction related to consumer protection and financial activities include: collecting, analysing and reporting on consumer trends in the EU; reviewing and coordinating financial literacy and education initiatives; developing training standards for the industry; contributing to the development of common disclosure rules; monitoring existing and new financial activities; issuing warnings if a financial activity poses a serious threat to the EBA's objectives as set out in the its funding Regulation; and temporarily prohibiting or restraining certain financial activities, provided certain conditions are met.

Overall, it can be said that Banking Union has its own pros and cons. The truly good side is that it breaks the 'vicious circle' between the banks and national governments, transfering the authority to the European Central Bank, which ensures more independent supervision mechanism, that is less prone to the protection of national interests. Breaking the 'vicious circle' also has positive effects on the fiscal matters of the national governments by depriving them of the incentives to constantly bail out irresponsible banks and thus spending taxpayers' money. Also, Single Rulebook of the Banking Union brings unified spectre of rules across the Monetary Union, hence bringing more practicality, stability and predictability to the businesses. Still it also represents the big trade-off of economic growth and financial safety. It is well established that many safety margins in banking carry with them an economic cost(Elliott,2012). The BU should be conceived in the way so it can, not only deal specifically with the Eurozone crisis, but make the 'single market' in financial services substantially more effective in the long run(Elliott,2012). Nevertheless, BU should be seen as 'evolving system' and thus prone to shaping and improvement as time passes by, in the matters of consumer protection, among others.

3 Development of the consumer protection law and policy in the EU

Even though Banking Union represents the latest result and a 'crown' of consumer protection tendencies of the EU, the process that led to it was long and full of debates and transformations. There still are and always were large barriers when it comes to cross-border purchasing of financial services. Eurobarometer survey 138 run in September 2011 says that 94% of survey respondents in the EU have never purchased a financial product in an EU Member State outside their home country, and only 11% indicated that they would consider doing that in the future. The main reasons for this aversion towards cross-frontier transactions stated by consumers are: difficulties with after-sales service (mentioned by 53 %), language difficulties (39 %), difficulties to settle disputes (29 %) and difficulties in obtaining information and advice (27 %). Data about the mid-term effects of the Banking Union is still to be gained, but nevertheless, the long road to the current situation in consumer protection law and policy, undoubtedly, needs to be continued.

There was no specific reference to a consumer policy in the Treaty of Rome in 1957, since the concept was still in its infancy. We can trace some developments on the consumer protection issues afterwards, but main impulse came after the UK's and Denmark's accession to the EU in 1973, when some concrete aspects of financial services consumer protection started developing, since these new EU members already had developed system of consumer protection law. First Programme for Consumer Protection and Information Policy(1975) was one of important legal documents dealing with the consumer protection aspects of financial services, since it set out five basic rights among which three were relevant for this issue: right to protection of economic interests[5], right to redress and right to information and education[6]. Since then a right to information and education became the focus of consumer protection policy, especially in the financial services sector. European Commission states: 'A further condition necessary if the consumer is to participate in a market on equitable terms with suppliers, is the availability of an adequate supply of objective information. Freedom to choose cannot be effective unless a consumer has both an adequate knowledge of market conditions and the appropriate skills to understand and use the information which is made available. ' EC furthermore states that well informed shopper will be better able both to (1) benefit from the extra competition on the marketplace and to (2) know his rights whether they are based on national laws and regulations or derived. Still, there are authors stating that 'while improved financial literacy will benefit consumers, the study and the latest research on financial education also highlight that, on their own, policies aimed at raising financial literacy are not enough.'

The proper 'legal basis' when it comes to consumer protection comes finally with the Maastricht Treaty. EU needed a treaty(as an constitutive legal document) which actually addresses this issue, and that problem finally gets solved with this Treaty. Article 3 promotes new EU's main goals, including 'a contribution to the strengthening of consumer protection' as one of them[7]. Under the Title XI named 'Consumer protection', we see proclamations on the already discussed concepts of 'economic interests of consumers' and 'provision of adequate information to consumers'(Article l29a, paragraph 2.). They claim that information asymmetry between consumers and financial service providers should be further reduced, independent financial advice from the third party provider should be encouraged and adequate and effective sanctions should be imposed.

Overall, the consumer experience from 2000 to 2007 can be characterised as a period of financial innovation and liberalisation during which consumers were offered a growing range of financial products (of increasing complexity in some cases). Yet paradoxically, many consumers were not well-equipped to make proper choices and fell prey to mis-selling or inappropriate selling. Because of these mechanisms, several directives on this issue followed, including Unfair commercial practices directive, Consumer credit directive and the most recent Mortgage credit directive. Since these directives are analysed in the following text, here should be noted only that Unfair commercial practices directive and consumer credit directive share a relation, with the first one having horizontal, and the latter one having sectoral character.

4 Directive on Unfair Commercial Practices

As it is already stated in the text, Directive on Unfair Commercial Practices represents lex generalis to our issue. As such, this directive is relevant and applicable when no specific norm or general explanation of some specific norm can be found under the special directives which apply on financial services sector only(i.e. Mortgage Directive or Consumer Credit Directive). Because all of this, Directive on Unfair Commercial Practices contains important explanations and definitions. This directive explains which commercial practices are considered being unfair, defining as such the ones that are: (1)contrary to the requirements of professional diligence and the ones that (2)materially distort or are likely to materially distort the economic behaviour to the average consumer[8] whom they reach and to whom they are addressed(DIRECTIVE 2005/29/EC , art 5, 2). Directive recognises that commercial practices can generaly be: (1)misleading and (2)aggressive. **Misleading practices** can be further divided to misleading actions and misleading omissions. **An action is misleading** if it contains false or untrue information or is likely to deceive the average consumer, even though the information given may be correct, and is likely to cause him to take a transactional decision he would not have taken otherwise. Examples of such actions include false or deceiving information on:

- the existence or nature of the product[9];
- the main characteristics of the product (its availability, benefits, risks, composition, geographical origin, results to be expected from its use, etc.);
- the extent of the trader's commitments;
- the price or the existence of a specific price advantage;
- the need for a service, or repair.

Misleading omissions specifically 'arise when material information that the average consumer needs, according to the context, to take an informed transactional decision is omitted or provided in an unclear, unintelligible, ambiguous or untimely manner and thereby causes (or might cause) that consumer to take a purchase decision that he or she would not have otherwise taken.'

Directive further states that '**a commercial practice shall be regarded as aggressive**[10] if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise'(DIRECTIVE 2005/29/EC, art 8).

These definitions provide important data when concluding if there is an unfair commercial practice in the banks' economic behaviour. Since the Directive was adopted in 2005, it should be applied only to the CHF loans contracts that emerged after its adoption and implementation.

5 Consumer credit directive and new mortgage credit directive

Consumer credit directive, adopted in 2008, brings series of consumer protection mechanisms. Though largely exclusive[11], this directive brings series of new duties for the creditor in the cases of its applicability. It brings the '**Standard European Consumer Credit Information**', standardised form in which the creditors are obliged to provide the pre-contractual information. This allows easy comparison of various offers and better understanding of the information provided for the consumers. Equally significant is the **Annual Percentage Rate of Charge** ("APR"), harmonised at the EU level and representing the total cost of the credit. Also, another regulated duty is the **obligation of creditors to assess the creditworthiness of the consumer**, thus bringing more predictability to the banks themselves(Article 8). Finally, this directive grants two essential rights to consumers: 'they are allowed to **withdraw from the credit agreement** without giving any reason within a period of 14 days after the conclusion of the contract; and they have the **possibility to repay their credit early at any time** – in this case, the creditor can ask for a fair and objectively justified compensation'. Overall, it can be said that the Consumer Credit Directive improved consumer protection status of the EU citizens, but still, as a largely exclusive act, left many exemptions in its fields of regulation. Besides and along with these gaps, Single Market needed better legal framework, which paved a road to the new directive.

Mortgage Credit Directive, adopted in 2014, is to be implemented at least by the end of March of 2016, and is currently the topic of interest across the EU. Before this directive, there was a voluntary Code of Conduct, a legal document drawn up in March 2001, which guaranteed that consumers received transparent and comparable information on housing loans in order to encourage cross-border competition. However, this sector of banking showed need for more than a soft law code, which led to creation of a Mortgage Credit Directive.

The new Directive brings more elaborate and complex solutions in comparison to the Consumer Credit Directive. Financial education of consumers, early repayments, obligation to assess the creditworthiness of the consumer and many other legal institutes are now improved and clarified in the terms of consumer protection. This directive requires minimum harmonisation in the Member States. The exemptions from this are the obligations to: (1)provide a standard pre-contractual information for borrowers through a European Standardised Information Sheet (ESIS) and (2)to apply a consistent EU standard for the calculation of the annual percentage rate of charge(APRC). Another important change is an obligation of creditors to give a consumer **sufficient time** (at least seven days) **to consider the implications of the agreement** they are being asked to enter into. But this norm remains flexible in the way that Member States can choose whether to provide this sufficient time (1)as a period of reflection before the credit agreement is concluded, (2)as a period of withdrawal after the conclusion of the credit agreement or (3)as a combination of the two. The offer may be accepted by the consumer at any time during the reflection period.[12]

After negative experiences with foreign currency loans in the Member States from the Central and Eastern Europe an adequate legal background for future resolutions was needed. Mortgage Credit Directive dedicates articles 23 and 24(together forming Chapter 9) to this issue. This Chapter says that Member States should ensure the: (1)possibility of the conversion of the credit agreement into an alternative currency under specified conditions[13] or (2)availability of other arrangements in place to limit the exchange rate risk to which the consumer is exposed under the credit agreement(DIRECTIVE 2014/17/EU, art 23, 1). The first solution is compulsory for creditor to be presented to the consumer in certain circumstances. Directive concludes that: 'Member States shall ensure that where a consumer has a foreign currency loan, the creditor warns the consumer on a regular basis on paper or on another durable medium at least where the value of the total amount payable by the consumer which remains outstanding or of the regular instalments varies by more than 20 % from what it would be if the exchange rate between the currency of the credit agreement and the currency of the Member State applicable at the time of the conclusion of the credit agreement were applied. The warning shall inform the consumer of a rise in the total amount payable by the consumer, set out where applicable the right to convert to an alternative currency and the conditions for doing so and explain any other applicable mechanism for limiting the exchange rate risk to which the consumer is exposed'(DIRECTIVE 2014/17/EU, art 23, 4). This resolution greatly contributes to the predictability and consumer protection in terms of this actual issue. Still, even though the results of this Directive's general application are yet to be seen, many economists already placed critiques towards this legal act(Dübel, 2015, 16).

6 Comparative analysis of some countries' policy towards chf loans issue

Mortgage Directive isn't applied with retrospective effect(DIRECTIVE 2014/17/EU, art 23, 5). It does not administer credit agreements existing before 21 March 2016. Because of this ex futuro applicability, Member Countries must seek improvised 'good sense' ways to interpret 'scarcer' legal framework that existed when CHF loans issue emerged. By end of 2009 foreign currency loans in Hungary amounted to 47% of GDP (30.6 % of GDP in CHF) and to 16 % of GDP in Poland (11.6 % of GDP in CHF). In end-2011, Croatia reports foreign currency loans of 67% of GDP (9.6 % of GDP in CHF) in end-2011. This means that the CHF loans plays the most prominent role in Hungary and Poland. **Hungary** decided to convert most of CHF loans to its domestic currency. Central Bank decided to subsidy the conversion, which took place at prevailing exchange rates. This solution required large amount of money for liquidity provision, which some countries, as Serbia and Croatia, couldn't afford. **Poland**, on the other hand, didn't consider conversion as a solution. The Polish Financial Supervision Authority (KNF) issued 'Recommendation "S" on good practice for mortgage banking', which intention was to stop foreign currency lending, hoping that the percentage of the CHF loans will soon water down in the total loan mass. Also this plan generally made it harder for the new borrowers to borrow by lowering loan to value ratio and maximum time to repay the loan. Currently other countries, like **Croatia** and **Romania**, are discussing the conversion scenario. However, in Croatia, banks are stating their own plans to fix the exchange rate, trying to put aside the conversion possibility[14]. Still,

during the end of the last year, Croatian parliament approved the bill which promoted conversion of the CHF loans to euro. This move is estimated to cost the banks in Croatia around $1.26 billion, which is equivalent to their combined profits over three years which put an incentive for banks to file a dispute[15]. In **Serbia**, concrete actions concerning the CHF loans issue are still at the level of discussions. Some banks proposed their own resolution programmes, but general resolution still remains to be reached. Lack of political will plays a large role, since percentage of CHF loans in Serbia is not as high as in other CEE countries. Still, mentionable practice of courts stating that 'binding the banks' business policy to the interest rate doesn't make the terms of contract definable and thus doesn't give the clear information to the consumer' can be traced(Jovanić, 2013). Still this represents just the analysis of the several concrete cases, not the general situation. But the complexity of the general situation, in the end, is what causes the issue.

Notes

[1]. Competent authority: European Central Bank. It is important to note that ECB supervises only the largest banks, while the national supervisors continue to monitor the remaining banks. Their supervision is coordinated and in accordance with EU's banking rules. Available at: http://ec.europa.eu/finance/general-policy/banking-union/index_en.htm

[2]. Competent authority: Single Resolution Board.

[3]. Competent authority: European Banking Authority.

[4]. Single Rulebook comprises of three main legislative acts: Capital Requirements Regulation and Directive, Deposit Guarantee Scheme Directive and Bank Recovery and Resolution Directive.

[5]. EC further states that: 'Consumers should be protected against the abuse of power by sellers of products or providers of services. To achieve this, there must be: a general prohibition of misleading statements as well as unfair behaviour on the market (in advertising, in marketing practices, in contracts)'.

[6]. Second Consumer Programme from 1981 extended the previous one, adding the price transparency of services and increased consultation between consumers and 'producers' as its main principles.

[7]. Treaty on European Union, art 3, (s), available at: http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf

[8]. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.(Art 5, 3 of the Directive)

[9]. The nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable.

[10]. Several elements are taken into consideration when determining if there is an aggressive commercial practice in a concrete case. These elements are: (1) the nature, location and duration of the aggressive practice; the possible use of threatening or abusive language or behaviour; the exploitation by the trader of any specific circumstance affecting the consumer in order to influence his/her decision; trader of any specific circumstance affecting the consumer in order to influence his/her decision and any disproportionate non-contractual conditions imposed on the

consumer who wishes to exercise his/her contractual rights (such as to terminate or switch a contract).

[11]. Article 2 of the Directive brings number of exclusions from the applicability of the Directive, i.e. 'credit agreements involving a total amount of credit less than EUR 200 or more than EUR 75 000'(st. 2 tač c). These number of exclusions make it harder for consumers to know their rights in the concrete situations, since the protection principles with many exclusive clauses can be questionable when it comes to their practicability.

[12]. However Member States may provide that consumers cannot accept the offer for a period of up to

ten days. If the consumer takes any action resulting in the creation or transfer of a property right related to funds obtained through the credit agreement, or transfers the funds to a third party, the reflection period or right of withdrawal should cease.

[13]. The currency in which the consumer primarily receives income or holds assets from which the credit is to be repaid, as indicated at the time the most recent creditworthiness assessment in relation to the credit agreement was made or the currency of the Member State in which the consumer either was resident at the time the credit agreement was concluded or is currently resident.

[14]. Available at: https://www.stratfor.com/sample/geopolitical-diary/central-europe-reacts-swiss-francs-appreciation

[15]. Available at: http://www.reuters.com/article/croatia-banks-courts-idUSL8N1273AV20151007

References

Douglas J. Elliott, (2012), Key issues on European Banking Union – Trade-offs and some recommendations, Global Economy and Development

Dübel Hans-Joachim, (2015), Mortgage Consumer Protection in Europe – New Regulations, Ongoing Challenges, The 3rd International Forum on Housing Finance, Seoul

Huttl Pia, (2015) Foreign loan hangovers and macro-prudential measures in Central Eastern Europe, Bruegel

Jovanić Tatjana, (2013), Banks' legal risk due to qualification of certain provisions of credit agreements relating to residential property as unfair, Pravo i privreda(4-6/2013)

Mourlon-Druol Emmanuel, (2016), Banking Union in Historical Perspective: The Initiative of the European Commission in the 1960s–1970s, JCMS: Journal of Common Market Studies

Twigg-Flesner Christian, Parry Deborah, Howells Geraint, Nordhausen Annette, (2005) An analysis of the application and scope of the unfair commercial practices directive, A REPORT FOR THE DEPARTMENT OF TRADE AND INDUSTRY

http://www.blogs.ft.com

http://www.brookings.edu

http://ec.europa.eu

https://www.centralbank.ie

http://www.europarl.europa.eu

http://eur-lex.europa.eu

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Far Away from Home and Beyond Their Wildest Dreams: Legal barriers of Frontier Workers under Tax and Social Advantages in the European Union

JASMINA TABAKOVIĆ

Abstract This article discusses legal barriers of frontier workers in the European Union, especially Slovenian frontier workers employed in Austria. Slovenian workers are not subject to a higher tax scale than other Slovenian residents since Member States assert taxing power over the cross-border situation in the same manner as over the comparable domestic situation and are not discriminated when exercising their fundamental freedoms. Although Member States exercise their tax sovereignty with regards to the lack of coordination insisting on an unclear fiscal national policy, it does not clarify the situation of frontier workers in a supranational and international context. Such a position can lead to a demographic decline in one Member State or fiscal distortions of tax competition. On the other hand, workers are exercising fundamental freedoms which are one of the goals in the internal market. Moreover, various kinds of restrictions (not only discriminations) that dissuade the taxpayer from exercising fundamental freedoms or place him on a less favorable position should have been removed. Integration of the national tax system is necessary or at least uniformation of the fiscal regime of neighboring Member States, which can, in the future, lead to coordinated fiscal policies in the EU.

Keywords: • free movement of frontier workers • prohibition of discrimination • tax and social advantages • role of the Member States and the European Union

CORRESPONDENCE ADDRESS : Jasmina Tabaković, Office of the District State Prosecutor of Maribor, Slovenia, email: jasmina_tabakovic@yahoo.com.

DOI 10.4335/978.961.6399.79.1.10
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

An area without internal frontiers in the European Union (EU) was important for the creation of the internal market in which the free movement of goods, people, services and capital is ensured in accordance with the provisions of the Treaty on European Union (TEU)[1] and the Treaty on the Functioning of the European Union (TFEU).[2] The EU provides an area of freedom and security without internal frontiers, thus maintaining borders concerning tax and social benefits for atypical workers, i.e. frontier workers. Therefore, these face obstacles when it comes to exercise tax and social benefits in both, the State of employment and the State of residence.

In the EU, approximately 7 million people work and live in another Member State. Among them, 1.1 million are frontier workers.[3] The biggest area of daily migration is in Northwestern Europe at the Belgian-Dutch-German tripoint and in the southern part of Scandinavia. According to the population number, Slovenia does not lie behind either. Between 16,000 and 18,000 Slovenian residents are working in Austria.

Slovenian frontier workers are provided with all the tax advantages enjoyed by other tax payers in the state of residence, but at first sight it seems that different tax rates and tax policies of two Member States, i.e. Austria and Slovenia, place frontier workers in a less favorable position. National tax legislation for frontier workers is not favorable because there is a bilateral tax treaty liable to the Slovenian income tax in accordance with the higher income in Austria. The situation of frontier workers is beyond their wildest dreams, because high tax surcharges and matters of survival force them to leave their homes and move to a neighboring Member State.

In this paper I discuss the question of discriminatory treatment of frontier workers in Slovenia who live in border areas and work in Austria. The Constitutional Court of the Republic of Slovenia declared that special tax relief for frontier workers is inconsistent with the principle of tax equity. The question is whether the position of frontier workers is disadvantageous or a less favorable situation already constitutes in discriminatory treatment on the internal market. I search for the answer to the question whether the high tax burden in Slovenia occurs because of double taxation, which is one of the major objectives of the fiscal policy of the EU and the Member States and is a serious obstacle to the stability of the internal market, or if frontier workers are only treated less favorable and not covered by the principle of non-discrimination.

2 Integration of direct taxation and social protection of frontier workers

Workers who are exercising their fundamental right of movement have the greatest rights under Article 45, 49 and 56 of the TFEU, but that cannot be said for frontier workers when their tax and social advantages occur. Frontier workers are linked to the environments they live and work in, which means they are faced with difficulties in enforcing tax and social benefits. Frontier workers may be treated disadvantageously; they may pay extra income tax in the State of residence, they may not receive social benefits in the State of employment, but in the State of residence, and this can provide

social benefits in a narrow range, eg the right to unemployment benefits, the right to social assistance etc.

The EU has limited powers in direct taxation of income of frontier workers, because the taxation is part of sovereign powers of each Member State. Taxation at EU level is neither harmonized nor coordinated within the scope of social security through coordination[4], but is the result of negative integration.[5]

The cross-border situation in international tax law[6] consequently leads to international double taxation. Through negotiations, Member States have taken measures to prevent double taxation and tax avoidance in the form of bilateral tax conventions for a Model Convention of international tax standards[7] of the Organization for Economic Cooperation and Development (OECD).

Article 15 of the OECD Model Convention defines the rules for taxation of income. A resident who receives a salary and other benefits relating to employment, shall be taxable only in the State of residence unless the employment is exercised in the other contracting State. The taxation of frontier workers was subject of discussion, but it was decided that their position shall be regulated individually, which means that the situation depends on the negotiation between the Member States and bilateral tax treaties.[8]

The Model Tax Convention recommends that the right to income tax belongs to the State of residence as a worker regularly returns home. The general rule in Article 15 that the State of residence has the exclusive right to tax is exempted in Article 18 for pensions and other similar remuneration, which shall be taxable only in the State of past employment, i.e. in the source State, but in practice, frontier workers can be committed to tax in the State of residence.

The taxation based on nationality and residence may lead to higher taxation, especially if frontier workers are from countries with higher tax burdens.[9] The role of the EU in the field of direct taxation of frontier workers is limited,[10] but nevertheless the elimination of double taxation is one of the most important objectives[11] of its fiscal policy.

The position of frontier workers in the EU depends on the tax jurisdiction of different national tax regimes, thus their situation is arranged differently. The EU taxation policy is important to prevent discriminatory taxation and reduce distortions between the tax systems of Member States in the internal market.[12] In addition to the Commission's role as a guardian of the discriminatory tax rules, it is also an important case law of the European Court of Justice (ECJ) which provides that Member States shall exercise their powers of taxation in accordance with the provisions of the Treaty.
For moving within the territory of the Union, the principle of non-discrimination and equal treatment is applicable. Article 18 of the TFEU states that any discrimination on the grounds of nationality shall be prohibited. Also, the prohibition of discrimination and the principle of equal treatment is determined in Article 7 of Regulation 492/2011,

which states that a worker who is a national of a Member State, must not be treated differently from national workers in respect of employment and working conditions in another Member State on the grounds of nationality, and that the worker enjoys the same social and tax advantages as national workers.[13]

The ECJ analyzed the tax and social advantages over the case of resident and non-resident affairs. The State of employment must provide equal treatment of citizens in comparable circumstances, meanwhile the State of residence, must not impose barriers to the residents in order to pursue a job in a neighboring Member State. The ECJ declares social benefits in conjunction with the principle of equal treatment broadly;[14] the State of employment confers benefits not only to migrant workers but also to their family members. Such an interpretation is built on the basis of Article 7 of Regulation no. 492/2011 in order to ensure optimal conditions for immigration and integration in the host Member State to encourage the free movement of workers and their family members. [15]

Regulation 883/2004 sets out the jurisdiction of a Member State which is obliged to grant social security benefits in order to avoid double payment of contributions. In accordance with Article 11 of the Regulation, the Member State of employment is competent to grant social benefits to frontier workers. Meanwhile the jurisdiction of Member States for granting tax advantages depends on bilateral treaties. Nevertheless, for the competence of granting tax advantages, the case-law of the ECJ is also important.

The decisions of the ECJ coincide with activities of unsuccessful harmonization of direct taxation of natural persons.[16] Moreover, the Court has developed and applied the principles on which it was identified in the exercise of economic freedom.[17] Also, the Court has referred to the rules of international tax law and its practice.[18] Regarding the taxation of the income of frontier workers, the ECJ received many critics; the mismatch of legal uncertainty, unfairness and impracticability.[19]

Nevertheless, the ECJ is still relying on the doctrine of the application of the same rule to different situations, based on the non-resident pilot case Schumacker[20] in 1995. The decision of the ECJ in Schumacker, which has been confirmed by the employment principles,[21] has resulted in different academic critics and after twenty years since the adoption of the decision it is still subject of various discussions.

The *Schumacker* case concerns a resident of Belgium, working in Germany, who demanded the German personal tax allowances to be reserved for residents. The ECJ stressed in the *Schumacker* case that direct taxation does not fall within the purview of the Community as such, and the powers retained by the Member States must nevertheless be exercised consistently with the Community law.[22] According to the ECJ, the situations of residents and non-residents are not, as a rule, comparable, and there are objective differences between them, both from the point of view of the source of the income and from the point of view of their ability to pay taxes or the possibility of taking into account their personal and family circumstances.[23] The *Schumacker*

principle stressed that a non-resident taxpayer is deemed to be in the same situation as a resident if his income derives entirely or almost exclusively from the economic activity which he performs in that State.

Wattel correctly recalls that the ECJ insisted on discerning a non-existence difference in treatment in its case law.[24] The ECJ surprisingly did not require the source State to grant national treatment to non-resident employees and it allowed a direct discrimination against non-residents by the Employment State, not only of the free movement of workers, but also of the Article 7 of Regulation no. 492/2011, which explicitly entitles non-national workers to the same tax benefits as nationals.[25] It is also illogical that discriminatory treatment applies only if no Member State takes into account the circumstances of the worker.[26]

In order to uderstand the position of Slovenian frontier workers, there is an important *Gilly* case in which the ECJ stressed that Member States have the discretion to freely determine the criteria for the allocation of taxation powers and that no rules which would guarantee the right to the most favorable tax regime of the Member States concerned were provided to frontier workers.[27]

3 The position of Slovenian Frontier workers employed in Austria

In 2004, Slovenia became a Member State of the EU and the number of frontier workers increased, especially since 2012[28], because jobs back home were lacking. Frontier workers enjoyed special tax relief in order to eliminate the high tax surcharge in Slovenia, whereas it was not considered as a privilege. But in 2013, the Constitutional Court declared that the special tax relief for frontier workers is inconsistent with the principle of tax equity. After the abolition of the special tax relief, frontier workers have to pay a tax on income received in Austria, where the tax policy is favorable.[29]

To understand the present situation of Slovenian frontier workers it is necessary to mention the 2005 Income Tax Act,[30] which introduced the taxation of worldwide income. That means that taxation is based on taxation of income and assets, irrespective of where the income is achieved. This has expanded the circle of personal income tax payers mostly being Slovenian residents, who receive different types of income abroad. Because of the high incomes in Austria, the Slovenian legislation guaranteed a special tax relief as laid down in paragraph 5 of Article 113 Income Tax Act (Income Tax Act-2).[31]

Since the Constitutional Court declared that special tax relief for frontier workers is inconsistent with the principle of equity,[32] the special tax relief was eliminated in 2014. Frontier workers can still apply only for general relief in comparison to other tax residents in Slovenia. Because they receive a high income in Austria, they are subject to higher income taxation as before 2014. Such tax policy especially burdens those with low incomes.[33]

Frontier workers are not subject to a higher tax scale than other Slovenian residents since Member States assert taxing power over the cross-border situation in the same manner as over the comparable domestic situation. As stressed above, Member States have the discretion to freely determine the criteria for the allocation of taxation powers and that frontier workers are not provided with rules, which have guaranteed the right to the most favorable tax regime of the Member States concerned. Slovenia takes into account their personal and family circumstances, such as travel expenses and food costs. If these circumstances would not be taken into account or would not be treated equally as other resident, it would be considered a breach of fundamental freedoms.[34]

I believe that the Slovenian legislation is unfavorable for frontier workers because wages are a high tax burden. Slovenia should act responsibly and regulate the situation of frontier workers as a national priority. Otherwise it will not only lose citizens, but also taxpayers.

4 Conclusion

One of the aims of a single market should be the elimination of double taxation, which can violate fundamental freedoms. Double taxation of income is a major obstacle for cross-border activities, as it interferes with the effective functioning of the internal market, has a negative impact on economic growth, employment and achievement of the objectives of Europe 2020.[35] Unfavorable tax policies of Member States can also affect the stability of the internal market. But on the other hand, that kind of tax policy encourages free movement as can be seen in the case of Slovenian frontier workers.

I believe that the most appropriate process of integrating the national tax system is the one which includes positive integration, more specifically a coordinated od harmonized European legislation. This should not be achieved through a consensus of the Member States but rather through a qualified majority. However, Member States should still preserve their tax sovereignty and behave in a politically responsible manner.[36]

Furthermore, I believe that the tax competition between Member States, which causes spontaneous harmonization especially between neighboring Member States, is important. These Member States cannot afford to divergent tax burden and other obstacles for individuals exercising their fundamental freedoms. If tax burdens vary significantly between Member States, then frontier workers are not provided adequate public services and economic opportunities and will move to a more efficient tax Member State. Nevertheless, unfavorable tax regimes in Slovenia encourage workers to move to Austria. [37]

Slovenian frontier workers are not subject to a higher tax scale than other Slovenian residents since Member State assert taxing power over the cross-border situation in the same manner as over the comparable domestic situation. Although their position, due to a higher income tax surcharge, is less favorable, they are not double taxed and are not treated in discriminatory manner.

Notes

[1] Consolidated version of the Treaty on European Union, OJ C 326, 26. 10. 2012, p. 13–390.

[2] Consolidated version of the Treaty on Functioning of the European Union, OJ C 326, 26. 10. 2012, p. 47–390.

[3] Labour Mobility within the EU, www.europa.eu/rapid/press-release_MEMO-14-541_en.htm, (1. 3. 2016). In 1977 there were around 150,000 frontier workers, in 1995 the number increased to 380,000. According to data in 2013, the number of frontier workers in the EU is 1.1 million.

[4] The wide discretion of Member State in the social security cannot have the effect of undermining the rights granted to individuals by the provisions of the EC Treaty in which their fundamental freedoms are enshrined, case C-18/95 Terhoeve [1999] ECR I-345, para. 44, case C-213/05, Geven [2007] ECR I-6347, para. 27.

[5] Integration through the elimination of the prohibition of restrictive national tax measures which are incompatible with the provisions of the Treaty over the decision of the Court of Justice.

[6] International tax law distinguishes between: taxation based on residence, i.e. unlimited tax liability or tax at source world (concept of residence) and taxation based on the source, i.e. limited tax liability (concept of source).

[7] Model Tax Convention, www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf (29. 2. 2016).

[8] Some Member States tax frontier workers only in the State of residence (e.g. convention between Belgium and France), or in the State where they work (e.g. convention between the Netherlands and Germany). It is possible to tax in both countries (e.g. Convention between Switzerland and Germany and between Austria and Slovenia).

[9] Stefaner, Zueger, Tax Treaty Policy and Development, (2005), p. 28.

[10] Neither the Council nor the European Parliament has any legislative competence in this area. Article 115 TFEU provides the possibility for the Commission to propose legislation to improve the functioning of the internal market with the necessary unanimity of all EU Member States.

[11] Terra, B., Wattel, P., (2012), European Tax Law, Sixth Edition, Kluwer Law International, p. 20.

[12] Taxation, http://europa.eu/pol/tax/index_en.htm (1. 3. 2016).

[13] 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, OJ L 141, 27. 5. 2011, p. 1–12.

[14] Case 207/78 Criminal proceedings against Gilbert Even and Office national des pensions pour travailleurs salariés [1979], ECR I- 02019, para. 22.

[15] Barnard, the Substantive Law of the EU, (2007), p. 279.

[16] Vanistendael, The consequences of Schumacker and Wielockx: two steps forward in the tax procession of Echternach, Common Market Law Review, 33/2, April 1996, p. 225.

[17] ECJ in its first fiscal case 270/83, Avoir fiscal, which did not relate to the situation of the frontier workers, in 1986, pointed out that the tax system of rules of direct taxation which treats residents and non-residents differently needs to be exercised in accordance with the EU law. Member States must respect the principles of loyalty and should not undermine the fundamental freedoms, which are stressed in the Schumacker case.

[18] Case, Case C-279/93, Finanzamt Köln-Altstadt against Roland Schumacker 14. 2. 1984, Recueil 1995, p. 225, case C-385/00, de Groot, para. 99 in C-234/01, Gerritse, para. 51.

[19] Wattel, Non-Discrimination à la Cour: The ECJ's (Lack of) Comparability Analysis in Direct Tax Cases, European Taxtion, 2015 (Volume 55), No 12, str. 542.

[20] Case C-279/93 Finanzamt Köln-Altstadt v Roland Schumacker [1995], ECR I-00225.

[21] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee Tax Policy in the European Union - Priorities for the years ahead, COM/2001/0260 final, UL C 284, 10. 10. 2001, p. 6–19.

[22] Ibidem, para 21.

[23] Case C-279/93 Finanzamt Köln-Altstadt vs. Roland Schumacker [1995], ECR I-00225, paras. 31–34.
[24] Wattel, Non-Discrimination à la Cour: The ECJ's (Lack of) Comparability Analysis in Direct Tax Cases, European Taxtion, 2015 (Volume 55), no. 12, p. 542.
[25] Terra, B. J., Wattel, J., European tax law, Sixth Edition, Kluwer Law International, 2012, p. 979– 980.
[26] Ibidem.
[27] Case C-336/96, Gilly v Directeur des services fiscaux du Bas-Rhin, [1998], ECR I-2793, paras. 35-36. The ECJ also stressed that it is not the aim of the tax conventions to ensure that the taxation of the taxpayer in one Member State is not higher than the taxation in another Member State.
[28] The number of Slovenian frontier workers in Austria is approx. 18,000.
[29] According to the favorable tax scale and a higher proportion of exempt income which is included in the tax base in Slovenia, an annual income of € 10,999 is not taxed. Frontier workers do not get their travel expenses and food costs reimbursed, but they receive the thirteenth and fourteenth salary, which is taxed less as other types of payment. Night or Sunday work is not taxed.
[30] Income Tax Act 2 (ZDoh-1, Official Gazette of the Republic of Slovenia, No. 54/2004).
[31] Special tax relief has been added to Article 113 (ZDoh-2E) (Official Gazette of the Republic of Slovenia, No. 10/2010 dated 12. 2. 2010) which stated that frontier workers are entitled to a tax relief on that income in the amount of 7,000 euros per year. For 2013, the allowance amounts to € 7,576.62.
[32] The Decision of the Constitutional Court of the Republic of Slovenia, No. U-I-147/12-18 of 29. 05. 2013.
[33] In Austria, a frontier worker receives at least € 1,300, whereas the minimum wage in Slovenia is € 790 gross.
[34] Case C-385/00, F.W.L. de Groot against Statssecretaris van Financiën [2002], ECR I- 11819, paras. 114–115.
[35] Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee — Double Taxation in the Single Market' COM (2011) 712 final, OJ C 181, 21.6.2012, p. 40–44.
[36] Hojnik, J. Ustavni pomen tržne zakonodaje EU, LeXonomica, No. VI/1, June 2014, p. 29–48.
[37] In 2013 1,529 Slovenian citizens migrated to Austria, in 2014 number has increased to 2,270 citizens.

Treaties
Consolidated version of the Treaty on European Union, OJ C 326, 26. 10. 2012, p. 13–390.
Consolidated version of the Treaty on Functioning of the European Union, OJ C 326, 26. 10. 2012, p. 47–390.
Case law of the European Court of Justice
Case 207/78 Criminal proceedings against Gilbert Even and Office national des pensions pour travailleurs salariés [1979], ECR I- 02019I-00225.
Case C-385/00, F.W.L. de Groot against Staatssecretaris van Financiën [2002], ECR I- 11819.
Case C-279/93 Finanzamt Köln-Altstadt v Roland Schumacker [1995], ECR I-00225.
Case C-18/95 Terhoeve [1999] ECR I-345.
Case C-336/96, Gilly v Directeur des services fiscaux du Bas-Rhin, [1998], ECR I-2793.
Case C-385/00, F. W.L. de Groot v Staatssecretaris van Financiën, [2002], ECR I-11819.
Case C-234/01, Arnoud Gerritse v Finanzamt Neukölln-Nord, [2003], ECR I-05933.
Case C-213/05, Geven [2007] ECR I-6347.
Secondary legislation

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, OJ L 141, 27.5.2011, p. 1–12. Regulation No 492/2011 specific provisions concerning certain benefits for frontier workers.

Opinion and Communications

Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee Tax policy in the European Union - Priorities for the years ahead, COM/2001/0260 final, UL C 284, 10. 10. 2001, p. 6–19.

Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee — Double Taxation in the Single Market' COM (2011) 712 final, OJ C 181, 21.6.2012, p. 40–44.

Slovenian Legislation

Income Tax Act 2 (ZDoh-1, Official Gazette of the Republic of Slovenia, No. 54/2004).

The Decision of the Constitutional Court of the Republic of Slovenia

The Decision of the Constitutional Court of the Republic of Slovenia, No. U-I-147/12-18, 29. 5. 2013.

References

Barnard, C., the Substantive Law of the EU: The Four Freedoms, Oxford University Press, Oxford 2007

Stefaner, Zueger, Tax Treaty Policy and Development, (2005), p. 28.

Terra, B., Wattel, P., European Tax Law, Sixth Edition, Kluwer Law International, 2012, p. 20.

Hojnik, J. Ustavni pomen tržne zakonodaje EU, LeXonomica, No. VI/1, June 2014, p. 29–48.

Wattel, Non-Discrimination à la Cour: The ECJ's (Lack of) Comparability Analysis in Direct Tax Cases, European Taxtion, 2015 (Volume 55), No. 12, p. 542.

Vanistendael, The consequences of Schumacker and Wielockx: two steps forward in the tax procession of Echternach, Common Market Law Review, 33/2, April 1996, p. 225.

Model Tax Convention, www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf (29. 2. 2016).

Labour Mobility within the EU, www.europa.eu/rapid/press-release_MEMO-14-541_en.htm, (1. 3. 2016).

Cross-border workers provide nearly half of Luxembourg's workforce http://www.wort.lu/en/luxembourg/cross-border-workers-provide-nearly-half-of-luxembourg-s-workforce-514336a6e4b0246d64a9b419 (1. 3. 2016).

Frontier Workers in the EU, www.europarl.europa.eu/workingpapers/soci/w16/summary_en.htm (29. 2. 2016).

Taxation, http://europa.eu/pol/tax/index_en.htm (1. 3. 2016).

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LEXONOMICA PRESS

The Challenges of Data Protection within the International Cooperation between Law Enforcement Agencies

DAVIDE NARDO

Abstract The paper focus on the current need to balance fairly civil rights and security issues in the light of recent technology developments and of potential risks for people's privacy, as revealed by Datagate scandal. Consequently, having regard to the European legal framework, it reviews recent proposal on data protection reform. The paper points out why current acts drafted by the European Commission are not sufficient to deal the challenges. Additionally it considers, as underlined by Professor Cannataci, the need to upgrade the legal framework of the Council of Europe and the chance to harmonize national legislations in order to strength trust between public authorities.

Keywords: • data protection • law enforcement agencies • European legal framework • Council of Europe

CORRESPONDENCE ADDRESS : Davide Nardo, postgraduate student of Department of Political and Social Sciences, University of Trieste, Italy, email: davide.nardo@studenti.units.it.

DOI 10.4335/978.961.6399.79.1.11
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Nowadays it is possible to connect through the Internet to blog journal websites or to social networks and have conversations with unknown people, we can buy and sell products through web stores or check our bank account from home. By the way people should be careful whenever they browse Internet, because they leave tracks, such as personal information and metadata, that are collected by Internet Service Providers and difficulty can be checked from us. So many questions concern the weaknesses of people's privacy and the management of these data by internet intermediaries, such as Google or Yahoo. Really these tracks can be used even by law enforcement agencies, cooperating with internet service providers, to collect evidence about misconduct, to avoid that threats against people's security are carried out. This is most evident, on the one hand, in the evolving phenomena of cyberterrorism, recruiting fighters and collecting funds all over the world.[1] On the other hand, however, people and companies concern that these agencies use wrongly these data breaching their civil rights, for example gradually keeping under constant scrutiny the community, as in the George Orwell's Big Brother. Consequently people need to know what the police is doing and it's only through transparency that we can actually detect possible violations of fundamental rights.[2] For these reasons this legal framework presents many problems, especially in the balancing of people's rights with the need of ensuring them an effective protection against criminality. Besides it should be pointed out that technology development is running faster than the law development and only recently institutions are starting to deal the problem of cybersecurity.

2 The challenges of ensuring the right to privacy in investigational activities

It can be observed that the right to privacy, ruled by the Universal Declaration of Human Rights and by the International Covenant on Civil and Political Rights, is not conceived for the digital environment. Substantially they grant the respect of the individual's private sphere, including family life and correspondence, against intrusion from others and states, but they do not refer to data processing or system information.[3] Likewise the Council of Europe states the respect of privacy in the 1950 European Convention on the Human Rights.[4] Not by chance, as a consequence of the scandals that involved intelligence agencies of U.S.A. and U.K., the United Nations Human Rights Council affirmed in the Resolution 20/8, adopted in 2012, entitled "*The promotion, protection and enjoyment of human rights on the Internet*"[5], that the same rights people have offline must also be protected online in accordance with the Universal Declaration of the Human Rights and the International Covenant on the Civil and Political Rights. Nevertheless it must be considered in relation to the need to protect the rights and freedoms of others.[6] For this purpose the ECHR states some exceptions to derogate the right of privacy, in accordance with the exceptions provided by the International Covenant on Civil and Political Rights: exceptions provided by the law and necessary to the interests of national security, public safety or economic wellbeing of the country, to the prevention of crime, to the protection of health or morals, or to the protection of the rights and freedoms of others.[7] However these exceptions raise doubts on the effective protection of the right to privacy in the

treatment of personal data, because criminal investigations might result into collecting and exchanging a considerable amount of personal data, including telephone and internet traffic data, that need not to be related directly to cybercrime.[8]In some cases, national security agencies undertake intelligence activities that may concern the characteristics of mass surveillance and can be used by governments to spy other governments, as revealed by Edward Snowden. Therefore governments, as Germany and Brazil, have asked for a greater democratic control on the intelligence activities and they have invoked the stop of the surveillance[9]. Consequently, as noted in the Report of the Office of the United Nations High Commissioner for Human Rights, any interference with privacy should be proportional to the end sought and be necessary in the circumstances of any given cases, in order to avoid that law enforcement agencies overstate their mandate, breaking unfairly the right, because measures adopted result often arbitrary and not justified to get goals.[10] Otherwise they would threaten the private life of people and the relations between countries. Indeed, in response of Snowden revelations about surveillance program led by United States National Security Agency in respect of Americans, European Parliament, in 2013, asked the Commission to suspend the Terrorist Finance Tracking Program Agreement, adopted for the prevention, detection and prosecution of the terrorism, in order to get a full and comprehensive clarification of the facts about activities of United State intelligence agencies.[11] And more recently the Court of Justice of the European Union declared that the Safe Harbor Agreement is invalid, because United States, in contrast with this instrument, do not grant the same data protections of the European Union on data transferred overseas threatening fundamental rights of European citizens.[12] So we can say that Snowden's revelations are involving government's mistrust and are concerning to the real aim of intelligence agencies. Anyway activities of intelligence agencies should not be confused with those of judicial law enforcement: the mission of intelligence agencies is to provide policymakers, military commanders and law enforcement officials with intelligence on a wide range of national security issues, while the mission of the judicial law enforcement is to prevent and repress criminality.

3 The European legal framework on data protection

Actually protection data in the field of judicial cooperation in criminal matter is already regulated in the context of the European Union, but it must be pointed out that current rules are not sufficient to ensure high level of data protections for all individuals in the European Union.[13] So the European Commission urged the Council and the European Parliament to update this legal framework proposing a comprehensive reform of data protection rules in the European Union. Exactly it assumed that current rules are not able to fit to technological development and to globalization process, challenging the protection of personal data. This, according to the Digital Agenda of Europe, and to the need of harmonizing the online environment.[14] Indeed the current framework is regulated by the 1995 Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data[15] and by the 2008 Data Protection Framework Decision[16] entered into force before the adoption of the Lisbon Treaty. It must be pointed out that the current framework is not preventing the fragmentation of implementing personal data across the European Union.[17]

In particular it is possible to point out three problems that affect the legal framework.[18] First, current divergences among member states in the implementing, interpreting and enforcing the 1995 Data Protection Directive raised barriers threatening the policies and the functioning of the internal market. The Directive sets many provisions that are broadly leaving states free to interpret and transpose key provisions and concepts in different ways. On this concern it can be observed that Article 8 forbids to process personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership or data concerning health or sex life[19], but some states have specified and added other categories, for example: the Czech Republic and Estonia take account even biometric data and genetic data; Spain and Poland include legal data. Some member states, as Cyprus and Denmark allow the chance of processing sensitive data only when data are processed by health professionals, whereas in the Czech Republic and Slovakia this is possible also for health insurance purposes.

Second, globalization and technological development have reduced the chance that individuals are aware of what happens to their personal data, because personal data are transferred across many virtual and geographical borders, even through "cloud computing", a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources managed by Internet Service Providers. Besides it must be pointed out that, although companies have to respect the duty to inform individuals about the treatment of their data, often information is not entirely available or it is understandable for them. And aggregation and cross-linking of these data from different sources increase risks of losing anonymity on information gathered.

Third, the Data Protection Directive specifically excluded police and judicial cooperation in criminal matter and the Data Protection Framework Decision reflects specificities of the pre-Lisbon pillar structure of the European Union. On this concern, the scope of this act is limited to cross-borders processing activities, therefore it does not cover data processing by police and judicial authorities at national level; this is in contrast to Article 16 of Treaty on the Functioning of the European Union on the right to the protection of personal data. Moreover, while the Framework Decision rules general data protection principles, it provides at the same time the possibilities of derogating to them at the national level, thereby making difficult their harmonization and increasing gaps and uncertainty in the field of police and judicial cooperation in criminal matter. This, as noted by the European Commission, hinders the smooth exchange of these data among relevant national authorities. In particular this instrument leaves a large room of discretion to member states in assessing the adequacy of a third country for the purposes of transferring personal data to investigate, prevent, detect or prosecute criminal offences or the execution of criminal penalties.[20]

As a result, the reciprocal trust among law enforcement agencies risk to be undermined, since an authority might be less willing to share information with an authority of another member state, that could share this information with authorities of third countries without clear safeguards.

Finally, the rules setting the relation between the Framework Decision and the provisions enshrined in other acts concerning police and judicial cooperation in criminal matter are not entirely clear and leaves a large room for interpretation on a case-by-case basis.[21] Not by chance the European Commission proposal on the data protection reform focus on strengthening individual rights, dealing challenges of the globalization and the latest technologies and increasing cross-border cooperation in criminal matter. More precisely the aim of the draft regulation on data protection aims to update and modernize principles set up by the 1995 Directive and by the draft directive on the protection of personal data.[22]

4 The importance of Council of Europe's legal framework

In the same way as the legal framework of European Union, it may be observed that even the legal framework in the context of the Council of Europe should be updated and modernized, since acts regulating the protection of data processed for purpose of law enforcement are outdated and are not sufficient to deal challenges for privacy. This, particularity concerning the Convention for the protection of individuals with regard to the automatic processing of personal data[23], also called Convention 108, and the Recommendation No R(87)[24], providing a guidance on how data should be collected for police work and control by independent authorities.

Anyway the global dimension of virtual domain is still matter of discussion at international level, especially in the field of law enforcement cooperation, where many member states of United Nations recognized the importance of developing an international approach, but differences between existing national legal frameworks hinder the harmonization process. On this concern Council of Europe Convention on Cybercrime[25], adopted by member states in 2001, may be considered a valid legal instrument to organize a common answer to threats represented by cyber attacks, since it has been signed also by United States, Canada, Japan and South Africa, even if it is hardly criticized by other countries, such as Russia and China, with different approaches to the governance of cyberspace.[26] This act, even if it does not encourage the protection of personal data, rules many provisions to criminalize the breaching of computer data and to regulate the collection of evidence in electronic form.[27]

Nevertheless the European Data Protection Supervisor, Giovanni Buttarelli, has underlined that a clause of proportionality should be provided in relation to investigational and procedural activities, specifically related to the temporary preservation of computer data (so called "freezing").[28] Moreover he pointed out that states should upgrade their legislation in order to afford enhanced protection to the victims of cybercrimes, because existing rules on jurisdiction are not always appropriate to deal this criminal phenomena.

5 Conclusion

The nature of cyberspace makes difficult to enforce the existing rules, especially in the light of new information and communication technologies, such as social network, that increase vulnerabilities of people's privacy. As a result, a general reform of the legal framework should be encouraged and discussed at the international level, because the globally connected Internet makes cybercrime a cross-border problem.

On this concern, it is possible to say that the draft European Union reform on data protection proposal, may not be sufficient to solve the problem. European Union should work with international institutions, third countries and other regional organizations in order to improve as far as possible the harmonization of different legal frameworks and to achieve common standards about data protections, criminalization of cybercrimes, investigative powers and mechanisms of international cooperation. Furthermore governments should discuss the adoption of common standards within the field of intelligence agencies, providing a solid protection of national security. In particular they should focus on severe restrictions of surveillance activities, effective safeguards for individual rights and the actual role of independent civilian oversight agencies. The objective is strengthening trust among public authorities and encouraging an effective cross-border cooperation, in the light of the fair balance between fundamental rights and national security. Conversely, as the phenomena of insiders showed, risks for social stability might increase against a too strict social control. Therefore we need to give up traditional approaches thinking in a new way.

Notes

[1] PINO, Raffaella (2013), Il cyber terrorismo: un'introduzione, Ciberspazio e Diritto Vol.14, No.49

[2] HAYES, B. (2011) Monitoring the State and Civil Liberties in Europe, Cybercriminality: Finding a balance between freedom and security, p. 229

[3] Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights

[4] Handbook on European Data Protection Law of the European Union Agency for Fundamental Rights, 2014, pag.14-15

[5] Resolution 20/8, adopted by Human Rights Council, on the promotion, protection and enjoyment of human rights on the Internet, 16 July 2012

[6] Handbook on European Data Protection Law of the European Union Agency for Fundamental Rights, 2014, p. 21

[7] Article 8 of European Convention on Human Rights

[8] BUTTARELLI, G. (2011), Fundamental Legal Principles for a balanced approach, Cybercriminality: Finding a balance between freedom and security, p. 65-73

[9] See <https://www.rt.com/news/un-draft-resolution-surveillance-110/>

[10] Report of the Office of the United Nations High Commissioner on the Right to Privacy in the Digital Age, 30 June 2014, p.6-9

[11] Joint Motion for European Parliament resolution on the suspension of the TFTP agreement as a result of US National Security Agency surveillance, 21 October 2013

[12] Judgment of the Court of Justice of the European Union in Joined Case C-362/14, Maximillian Schrems v Data Protection Commissioner, on the request for a preliminary ruling from the High Court (Ireland), 21 October 2013

[13] Commission Staff Working Paper – Impact Assessment, accompanying the Regulation of European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) and Directive of European Parliament and of the Council on the protections of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or executions of criminal penalties, and the free movement of such data, 25 January 2012

[14] Proposal for a Regulation of European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 2012, p.1-3

[15] Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 24 October 1995

[16] Council Framework Decision 2008/977/JHA on the protection of personal data processed in the frame work of police and judicial cooperation in criminal matters, 27 November 2008

[17] Proposal for a Regulation of European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 2012, p.1-3

[18] Commission Staff Working Paper – Impact Assessment, accompanying the Regulation of European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) and Directive of European Parliament and of the Council on the protections of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or executions of criminal penalties, and the free movement of such data, 25 January 2012

[19] Article 8 of the Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 24 October 1995

[20] Article 13 of the Council Framework Decision 2008/977/JHA on the protection of personal data processed in the frame work of police and judicial cooperation in criminal matters, 27 November 2008

[21] Annex 3 of the Commission Staff Working Paper – Impact Assessment

[22] See <http://www.consilium.europa.eu/en/policies/data-protection-reform/data-protection-regulation/>

[23] Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 28 January 1981

[24] Recommendation No. R (87) of the Committee of Ministers to Member States regulating the Use of Personal Data in the Police Sector, 17 September 1987

[25] Council of Europe Convention on Cybercrime, 23 November 2001

[26] VATIS, M. (2011), The Council of Europe Convention on Cybercrime, Proceedings of the Workshop on Deterring Cyberattacks: Informing Strategies and Developing Options for US Policy

[27] Handbook on European Data Protection Law of the European Union Agency for Fundamental Rights, 2014, p.148

[28] BUTTARELLI, G. (2011) Fundamental Legal Principles for a balanced approach, Cybercriminality: Finding a balance between freedom and security, p.65-73

Legal sources

Annex 3 of the Commission Staff Working Paper – Impact Assessment

Commission Staff Working Paper – Impact Assessment, accompanying the Regulation of European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection

Regulation) and Directive of European Parliament and of the Council on the protections of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or executions of criminal penalties, and the free movement of such data, 25 January 2012

Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 24 October 1995

Council Framework Decision 2008/977/JHA on the protection of personal data processed in the frame work of police and judicial cooperation in criminal matters, 27 November 2008

Handbook on European Data Protection Law of the European Union Agency for Fundamental Rights, 2014

Joint Motion for European Parliament resolution on the suspension of the TFTP agreement as a result of US National Security Agency surveillance, 21 October 2013

Judgment of the Court of Justice of the European Union in Joined Case C-362/14, Maximillian Schrems v Data Protection Commissioner, on the request for a preliminary ruling from the High Court (Ireland), 21 October 2013

Proposal for a Regulation of European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 2012

Recommendation No. R (87) of the Committee of Ministers to Member States regulating the Use of Personal Data in the Police Sector, 17 September 1987

Report of the Office of the United Nations High Commissioner on the Right to Privacy in the Digital Age, 30 June 2014

Resolution 20/8, adopted by Human Rights Council, on the promotion, protection and enjoyment of human rights on the Internet, 16 July 2012

References

Buttarelli, G. (2011) Fundamental Legal Principles for a balanced approach, Cybercriminality: Finding a balance between freedom and security

Hayes, B. (2011), Monitoring the State and Civil Liberties in Europe, in Cybercriminality: Finding a balance between freedom and security

Pino, R. (2013), Il cyber terrorismo: un'introduzione, Ciberspazio e Diritto Vol.14, No.49

Vatis, M. (2010), The Council of Europe Convention on Cybercrime, Proceedings of the Workshop on Deterring Cyberattacks: Informing Strategies and Developing Options for US Policy

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Will the "Internet of Things" Break All Boundaries of Privacy?

JERNEJA HORVAT

Abstract Internet of Things is a phenomenon that connects devices to the Internet, which are then able to communicate not just to people, but also to each other. For different purposes, the Internet of Things stores an enormous amount of personal data, which is then being processed by different controllers. Such storage causes certain issues, among which the article points out security, privacy, consent and discrimination issues. Particularly because of the growing dimensions of the Internet of Things technology, these questions must not be left to self-regulation or no regulation at all, but must be controlled and regulated on an international level. EU has been preparing a legislative, more suitable for the Digital Single Market and has already proposed a new Data Protection Regulation. Its aim is to harmonise the current data protection laws in place across the EU Member States. Under the new regulation, anyone who will process the personal data will be held responsible for its protection. Nonetheless, the Internet of Things will remain to grow and have a huge impact on people's lives. Although secured with proper security mechanisms and regulated by appropriate legal framework, it will continue to massively invade privacy and therefore change its concept.

Keywords: • Internet of things • privacy • security • Digital single market • Regulation

CORRESPONDENCE ADDRESS : Jerneja Horvat, University of Maribor, Faculty of Law, Mladinska ulica 9, 2000 Maribor, Slovenia, email: jerneja.ht@gmail.com.

DOI 10.4335/978.961.6399.79.1.12
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 The term "Internet of Things" and types of consumer devices already contributing to the Internet of Things

The Internet of Things (hereinafter: IoT) is a network of things each embedded with sensors, which are connected to the Internet (Chandrakanth et al., 2014) This term, first used by Kevin Ashton in a presentation in 1998 (Santucci, 2009), describes several technologies and research disciplines that enable the Internet to reach out into the real world of physical objects. With 20 to 30 billion things assumed to be connected to the Internet by 2020 (Bauer et al., 2014) we are now experiencing a paradigm shift in which everyday objects become interconnected and smart. IoT refers to an infrastructure in which billions of sensors embedded in common, everyday devices or things linked to other objects or individuals, are designed to record, process, store and transfer data and, as they are associated with unique identifiers, interact with other devices or systems using networking capabilities. As IoT relies on the principle of the extensive processing of data through these sensors that are designed to communicate unobtrusively and exchange data in a seamless way, it is closely linked to the notions of pervasive and ubiquitous computing (Article 29 Working Party Opinion 8/2014, 2014).

The crucial elements of the IoT technology are Micro-Electro-Mechanical Systems sensors (MEMS) that translate physical phenomenon, such as movement, heat, pressure, or location, into digital information (Fraden, 2010). These sensors enable the devices to collect data and then connect to the Internet and to each other. There are five types of Internet of Things technologies currently available to the customers: **health and fitness sensors**, **automobile black boxes**, **home monitors and smart grid sensors**, **devices designed specifically for employee monitoring**, and **software applications that make use of the sensors within today's smartphones** (Peppet, 2014). To specify a few, among health and fitness sensors, for example wearable computing is becoming more and more popular. Wearable devices refer to everyday objects and clothes, such as watches or glasses, in which sensors are included to extend their functionalities. They may embed cameras, microphones and sensors that can record and transfer data to the device manufacturer. It also supports the creation of applications by third parties who can thus get access to the data collected by such things. Additionally, Quantified Self things are also widely used by individuals who want to record information about their own habits and lifestyles. Such devices focus on tracking movements like activity counters which continuously measure and report quantitative indicators related to the individual's physical activities.

It is not yet certain, to which extent the IoT can actually be used. The question of how the transformation of all data collected in the IoT into something useful, and thus commercially viable, remains largely open.

2 Four major problems, related to the IoT

The devices, described above, are currently generating reams of data about their users' activities, habits, preferences, personalities and characteristics. These data are very valuable, but at the same time, IoT presents several challenging issues, since these data have a high potential for misuse. It is nearly impossible to insure complete protection of

privacy, the devices are prone to hacking and other security breaches, there are still issues regarding consent and also, the IoT could potentially lead to discrimination (Peppet, 2014).

2.1 Privacy

Simply put, the trouble with collecting such an enormous amount of data is that there is only so much de-identification possible. Even when the information is de-identified by removal of the name, address and other obvious identifying information from the dataset, after these data are shared, it is still relatively easy to re-identify that dataset. This can happen precisely because of our unique features. If someone would be familiar with some of these features, they could use this knowledge to identify us. Furthermore, solely based on collected data, one is able to then predict much other information about an individual (Ohm, 2010). Anonymization becomes exceedingly difficult in datasets, in which an individual can be distinguished from other individuals by only a few attributes. Sensor data for example capture a very rich picture of an individual, with so many related activities, that each individual in a sensor-based dataset is reasonably unique (Lane et al., 2012). Additionally, the processing of the data relies on the coordinated intervention of a significant number of stakeholders (i.e. device manufacturers, social platforms, data aggregators or brokers *etc.*). Once the data is remotely stored, it may be shared with other parties, sometimes even without the individual concerned being aware of it. Such further transmission of the data is thus imposed on the user who cannot prevent it without disabling most of the functionalities of the device. Resultantly, the IoT can put device manufacturers and their commercial partners in a position to build or have access to very detailed user profiles (Article 29 Working Party Opinion 8/2014, 2014). Such data flows cannot be managed with the classical tools used to ensure the adequate protection of the data subjects' interest and rights. Also, the communication between objects is frequently triggered automatically, without individual being aware of it. In the absence of the possibility to control how object interact, it is becoming very difficult to control the generated flow of data, not to mention to control its subsequent use.

2.2 Security

IoT devices are also prone to security vulnerabilities. The security problems occur due to several reasons. These products are often manufactured by traditional industry that is not computer science experts, rather than computer hardware or software firms. The engineers involved may therefore be unaware of the possible data-security issues, and the companies do not place sufficient concern to security (Fung, 2015). Hacking is just an extreme case, but short of that, there are many kinds of problems that could arise. Even though the information, gathered by the IoT devices might be mundane, it can nevertheless produce extremely detailed profiles of individuals' behaviour.

2.3 Consent

User's consent is a key notion in data protection, but it is not always clear where consent is needed, and what conditions have to be fulfilled for consent to be valid. The

users may not always be aware of the data processing carried out by a specific object or they simply do not understand the complex technology of the IoT and therefore the true consequences of consent to the use of IoT devices. Additionally, at the moment, IoT manufacturers prefer to only provide privacy and data related information in website privacy policies. Such lack of information constitutes a significant barrier to demonstrating valid consent. IoT devices complicate consent just as they complicate discrimination, privacy and security.

Consent is one of several legal grounds to process personal data. It has an important role, but this does not exclude the possibility, depending on the context, of other legal grounds perhaps being more appropriate from both the controller's and from the data subject's perspective. If it is correctly used, consent is a tool giving the data subject control over the processing of his data. If incorrectly used, the data subject's control becomes illusory and consent constitutes an inappropriate basis for processing (Article 29 Working Party Opinion 15/2011, 2011).

The Commission Communication "A comprehensive approach on personal data protection in the European Union" explains that when informed consent is required, the current rules provide that the individuals' consent for processing their personal data should be a freely given, specific and informed indication of their wishes by which individuals signify their agreement to this data processing. In the online environment it is often more difficult for users to be aware of their rights and give informed consent. Article 8(2) of the Charter of Fundamental Rights of the EU states that personal data can be processed "*on the basis of the consent of the person concerned or some other legitimate basis laid down by law*." Therefore, consent is recognized as an essential aspect of the fundamental right to the protection of personal data. The other legal ground for this right is the Directive 95/46/EC (hereinafter: the Data protection directive). Also, the requirements for consent to be valid are the same under Directive 2002/58/EC (hereinafter: the e-Privacy directive). The legislative history shows relative consensus on the conditions of valid consent, namely that it is freely given, specific and informed, but it also shows some uncertainty over the ways in which consent may be expressed (European Commission, 2010). As to how consent must be provided, Art. 8.2(a) of the Data protection directive requires explicit consent to process sensitive data, which means an active response. For data other then sensitive data, Art. 7(a) requires consent to be unambiguous, meaning that it leaves no doubt as to the individual's intention to provide consent. This requirement enables data controllers to use different types of mechanisms to seek consent (European Comission, 2010). In practice, however, establishing when consent is needed and more particularly the requirements for valid consent, including how to apply them correctly, is not always easy because of a lack of uniformity across Member States.

2.4 Discrimination

Discrimination is not a problem one would expect at first glance of IoT, but it is no less obvious than others. IoT allows the assortment of customers more precisely than ever before, but such sorting can easily turn from relatively benign differentiation into new and invidious types of unwanted discrimination. Huge amounts of sensor data from IoT

devices can give rise to unexpected inferences about individual consumers. Employers, insurers or others can later make economically important decisions based on those inferences, which could lead to new forms of illegal discrimination based on race, age or gender, and could also create troublesome forms of economic discrimination based on IoT data.

3 The current legal framework and the future development of IoT in EU

For the past six years, the Commission has been cooperating actively with Member States and third countries towards the development and future deployment of the IoT technology. The need to tackle regulatory issues of the IoT governance has been recognized by the Commission already in 2006, particularly at the occasion of a conference, entitled "From RFID to the Internet of Things." In 2008, the Commission published a Staff Working Document regarding the IoT, in which it stated that among others, policy issues to be discussed in this context include raising awareness among all stakeholders, reducing entry barriers to IoT technologies/services and guaranteeing individuals' fundamental rights regarding privacy, protection of personal data and consumer protection. In a further Communication of 18 June 2009, the EU Commission expressed the opinion that the development of IoT could not be left to the private sector and to other world regions. It stated, that the governance of the IoT should be designed and exercised in a coherent manner with all public policy activities related to Internet governance. The technical advances occur regardless of public intervention, simply following the normal cycle of innovation. Although IoT helps to address certain problems, it ushers in its own set of challenges, some directly affecting individuals. The Commission stated that leaving the development of IoT to the private sector, and possibly to other world regions is not a sensible option in view of the deep societal changes that IoT brings about. The Commission therefore urged the European Policy makers and public authorities to ensure that the use of IoT technologies and applications will stimulate economic growth, improve individuals' well-being and address some of today's societal problems. In March 2015 the Commission initiated the creation of the Alliance for Internet of Things Innovation, which flags the intention of the Commission to work closely with all stakeholders and actors of the IoT. The Digital Single Market, adopted in May 2015, leads EU another step further in accelerating developments on IoT. It consolidates initiatives on security and data protection, which are essential for the adoption of this technology (European Commission, 2016).

The relevant legal framework to assess privacy and data protection problems in the EU consists of the Data protection directive and e-Privacy directive as amended by Directive 2009/136/EC. Both of them apply, when conditions set in Art. 4 of the Data protection directive are met. The national law of a Member State is applicable to all processing of personal data carried out in the context of establishment of the controller on the territory of the Member State. All objects that are used to collect and further process the individual's data in the context of the provision of services in the IoT qualify as equipment in the meaning of the Data protection directive (Article 29 Working Party Opinion 8/2010, 2010). It thus applies to devices such as connected home devices, smoke alarms, sleep trackers and also to the users' terminal devices (e.g. tablets and smartphones). Art. 29 of the Data protection directive also constitutes a

Working Party (Article 29 Working Party), which is composed of representatives from all EU Data Protection Authorities, the EDPS and the European Commission and has advisory status.

However, there has been an important development regarding the regulation of Digital Single Market in the past few months. In 2012, the Commission put forward its EU Data Protection Reform and on 15 December, the Commission, the European Parliament and the Council have finally come to an agreement to reform the Digital Single Market. The Reform will consist of two instruments: the General Data protection Regulation and the Data Protection Directive. Under the directive, any data by which and individual can be identified, was the sole responsibility of the data controller, i.e. the owner of these data. Under the new regulation, however, any company or individual that will process the data will also be held responsible for its protection, including third parties such as cloud providers. This is an important development for the Digital Single Market, since it constitutes a far greater responsibility of anyone in possession of personal data. It will also supposedly allow people to regain control of their personal data, by imposing new ways of control over the personal data, such as easier access to their own data, a right to data portability, the "right to be forgotten" and the right to know when their data has been hacked. New rules will become applicable in two years.

4 Conclusion

The IoT holds significant prospects of growth for a great number of innovating and creative EU companies, which operate on these markets. Nonetheless, there seems to be too much focus on economic advantages and not enough on what is actually at stake and the consequences it may have on society at large. Even if the data controllers will comply with the legal framework in the technical sense, there is still an impending issue of not letting a consumer choose a product that is not connected. While it does in a lot of aspects make life easier, a lot of people are not comfortable letting so much information about their activities be stored somewhere. Furthermore it is terrifying to think that soon every bit of our lives will be supervised and controlled. For example, there is already sufficient technology available for insurance companies to determine exactly how big of a risk a certain individual is. By dissecting our behaviour, our habits, hobbies, our regular paths or even our style of driving a car, they could adjust the insurance premiums and personalize them. In that moment, a person would be forced to always think about how they would act, what they would do, how they would drive and so on. To some point, that would maybe benefit the society, because it would be able to force people into molds and make them more manageable. But is that not a huge violation of not just a person's privacy, but also the whole person in general?

The point of IoT is to ease the businesses to provide products and services people need, to fasten their responses and to therefore eventually satisfy the consumers. But because of the very sensitive nature of the personal data, these questions cannot be left to self-regulation, but must be managed at a higher, internationally unified level. By adopting the new legislation, EU has made an important step forward in the right direction, but should still remain very cautious and strict regarding the potential misuses of IoT technologies.

References

Article 29 Working Party (2010) Opinion 8/2010 on applicable law. WP 179.

Article 29 Working Party (2011). Opinion 15/2011 on the definition of consent. WP 187.

Article 29 Working Party (2014) Opinion 8/2014 on the Recent Developments on the Internet of Things. WP 233.

Bauer, H.; Patel, M.; Veira, J. (2014). The internet of Things: Sizing up the opportunity. *McKinsey&Company*. Retrieved from http://www.mckinsey.com/industries/high-tech/our-insights/the-internet-of-things-sizing-up-the-opportunity

Chandrakanth, S.; Venkatesh, K.; Uma Mahesh J.; Naganjaneyulu K.V. (2014). Internet of Things. *International Journal of Innovations & Advancement in Computer Science*, 3(8). Retrieved from http://academicscience.co.in/admin/resources/project/paper/f201410191413694978.pdf

Commission Communication (2009). Internet of Things – An action plan for Europe, 278 final.

Commission Communication (2010). A comprehensive approach on personal data protection in the European Union, 609 final.

Commission Staff Working Document (2008). Future Networks and the Internet – Early Challenges regarding the ''Internet of Things." *SEC* yyy.

Conference organised by DG Information Society and Media, Networks and Communication Technologies Directorate (2006). From RFID to the Internet of Things. Retrieved from http://cordis.europa.eu/pub/ist/docs/ka4/au_conf670306_buckley_en.pdf

European Commission (2015). Press release: Agreement on Commission's EU data protection reform will boost Digital Single Market. Retrieved from http://europa.eu/rapid/press-release_IP-15-6321_en.htm

European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)' (2012) 11 final; Commission Communication, 'Safeguarding Privacy in a Connected World, A European Data Protection Framework for the 21st Century' (2012) 9 final.

European Parliament and Council Directive (EC) 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector, (2002) OJ L 201 p. 37-47 as amended by European Parliament and Council Directive (EC) 2009/136 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (2009) UL L 337 p. 11-36.

European Parliament and Council Directive (EC) 2009/136 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (2009) UL L 337 p. 11-36.

European Parliament and Council Directive (EC) 95/46 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 p. 31-50.

Fraden, J. (1997). *Handbook of modern sensors: Physics, designs, and applications*. Woodbury, NY: American Institute of Physics.

Fung, B. (2015). Here's the Scariest Part About the Internet of Things. *The Washington Post*. Retrieved from https://www.washingtonpost.com/news/the-switch/wp/2013/11/19/heres-the-scariest-part-about-the-internet-of-things/

Lane, N. D.; Xie, J.; Moscibroda, T.; Zhao, F. (2012). On the Feasibility of User De-Anonymization from Shared Mobile Sensor Data. *AMC New York*. Retrieved from http://niclane.org/pubs/lane_phonesense.pdf

Ohm, P. (2010). Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization. *UCLA Law Review* 57(1701).

Peppet, S. R. (2014). Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security & Consent. *Texas Law Review*, 93(85), 87-165.

Santucci, G. (2009). From Internet of Data to Internet of Things. *Paper for the International Conference on Future Trends of the Internet.* Retrieved from ftp://ftp.cordis.europa.eu/pub/fp7/ict/docs/enet/20090128-speech-iot-conference-lux_en.pdf

The Internet of Things. Retrieved from https://ec.europa.eu/digital-single-market/internet-things

Weber, R. H. (2009). Internet of things – Need for a new legal environment? *Computer Law & Security Review, 25*(6), 522-527.

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Authority Instead of Commissioner – New System of Data Protection in Hungary

KRISTÓF RUISZ

Abstract According to Article 28 (1) of Directive 95/46/EC (Data Protection Directive or Directive) each Member State shall provide that one or more – completely independent – public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to the directive. In Hungary, from 1995 until 1 January 2012, when the new constitution, the 'Fundamental Law of Hungary' was adopted, a Data Protection Commissioner was responsible for monitoring the application of data protection regulations. The last Commissioner was elected in 2008 for 6 years, meaning that his term of office should have ended in 2014. By adopting the Fundamental Law and its Transitional Provisions, the Parliament fundamentally changed the Hungarian data protection system, replacing the Commissioner with the Hungarian National Authority for Data Protection and Freedom of Information. The European Commission found that by the abrupt termination of the Commissioner's term, Hungary had infringed the Directive, and therefore it launched infringement proceedings against Hungary before the European Court of Justice (CJEU). By judgment of 8 April 2014, the CJEU ruled that by introducing the above described structural changes, Hungary failed to fulfil its obligations determined in the Directive. In this article we will analyse the differences between the two data protection systems, and will also address parts of the Court's ruling.

Keywords: • data protection • monitoring • data protection commissioner • Hungary

CORRESPONDENCE ADDRESS : Kristóf Ruisz, European nnd International Business Law Ll.M Eötvös Loránd University, Hungary, email: ruisz.kristof@gmail.com.

DOI 10.4335/978.961.6399.79.1.13
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Hungary implemented the Directive in 1995 in two separate legal regulations: on the one hand, by Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest (Data Protection Act), which created the independent function of the Data Protection Commissioner (hereinafter also referred to as the Commissioner); and on the other hand, by amending Act LIX of 1993 on the Parliamentary Commissioners for Civil Rights (Commissioners Act), which then regulated the election procedure of the Commissioner.

According to the Commissioners Act, the Commissioner was elected by two thirds of the Members of Parliament for a 6-year term, which was renewable once. It was also the Commissioners Act that said that the office term of the Commissioner may only be terminated for reasons listed therein.[1]

On 29 September 2008, the Hungarian Parliament elected András Jóri as Data Protection Commissioner whose term – based on the above described 6-year rule – should have ended in September 2014.

After the 2010 elections, however, due to the two thirds majority of the governing party in the Hungarian Parliament, national legislation gained speed and, as there was no significant political opposition, also became a lot easier.

It was a clear manifestation of that accelerated, unopposed legislation when the Hungarian Parliament went right back to the Constitution[2] and replaced it with the new 'Fundamental Law of Hungary' mentioned above.

Article VI (3) of the Fundamental Law declared that 'an independent authority created by means of an implementing act of Parliament [i.e. an act accepted by a two thirds majority] shall supervise the protection of personal data and the granting of the right of access to data of public interest.' Pursuant to the Transitional Provisions of the Fundamental Law 'The mandate of the Data Protection Commissioner in office shall be terminated when the Fundamental Law enters into force'[3], and at the same time, Act CXII of 2011 on the Right of Informational Self-Determination and on the Freedom of Information (Information Act) came into effect. This act created the Hungarian National Authority for Data Protection and Freedom of Information (Authority), prematurely bringing to an end the term to be served by the Commissioner.

As a consequence, a rather interesting situation occurred in connection with the execution of data protection regulations in Hungary. Almost all of a sudden, the Parliament established a whole new institution for monitoring the application of data protection regulations which, theoretically, was the legal successor of the Commissioner, but was given a wider competence and different powers.

Besides, this raised the question whether Hungary could infringe the independence of the Commissioner – and by that, the relevant provisions of the Directive – by prematurely removing him from his position. This, i.e. the possibility of infringement of

independence, was also sensed by the European Commission, which initiated infringement proceedings and then, a litigation procedure against Hungary.

In the meantime, the new data protection authority started its operations on 1 January 2012, in accordance with the relevant Hungarian laws.[4]

2 Authority instead of commissioner – the judgment of the European Court of Justice

a. Infringement Proceedings

After the Fundamental Law entered into force, and therefore the mandate and function of the Data Protection Commissioner was terminated, in the first half of 2012 active correspondence started between Hungary and the European Commission.

In January 2012, 'the Commission sent a letter of formal notice to Hungary'[5], in which it elaborated its opinion on the abrupt termination of the Data Protection Commissioner's office term, which, the Commission thought was the breach of Hungary's obligation under the Directive – the obligation according to which the complete independence of the data protection authority must be ensured. In the Commission's opinion, the above determined independence was jeopardized in several ways: on one hand, because the office term of the Commissioner was prematurely put to an end; on the other hand, because Hungary failed to consult with the Commissioner prior to the complete restructuring of the data protection monitoring system; and thirdly, because the new data protection act (i.e. the Information Act) provided an excessively wide framework for the termination of the office term of the Authority's Chairperson.

Hungary, of course – only in part though –, contested the above allegations of the Commission and the breach of obligation, and presented several evidence against the Commission's arguments.

Firstly, Hungary could prove that it had consulted with the (previous) Data Privacy Commissioner about the new regulations and the establishment of the Authority, and made a promise to amend the relevant laws in order to avoid even the slightest possibility of political influence related to the termination of the office term of the Authority's Chairperson. The promised modification was executed by Hungary, by which the Commission's doubts were partially dissolved. Only partly though, because Hungary maintained that it did not breach the obligation of ensuring the complete independence of the data protection authority by prematurely ending the term of the Commissioner, and the Commission could not accept that.
As a result, the European Commission brought an action against Hungary before the CJEU and requested the Court to establish that Hungary violated the Directive. To support the Commission in its claim, the European Data Protection Commissioner asked to intervene in the case on the Commission's side. His request was accepted by the president of the Court in its decision of 8 January 2013, putting the Commission and the European Data Protection Commissioner against Hungary in the litigation procedure.

b. Litigation Procedure Before the European Court of Justice

In litigation procedures before the CJEU, a precondition to hearing the case by the Court is a decision on the admissibility of the claim.

Hungary argued that the Commission's claim is not admissible: should the CJEU establish that Hungary terminated the office term of the Data Protection Commissioner by infringing the Directive, it could only be rectified by appointing the previous commissioner to be the Chairperson of the Authority. If Hungary did that, the appointed Chairperson of the Authority would be removed from office based on the Court's decision, which would also be regarded as breach of the principle of the independence of the Authority.

This argument was challenged by the Commission and was not accepted by the Court either, which then established that the case was admissible.

i. Opinion of the European Commission

The Commission maintained that 'complete independence' of the data protection supervisory authority means being free from any and all kinds of direct or indirect influence, which includes, among others, that even the risk of influencing the Authority cannot arise either.

Besides the above, complete independence shall also mean that the office term of the authority cannot be put to an end before the deadline (autonomously) determined by the Member States, except when the affected Member State has a severe and objectively justifiable reason for doing so.

It is worth noting here that the Directive gives complete freedom to the Member States in determining the form and length of office term of the authority, but if a Member State elects or appoints a data protection supervisor for a predetermined period, such period may only be put to an end in very limited cases. In the Commission's opinion, in this case, Hungary did not have such acceptable, objectively substantiated reason.

ii. Hungary's Arguments

Hungary tried to come up with a reasoning based on legal theory and legal interpretation against the Commission's arguments.

On the one hand, it highlighted that as the new institutional structure was introduced by the new constitution of Hungary[6], which meant that the new system of data protection was established by the constitutional power of Hungary. Although the hierarchy between EU law and the law of the Member States within the European Union is relatively clear, Hungary's argument, according to which the new Authority was created by the state's constitutional power, could theoretically place the regulation above 'normal' legislation.

On the other hand, Hungary also based its reasoning on the interpretation of the Data Protection Directive, stating that Article 28 of the Directive only refers to the complete independence in the performance of the tasks entrusted to the data protection

supervisory authority. Looking at it from another standpoint, a potential change in the institutional model does not mean that the systems before and after the change could not operate in complete independence. In Hungary's interpretation, the freedom given to the Member States by the Directive to establish the institution of data protection supervision and to determine the term of office extends to the appointment of the person entrusted to exercise the powers of the supervisory authority within the institutional model selected and the replacement of that person by law.

iii. Judgment of the Court

In its judgment, the Court elaborated its opinion almost exclusively reacting on the legal theory related issues of Article 28 of the Data Protection Directive.

In part, it referred to its earlier decisions[7] related to the present case, in which it declared that (i) the independence in question must be such that ensures complete freedom from external influence for an authority/organisation when performing their duties, and this includes any and all kinds of direct or indirect influence of any form that might have an effect on the operation and decisions of the organisation, and (ii) the functional freedom, which ensures that the members of the organisation will not be bound by instructions of any kind in the performance of their duties, is a necessary, but in itself insufficient requirement to establish the complete independence of the organisation.

According to the CJEU, even the risk of influence by a supervisory state body, be it administrative or political, on the decisions of the data protection supervisory authorities would in itself be enough for them to lose their independence. This includes the decisions of such authority, as well as the authority managing personal data, and as such, the Hungarian Data Protection Commissioner too. Should EU law allow a Member State to compel a data protection supervisory authority to vacate office before serving its full term in contravention to the relevant provisions set out in the applicable legal regulations, then it is quite obvious that the given authority could not perform its duties in complete independence, free from external influence/pressure.

Drawing a very theoretical parallel here, this would be like allowing an employer to suggest to a definite term employee that he or she might be dismissed any time, while expecting him/her to perform his/her duties at the highest professional level, correctly, disregarding any kind of outside impacts. In such cases, we are right to say that the employee in the above example, i.e. the authority, would not be able to operate free from external influence; and this is also true for the case when the institutional system of the authority is completely restructured.

In the Court's opinion[8], the requirement of independence determined in the Directive also includes the obligation to respect the office term of the data protection supervisory authorities and to end it prematurely only in predetermined cases set out in the relevant laws. Such objective reasons for early termination shall always be previously determined in legal regulations, and a change of the institutional background cannot – ad hoc – be considered as an objective reason.

In Hungary's case, the reasons predetermined in the Commissioners Act for termination of office clearly did not exist at the time of restructuring the institutional system of data protection supervision – this was not contested during the procedure by Hungary either.

It therefore can easily be stated that by prematurely bringing to an end the term served by the Data Protection Commissioner, 'Hungary has failed to fulfil its obligations'[9] under the Directive.

Irrespective of the Court's judgment, at that time (in 2014), the Hungarian National Authority for Data Protection and Freedom of Information had already been operating for two years.

c. Effects of the Court Procedure

The breach of obligation by Hungary was then established by the CJEU, but what could and were the effects of such decision be?

In procedures before the CJEU, if the Court finds that a Member State has failed to comply with its obligations under EU law, that Member State shall be obliged to change its previous measures accordingly. Should the Member State fail to do so, the case is brought to the judges in Luxembourg again who may then impose penalties on the 'guilty' Member State.

A possible solution could have been that Hungary would have reinstated, at least in part, the function of the Commissioner while also keeping the newly established Authority, this way not infringing EU law again by vacating office of the Authority created by the new laws and its Chairperson based on the judgment of the CJEU. Hungary, however, has chosen a different solution: it concluded an agreement with the former Commissioner in which it promised to apologise him in public and to pay him a compensation equalling the wage he would have received if he served his full term.

3 Commissioner and authority - similarities and differences

It is clear from the above, and is also obvious from the Court's judgment, that the objectives of the Commissioner and the Authority are basically the same. Both institution supervise the data protection system of the given Member State, both functions are in compliance with the Directive, but their powers and organisational structure are different.

d. Same Objectives

In general, both the Authority and the Commissioner are 'responsible for supervising and defending the right to the protection of personal data and for dealing with cases in relation to freedom of information in Hungary'.[10]

Although several different acts regulate(d) the operation of both institutions[11], the rules of their independence are the same. Both institutions are autonomous, independent bodies which shall be free from the influence of the government, other state organs, political parties and the private sector as well. They shall not be bound by any

mandatory instructions when performing their duties, they shall act independently from other organisations, and their powers and duties may only be determined by an act of Parliament.

e. Different Organisation

One of the main differences between the two institutions is in their organisational structure.

The Data Protection Commissioner carried out his/her tasks together with other parliamentary commissioners of equal rank. His/her operation was supported by a staff of 'experts, lawyers, computer engineers and other professionals, together making up the Office of the Data Protection Commissioner.'[12] The Commissioner and his/her Office was not an administrative organ in the conventional sense, neither a court nor an authority, therefore it did not possess the powers of an authority.

On the contrary, as it is obvious from its name, in the new system a more conventional administrative body is responsible for the supervision of data protection. The head of the Authority is the Chairperson who – on a proposal from the prime minister – is appointed by the president for a 9-year term, and who is an integral part of the organisation. Under the direction of the Chairperson there are deputy chairpersons, departments and sub-departments with civil servants and other employees, so with its structure, the Authority is integrated deeper in the Hungarian administrative system than the Commissioner and its Office.

f. Even More Differences in Competence and Powers

When we are trying to collect the different duties of an institution established by an act, it is relatively easy, because – if we are lucky – the act itself determines the tasks of the institution and the manner in which they should be performed.

According to the Commissioners Act, the Commissioner was entitled to ask for information on data management from any data controller, and to inspect any and all documents on data management which may have been related to personal or public data. The Commissioner could also enter into any premises where data management was taking place. These powers placed the Commissioner on a quasi authority level.[13]

It also supported the Commissioner's administrative character that if the Commissioner observed unlawful data management, he or she had the right to request the data controller to terminate its data management activities, based on which the data controller was obliged to take the necessary measures, and had to inform the Commissioner in writing on the measures taken within 30 days. If the data controller failed to terminate its unlawful activities, the Commissioner could order the unlawfully managed data to be blocked, deleted or destroyed, and could also prohibit further unlawful data management.[14] That was still only a prohibition, meaning that there was no direct financial consequence of the Commissioner's actions. They could, however, result in indirect financial consequences if the Commissioner informed the public about the unlawful data management and the person of the data controller.

The Commissioner had other duties as well that were taken over by the Authority, e.g. the maintenance of the data protection register, and giving his/her opinion on legal regulations and amendments to legal regulations related to data protection.[15]

Compared with the Commissioner, the Authority was provided with broader competencies to pursue violations of both data protection and informational rights.

The Authority has right to initiate investigations based on request received from anyone whose personal data is processed by someone else, as well as 'to launch an official data protection procedure if it is presumed that the illegal processing of personal data concerns a wide scope of persons; concerns special data, or significantly harms interests or results in the risk of damages.'[16]

Like the Commissioner, the Authority is also entitled to order the correction, blocking, deletion or destruction of unlawfully controlled personal data. In addition, the Authority also has the right to prohibit the unlawful control or processing of the personal data and the transfer thereof to other countries. The Authority may intervene in court proceedings, and can also give recommendations in general or to specific data controllers (a 'power' the Commissioner was also entrusted with).

The Commissioner, more or less, was also entrusted with the rights listed above, expect for one – very important – power: the Authority is entitled to impose a fine[17] on violators of data protection laws, the amount of which may vary from HUF 100,000 to HUF 20,000,000.[18]

Moreover, 'the Authority provides a data protection audit as a service to those entities that request it.'[19] It can help such entities fully comply with the relevant legal regulations and therefore avoid a possible fine by having been audited by the Authority.

It can thus be concluded that the difference between the two systems is the strongest in terms of the different supervisory powers of the two types of institutions: the new Authority is entitled to impose significant fines on violators of law, while the Commissioner's strongest power was publicity.

Without getting involved in a deeper historical or political analysis here, we can say that in Hungary an institution that can, on the one hand, turn to the public (by publishing its decisions), and on the other hand, is entitled to impose fines, is a lot more efficient in the enforcement of laws than a commissioner who 'only' has the right to inform the public on a potential infringement of data protection regulations.

4 Conclusion

Within their competence, both the Commissioner and the Authority were (are) appropriately supporting the enforcement of citizens' rights, and both institutions were (are) compliant with the provisions of the Directive. In fact, I think that by entrusting the data protection authority with the power of imposing fines, the new system is even more efficient than the previous one was.

Regardless of the greater effectiveness, however, there still are some questions left unanswered: considering that the CJEU declared that Hungary unlawfully terminated the office term of the Commissioner, and therefore changed the supervisory system of data protection contrary to the relevant provisions of EU law, will a public apology and a compensation paid to the former Commissioner be regarded as a satisfactory result by the citizens of Hungary?

And, provided that the Hungarian citizens will be satisfied with the above, will it also be true for the European Commission?

Notes

[1]According to Section 15 of Commissioners Act, the Commissioner's office term could be terminated for the following reasons: (i) expiry of the term, (ii) death of the Commissioner, (iii) resignation of the Commissioner, (iv) declaration of conflict of interest, (iv) dismissal, or (v) removal of the Commissioner from his or her position.

[2]Act XX of 1949 on the Constitution of the Republic of Hungary

[3]Article 6 of the Fundamental Law

[4]Mainly the Information Act

[5]Judgement of the Court (Grand Chamber) in Case C-288/12 Commission v Hungary <http://curia.europa.eu/juris/document/document.jsf?docid=150641&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=52728> accessed 19 February 2016

[6]The Fundamental Law of Hungary and its Transitional Provisions

[7]Case C-518/07 Commission v Germany EU:C:2010:125 and Case C-614/10 Commission v Austria EU:C:2012:631

[8]Case C-288/12 Commission v Hungary ECLI:EU:C:2014:237 paras 54-61

[9]Case C-288/12 Commission v Hungary ECLI:EU:C:2014:237 para 62

[10]The basic tasks, competence of the Authority 2.1.2 publication unit <http://naih.hu/2.1-a-szerv-alaptevekenysege,-feladat--es-hataskoere.html> accessed 20 February 2016

[11]The function and duties of the Commissioner were set out in the Data Protection Act and the Commissioners Act, while the operation of the Authority is governed by the Information Act.

[12]Organisation http://81.183.229.204:51111/abi/index.php?menu=101 accessed 21 February 2016

[13]Chapter IV of the Data Protection Act

[14]Chapter IV of the Data Protection Act

[15]Chapter IV of the Data Protection Act

[16]The basic tasks, competence of the Authority 2.1.2 publication unit <http://naih.hu/2.1-a-szerv-alaptevekenysege,-feladat--es-hataskoere.html> accessed 20 February 2016

[17]Section 61 of the Information Act

[18]Between EUR 320 and EUR 63,000 calculated on the average exchange rate on 26 February 2016

[19]The basic tasks, competence of the Authority 2.1.2 publication unit <http://naih.hu/2.1-a-szerv-alaptevekenysege,-feladat--es-hataskoere.html> accessed 20 February 2016

References

Act CXII of 2011 on the Right of Informational Self-Determination and on the Freedom of Information

Act LIX of 1993 on the Parliamentary Commissioners for Civil Rights

Act LXIII of 1992 on the Protection of Personal Data and the Publicity of Information of Public Interest

Case C-288/12 *Commission v Hungary* ECLI:EU:C:2014:237
Case C-518/07 *Commission v Germany* ECLI:EU:C:2010:125
Case C-614/10 *Commission v Austria* ECLI:EU:C:2012:631
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
The Fundamental Law of Hungary
Hungarian National Authority for Data Protection and Freedom of Information - General Information:
< http://www.naih.hu/general-information.html> accessed 20 February 2016-02-28
The basic tasks, competence of the Authority 2.1.2 publication unit <http://naih.hu/2.1-a-szerv-alaptevekenysege,-feladat--es-hataskoere.html> accessed 20 February 2016
Acces to the Archive Website of the Data Protection Commissioner:
<http://www.naih.hu/archive--website--for-data-protection-commissioner---1995 2011-.html > accessed 21 February 2016
Archive Website of the Data Protection Commissioner:
< http://81.183.229.204:51111/abi/ > accessed 21 February 2016
Press release - Court of Justice upholds independence of data protection authorities in case against Hungary:
< http://europa.eu/rapid/press-release_MEMO-14-267_en.htm > accessed 26 February 2016

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LEXONOMICA PRESS

Passengers as European Union Consumers - Basic Rights and its' Restrictions at the Airport

ZITA GÉRESI-SÁNDOR

Abstract In this paper, I would like to analyse the connection between consumers' rights and aviation safety. I would also like to prove that we can not protect either of them without protecting the other one at the same time and in this context an extensive teamwork is needed on the part of air carriers, airport operators, authorities and passengers as well. In my opinion, the work that European Union started is still in progress but there are some more issues that need further development.

Keywords: • passenger • consumer • basic rights • fundamental rights • aviation • safety • security

CORRESPONDENCE ADDRESS : Zita Géresi-Sándor, Doctoral School of the Faculty of Law, University of Pécs, Pécs, Hungary, email: zizigeresi@gmail.com.

DOI 10.4335/978.961.6399.79.1.14
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

In the 21th century, we think of aviation as the most evident and natural form of transport. It is also well known that flying is the safest alternative of travelling. Thousands of people work at airports in order to every phase of our trips can go smooth, nevertheless this field is exposed to daily changes either thinking of terrorist threat, rapid progress of technology, or varying laws in effect. Civil aviation and it's security is far a more complex question than it seems at first sight. However, creating safety is not realised for self-serving purposes, so we can not prescind from persons mostly affected. They are: passengers. Passengers, who are consumers in the first instance, and whose basic rights obviously can not be sacrificed on the altar of safety. Naturally, they are also expected to make a compromise in their own interest, but principally, creating the best circumstances for travellers is the task of airlines, the airport operators, authorities and organisations operating in aviation so passengers can easily focus on their tour either travelling on business or for holiday.

It is also evident that we can not ignore the legal milieu we live in and which basically restricts exercising of rights. The mentioned legal milieu is two-(or more) faced, too; European Union regulations lay down detailed measures for the implementation of the common basic standards on aviation security, of which member states must not yield and which means a really high standard of safety and security. On the other hand, European Union gives extra rights and extra protection for passengers (as consumers), and the responsibility of ensuring these rights.

Additionally, we have to take into consideration that in matters European Union did not determine compulsory rules, member states decide how they complete legal institutions created by the EU, how they ensure compilance and how they make them applicable in their own legal system due to subsidiarity. My intention is to present practice of fundamental rights and current questions based on my experiences in my country, Hungary at Budapest Liszt Ferenc International Airport.

First, I would like to talk in a nutshell about classic passengers' rights and then I will try to present a new point of view on the connection between security and passengers' basic rights in a really practical way. In my presentation I would like to demonstrate only a small segment of civil aviation security which is closely connected to passengers rights in my opinion.

I also plan to review provisions that guarantee safety just like those enforcing consumers' rights and originating harmony among them. I do not intend to look into airline liability in case of accidents.

2 Consumers in the EU

I think we cannot deny consumers have key role in economic progress. European Union also recognised this fact soon and decided to protect consumers in several ways. The EU set up requirements to evolve living standards through a suitable legal and

economic environment. It was also a declared purpose to vindicate consumers interests in decision-making[1]. Consumer protection also became a substantive policy and is called horizontal policy what means all other policies should pay attention to respect it's achievements.

Now, the primary aim of the Union is to place citizens into the centre of the European Single Market (Bencsik, 2012: 49) and give them the possibility of an efficient as well as active participation. This purpose can be granted by strengthening the position of consumers, intensifying their welfare, and giving the educated european consumer effective protection (Bencsik, 2012: 46).

When talking about consumer protection we have to remember that Charter of Fundamental Rights also contains it, but at the same time, we must not forget that it is a legal principle[2] and not a fundamental right according to the Charter and that it makes a clear distinction between rights and principles, too. This means it is a general reqirement and does not originate fundamental rights.

We can even lay down that requirements of the high standard of protection and prevailing consumers' interests are adequately 'indefinite and unidentifiable'[3] to give the EU wide discretionary power.

Rights are specified trough secondary legislation with the ban of weakening the reached standard.

3.1 Classic consumers' rights

After reviewing the issue in general, we can examine the classic consumers' rights in the sphere of transport, namely civil aviation.

These passenger rights behove consumers when special conditions supervene and are laid down in Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91. These conditions are: denied boarding, cancellation and delay.

3.1 Denied boarding

When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger and the operating air carrier.

If an insufficient number of volunteers comes forward, the operating air carrier may then deny boarding to passengers against their will.

If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them and assist them[4].

3.2 Cancellation

In case of cancellation of a flight, the passengers shall[5]:
a) be offered assistance by the operating air carrier and
b) have the right to compensation by the operating air carrier, unless they are informed of the cancellation at least two weeks before the scheduled time of departure, or they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival, or they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

When passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport.

The air carrier shall not be obliged to pay compensation if it can prove that the cancellation is caused by extraordinary circumstances[6] which could not have been avoided even if all reasonable measures had been taken. The Court noted that technical problems may be regarded as 'extraordinary circumstances', provided that they stem from an event which, owing to its nature or origin, is not inherent in the normal exercise of the activity of the air carrier and is beyond its actual control.

The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier.

3.3 Delay

When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:
a) for two hours or more in the case of flights of 1500 kilometres or less, or
b) for three hours or more in the case of all intra-Community flights of more than 1500 kilometres and of all other flights between 1500 and 3500 kilometres; or
c) for four hours or more in the case of all flights not falling under a) or b),
passengers shall be offered by the operating air carrier the assistance[7].

3.4 Right to compensation, reimbursement and care

What do we mean by compensation, assist, or appraised right to compensation, right to reimbursement or re-routing and right to care?

3.4.1 Right to compensation

Where reference is made to Article 7 of Council Regulation 261/2004, passengers shall receive compensation amounting to:
a) EUR 250 for all flights of 1500 kilometres or less;
b) EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 kilometres;
c) EUR 600 for all flights not falling under a) or b).
References are made in terms of denied boarding when it happens to passengers against their will.

3.4.2 Right to reimbursement or re-routing

Right to reimbursement or re-routing means that passengers shall be offered the choice between reimbursement within seven days, of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with a return flight to the first point of departure, at the earliest opportunity. Passengers shall be also offered re-routing, under comparable transport conditions, to their final destination at the earliest opportunity, or re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.

This right can be put across in case of denied boarding, cancelling and delay when the delay is at least five hours.

3.4.3 Right to care

Right to care includes meals and refreshments in a reasonable relation to the waiting time, hotel accommodation in cases where a stay of one or more nights becomes necessary, or where a stay additional to that intended by the passenger becomes necessary, and transport between the airport and place of accommodation.

In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.

This can happen when a passenger is denied to board, and in the case of delay or cancellation.

3.5 Persons with reduced mobility or special needs

We should say same words about persons with reduced mobility or special needs given the fact that operating air carriers shall give priority to carrying persons with reduced mobility and any persons or certified service dogs accompanying them, as well as unaccompanied children.

In cases of denied boarding, cancellation and delays of any length, persons with reduced mobility and any persons accompanying them, as well as unaccompanied children, shall have the right to care as soon as possible.

The regulation also rules right of redress and obligation to inform passengers of their rights but I intend to concern these subjects further on.

4 Nature of travelling

Now, let's have a look at what kind of connection can be evinced between consumers and aviation security.

The first vital fact we have to notice is that travelling is a kind of service and authorities also have to respect it while realizing their tasks. Passengers come to the airport to go on holiday or on business trips come to that they arrive to Hungary to do the above mentioned activities. Naturally, passengers would like to do all these cosily, under passenger-friendly circumstances, without missing their flight[8]. I think this is the main touch of the issue and also the charasteristic that distinguishes authority activities exercised at airports from traditional policing. Recognising this can premise a client-friendly public administration which is criteria the state should meet[9]. The other thing we cannot forget about, is the fact that under certain circumtances - if they are threatening aviation safety - travellers can be prohibited from travelling, so in the last resort their right to travel is absolutely restricted. In this case, they get into contact with authorities or the maintaner of the airport but never the airlines they wanted to travel with.

With this foreword, I'd like to examine passengers' basic rights colliding with aviation security.

5 Safety and fundamental rights

In the case of an airport, the most important interest we have to protect is the safety of the critical infrastructure[10]. What is the biggest danger preying upon this vulnerable value? It's clearly terrorism. Terrorism, which is obviously and regrettably part of our world.

What tools are available nowadays to maintain safety and to prevent acts of terrorism? How do they affect the freedom to travel and other basic rights?

5.1 Right to protection of personal data

When booking a ticket, we hand over our personal data to the air carrier, whose authorization is given by Act XCVII of 1995 on Civil Aviation Section 27/A Subsection (1).

These data are called PNR (Passenger Name Record), which mean files concerning air passengers stored by the air carrier's reservation system[11].

The acciessible data are the following: surename and forname, nationality or stateless status, number, type, validity of the travel documents, code of issuing state, date of birth, place of crossing the border, place of departure, transit and arrival, data concerning reservation, buying the ticket and way of payment, seats occupied, information about baggage, special needs, place of residence, phone number, e-mail address and gender. Practically, the enumerated data lead to a whole profile of the person, and from the data given for special needs - e. x. nutritional needs, allergy to certain ingredients - conclusions related to sensitive data can be drawn[12]. Hungarian law must ensure airways the right to handle PNR data according to the PNR agreement accepted in 2007. Previously, a narrower set of data (called API data) could have been managed by airways, but those proved to be an ineffective mean of preventing terrorist acts (Nagy, 2013: 188).

Personal data can only be transmitted to organisations defined by law - including police - of which the airlines inform passengers preliminary.

Therefore, we have not even started our voyage, our personal data are managed by several handlers in favour of fulfilling their tasks. Is it sure that managing all of these data is essential for the sake of aviation safety? To my mind, not at all, and what is more, we can state that in the case of a bulk-rate person it can be rated as unnecessary intervention into one's private life. Hungarian Commissioner for Data Protection expressed his doubts parallel to European national data protection authorities and European Data Protection Supervisor about this regulation, saying it is not proven that PNR data are indispensible means of fighting terrorism[13].

5.2 Right to effigy

Even before taking off, right after arriving to the airport, another fundamental right, namely the right to effigy gets into the cross-fire of the closed-circuit camera system consisting of more than a thousand cameras. This right is specified by Hungarian Civil Code as a part of system of personality rights[14]. With the help of these cameras, our whole activity can be followed up. Our portrait is recognisable, everything is recorded, even when we decide to go shopping before boarding the flight. The records are stored for 30 days, its claim is Section 31 Subsection (3) of Act CXXXIII of 2005, with the purpose of preventing terrorism and crimes against property. In my opinion, when talking about a critical infrastructure, we have to be very prudent at defining level of security so it is justifiable to lay out a system that scans every square centimeters of the airport, but only with giving simultaneously information to public at both terminals. The operator of the airport is responsible for managing data in a regular way. With this aim did the operator set up informative boards in the passenger halls.

5.3 Right to property

Should we be incautious, our right to property will be bruised at once. It is an elemental ban that we must not leave our baggage without supervision either it is a cabin baggage or a hold baggage. The reason for this measure really don't inquire any explanation so I abstain from it. Despite the well-known prohibition it occures several times a day that passengers miss the expectable diligence and leave their suitcases and handbags. This would be a great opportunity for the occasional thieves, but the awake guards of order, namely policemen move immediately (in maximum 1 or 2 minutes) to the location - using the camera system - they block the affected area and screen the bag so they can make sure it doesn't contain any explosive substances or devices or any other dangerous goods. During the examination, no one is permitted to dispose of the luggage, even the owner found meanwhile. This negligent attitude is threatened by Act II of 2012 on minor offences[15], for breaking the rules of safety and security of civil aviation. Taking into account terrorist-target nature of the airport, we can say that this preventive measure is reasonable and not a restriction that affects the essential content of the right, especially if we think about the number of protected people and possessions.

I would like to talk about right to property also from a different point of view. It is clear for everyone who have ever travelled by air that passengers are not allowed to carry certain tools onto the board or on the security restricted area. These articles are ruled by Attachment 4-C. of Commission Implementing Regulation (EU) 2015/1998 of 5 November 2015 laying down detailed measures for the implementation of the common basic standards on aviation security. These tools include guns, firearms, stunning devices, objects with a sharp point or sharp edge, and workmen's tools. In practice, when the security controllers find such a thing while checking the passenger's clothes, they simply take it away from the person, then they put it into a storage container, and the passenger can continue his/her way onto the board. No rule obligates the airport operator to retain these objects and after a while the articles are eliminated even they were not possessed wrongly, and the passenger was likely to be only unobservant.

5.4 Right to human dignity

The last concerned fundamental right is the right to human dignity that can be jeopardised at security control. The security checking is compulsory, due to concerning EU regulations. Aquittance can't be permitted to passengers on the ground of age, gender, state of health or any other personal attributes. The most controversial method of security control is the manual search. It is a fact that most negative feedbacks are connected to the performance of checking, passengers often take it as a way of humiliation and they judge it highly obscene. Passenger security control involves searching the raiment in whole, the controller can even touch private parts. In cause of suspicion, control is performed separated, in which case passengers may be instructed to take off their overclothes. We also have to mention question of ethnical-based discrimination. It happens, that persons having certain ethnical features are searched circumstantially[16], which tendency is enhanced when news of terrorist attacks are

publicised. We have to recognise that it is the most sensible field when talking about restricting freedom to travel. Power to control must be ensured to prevent abuse, so as to passengers should merely bear the necessary extent of limitation of their rights. Naturally, as we are humans, we are unfortunately exposed to bias and 'it takes only seven seconds for us to judge another person when we first meet them'[17], which is a harmful tendency.

All introduced measures, taken by authorities or civil organisations, intervenes into one's private life with reference to safety. However, safety is never absolute, and trying to eliminate all possible contingency is a „mission impossible". It comes natural to emphasize prevention, but when determining volume of restrictions, a vital viewpoint must be taken into consideration, which is no other than reason. We also have to estimate what injuries we can cause and what benefits we can gain by limiting persons' travelling. The only certain matter is that our objective can never be to reach our desire, namely safety by undue steps.

6 Premises in need of development

6.1 Complaint handling

In the civil sector the handling of complaints is often disappointing, it's status is the same either at airlines or at airport operators. Besides, representation of passenger interests is often really weak. To my mind, raising the level of complaint handling and enhancing the relevancy of settling disputes out of court would mean improvement of service quality. It would be reasonable to expand passengers' rights in this aspect onto the airport operators because currently there is no obligation on the operators' side ever in the case of violating rights.

6.2 Right to information

Next issue is right to information, in my interpretation right to sufficient information. As previously said, the transport sector's typical nature is the service complexion. We can't expect the passengers to make a reasonable decision without enough information. So if, all organisations present at airports - authorities as well as airport operators - should be obliged to do their all for informing passengers in an adequate way. Of course, the reverse of the medal is that passengers should also be rational and conscious and it can only be reached by training them what is a long process and the biggest future challenge for the EU.

7 Conclusions

I also think that legislative measures are not sufficient. The final aim is to make the mentioned performers interested in approving service and to look at the airport as unity.

Notes

[1] European Parliamentary Research Service Members' Research Service 'Consumer protection in the EU – Policy overview '(2015)

[2] Charter of Fundamental Rights of the European Union (2000/C 364/01) art 38

[3] Bencsik, A. 'A fogyasztói jogok tartalmának és érvényesülésének közjogi keretei' PhD dissertation (2012) p. 53

[4] Case C-22/11 Finnair Oyj v Timy Lassooy on the questions of denied boarding

[5] Case C-549/07 Wallentin-Hermann v Alitalia on the interpretation of cancellation

[6] Case C-394/14 Sandy Siewert v Condor Flugdienst GmbH providing further clarification on extraordinary circumstances

[7] Joined Cases C-402/07 and C-432/07 Christopher Sturgeon and Others v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA on delay

[8] Conclusion made on the ground of IATA Global Passenger Survey (2015) <https://www.iata.org/publications/Documents/Highlights%202015-Global-Passenger-Survey-Final.pdf > accessed 12 February 2016

[9] Balaskó, A. – Molnár, M. B. 'A közigazgatás és az emberek' (2014) Scriptura 2014(1) <http://onszak.hu/folyoirat/wp-content/uploads/2014/06/01Teljes.pdf> accessed 20 February 2016

[10] 'Critical infrastructure is a complexity of vulnerable systems, whose accurate and efficient operation is the pledge of functioning of the states.' In: Krasznai, A. '2001. szeptember 11-e és az új típusú terrorizmus nemzetközi összefüggései' PhD dissertation (2011) p. 28

[11] Nagy Klára, 'Az Európai Unió keretében megvalósuló bűnmegelőzési célú adatkezelések – A rendőrségi együttműködés adatvédelmi összefüggései' PhD dissertation (2013) p. 187 cites

[12] Kondorosi Ferenc - Ligeti Katalin, 'Az európai büntetőjog kézikönyve'(published by Magyar Közlöny Kiadó, Budapest, 2008) pp. 361-362

[13] Report of Commissioner for Data Protection (2008) p. 219 < http://www.naih.hu/files/Adatvedelmi-biztos-beszamoloja-2008.PDF > accessed 1 February 2016

[14] Act V of 2013 on Civil Code Section 2:43

[15] Minor Offences Act s 228

[16] Ernszt mentions the described phenomenon and takes it disproportionate and unnecessary. Ernszt, I. 'A nemzetközi repülés védelme' PhD dissertation (2007) p. 154

[17] Linda Blair British clinical psychologist quoted by an article titled 'A 7-second test for a new date' http://edition.cnn.com/2010/LIVING/12/22/ts.7second.date.test/ accessed 29 April 2016

European Union legislation and cases

Charter of Fundamental Rights of the European Union (2000/C 364/01) art 38

Regulation (EC) 261/2004 on establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004]

Case C-394/14 Sandy Siewert v Condor Flugdienst GmbH

Case C-22/11 Finnair Oyj v Timy Lassooy

Case C-549/07 Wallentin-Hermann v Alitalia

Joined Cases C-402/07 and C-432/07 Christopher Sturgeon and Others v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA

Acts

Civil Aviation Act XCVII 1995 s 27/A (1)

Minor Offences Act II 2012 s 228

Civil Code Act V 2013 s 2:43

References

Balaskó, A. - Molnár, M. B. (2014) A közigazgatás és az emberek, Scriptura 2014(1) (online journal)
<http://onszak.hu/folyoirat/wp-content/uploads/2014/06/01Teljes.pdf> accessed 20 February 2016
Bencsik, A. (2012) A fogyasztói jogok tartalmának és érvényesülésének közjogi keretei PhD dissertation, Pécs
Ernszt, I. (2007) A nemzetközi repülés védelme PhD dissertation, Pécs
Krasznai, A. (2011) 2001. szeptember 11-e és az új típusú terrorizmus nemzetközi összefüggései PhD dissertation, Debrecen
Nagy, K. (2013) Az Európai Unió keretében megvalósuló bűnmegelőzési célú adatkezelések – A rendőrségi együttműködés adatvédelmi összefüggései PhD dissertation, Győr
European Parliamentary Research Service Members' Research Service 'Consumer protection in the EU – Policy overview'(2015) <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA%282015%29565904_EN.pdf > accessed 12 February 2016
IATA Global Passenger Survey (2015)
< https://www.iata.org/publications/Documents/Highlights%202015-Global-Passenger-Survey-Final.pdf
> accessed 12 February 2016
Report of Commissioner for Data Protection (2008) 219
< http://www.naih.hu/files/Adatvedelmi-biztos-beszamoloja-2008.PDF > accessed 1 February 2016
http://edition.cnn.com/2010/LIVING/12/22/ts.7second.date.test/ accessed 29 April 2016

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The Necessity to Protect Consumers' Rights with Regard to Polish Regulation on the Medicinal Products Sale at a Distance to the Public

JUSTYNA NOWAK

Abstract The necessity to protect consumers by different legal mechanisms is unquestionable, however the level of the protection should be formed with regard to the peculiarity of certain area of the economic branch. It is particularly noticeable in case of medicinal products market on the example of distance selling. The therapeutic effect of drugs distinguishes them substantially from other goods. Due to their character each legal construction the aim of which is to ensure the protection of consumer rights such as the right to withdrawal or the prohibition on pharmacies advertisement, should be balanced and proportionate.

Keywords: • consmers' rights • Polish regulation • pharmacies advertisement • Poland

CORRESPONDENCE ADDRESS : Justyna Nowak, PhD student in the Faculty of Law and Administration of the University of Lodz in the Department of European Economic Law, Poland, email: jnowak@wpia.uni.lodz.pl.

DOI 10.4335/978.961.6399.79.1.14
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 The initiation of medicinal products sale at a distance to the public

1.1 The ruling in the DocMorris case

The medicinal products sale at a distance to the public has been possible in European Union since 2003, when the preliminary ruling on the interpretation of the legality of Internet pharmacy in the DocMorris case[1] was given. The court stated that a national prohibition on the sale by mail order of medicinal products, the sale of which is restricted to pharmacies, is a measure having an effect equivalent to a quantitative restriction for the purpose of Article 28 EC (34 TFEU). The Court also emphasised that the use of the Internet does not give rise to any additional health risk, which can be avoided only by an prohibition on mail-order business in medicinal products. On the contrary, the technical potential of the Internet, in particular the ability to prepare customised interactive pages, can be used in order to ensure optimum health protection.

In the light of the foregoing, article 36 TFEU may be relied on to justify a national prohibition on the sale by mail order of medicinal products, the sale of which is restricted to pharmacies as far as the prohibition concerns medicinal products subject to prescription. It cannot be use to justify absolute prohibition on the medicinal products sale at the distance to the public, though.

After the ruling, the development of the Internet pharmacies was noticeable. In majority of Member States it only embraces OTC[2] products. In some of them it is even possible to use this type of sell for prescription drugs. It is practised in Ireland, Sweden, Germany and the Netherlands.

1.2 The Directive 2011/62/EU

In 2011 the Directive 2011/62/EU[3] on the prevention of the entry into the legal supply chain of falsified medicinal products came into life, causing significant changes in the area of the Internet pharmacies. Not only does the directive confirm its legality, but it also recommends that Member States shall ensure that medicinal products are offered for sale at a distance to the public by means of information society services by the natural or legal person offering the medicinal products being authorised or entitled to supply medicinal products to the public. The regulation indicates what sort of information the website should contain.

2 Polish regulation on the medicinal products sale at a distance to the public

2.1 Application of the general rules of consumer protection to the medicinal products sale

First Polish regulations on the medicinal products' sale at a distance to the public falls on the year 2008[4]. The regulations was the implementation of the so called pharmaceutical package, consisting of Directives 2004/24/EC[5], 2004/27/EC[6], 2004/28/EC[7]. The regulation widely elaborated on informational duties imposed on the seller towards a consumer. The information that needed to be given included among others name and the address of the entrepreneur supplying medicinal products, the organ giving the permission for the medicinal products sale and the number of the permission, the price of the product, possible methods of payment, the delivery details as well as the possibility to withdraw from a contact within 10 days from the moment of the delivery without any reason and without incurring any costs but the direct costs of the return of the product.

The aforementioned conditions imposed on the seller were subsequent to the Directive 97/7/EC[8] on the protection of consumers in respect of distance contracts. The Directive was the answer to the introduction of new technologies causing increasing number of ways for consumers to obtain information about offers and to place orders. In motive 4 it emphasised the necessity to introduce at Community level a minimum set of common rules in the area of distance selling. The regulations was implemented to Polish legal system with the Act on the protection of certain consumer rights and on the liability for damage caused by a dangerous product[9], provisions of which were also applicable to the medicinal products distance selling. Lack of explicit exclusion of the application of the Act suggested that in case of medicinal products distance selling general rules in the area of consumer protection were also applicable. Directly applicable were among others provisions concerning dates on performing the obligation, payments conditions, impossibility of performance and the return of the costs in case of withdrawal from a contract.

The mutual relationship between the Act on the protection of certain consumer rights and the regulations on the medicinal products sale at a distance to the public indicated that medicinal products were treated like any other goods offered to consumers, what having on mind their particular character and purpose, seemed to be controversial. The only significant difference was manifested in the duty imposed on the entrepreneur to ensure that there is a telephone line functioning by every Internet pharmacy, where the client may enquire about the safety and the quality of the medicinal products offered by a pharmacy.

What stirred much controversy in particular was the right to withdraw from a contract without any consequences. That right is one of the most significant rule in consumer protection area, resulting from the peculiarity of distance selling. The consumer is not able to see the product or ascertain the nature of the service provided before concluding

the contract. Nevertheless in case of medicinal products is was particularly troublesome for the seller, who had to neutralize returned products and couldn't sell them again. The reason of such regulation thus was negatively assessed, because it exposed entrepreneur to big loss. It also did not contribute to increase the level of consumer protection, because there was enough information on the product available for the consumer on the Internet or special telephone lines functioning by the Internet pharmacies to assess if he was going to need one. There was no point in examining the good after its delivery as medicinal products do not differ regarding sizes, materials or quality, what differentiates them from goods, to which general rules in the area of consumer protection are applied.

2.2 Separate regulation of the medicinal products sale at a distance to the public

In the year 2015 both regulations on consumer protection and on the medicinal products sale at a distance to the public were repealed. The new Consumer Rights Act[10] from the year 2015 implemented the Directive 2011/83/EU[11] on consumer rights, whereas the latest regulations on medicinal products distance selling[12] implemented the Directive 2011/62/EU[13] amending the Community code relating to medicinal products for human use.

The current regulation on the medicinal products sale at a distance to the public cancels the right to withdraw from a contract without any consequences and without any reason. Complying with the rules of the pharmaceutical law act, it limits the right to withdrawal from a contract to 3 enumerative cases which include products improperly delivered, products with quality defects and falsified products. The regulation was given a positive opinion of the President of the Office of Competition and Consumer Protection, who finds the three cases entitling a consumer to withdraw from a contract sufficient for consumer rights protection.

For comparison, other groups of contract without the right to withdraw from them according to the motive 47 of the directive on consumer rights include goods, value of which is dependent on fluctuations in the market and goods made to the consumer’s specifications or which are clearly personalised. Polish statute also excludes from the rights to withdrawal goods that quickly go bad or with short expiry date, goods delivered in sealed package, which after its opening couldn't be returned due to health protection or hygienic reasons as well as goods such as diaries, periodicals and others. The reason to exclude them from the right to withdrawal is that they cannot be resold at the same price or resold at all, what makes it troublesome for the entrepreneur. The same justification made the legislator exempts medicinal products from the rights to withdrawal.

What is more, the regulations from 2015 explicitly excludes the application of the Consumer Rights Act, what in light of the peculiar character of the medicinal products is justified and remains consistent with European Union legislation, which reiterates the necessity of separate regulation on medicinal products. According to motive 22 of the

Directive amending the Community code relating to medicinal products, the Court of Justice has recognised the very particular nature of medicinal products, therapeutic effect of which distinguishes them substantially from other goods. Also the Directive on consumer rights states in motive 11 that its regulation should be without prejudice to Union provisions relating to specific sectors, such as medicinal products for human use and medicinal devices.

3 The prohibition on advertising pharmacies

Another aspect of consumer protection in medicinal products distance selling concerns the total prohibition on advertising given on Polish pharmacies. That rule does not have its equivalent in the EU law. In fact Poland is the only Member State that have introduced such regulation. The Directive on the Community code relating to medicinal products for human use concerns only the advertisement of medicinal products, which under certain conditions is legitimate.

The introduction of the regulation was justified by the Ministry of Health with the intention to cut down on drugs consumption. The effect has not been reached, as the consumption tends to increase in spite of the prohibition. However, even if it did, it couldn't be assessed as proportionate. The prohibition by contrast has entailed serious social and economic consequences.

The prohibition has had negative influence of the activity of Internet pharmacies. The only information concerning pharmacies that could be spread around consumers is an address and opening hours. However due to its narrow interpretation, the information doesn't embrace the Internet domain. Also Internet pharmacies cannot use neither the search engine optimization nor advertising Internet campaigns. It significantly limits the possibility to use Internet pharmacies services by the consumers. As a result the regulation introduced to protect customers has turned against them, seriously limiting their right to information. Additionally, it is inconsistent with the regulation on the medicinal product advertisement, legitimate under certain conditions. Also the doubts causes the fact, the some OTC medicinal products can be sold in common shops, which are not deprived of the possibility to advertise. What is more, pharmacies can sell products different from medicinal products, such as cosmetics, prohibition of advertising of which by the pharmacies has no justification whatsoever.

The aforementioned shows that there is no reason to restrict the possibility to advertise pharmacies. Due to its negative impact on entrepreneurs, Polish business organization representing employers' interests in Poland and in the EU, filed a complaint to the European Commission, faulting that the regulation in its cross-border aspects does not comply with the freedom of economic activity and the free movement of goods being measure having equivalent effect to quantitative restrictions on export prohibited on the grounds of article 34 TFUE. After initial analysis the European Commission admitted that there is the probability that the regulation infringes EU law.

4 Conclusions

To conclude, the Polish legal constructions described above and their evolution show that the market of medicinal products should follow its own rules, also in the area of consumer protection, mainly due to the autonomic and very peculiar character of medicinal products. The application of general consumer protection regulation in this case should be exceptional, proportionate and properly justified. However the regulation also should be balanced and cannot go as far as the prohibition on pharmacies advertising is concerned. In that case it is for the detriment of the consumers instead of being to their benefit.

Notes

[1] Judgement of the Court of 11 December 2003, C-322/01, ECLI:EU:C:2003:664.

[2] Over-the-counter (OTC) drugs are medicines sold directly to a consumer without a prescription.

[3] Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products, OJ L 174, 1.7.2011, p. 74–87.

[4] The regulations of Ministry of Health, Journal of Laws 2008, no 60, item 374.

[5] Directive 2004/24/EC of the European Parliament and of the Council of 31 March 2004 amending, as regards traditional herbal medicinal products, Directive 2001/83/EC on the Community code relating to medicinal products for human use, OJ L 136, 30.4.2004, p. 85–90.

[6] Directive 2004/27/EC of the European Parliament and the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, OJ L 136, 30.4.2004, p. 34–57.

[7] Directive 2004/28/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/82/EC on the Community code relating to veterinary medicinal products, OJ L 136, 30.4.2004, p. 58–84.

[8] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19–27.

[9] Act of 2 March 2000 on the protection of certain consumer rights and on the liability for damage caused by a dangerous product, Journal of Laws of 31 March 2000, No. 22 , item 271.

[10] Act of 24 June 2014 on the Consumer Rights, Journal of Laws 2014, item 827.

[11] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64–88.

[12] The regulations of Ministry of Health, Journal of Laws 2015, item 481.

[13] Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products, OJ L 174, 1.7.2011, p. 74–87.

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New Consumer Protection Directive on Alternative Dispute Resolution and Regulation on Online Dispute Resolution Challenge or Effective Tool for Protecting Consumer Rights?

TAMUNA BERIDZE

Abstract Every day more and more people use the comfort of the online marketing/shopping which at the same time brings the problems of how the issues of the e-commerce in case of contractual breach occurs can be solved. High prices of court proceeding are the barrier for insuring the protection of the consumer rights, as many times the consumers restrict themselves from filing the claim in the court as the price of the goods are lower than the time and resources which are going to be put in. Two new measures were issued by the European Legislature in 2013 granting low-cost access to justice to the consumers. The Directive on Alternative dispute Resolution (ADR) and the Regulation on Online Dispute Resolution (ODR), in the following article it will be discussed to what extend do these regulations achieve this aim in case of the cross-border consumer disputes to support the out-of-court settlement of the consumer disputes. It is argued that it will be unlikely that they will promote the cross-border consumer access to justice with the same efficiency as it is expected.

Keywords: • consumer protection • conumer rights • alternative dispute resolution • online dispute regulation

CORRESPONDENCE ADDRESS : Tamuna Beridze, Student at Ivane Javakhishvili Tbilisi State University (TSU) and Eotvos Lorand University, Budapest, Trainee at Law Firm, “Oppenheim”, Budapest, email: tk.beridze@gmail.com.

DOI 10.4335/978.961.6399.79.1.14
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

European Union (EU) has unarguably achieved very successfully the creation of the internal borders, where the free movement of the people and goods are insured with the high quality, therefore this promoted the creation on the Internal Market, and active purchase of goods while shopping in different country or online. This system seems like the perfect paradise for all of its citizens until everything goes smoothly and no problem arises, however all the perks of the European Union seem to be breaking through once one simple transaction, for example purchasing goods by the credit card does not go as smoothly as it was expected and the consumer is faced with the problem of requiring to submit the claim in the authoritative institution if the company will not be able to provide adequate reaction.

The Insurance of the Consumer Protection in the Internal Market is one of the basic principles of the European Union, which is directly connected to the effective development of the internal market. Aware of this situation, the European Union has long been working to strengthen consumer protection by very active policies, both informative and normative (Article 169(1) TFEU and Art. 38 CFREU), promoting, in particular, the improvement of the systems for effective protection of consumer rights (Luisa, 2015: 131). It does not come as the surprise that there are series of the directives and regulations issued by the European Union Institutions which promote the progress of the functioning of the internal market and at the same time the maintenance of high quality protection of the consumer rights.

However with the development of the modern technology it is of the outmost importance to insure the keeping up of the pace by the nowadays policy makers. Technology introduces the new challenges to the policy makers which were not existent to them over a decade ago. Growth in the demand of the online shopping by the consumers is one of the challenges which needs to be given big attention, as this is already present and the future of the internal market not only in the European Union, but throughout the whole world.

2 Problem arising out of Cross-border/Online shopping

Cross-border shopping problem arises when the companies are not able to provide the consumers with the adequate actions to resolve the dispute. Consumer is left with the question what can she/he do in order to claim rights against the company? Which ways are there to be addressed in order the dispute to be solved? Is the court the only institution which can be addressed after the dispute has arisen?

Generally the courts are not seen to be the most attractive means for the problem to be solved, especially in case of the cross-border disputes, in the literature and the practice it has been questioned whether addressing the court distorts the normal functioning of the internal market. Many times the consumers do not want to go to courts because of several reasons such as for example: generally the costs which will be incurred during

the court proceedings will be so high that it will override the costs of the goods purchased. Traditional court proceedings are, however, not always practical or cost-efficient and the costs (e.g., court fees, lawyers' and experts' fees) and the risks attached to litigation often make it uneconomical for a consumer to seek compensation, especially for small claims (European Commission, 2011b). Procedures are also complex and lengthy. For example, the average time for solving disputes of civil, commercial and administrative law cases in first instance courts can amount to 928 days in Italy, 925 days in Portugal and 408 days in Bulgaria (European Commission, 2011b). Lawyers' fees vary per Member State, but in most Member States the hourly amount paid to a lawyer ranges between €100 and €300 and in a few Member States it can even exceed €700. As a result, only 2% of consumers who had a problem brought their complaint to court in 2010 (The Gallup Organization, 2011a), and 25% of consumers would not go to court for less than €1000 (TNS Opinion & Social, 2011). (Juskys, Ullbaite, 2012, 26).

It is common wisdom that cross-border consumer contracts give rise to a number of problems that are absent from domestic contracts. These problems include uncertainty regarding the applicable law as well as regarding the competent court. (Rühl, 2015: 432). Therefore it can be said that when the dispute is domestic, it faces less complications rather than when the disputes is cross border. One of the main issues in cross-border court litigation concerns jurisdiction, i.e., determining the country where the dispute is going to be solved (Inchausti, 2015: 40). In courts protection of the consumer rights might be more assured, but unfortunately they are not very flexible in handling the issue of moving from one country to another for the court proceeding.

Due to the lack of flexibility of Justice, in general the system of Alternative Dispute Resolution was introduced in different countries. It was up to the countries or the independent organizations to organize the consumer dispute settlement schemes, however it raised the question weather with the lack of the unified regulation it distorted some parts of the internal market to develop as well as the rest of it. According to a recent study conducted by The Nielsen Company (commissioned by PayPal), the number of consumers who engage in cross-border online shopping and the amount of money they spend online is huge. In Germany, for example, 14.1 million consumers engaged in online cross-border shopping in 2013 and spent approximately 7.6 billion Euros on foreign websites (The Nielsen Company, 2014: 5). However the issue was raised that this number can be much greater if the well-organized ADR schemes specializing in Consumer disputes would exist. Both these counties United Kingdom and Germany have highly developed Alternative Dispute Resolution schemes, however in some parts of the European Union ADR schemes are just the theory and practically non-functional. According to the Study on the use of Alternative Dispute Resolution in the European Union (Civic Consulting, 2009), ADR mechanisms are highly diverse, not only across the European Union, but also within the Member States (Jushkis, Ulbaite, 2012: 26).

With this aim the EU commission has introduced Directive and the Regulation on the Consumer Alternative Dispute resolution, which includes the implementation of at least one ADR schemes specializing in this field, to insure that consumers will not be faced with the challenges. However question arises weather the directive and the regulation meet the expectations set by the European Commission? There are certain issues which were not addressed properly and even with the introduction of these new acts this will remain the same and will not promote so efficiently as it was intended the development of the Internal Market.

3 Access to the Justice though ADR

According to the ADR directive it is imposed that the issuance of the directive was based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), although the European Commission had the choice between different legal provisions…, (Benohr, 2012: 7). According to Article 169 (1) TFEU, the EU aims to promote the interests of consumers and ensure a high level of consumer protection. In order to attain these objectives the EU can adopt two types of measures (Article 169(2)):

(a) Measures adopted pursuant to Article 114 TFEU in the context of the completion of the Internal Market;
(b) Measures which support, supplement and monitor the policy pursued by the member states.

Article 169 (2) (b) might have been a more appropriate bases for the directive as it allows EU to adopt measures that support and supplement ADR consumer schemes in the Member States, without requiring a market building rationale (Benohr, 2012: 7).
Additionally for anyone acquainted with the TFEU, this finding must come as a surprise. After all, Art. 81(1) and (2) (g) TFEU specifically allow European lawmakers to adopt measures … aimed at ensuring … the development of alternative methods of dispute settlement (Ruhl, 2015: 431). However the commission did not decide to base the directive and the regulation on the referred articles, because it would not have allowed the legislator to have applied the directive and the regulation to the domestic disputes.

"Access to Justice" through Alternative Dispute Resolution schemes has many times been debated, weather it ensures protection of the rights of the parties or not.[1] Article 6 (1) of the European Convention on Human Rights (ECHR) as well as Article 47 of the charter of Fundamental Rights in the European Union ensure the access of justice to every individual who believe that their rights have been infringed. For several decades, ADR mechanisms claim their space not only as alternative techniques to get to resolution of dispute, but more broadly, as alternative techniques to ensure "access to Justice" (Inchausti, 2015: 31). However it is still disputable how the ADR ensures the protection of the consumer rights, considering the fact that it focuses on the "resolution" /settlement of the conflict between consumer and the trader, rather than guaranteeing the protection of the rights. However the question whether ADR is the means to protect

the rights of the disputant parties is not the question of this paper, therefore it will not be discussed any further.

4 Definition of the Term (Consumer) Alternative Dispute Resolution

In the new acts the dispute resolution systems are referred as Alternative and Online Dispute resolution. According to Article 4: ''ADR entity' means any entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure and that is listed in accordance with Article 20(2)", however since the acronym ADR in that context can give rise to confusion over weather what is being described is court annexed ADR, it is preferable to use different name (Creutzfeldt, 2015: 4) . It is more logical if the ADR for consumers would had been referred as CADR,[2] as Consumer Alternative Dispute Resolution (CADR).

According to regulation on Online Dispute Resolution Article 5, 'the online platform is to be created which will help the consumers to submit their claim, and this platform will provide the service in terms to guide the consumer to find the appropriate ADR scheme responsible for resolving the dispute', however it does not intervene with the resolution of the dispute at all. Online Dispute Resolution is associated to be the application through which the consumer and the trader along with the third party are able to carry out the CADR procedure from the places which would be most convenient, however the platform does not provide the consumer with such a comfort and is just so called "search engine" for competent CADR entity, therefore the name of the regulation does not match its content.

5 Specific Features of the EU Directive 2013/11/EU on ADR and Regulation (EU) No 524/2013 on ODR

Directive on ADR for Consumers and the Regulation for the ODR are interconnected in the sense that these two directives fulfill each other. However it shall be noted that The ADR Directive could function even without the ODR Regulation, but the ODR Regulation could not work without the ADR Directive (Bogdan, 2014: 156). And the success of the ODR regulation is very much depended on the success of the ADR Directive, however the directive contains several features which will deprive it from successfully meeting the aims of the EU legislator.

Establishment of the Permanent body of ADR

The EU Directive imposes the obligation on the countries, in case of absence of the functioning ADR Schemes to create the permanently functioning ADR Body, which will provide at least two specialists for the dispute resolution. All ADR entities will have to meet quality criteria in line with the requirements set out in the Directive. This goes for domestic as well as cross-border disputes. The Directive aims at minimum harmonization and leaves some discretion on the specific form of ADR to be implemented in the Member States (Weber, 2015: 266). However it is unclear what

does ADR scheme consist of? Who are the ADR entity members? Are the two employed people stuff members or they are independent contractors? In order to better represent the issue it is advisable to draw the parallel with the Arbitration Institution and the disputant party contracts with the Arbitrators.

In the Institutional Arbitration it is widely accepted that the parties are contracting with the administering institution, which is regarded as the administrational contract. Generally under this contract the party undertakes the obligation to provide the parties with the administering services connected to the outgoing arbitration procedure. However this contract is separate from the contract concluded with the arbitrators (arbitration contract) and from the arbitration agreement between the parties to arbitration (Hofman, 2015: 110). This somehow creates triangle between the Arbitration institution, parties and the arbitrators, as the arbitrators act not on behalf of the Arbitration institutions, but rather on behalf of the parties.

In case of the contractual relationship between the ADR scheme and the parties it is unclear whether the contract is formed between the institution and the parties or the parties and the Mediators. The persons entrusted with the Consumer ADR belong to the ADR entity (Hofman, 2015, 111). The essence of the knowledge weather the contract is directly between the parties and the mediator situates in the following as the tasks and obligations of the entities are not regulated directly by the directive. However the text of the ADR Directive entitles the member states to impose their own regulation to the latter, however this will not guarantee equal treatment of every consumer in every ADR Scheme, as in case of the breach of the contract by the ADR entity or the mediator it will be essential to differentiate which entity is the individual supposed to sue and burden of proof in different countries will be different due to the individual legislation regulations.

In terms of establishing the ADR scheme, in case the already existing scheme will not accept the role of acting in the field of Consumer dispute resolution, the member states have the obligation to create at least one scheme which will be dealing with mentioned latter, which will be funded by the state funds. Additionally the states are encouraged to provide the schemes with the private funding. These arises two issues the willingness of the traders to conduct the process with the state funded scheme, companies will ask themselves whether state-created and funded dispute settlement entities subject to certain quality standards are in fact any different from a national court (Ruhl, 2015: 447). Secondly this makes the impartiality of the scheme questionable.

Recital 46 of the ADR Directive States: 'However, ADR entities should be encouraged to specifically consider private forms of funding and to utilise public funds only at Member States' discretion. This Directive should not affect the possibility for businesses or for professional organizations or business associations to fund ADR entities'. In case in the business association there is the company against which the consumer has the dispute, will not this incur the breach of the impartiality principle which is so strongly introduced in the directive?

The directive gives the discretion to the ADR schemes weather to start proceeding of the case or not, however the ADR scheme is under no obligation to administer every case submitted to it, however the directive does not regulate what are the conditions under which the rejection by the scheme will be justified. If the scheme was found by the ODR platform to had been the only competent scheme to had resolved the dispute and it rejects the claim without any reasoning, the consumer is faced with the issue that the full protection of his/her rights were not met, as he/she was deprived from the right of addressing the ADR scheme before submitting the claim to court.

Discomfort of addressing the ADR scheme abroad

The aim of the directive was to try to maximally minimize the inflexibility which occurred during the cross-border disputes in courts, there is broad agreement that many consumer disputes never end up in court because litigation is widely perceived by consumers to be costly, burdensome, and time consuming (Ruhl, 2015: 444). Generally, ADR is discussed as a means of strengthening consumer law enforcement (Weber, 2015: 266) One of the obstacles which was supposed to be removed was the movement of the consumer from one country in another in order to resolve the dispute, however with this new directive it is unlikely that this will be resolved. Recital 26 of the directive states that:
'This Directive should allow traders established in a Member State to be covered by an ADR entity which is established in another Member State.' The majority of ADR entities only accept complaints against professionals that are domiciled in the same Member State as the ADR entity. Foreign professionals who compete with local professionals on local markets are therefore at a disadvantage vis-à-vis their local competitors because they cannot offer local consumers access to local ADR schemes but merely to local courts (Ruhl, 2015: 439).
Article 10 (b) of the ODR Regulation provides that: '[ADR Schemes] do not require the physical presence of the parties or their representatives, unless its procedural rules provide for that possibility and the parties agree', this provision gives the discretion to the ADR scheme whether to impose the presence of the individuals or not. It is hard to predict how many schemes will waive their right for the demand the parties to be present at the procedure, therefore this directs us to the consequence when the consumer is required to go to the member state country, where the company is registered in order to resolve the dispute. Therefore the question arises why would consumer be willing to go to different country when he/she is covered with the protection of Rome I regulation to address the court of the country where he/she is domiciled.

6 Language Barrier

Language barrier is going to be one of the most obvious challenges while the process of the implementation of the Directive. As according to the Article 9 (h) of the Directive, the entities shall display:

'the language or languages in which complaints can be submitted and the dispute resolution procedure conducted'.

It is easy to see that the ADR entities do not have the obligation to provide services to the consumers in all languages, therefore for the consumers the translation for the procedure will incur a lot of additional expenses, which will be one of the main reasons why one will limit himself/herself to start proceedings in the ADR schemes. Art. 5(2) of the ODR-Regulation, consumers and traders may submit complaints by filling in an electronic complaint form available in all the official languages of the European Union. According to Art. 9(3) and (4), the ODR platform must communicate with the parties in the language they choose. (Ruhl, 451) However as it was also mentioned above the ODR is just the platform to assist the consumers to find the appropriate ADR scheme, therefore even if it would have the obligation to translate the documentations submitted, it does not assist the consumer during the preceding which might be conducted in the other language, which also causes the lack of trust from the consumers side as he/she is not able to understand the language. Additionally the ODR platform is not required to translate the outcome of the ADR procedure.

7 Enforcement

When parties enter into the legal relationship, for example purchasing contractual relationship it might be assumed that they rely not only on their good will for the fulfilling their contractual obligations, rather also upon some mechanism which will help them claim their rights, to say in short if one party fails to fulfill their contractual relationships the other party has the mechanism to claim their rights with the power of enforcement. Law enforcement is an important disciplining mechanism for contracting parties (Wagner 2014a). Without the threat of enforcement, parties would not have incentives to abide by contracts and would rather act opportunistically, not fulfilling the contract (Weber, 2015: 267). Enforcement is the force which promotes the proper functioning of legal relationships and the delivery of the justice upon agreed terms.

As the purpose of the directive and the regulation is to make the disputes for consumers with the trades as easy and fastly resolving as possible, however neither the directive nor the regulation regulates the enforcement of the dispute outcomes, along with other obstacles discussed above the lack of the enforcement mechanism might come as an obstacle for reaching these goals. If the enforcement of the reached agreements will depend on the good will of the trader, the consumer will not be willing to enter into the negotiation when he/she is not guaranteed totally that the decision will be enforceable.

In this section the issues connected with the ODR is discussed and the assumptions are made how it is going to affect the development of the ADR and ODR acts of EU Commission. In the end It will be assumed that additional regulation of the enforcement mechanism shall be created by EU Legislative institutions which will ensure the same level of enforcement in every member state of the EU.

As it is known the agreements might have different outcomes according to their nature, whether they are binding or non-binding, non-adjudicative or adjudicative. Indeed, if theTrader is unwilling to comply with the ODR outcome, the consumer has two options depending

on the binding nature of the outcome (Shultz, 2002: 10-11). If the outcome is binding between the parties, the winning party can go before the judge for enforcement. In the case of a non-binding outcome, there is nothing the party can do to have the decision enforced outside of private enforcement mechanisms or traditional court proceedings, where he will have to initiate a new claim. (Cortes, 2015: 83)

With this regard issues will be discussed in two sections the first will discuss the arguments which are binding in light of the recognition and enforcement of Unilateral as well as Bilateral contracts, in the second section the accent will be made on private enforcement tools and how effective they are.

8 Judicial Enforcement of Online and Alternative Dispute Resolution Agreements

Nature of the outcome of ADR

According to the ADR directive it is unclear what the nature of the outcome of the procedure is. It gives the discretion to the member states to make the binding nature of the outcome up to the ADR schemes or leave them with just the recommendation phase. Generally idea of ADR mechanism is that it, provides fast and cheap alternative to the court proceedings for the consumers, however the consumer has to have guarantee that if the other party does not comply with the outcome he/she will be able to enforce the agreement through the public authority. The binding nature of the outcome comes directly into conjunction with the issue of enforcement of the decision though the public authority. In order the outcome to be enforceable through the public authority it needs to have the binding nature so both parties will have the obligation to comply with the agreement. With this context it is therefore interesting to discuss to what instance is it possible to have pre-dispute ADR agreements?

Consumer Protection is often part of the public policy of a country. In the European Union, the Brussels **I** and Rome **I** Regulations implemented a general prohibition on pre-dispute ADR clauses for consumer agreements. Indeed, Article **17** of the Brussels I Regulation (now Article 23 of the Brussels I Recast) prohibits pre-dispute choice of court agreements if such an agreement has not been entered into after the dispute has arisen (Hanriot, 2015: 7). However the European Judge has held that online conciliation can be established if it does not breach the right to access the justice afterwards. However this is going to have the 'chilling effect' on the consumer. If the outcome is not binding once again why would he/she want to carry out ADR procedure with the trader, especially when the ADR Directive establishes that one can access ADR service after he/she has failed to resolve the dispute directly with the trader?

Alternative Dispute Resolution is a specific field it requires a lot of trust from the parties' side in order it to be successful. Therefore if one has failed once negotiations with the trader, if for the second time there is still no mechanism for ADR the outcome to be binding to the trader why consumer would be willing to go through the same type of procedure twice? One of the ways how ADR outcome will be effective is if it is binding to the parties.

Enforcement of the Binding outcomes through the Public Authorities

Firstly as it was mentioned the binding nature of the outcome of the ADR decision has strong ties to its recognition and enforcement. Secondly it shall be regulated by the legislation what are the nature of the outcomes and how shall they be enforced in the member states especially in the cross-border disputes.

The European Union has issued several regulations and directives such as for example Small Claims Regulation and Mediation directive to ensure the easy access to Justice. The Mediation Directive leaves it up to states how will the agreements reached both during offline and online mediation be recognized and enforced in the Member States. Article 6(2) of the directive establishes that the enforcement of the agreement could be delegated to the court or non-judiciary authority. Which makes the whole situation very uncertain and inconvenient to the consumers. For example, in Spain (Cortes, 2015: 163-164), he Spanish Mediation Bill provides hat a mediated agreement reached with the assistance of an accredited mediator is directly enforceable in court (Cortes, 2015: 163-164). However this might come as an obstacle during the cross-border enforcement of the ADR Outcomes. Likewise of the Spanish regulation of the enforcement of the ADR outcomes it could be in every member state, as if the discretion is given to all of them there is possibility that all will regulate the enforcement in their own ways, which does not help the development of CADR. As the aim of the acts is that is shall make the costs for the dispute resolution as low as possible (ODR platform is completely free for the consumers, while the service of ADR schemes shall be for no cost or for the minimal one) this aim will not be reached unless enforcement also regulated by the separate of recast version of the directive. In some member states such as for example France additional costs are occurred for the recognition and enforcement of the foreign decisions in France. According to article 1516 NC proc civ. the enforcement of the foreign decisions shall be brought to the French court of I instance which is located in Paris, According to Art 751, it is compulsory for the persons represented in the I instance of French courts to be represented by the lawyer, while some other countries laws, for example Hungary, allows the persons to represent their own cases. This raises two issues, one that it incurred additional cost of hiring the lawyer in France, which does not have as low cost as the issuers of ADR Directive would wish for, and secondly when only the I instance of Paris has the Jurisdiction over recognition and enforcement of these kinds of decisions it leaves individuals who are leaving far from this area in the difficult and uncomfortable situation. This kind of proceedings evidently imply additional costs that are disproportionate compared to the claim, which prevents the

consumer from pursuing his claim and, as a matter of fact, will hinder his access to justice (Hodges, 20, :111). This is the case but for the 'rational apathy problem'. The rational individual will not act if costs outbalance the benefits, for instance, when harm is very small and the investment to enforce the law is costly (Van den Bergh 2007, p. 184).

9 Arbitration as the means of CADR Procedure

New York Convention on the enforcement of the International Arbitration awards (NYC), is one of the most efficient conventions existing nowadays, within the context of international arbitration, the NYC represents a great tool to the extent that the enforcement of foreign arbitration awards and outcomes is now easier than the enforcement of foreign court decisions with the *exequatur* proceedings (Blake,: Para. 24.29). Therefore with the condition that there is not efficient tool of enforcement of consumer dispute outcomes it might come handy to enjoy the perks of NYC if it is assumed that the procedure was carried out through Arbitration. However before this assumption might sound too good to be true it is necessary to analyze weather it could really be applicable to consumer disputes, especially the online ones, weather international arbitration could be used for the consumer disputes given very characteristic nature of the Arbitration agreement.

Until now the procedures of mediation and conciliation which generally are non-judiciary have been considered as the discussion topic of the article, however it is interesting to analyze to what extent arbitration could be permissible as the means of Consumer Dispute Resolution Mechanism. One of the most common provisions applied all over the world is the prohibition of pre-dispute arbitration clauses in consumer contracts (Hentiot, 2015: 6). Due to its binding nature to the both parties, consumers shall always be protected with the degrees which the national laws of their countries provide them with. However if the Arbitration is accepted not before the dispute arises but afterwards and the consumer accepts it to be the means of dispute resolution, it is possible it to be used as the means of CADR. The UNCITRAL Working Group adopted a similar position by creating two tracks in the procedural rules in order to accommodate jurisdictions in which pre-dispute ADR agreements are considered binding on parties (Track I), as well as jurisdictions where pre-dispute ADR agreements are not considered binding on parties and did not end in a binding arbitration phase (Track 11).

Unilateral agreements in the scope of Arbitration

ADR Directive as it was mentioned above leaves it up to the countries to regulate the unilaterally binding nature of the CADR. Hence unilateral binding nature means that the outcome of the dispute will not be binding on the consumer until he/she accepts it, however the trader is deprived of enjoying the same rights as the consumer does. This ADR mechanism has already been

Implemented in some Member States. In Germany, for instance, insurance companies agreed to be bound **by** the German Insurance Ombudsman for claims of up to 10 000 € (Eidemnueller & Engel, 13-14). However the unilateral binding nature of the CADR might come in conflict with the traditionally accepted concept of the arbitration agreement. The arbitration agreement requires the mutual agreement of the parties in order it to be binding. However, those principles are applicable only in the frame of commercial arbitration in business-to-business disputes. When it comes to business-to-consumer (B2C) disputes, the imbalance of powers between the parties compensates for the lack of mutuality (Schultz & Kaufmann-Kohler, 159).

However taken the stronger position on the internal market which marks the principle of the consumer protection, It is why the ADR Directive enables the unilateral nature agreement to be binding in context of arbitration when it is used during Business to Consumer aspect (B2C). If under the ADR Directive Arbitration will be used as the means of CADR it is interesting to what extent is New York Convention on the enforcement of International Arbitration Awards applicable and weather it will contribute to more affective enforcement of CADR outcomes in EU.

10 NYC in context of Consumer and online Dispute Resolution

NYC was adopted in the year of 1958, which makes it clear naturally that the drafters of the convention have not born in mind that in the far future there might have arisen the question whether International Arbitration Proceedings could be possible in the form of Online procedure, and therefore weather this could be fallen within the context of the NYC. NYC has set formal requirements for the validity of arbitration awards, and the party seeking the enforcement of the outcome must provide an award that is in writing, signed by the arbitrators, and that is either the authenticated original or a duly certified copy thereof (Hanriot, 2015: 10). Hence when the procedure is carried out online this convention might not accept the fulfillment of its requirements through the means of electronic procedure.

Even though the electronic means are shifting very fast the law seems to be slower to keep up with its pace, while some regulations allow and encourage the usage of the electronic comfort for instance the latest positions of the UNCITRAL on the recognition of electronic arbitration agreements, and the global trend in national legislations to give full recognition to electronic documents and electronic signatures, provide a suitable framework for the growth of ODR (Hill, 1999: 203). It depends to the national legislation of the countries to what extent do they support the recognition and enforcement of the documents produced through online means, which might come as an obstacle for the Online Dispute Resolution and especially during the time when consumers carry out the whole procedure online and have no hard copy of the entitled outcome.

It is well-known fact that the online procedures and the documents produced through it can be easily the subject of the fraudulent enforcement, therefore when the national

laws demand the hardcopies of the awards rended it might come as the extra protection for the right enforcement of the Justice however a burden to the fast outcome of ODR.

Non-Commercial Nature of the Consumer Disputes - Burden for the application of NYC?

In Practice it is accepted that NYC is applicable to the cases which have the nature of commercial disputes. Therefore it is questionable weather NYC will be applicable to the consumer disputes given their un-commercial character. As it is accepted through the most legislations of the countries the consumer disputes do not fall under the definition of "Commercial Nature" therefore the NYC could not be applicable to consumer disputer.
Then, the major hurdle for the use of the NYC in the context of consumer disputes concerns the traditional access to justice issues encountered by the consumer seeking redress. Indeed, the costs and the knowledge of this procedure might discourage the common consumer to the extent that any party seeking to enforce an award under the provisions of the NYC will have to go to court. (Hanriot, 2015: 15).

11 Private enforcement of CADR outcome

Private Enforcement of the CADR Outcomes could be managed in two types of enforcement one as it is referred self-regulatory, through using the means such as the public feed-backs, ratings and trust marks, and the other as the 'Self-execution', Automatic Enforcement. As the accent will be made on the automatic enforcement, here briefly will be discussed the example of Amazon. Amazon, has built one of the best customer services available,' (Grannis, 2012: 6 which undoubtedly contributed and still contributes to the success of the services provided by this famous trader. This kind of in-house "customer care" and complaints management department operated within many large traders has now taken an important part in the business management, and traders have created very effective methods to resolve customer issues (Creutzfield, 233-234).

As for the self-execution enforcement there are various mechanisms used: escrow accounts, credit card's chargeback, dedicated funds, or transaction insurance mechanisms (Hanriot, 2015: 18). However to make the example clear briefly the case of credit card's charge back will be discussed. For this automatic transaction the consumer will need to be the holder of the credit cards, the issuer of the credit card acts as an arbitrator in the relationship between the trader and the consumer. This mechanism allows a buyer, after he has authorized the transaction via a credit card, to request the reimbursement of the payment from the merchant under particular circumstances. The situations justifying the chargeback are different depending on national laws (Honrle, 2009: 38-39). However the national laws establish different scopes of the protection which might confuse the consumer. However the 'arbitrator' usually conducts a *mere prima facie* analysis that will be in favour of the consumer most of the time (Cortes, 2015: 70). Therefore the assumption can be made that this type of self executory

enforcement puts the trader in the difficult position, where it has to bear the cost not only of the purchased goods but also the arbitration proceeding.

For conclusion of this section it can be said that, weather the settlement made during the proceeding is binging or not is up to the ADR scheme, therefore it might produce the outcome in terms of recommendation or the agreement document, however there is no mechanism how the agreement reached during the CADR can be enforced, generally it is up to the countries to regulate the enforcement of the Mediation agreements, and unfortunately it also differs with the credibility in all the member states. Therefore if the agreement was binding in case the breach occurs, the consumer is supposed to proceed the claim in the court with the bases of contractual dispute, which will become another burden to the consumer. Thus it would had been advisable if the directive would insure the enforcement of the decisions made by the ADR schemes in order to had made this much more easier for the consumer and to have insured higher motivation of the participation.

12 Small claims Regulation Procedure – Alternative to the ADR directive?

If one looks over different regulations issued by the European Union Legislation bodies, the question weather quantity meaures quality arises. As with the aim to demolish the legal differences between the member states and make the cross-border litigation easier for the EU citizens several regulations has been issued one of them is regulation (EC) No 861/2007, establishing a European Small Claims Procedure, which aims that the decisions made in one country shall be directly enforceable in another member state and also supports the easy enforcement of the Judgments, also offers low cost and fast procedure of litigation. Therefore if the consumers are not restricted to bring small claims to the courts and are guaranteed by the enforcement of the decision easily, additionally the member states are supposed to enforce the foreign decisions as they were domestic ones, therefore individuals will not face the difficulties of recognition and enforcement of the decisions as discussed above. Given all this there is the question if the establishment of ADR directive and ODR regulation is really necessary?

13 Conclusion

EU Directive 2013/11/EU on ADR and Regulation (EU) No 524/2013 on ODR were issued by the parliament and the Council of Europe with the aim to promote further strengthening and development of the European Internal market through the aim of insuring the rights of consumers and strengthening their position in order to promote freer cross-border shopping among the countries. The directive and the regulation are interconnected acts of legislature which promote the development of each other. The ODR regulation is not self-independent as it only will be able to exist if the implementation of ADR Directive will be successful.

Even though the European Legislatures' intentions might be very noble, the Directive and Regulation as it was discussed in the article do not provide necessary means them to be successful on the implementation phase, as issues such as the Language barrier, Uncertain structure of the ADR Schemes, lack of knowledge of the consumers, non-existing tools for the outcomes of the CADR procedure to be enforceable will make it less likely the aims of the legislators to be achieved.

Notes

[1] Author's note: in this case alternative dispute resolutions such as Mediation, Conciliation and etc. are referred, as I strongly believe that while presenting the case in front of Arbitral Tribunal, the protection of parties rights are not put under stake. Mediation based on its features is concentrated on different aims rather than arbitration.

[2] Author's note: Originally it has been proposed that the acronym shall be Consumer Dispute Resolution (CDR), however it would still cause the confusion between the pre-required process of the consumer and the trader, where the consumer is required to submit its dispute to the competent CADR scheme.

References

[2010] EUECJ C-317/08, C-317/08, [2010] ECR I-221, [2010] 3 CMLR 17

Benohr, I. & Creutfeld-Banda, I., (2012) 'Alternative Dispute Resolution for Consumer in the European Union', 'Consumer ADR in Europe', (Oxford and Portland, Oregon: Hart Publishing) pp. 1-23.

Blake, S., Brown, J., Stuart Sime, S., (2012) *A PracticalApproacht oAlternative Dispute Resolution*, 2nd ed. (Oxford: Oxford University Presss).

Bogdan, M., (2015) *'The New EU Regulation on Online Resolution for Consumer Disputes',* Masaryk University Journal of Law and Technology, Vol. 9:1, (Masaryk) Pp. 155-163, https://journals.muni.cz/mujlt/article/view/2665/3698

Civic Consulting (Berilin), (2011). Study on cross-border alternative dispute resolution in the European Union, (Brussels, European Parliament) http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/adr_study_/adr_study_en.pdf.

Cortes, P. (2010), '*Online Dispute Resolution for Consumers in the European Union'* (New York: Routledge)

Creutzfeldt, N., (2013) "The Origins and Evolution of Consumer Dispute Resolution Systems in Europe" in Christopher Hodges & Adeline Stadler, eds, *Resolving Mass Disputes: ADR and Settlement of Mass Claims* Cheltham: Edward Elgar.

Creutzfeldt, N., (2015) *'Specific Problems of cross-border Consumer ADR: What Solutions?*', 'The Role of Consumer ADR in the Administration of Justice, New Trends in Access to Justice under EU Directive 2013/11', (Munic: sellier European law publishers GmBH)

DIRECTIVE 2013/11/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)

Eidemnueller, H., Engel, M., (2013) 'Against False Settlement: Against False Settlement: Designing Efficient Consumer Rights Enforcement Mechanisms in Europe'.

European Commission. (2011b). Commission staff working paper. Executive summary of the impact assessment, accompanying the document proposal for a directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes (directive on consumer ADR) and proposal for a regulation of the European Parliament and

of the Council on online dispute resolution for consumer disputes (regulation on consumer ODR). SEC (2011) 1409 final.

Grannis, K., (2012) "Amazon.com Tops in Customer Service, According to NRF Foundation/American Express Survey", *National Retail Foundation,* <https://nrf.com/media/press-releases/amazoncom-tops-customer-service-according-nrf-foundationamerican-express-survey>

Hill, R., (1999), "On-line Arbitration: Issues and Solutions", (Arbitration International).

Hodges, Chr., & Stadler, A., (2013) ' Resolving Mass Disputes : ADR and Settlement of Mass Claims (UK ; Northampton, MA, USA : Edward Elgar Publising).

Hofman, N., *'The Role of ADR Institutions: Mere Secrtariat or Supervisory Body-Lessons learned from Institutional Arbitration',* 'The Role of Consumer ADR in the Administration of Justice, New Trends in Access to Justice under EU Directive 2013/11', (Munic: sellier European law publishers GmBH)

Hornle, J., (2009) *Cross-border internet dispute resolution,* Eidemnueller & Engel, "Against False Settlement" (UK: Cambridge University Press,)

Inchausti, F. G., (2015) *'Specific Problems of cross-border Consumer ADR: What Solutions?*', 'The Role of Consumer ADR in the Administration of Justice, New Trends in Access to Justice under EU Directive 2013/11', (Munic: sellier European law publishers GmBH)

JushkYs, A., Ulbaite N., Alternative Dispute Resolution for Consumer Disputes in the European Union: Current issues and future opportunities. Issues of Business and Law, 4, 25-34,

Maria Luisa Villamar Lopez, M. L. (2015) , 'On Minimum Standards in Consumer ADR', 'The Role of Consumer ADR in the Administration of Justice, New Trends in Access to Justice under EU Directive 2013/11', (Munich: sellier European law publishers GmBH)

Musgrave, M. R. (1959) The Theory of Public Finance (New York: McGraw-Hill).

Radvan, M. (2014) Tax Law as an Independent Branch of Law in Central and Eastern European Countries, Lex localis - Journal of Local Self-Government, 12(4), pp. 813-827, doi: 10.4335/12.4.813-827(2014).

Rühl, G., (2015) *"Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: a Critical Evaluation of the European Legislature's Recent Efforts to Boost Competitiveness and Growth in the Internal Market*", Journal of Consumer Policy, Issue 4, Volume 38, (New York: Springer Science+Business Media) pp. 431-456

Schultz, T., (2002), "Online Dispute Resolution: an Overview and Selected Issues", (Geneva: United Nations Publications)

Schultz, T., Gabrielle Kaufmann-Kohler, G., (2004) '*Online Dispute Resolution: Challenges For Contemporary Justice,* (The Hague: Kluwer Law International)

The European Parliament and Council Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, (Directive on consumer ADR), Article 4 (h).

The Gallup Organization. (2011a). Flash Eurobarometer 300: Retailer attitudes towards cross-border trade and consumer protection. Analytical report. Retrieved April 30, 2012, from http://ec.europa.eu/public_opinion/flash/fl_300_en.pdf.

The Nielsen Company 2014, p. 5

TNS Opinion & Social, (2011), Special Eurobarometer 342: Consumer empowerment. http://ec.europa.eu/public_opinion/archives/ebs/ebs_342_sum_en.pdf.

UNCITRAL, *Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph **1,** of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, **10** June 1958,* UNGAOR, 61st Sess, Supp No 17, UN Doc A/61/17, Annex II.

UNCITRAL, Working Group III, (2013) Report of Working Group III (Online Dispute Resolution) on the work of its twenty-sixth session, UNCITRALOR, 46th Sess, UN A/CN.9/762, paras 13-24.

Van den Bergh, R. (2007), 'Should consumer protection law be publicly enforced? In W. Van Boom & M. Loos (Eds.), Collective enforcement of consumer law (Groningen: Europa Law Publishing), (pp. 179–203).

Wagner, G., (2014)"Private law enforcement through ADR: Wonder drug or snake oil?" 51:1 CML Rev 165

Wagner, G., (2014), 'Private law enforcement through ADR: Wonder drug or snake oil?', Vol. 51 Issue 1, Common Market Law Review, (UK: Kluwer Law International), pp. 165–194

Weber, F., (2015), 'Is ADR the Superior Mechanism for Consumer Contractual Disputes?—an Assessment of the Incentivizing Effects of the ADR Directive', Issue 3, Volume 38, (New York: Springer Science+Business Media) pp. 265-285.

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LEXONOMICA PRESS

The Cross-border Portability of Online Content Services in the Internal Market

EDITA BEGANOVIĆ

Abstract In December 2015 European Commission introduced Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market. The paper shows some of the causes for the Regulation of this kind to be presented, as well as most important points of discussion regarding the content of Regulation and their pros and cons. Proposal is presented in terms of consumer protection, while other legal fields are only slightly mentioned. It is estimated that there is approximately 29 million consumers who would potentially make use of the cross-border portability of online content services in the EU and that this percentage will grow in future.

Keywords: • cross-border portability • internal market • consumer • EU

CORRESPONDENCE ADDRESS : Edita Beganović, University of Maribor, Faculty of Law, Mladinska ulica 9, 2000 Maribor, Slovenia, email: beganovic.edita@gmail.com.

DOI 10.4335/978.961.6399.79.1.15
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

The increasing digitalization of data and the growing number of online content bring new challenges for the European Union, which wants to remove as many virtual borders between Member States as it can. Member States have different policies regarding the regulation of online content, sometimes causing EU citizens inability to use online content that they legally purchased in the territory of their country (Member State of habitual residence), while being temporarily in another Member State as the latter does not recognize free access of (specific) online content once they stepped on its territory. For example, in Slovenia Voyo[1] can be purchased, but at the exact moment when the Slovenian border is crossed, the access to the service is denied. There is a way to solve this problem via the VPN[2] technology, which virtually puts the user in Slovenia, and the user can access the content. Although use of VPN in Slovenia is legal, that does not mean it can be used anywhere and anytime. If a Slovenian user, currently in Germany, browse through VPN English online content, Slovenian, German and English laws have to be respected. If a VPN is used to access the content unavailable in Slovenia due to copyright, infringement of the latter is caused. However, in Slovenia user most probably will not be persecuted for this, as long as it is for non-commercial and personal use only.[3]

Recent expanding of Netflix to 130 countries, among which is Slovenia, has also highlighted the problem. Since Netflix does not have global licences for all of their contents, Slovenian user can access only to 17,63% of their TV series and 12,08% of their movies comparing to United States user. Austrian user can access almost three times more content than Slovenian. Nevertheless, the price of the package is similar in all three countries (as well as the others).[4] A problem occurs when Austrian user goes to Slovenia and he can only access to content that Netflix provides for Slovenia.[5] This kind of geo-blocking is frequently done without clear justification and amounts to unfair discrimination.[6]

2 Proposal for a regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market [7]

In December 2015 European Commission introduced Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market. Andrus Ansip[8] explained in simple words: "*We want to ensure the portability of content across borders. People who legally buy content – films, books, football matches, TV series – must be able to carry it with them anywhere they go in Europe."*[9] People would be entitled to subscribed or bought licensed programs in all Member States, not only in the domestic Member State, as long as purchase or subscription to the program concerned was carried in domestic Member State.

The legal basis of the Proposal derives directly from an Article 114 TFEU, which means that online services are classified as measures that facilitate the functioning of

Internal Market.[10] The Proposal is consistent with the EU policies in the field of consumer protection and Article 169 TFEU.[11]

In order for cross-border portability of online services to work, the next steps should be taken: establishing habitual residence, authentication requirements should be imposed on service providers, temporary presence as well as scope of application should be clearly defined and level playing field should be the same for all online service providers.[12]

Although the draft applies to online content services, it is restricted to certain services. The consumer must be able to access the service on a portable basis, without being limited to a specific location. They must also have a contract for availability in the given area, or must make a payment for the service, unless the consumer's member state of habitual residence is verified.[13] On the other hand, service providers who do not already offer portable services in their home country are not required to do so across borders.

Reactions to proposal are various. According to some, it leads to conflict between two legal branches, copyrights and competition, the latter being in fully accordance with the EU-wide digital single market, while a copyright law (currently) allows geographical restriction of license by the right owner in each EU Member State, and by that users are unable to access to licensed content when travelling to other Member States.[14] The Council of EU also made its own compromise proposal[15] that slightly enlightens the problems of Regulation.[16]

3 Problems

Most of comments regarding the Proposal of Regulation are connected to insufficient or confused comprehension of certain concepts, such as habitual residence, temporary residence and verification. Of course, financial costs and time frame for Regulation to be implemented raised a lot of interests, too.

Temporary and habitual residence

With new proposal right owners will find themselves in dilemma on how to prevent content that is only licensed for consumers in one Member State from being accessed by consumers in other Member States.[17] If proposal is confirmed, online content service providers will have to create a system to differentiate temporary and habitual residents in order to know whether subscribers are entitled to their services. If providers provide service to ineligible residents, they risk copyright infringement (this problem can be solved by pan-EU licence).[18] Council`s Proposal tries to determine temporary residents who are temporarily present in other Member States of the Union for purposes such as leisure, travel, business or study.[19] *The Council also requires that the subscriber "returns regularly" to this Member State, although there is no explanation of what "regularly" means. Once this residency is established, the presence of the subscriber in another Member State is always treated as "temporary", meaning online content providers may be required to provide services to subscribers outside the home territory*

for prolonged periods of time.[20] When trying to determine temporary presence in the time frame, one of the solutions for solving it could be the three months period according to right of residence for up to three months without any conditions or formalities in another Member State.[21] After that period EU citizens may have to register with the relevant authorities if living in the country longer than 3 months, but this is not the case in every EU country. However, the period and regulations after the 3 months period is not relevant to case. Another solution could be 12 months, since this is the maximum duration of studies or traineeships abroad[22]. Both solutions are oriented to loose application of regulation, while stricter regulation of temporary presence would probably consider only short term journeys – a day or two, few days. On the other hand, the European Consumer Organization interprets absence of specific time limits for enjoying portability like there are no limits. Furthermore, the Organization suggests prohibition of any kind of time limits to be put in the Regulation.[23] It is interesting that cable operators, mostly being online content service providers, agree on no time limits, stating: "*Any attempt to quantify in the licensing contracts the temporary presence in a Member State, for example by setting a limit of days, should be considered unlawful*."[24] Nevertheless, the answer for temporary presence should be solved with Regulation, as right-holders could decide upon the issue and the decision would not be in favour of consumers. [25]

Financial costs

Important factor is a financial cost for both, providers and consumers. According to European Commission the online content services provider would not have to take any measure to ensure the quality of delivery of such services outside the subscriber's Member State of residence.[26]

The Commission did not mention that access to services in other Member States must be free.[27] But it tries to avoid additional costs with fiction of in-territory use, meaning that even if the user is in another Member State, it will seem as the user is in his own Member State, in order for service provider not to need additional licences for providing online services across the border.[28] Still, service providers think implementation of technology should not be their burden. Thus, there should be possibility in Regulation for service providers to set additional charges.[29] Furthermore, Council proposed Regulation to be obligatory only for providers of online content service which are provided against payment of money and not to apply to service providers who offer online content services without payment of money and who do not exercise the option to enable the cross border portability of their services , so it does not impose any disproportionate costs. On the other hand, it allows those providers of an online content service provided without payment of money to choose to enable its subscribers who are temporarily present in a Member State to access and use the online content service provided that the subscriber's Member State of residence is verified by the provider in accordance with Regulation. Consequently, it causes exception for this Regulation to apply to that provider (provider of an online content service provided without payment of money). [30]

Verification

On the other hand, services free of charge will have to be provided for cross-border portability if they "verify" the subscriber's Member State of residence. The meaning of verification is not completely clear in this situation.[31] It can be interpreted differently by subscriber and right-holder, thus service provider can have legal certainty problems.[32] Consequently, meaning of verification should be put in Regulation as well. Thus, Council`s Proposal adds verification means:

In order to comply with the obligation set out in paragraph 1, […] the provider shall rely on the following verification means:

(a) an identity card or any other valid document confirming subscriber's Member State of residence;

(b) the billing address or the postal address of the subscriber;

(c) bank details such as bank account, local credit or debit card of the subscriber;

(d) the place of installation of a set top box or a similar device used for supply of services to the subscriber;

(e) the subscriber being a party to a contract for internet or telephone connection in the Member State;

(f) the subscriber paying a licence fee for other services provided in the Member State, such as public service broadcasting;

(g) sampling or periodic checking of Internet Protocol (IP) address to identify the Member State where the subscriber accesses and uses the online content service or identifying that Member State by other means of geolocation;

(h) a declaration by the subscriber on their Member State of residence;

(i) registration on local electoral rolls, if publicly available;

(j) the payment of local/poll taxes, if publicly available.[33]

Online content service provider can use only one verification mean or combination of them if it is necessary. The provider shall be entitled to request the subscriber to provide the information necessary for the verification of the Member State of residence. If the subscriber fails to provide that information and in consequence the provider is unable to verify the Member State of residence, the provider shall cease to be subject to the obligation set out in Article 3(1) with regard to the subscriber in question for as long as it cannot verify the subscriber's Member State of residence.[34]

Time

Important question concerning the topic is (in)sufficient time for online content service providers to prepare as it should come into force in 2017[35]. This transition period could get extended if it comes to complications such as long negotiations with service providers and right holders, as well as adaptation of platform architecture and software solutions.[36] The time period for Regulation to come to life is quite short and although it is reachable, time extensions are more than possible. In the European Council`s Proposal the Commission's original deadline for implementation is removed.

4 Conclusion

The cross-border portability of online content services is an important problem in the digital era, as it is estimated that there is approximately 29 million consumers who would potentially make use of it in the EU and that this percentage will grow in future as use of mobile devices is on the rise.[37] Not only consumers, but also content creators, right-holders and commercial users are affected by limited cross-border portability, most often because transaction costs prevent exercise of cross-border business opportunities.[38]

The new proposal is in favour of consumers, who will no longer look for the other semi-legal ways to access the online content. However, these other ways could stay relevant if the costs of cross-border portability of online content do not justify the facilitated access to online content abroad. It is those costs that have to be restricted to a minimum at the very beginning for the purpose of Proposal to be successful once it becomes regulation.

Notes

[1] VOYO is Slovenian online video store and television.

[2] A Virtual Private Network (VPN) is a network technology that creates a secure network connection over a public network such as the Internet or a private network owned by a service provider. A VPN can connect multiple sites over a large distance. See What is VPN? <http://whatismyipaddress.com/vpn> accessed: 30 December 2015.

[3] Matej Huš, 'Dostop do nedostopnega' (Monitor, November 2013) <http://www.monitor.si/clanek/dostop-do-nedostopnega/150027/> accessed: 13 March2016

[4] Gregor Grosman, 'TABELA: Netflix v Sloveniji z zgolj 12-odstotki filmov' (Večer, 12 January 2016) <http://www.vecer.com/clanek/201601126176037> accessed 13 March 2016

[5] Netflix subscribers have reported that they can already log into their Netflix accounts in countries other than their country of residence (or the country in which they subscribed to Netflix); but the content offered to them in the other countries is Netflix's local content in those countries, rather than the content from the subscriber's country of residence (or the country of their original subscription). See Marketa Trimble 'Proposed EU Regulation on Cross-Border Access to Copyrighted Content (Guest Blog Post) ' <http://blog.ericgoldman.org/archives/2016/05/proposed-eu-regulation-on-cross-border-access-to-copyrighted-content-guest-blog-post.htm> accessed: 11 May 2016

[6] 'What you need to know about the EU's plan for a digital single market' (Direct Marketing Association UK, 3 February 2016) <http://www.dma.org.uk/article/what-you-need-to-know-about-the-eu-s-plan-for-a-digital-single-market> accessed 13 March 2016

[7] Proposal for a regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, 2015/0284 (COD), COM(2015) 627 final. 9 December 2015

[8] Vice-President for the Digital Single Market

[9] European Commission - Press release, Commission takes first steps to broaden access to online content and outlines its vision to modernise EU copyright rules, 9 December 2015.

[10] Giuseppe Mazziotti and Felice Simonelli, 'Regulation on 'cross-border portability' of online content services: Roaming for Netflix or the end of copyright territoriality?' (Centre for European Policy Studies, 15 February 2016) <https://www.ceps.eu/publications/regulation-

%E2%80%98cross-border-portability%E2%80%99-online-content-services-roaming-netflix-or-end> accessed 13 March 2016

[11] Proposal for a regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market

[12] Emilie Anthonis, 'How to make portability work' (Association of Commercial Television in Europe, February 2016) <https://www.ceps.eu/sites/default/files/160215%20ACT%20-%20How%20to%20make%20portability%20work.pdf> accessed 13 March 2016

[13] Sam Churney, 'Cross border portability the next phase for European Commission' <http://www.tvbeurope.com/cross-border-portability-the-next-phase-for-european-commission> accessed 30 December 2015

[14] 'Cross-border portability of online content: European Commission values competition over copyrights' <http://www.osborneclarke.com/connected-insights/blog/cross-border-portability-online-content-european-commission-values-competition-over-copyrights/> accessed: 30 December 2015

[15] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market - Presidency Compromise Proposal, 13.4.2016

[16] Council`s Proposal was issued after the Conference and completed article. According to that, solutions written in Council`s Proposal are on equal level as any other solutions in the Article.

[17] 'Digital Single Market: Copyright reform and proposed new regulation on the cross-border portability of online content' <http://www.osborneclarke.com/connected-insights/blog/digital-single-market-copyright-reform-and-proposed-new-regulation-cross-border-portability-online-content/> accessed 30 December 2015

[18] Ibid.

[19] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market - Presidency Compromise Proposal, 13.4.2016

[20] 'Digital Single Market : delays and controversy as Commission's proposals on e-commerce, connected cars and digital content are finalised' <http://www.osborneclarke.com/connected-insights/blog/digital-single-market-delays-and-controversy-commissions-proposals-e-commerce-connected-cars-and-digital-content-are-finalised/> accessed 10 May 2016

[21] 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, [2004] L158/77, Art 6

[22] Erasmus+ for Higher Education Students and Staff, (European Commission, January 2015) <http://ec.europa.eu/education/opportunities/higher-education/doc/students-questions-answers_en.pdf> accessed 13 March 2016

[23] BEUC – The European Consumer Organisation, 'Proposal for a regulation on ensuring cross-border portability of content services, BEUC position' <http://www.beuc.eu/publications/beuc-x-2016-022_are_proposal_for_a_regulation_on_ensuring_cross-border_portability_of_content_services.pdf> accessed 13 March 2016

[24] Cable Europe Position Paper on the Commission proposed Regulation on Content Portability, 7 April 2016

[25] Giuseppe Mazziotti and Felice Simonelli, 'Regulation on 'cross-border portability' of online content services: Roaming for Netflix or the end of copyright territoriality?' (Centre for European Policy Studies, 15 February 2016) <https://www.ceps.eu/publications/regulation-%E2%80%98cross-border-portability%E2%80%99-online-content-services-roaming-netflix-or-end> accessed 13 March 2016

[26] Lisbeth Savill, 'European Commission Announces Its Intention to Regulate Cross-Border Portability of Online Content' < http://www.lexology.com/library/detail.aspx?g=fc7dd7dc-bc63-4fe6-af25-05aac665504c> accessed: 30 December 2015.

[27] EU to have portable online content by 2017. See European Commission - Press release, Commission takes first steps to broaden access to online content and outlines its vision to modernise EU copyright rules, 9 December 2015.
[28] Kristina Ehle, Jannis Werner, 'Travelling with your Online Account in Europe' (Morrison Foerster, 23 February 2016) <http://www.mofo.com/resources/publications/2016/02/160222onlineaccounteurope> accessed 13 March 2016
[29] Cable Europe Position Paper on the Commission proposed Regulation on Content Portability, 7 April 2016
[30] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market - Presidency Compromise Proposal, 13.4.2016
[31] Ibid.
[32] Emilie Anthonis, 'How to make portability work' (Association of Commercial Television in Europe, February 2016) <https://www.ceps.eu/sites/default/files/160215%20ACT%20-%20How%20to%20make%20portability%20work.pdf> accessed 13 March 2016
[33] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market - Presidency Compromise Proposal, Article 3B, 13.4.2016
[34] Ibid.
[35] Ibid.
[36] Emilie Anthonis, 'How to make portability work' (Association of Commercial Television in Europe, February 2016) <https://www.ceps.eu/sites/default/files/160215%20ACT%20-%20How%20to%20make%20portability%20work.pdf> Accessed 13 March 2016

[37] Tambiama Madiega, 'Briefing: Cross-border portability of online content services' (European Parliamentary Research Service, February 2016) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577970/EPRS_BRI(2016)577970_EN.pdf> accessed 13 March 2016
[38] Stephane Reynolds, 'Review of the EU copyright framework' (European Parliamentary Research Service, October 2015) <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS_STU(2015)558762_EN.pdf> accessed 13 March 2016

References

BEUC – The European Consumer Organisation, 'Proposal for a regulation on ensuring cross-border portability of content services, BEUC position' <http://www.beuc.eu/publications/beuc-x-2016-022_are_proposal_for_a_regulation_on_ensuring_cross-border_portability_of_content_services.pdf> accessed 13 March 2016

Cable Europe Position Paper on the Commission proposed Regulation on Content Portability, 7 April 2016

[1] 'Digital Single Market : delays and controversy as Commission's proposals on e-commerce, connected cars and digital content are finalised' <http://www.osborneclarke.com/connected-insights/blog/digital-single-market-delays-and-controversy-commissions-proposals-e-commerce-connected-cars-and-digital-content-are-finalised/> accessed 10 May 2016

'Cross-border portability of online content: European Commission values competition over copyrights' <http://www.osborneclarke.com/connected-insights/blog/cross-border-portability-online-content-european-commission-values-competition-over-copyrights/> accessed: 30 December 2015

'Digital Single Market: Copyright reform and proposed new regulation on the cross-border portability of online content' <http://www.osborneclarke.com/connected-insights/blog/digital-

single-market-copyright-reform-and-proposed-new-regulation-cross-border-portability-online-content/> accessed 30 December 2015

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, [2004] L158/77, Art 6

Emilie Anthonis, 'How to make portability work' (Association of Commercial Television in Europe, February 2016) <https://www.ceps.eu/sites/default/files/160215%20ACT%20-%20How%20to%20make%20portability%20work.pdf> accessed 13 March 2016

Erasmus+ for Higher Education Students and Staff, (European Commission, January 2015) <http://ec.europa.eu/education/opportunities/higher-education/doc/students-questions-answers_en.pdf> accessed 13 March 2016

European Commission - Press release, Commission takes first steps to broaden access to online content and outlines its vision to modernise EU copyright rules, 9 December 2015.

Gregor Grosman, 'TABELA: Netflix v Sloveniji z zgolj 12-odstotki filmov' (Večer, 12 January 2016) <http://www.vecer.com/clanek/201601126176037> accessed 13 March 2016

Giuseppe Mazziotti and Felice Simonelli, 'Regulation on 'cross-border portability' of online content services: Roaming for Netflix or the end of copyright territoriality?' (Centre for European Policy Studies, 15 February 2016) <https://www.ceps.eu/publications/regulation-%E2%80%98cross-border-portability%E2%80%99-online-content-services-roaming-netflix-or-end> accessed 13 March 2016

Kristina Ehle, Jannis Werner, 'Travelling with your Online Account in Europe' (Morrison Foerster, 23 February 2016) <http://www.mofo.com/resources/publications/2016/02/160222onlineaccounteurope> accessed 13 March 2016

Lisbeth Savill, 'European Commission Announces Its Intention to Regulate Cross-Border Portability of Online Content' < http://www.lexology.com/library/detail.aspx?g=fc7dd7dc-bc63-4fe6-af25-05aac665504c> accessed: 30 December 2015.

Matej Huš, 'Dostop do nedostopnega' (Monitor, November 2013) <http://www.monitor.si/clanek/dostop-do-nedostopnega/150027/> accessed: 13 March2016

Proposal for a regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, 2015/0284 (COD), COM(2015) 627 final. 9 December 2015

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market - Presidency Compromise Proposal, 13.4.2016

Sam Churney, 'Cross border portability the next phase for European Commission' <http://www.tvbeurope.com/cross-border-portability-the-next-phase-for-european-commission> accessed 30 December 2015

Stephane Reynolds, 'Review of the EU copyright framework' (European Parliamentary Research Service, October 2015) <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS_STU(2015)558762_EN.pdf> accessed 13 March 2016

Tambiama Madiega, 'Briefing: Cross-border portability of online content services' (European Parliamentary Research Service, February 2016) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577970/EPRS_BRI(2016)577970_EN.pdf> accessed 13 March 2016

What is VPN? <http://whatismyipaddress.com/vpn> accessed: 30 December 2015.

'What you need to know about the EU's plan for a digital single market' (Direct Marketing Association UK, 3 February 2016) <http://www.dma.org.uk/article/what-you-need-to-know-about-the-eu-s-plan-for-a-digital-single-market> accessed 13 March 2016

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Determining Locus Solutionis in Contractual Disputes on the Internet

DANIJELA VRBLJANAC

Abstract International jurisdiction for contractual disputes on the EU level is regulated by the Brussels I bis Regulation. The respective instrument confers international jurisdiction to courts of the Member State in which the obligation in question is to be performed (Art. 7(1)(a)). The place of performance is concretised as the place of delivery and place of provision of services if the contract at issue is sale of goods or provision of services, respectively (Art. 7(1)(b)). It follows that the internet context becomes relevant when goods or services are to be delivered or provided online. The author will argue that those cases can either be characterised as provision of services or other contracts which, for the purpose of the Brussels I, fall into the ambit of general provision on establishing jurisdiction in matters relating to contracts (Art. 7(1)(a)). They cannot be qualified as sale of goods due to the nature of goods which may be acquired online and intellectual property issues necessarily involved. The aim of this paper is to propose a manner in which the provision at issue should operate in contractual disputes on the internet, having regard of principles the Court of Justice of the European Union established interpreting that jurisdictional rule.

Keywords: • Brussels I bis Regulation • contractual disputes • international jurisdiction • internet

CORRESPONDENCE ADDRESS : Danijela Vrbljanac, Department of International and European Private Law at the Faculty of Law, University of Rijeka, Croatia, email: dvrbljanac@pravri.hr.

DOI 10.4335/978.961.6399.79.1.15
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, pp. 1-32, hereinafter: the Brussels I bis Regulation) which entered into force in January 2015, thus replacing Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, pp. 1-23, hereinafter: the Brussels I Regulation) represents one of the most important legal sources of European procedural law containing rules on establishing international jurisdiction in civil and commercial matters. The focal point of this paper is the provision of Art. 7(1) of the Brussels I bis Regulation (formerly Art. 5(1) of the Brussels I Regulation and Art. 5(1) of Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299, 31.12.1972, pp. 32-42) which confers international jurisdiction for contractual disputes to courts in the Member State in which the contract is to be performed. With the expansion of the Web 2.0, courts will be increasingly confronted with the challenging task of adapting this rule, based on the close territorial connection between the dispute and the territory of Member States, to internet disputes which defy the geographic borders. The analysis of internet disputes in this paper will be limited to matters relating to contracts that fall into the ambit of Art. 7(1) of the Brussels I bis Regulation, i.e. P2P and B2B contracts. After giving the insight into the interpretation of the Court of Justice of the European Union (hereinafter: the CJEU) concerning the respective provision, the author offers the solution for determining the place of performance online.

2 The Provision on Jurisdiction in Matters Relating to a Contract

According to subparagraph (a) of Art. 7(1) of the Brussels I bis Regulation, jurisdiction is conferred to courts for the place of performance of the obligation in question. Subparagraph (b) specifies the place of performance for two most common types of contracts, i.e. sale of goods and provision of services. In the case of the sale of goods contract, the place of performance is the place where the goods were delivered or should have been delivered, while the place where the services were provided or should have been provided is the relevant jurisdictional criterion for the provision of services contract. It stems from the subparagraph (c) that subparagraph (a) should be applied only when the contract at issue is not the one for the sale of goods or provisions of services.

2.1 The Scope of the Provision

The CJEU provided the autonomous interpretation of the term ‘matters relating to a contract’ for the purposes of the Brussels I.[1] It was first established that the respective term is ‘not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another’ (Judgment in *Handte v TMCS*, C-26/91, EU:C:1992:268, paragraph 15). This principle originates from the case in which the French court expressed its doubts whether it may, for the purposes of the Brussels I,

qualify the relationship between the manufacturer and the sub-buyer, who bought goods from the intermediate seller in the chain of contracts, as the contractual one. The negative definition of contract was later shifted into the one in the affirmative, according to which the existence of the contract 'presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based' (judgment in *Engler*, C-27/02, EU:C:2005:33, paragraph 51). This unusual shift of the negative definition into the one in the affirmative and consequential broadening the scope of the provision may be explained by the initial concern of the CJEU of construing the term too extensively and may be a direct consequence of the wording of the question referred for the preliminary ruling.

Even though the provisions of special jurisdiction are to be interpreted restrictively, being an exception form the general jurisdictional rule (see Bogdan, 2012: 43), the notion of the contract should not be understood too narrowly. It entails the relationship arising from the membership in the association, since the rights and obligations arising out of it are similar to ones which originate from the contract (judgment in *Peters v Zuid Nederlandse Aannemers vereniging*, C-34/82, EU:C:1983:87, paragraph 13). The jurisdiction should be determined in accordance with Art. 7(1) of the Brussels I bis Regulation even when one of the parties contests the existence of the contract. If it were not so, the efficiency of the provision would be called into question every time a party would challenge the existence of the contract (judgment in *Effer Spa v Kantner*, C-38/81, EU:C:1982:79, paragraph 7).

2.2 The Interpretation of the Provision

The original text of the Brussels Convention did not contain the provision in subparagraph (b).[2] Regardless of the type of the contract, the jurisdiction was conferred to the court for the place of performance of the obligation in question. Since every contract has at least two obligations, the CJEU clarified in *De Bloos* which one is relevant for establishing jurisdiction. It is the one upon which the plaintiff's claim is founded (judgment in *De Bloos v Bouyer*, C-14/76, EU:C:1976:134, paragraph 11 and 13).[3] However, if the plaintiff contends that the dispute is based on two or more obligations of equal rank which must be performed in different Member States, the courts of each of those Member State are only competent with respect the obligation which was or should have been performed in that Member State. If the plaintiff wants to bring claims based on those obligations before the same court, he may do so before the court which is competent pursuant to provision on general jurisdiction based on defendant's domicile (judgment in *Leathertex*, C-420/97, EU:C:1999:483, paragraph 41 and 42). The defendant's domicile will again be the only available forum in the event that the obligation in question is the obligation not to do something, which cannot be geographically limited and is performed in multiple places. The CJEU has come to this conclusion in the case concerning the contract between two companies which agreed to act exclusively and not to commit themselves to other partners (judgment in *Besix*, C-256/00, EU:C:2002:99, paragraph 55).

Once it was resolved which obligation is the relevant one, the issue of determining the place of performance has arisen. In the landmark case *Tessili*, the Italian company

Tessili, which manufactured the women ski suits, sold them to the German company Dunlop. The ski suits were sent to Dunlop through the carrier engaged by Dunlop. The poor quality of the ski suits gave rise to the dispute, in which the issue appeared whether the obligation is performed in Italy where the suits were handed over to the carrier, or in Germany, where the buyer received the goods. The CJEU decided not to adopt the autonomous qualification it usually resorts to and decided that the place of performance of the obligation in question is to be determined in accordance with the applicable law (judgment in *Industrie tessili italiana v Dunlop AG*, C-12/76, EU:C:1976:133, paragraph 15). In other words, the court seised must, before even establishing if it has competence to discuss the case, determine the applicable law.[4] With the aim of simplifying this process for most common types of contracts, the subparagraph (b), or the *Tessili* provision as it is sometimes referred to, was introduced with the Brussels I Regulation. Subparagraph (b) is to be interpreted autonomously, without reference to *Tessili* or *De Bloos* (Mankowski, 2012: 159-160, paragraph 96).

The subparagraph (b) does not address the situation when the goods are to be delivered or the services are to be provided in several places. The solution was once again offered by the CJEU. If the delivery of goods must be performed in different places in the same Member State, it must first be established if there is a principal place of delivery based on economic criteria. If there is, the court for that place is competent to hear all the claims based on the contract. If there is no principal delivery, the plaintiff may institute the proceedings in the court for the place of delivery of its choice (judgment in *Color Drack*, C-386/05, EU:C:2007:262, paragraph 45). This principle was partly applied in the case in which the services were to be provided in several places in different Member States (judgment in *Rehder*, C-204/08, EU:C:2009:439, paragraphs 32-28). If the place of the main provision of services cannot be determined, the place where the provider of the services has carried out his activities in the most part should be relevant, provided that this is in line with the parties' intentions based on the provisions of the contract. For the purpose of the latter, the facts of the case may be taken into account, particularly the duration of time spent and the importance of the activities carried out. If the previous criteria fail, the domicile of the provider of the service should be considered as the place of the main provision of services (judgment in *Wood Floor Solutions Andreas Domberger*, C-19/09, EU:C:2010:137, paragraphs 40-42).

3 Determining the *Locus Solutionis* Online

In the context of the internet, the respective provision becomes cumbersome when the goods to be delivered are digital or services must be provided online. The mere fact that the contract was concluded online will not make difference, since the Brussels I does not accept the *locus contractus* as the relevant jurisdictional criterion.

3.1 Delivering Digital Goods

The term digital goods refers to goods that do not exist in material world, but the virtual one (Watkins, Denegri-Knott, Molesworth, 2016: 44), i.e. the non-rivalrous goods in the sense that consumption by one consumer does not prevent simultaneous consumption by other consumer (Murray, 2013: 11). Digital goods which may be

acquired online are electronic books, magazines, music, movies, photographs and software. What characterises acquiring those goods is the fact that they cannot be fully owned by the acquirer (Watkins, Denegri-Knott, Molesworth, 2016: 45) in the way the material goods may be. In the offline context, a person buying a DVD becomes the owner of the plastic carrier of the content, it does not automatically become the owner of the content itself, but merely has the permission to use it (Gliha, 2006: 807). When the digital goods are being acquired online, the digital content necessarily becomes separated from the carrier; hence the rights of the acquirer regarding the goods cannot be described as ownership. That is why acquiring the goods cannot be qualified as the sale of goods.[5] Even the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods excludes from its scope of application goods like CDs and DVDs which serve as merely the carrier of the digital contents. On the other hand, goods like household appliances and toys in which the digital content has a subordinate function fall into the ambit of the Proposal (Brussels, 9.12.2015, COM(2015) 635 final, 2015/0288 (COD), Recital 13 and Art. 1(3)).

The CJEU recognised this particularity of the digital goods in *Falco Privatstiftung* (judgment in *Falco Privatstiftung*, C-533/07, EU:C:2009:257). The plaintiffs were Falco Privatstiftung, an Austrian foundation managing the copyright of the late Austrian singer Falco and Mr Thomas Rabitsch, domiciled in Austria, who is a former member of the singer's rock group. The defendant was Ms Weller-Lindhorst, domiciled in Germany who sold video and audio recordings of a concert performed by the singer and the rock group. She concluded a licensing agreement with the plaintiffs concerning video recordings pursuant to which she had the right to sell the recordings in Austria, Germany and Switzerland (Opinion of Advocate General Trstenjak delivered on 27 January 2009 in case *Falco Privatstiftung and Rabitsch*, C- 533/07, EU:C:2009:34, paragraph 12.). The national court wanted to establish whether the contract at issue may be considered as the provision of services for the purpose of establishing international jurisdiction. The CJEU answered that the jurisdiction should be determined in accordance with the subparagraph (a). The licensing agreement cannot be qualified as the contract for the provision of services, since the owner of the intellectual property right does not perform a service actively but solely obliges to permit the licensee to exploit the right. For the contract to be qualified as the one for the provision of services, it is necessary that a party actively provides a service in return for remuneration (judgment in *Falco Privatstiftung*, C-533/07, EU:C:2009:257, paragraph 29 and 31.).

Given that subparagraph (b) is inapplicable, international jurisdiction for acquiring goods online, should be established in accordance with subparagraph (a). Therefore, *Tessili* and *De Bloos* doctrines are applicable for establishing international jurisdiction. Whether the obligation at issue is payment or the delivery of goods, or perhaps another contractual obligation, the performance of the obligations should be established in accordance with the applicable law, unless the parties agreed on the place of performance of that obligation (see judgment in *MSG v Les Gravières Rhénanes*, C-106/95, EU:C:1997:70). Considering that the rules on applicable law for contracts are unified at the EU level, the applicable law will be established in accordance with Art. 4(2) of 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, pp. 6-16) pursuant to which the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. Since the provision establishes applicable law for the entire contract, all the obligations will most likely be governed by the same applicable law (see Cordero Moss, 1999: 387), unless the *dépeçage* is triggered. The characteristic performance is usually the non-pecuniary obligation, the obligation which represents the centre of gravity of the contract and performs the socio-economic function of the contract (Giuliano and Lagarde, Report on the Convention on the law applicable to contractual obligations Oj C 282, 31.10.1980, pp. 1-50; see also McParland, 2015: 424-427, paragraphs 10.341-10.353). In the case of supply of the digital goods, that obligation is performed by the supplier. Therefore, the place of performance of the obligation and international jurisdiction will be determined in accordance with the law of the supplier's habitual residence.

3.2 Providing Online Services

Services which are provided online may be divided into two categories: services that can only be provided online, which are provided by certain internet service providers, e-shopping, e-banking and e-finance internet sites and the ones which may be provided in both online and 'offline' environment, like different educational courses or consulting services. In any case, jurisdiction is conferred to courts for the place of provision of services and determining this place in the internet context presents difficulties. For instance Polish and Estonian national reports on the application of the Brussels I Regulation indicated that national courts came across obstacles when trying to localise the provision of non-physical services (Hess, Pfeiffer and Schlosser, Study JLS/C4/2005/03, Report on the Application of Regulation Brussels I in the Member States, Munich, Final Version, September 2007, p. 95).

Providing services online may be localised in several places, like the place of uploading, the place of downloading, service provider's establishment, the service recipient's establishment, the place where the servers are situated.[6] The place of uploading and the place of downloading may be completely random and fortuitous places easily manipulated by both parties. For instance, in the Polish national report on the application of the Brussels I Regulation, it was suggested that the place of downloading should not be relevant, since the recipient may pass through several Member States while downloading the content (European Civil Procedure: Study JLS/C4/2005/03 – Evaluation of Application of Regulation 44/2001, National Report – Poland, Warsaw, July, 2006, pp. 32-33). The servers may be situated in the country that has no connection with the parties or the dispute. From the perspective of the legal certainty requirement,[7] the parties domicile may seem as the most appropriate choice.
The answer to the presented issue may be found in the CJEU's case law. In *Car Trim*, one of the cases on the interpretation of the place of the delivery of goods, the CJEU clarified that the place of delivery is deemed to be the place where the physical transfer of goods took place, by which the purchaser obtained the power of disposal of the goods, since the main purpose of the sale of goods contract is the transfer of those goods from the seller to the purchaser. This issue has arisen since the goods were

transferred to the carrier before they reached the purchaser (judgment in *Car Trim*, C-381/08, EU:C:2010:90, paragraphs 60-61.). The same principle was later followed in drafting the text of the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, Brussels, 9.12.2015, COM(2015) 634 final, 2015/0287 (COD)). According to Art. 5(2), the supply will take place when the digital content is supplied to the consumer or to the third party chosen by the consumer, whichever happens earlier. The same criterion should be followed for establishing the place of provision of online services for the purposes of the subparagraph (b) of the Brussels I bis Regulation. If the service is being downloaded from several places, the CJEU's principles established in cases of provision of services in offline environment should be applied, according to which the place of the main provision of services is relevant. In the absence of the latter, it must be determined where activities are carried out in the most part. If this fails as well, the domicile of the provider of the service may be considered as the place of the main provision of services. There is also the possibility of replacing the place of downloading as the place of receiving the service with the domicile of the recipient of the service. That way, the *Cart Trim* principle would be party followed and the jurisdiction would be based on the criterion which is more in line with the principle of legal certainty.[8]

4 Conclusion

The operation of the Brussels I bis jurisdictional rule for matters relating to contracts, regulated in Art 7(1) requires certain adaptation to internet disputes when digital goods are being delivered online or services are being provided online. In this respect, it must be noted that those contracts will either be qualified as other contracts in the sense of paragraph (a) or provision of services from the subparagraph (b). They should not be characterised as the sale of goods contracts since the ownership over digital goods is not transferred to its acquirer. The acquirer is merely permitted to use the goods. While the provided analysis proves that the relevant provisions can be adequately adapted to the internet environment, the unfortunate consequence of differing the contracts that fall within the subparagraph (a) from those which are governed by the subparagraph (b) is the fact that the jurisdiction will be determined in substantially different ways. In the case of acquiring the digital goods online, operative parts of early CJEU cases, *Tessili* and *De Bloos*, are applicable meaning that the deciding court will have to establish whether it has jurisdiction in accordance with the law applicable to the obligation in question. On the other hand, determining the international jurisdiction for provision of online services should follow autonomous determination of the place of performance established in *Car Trim.*

Notes

[1] The term Brussels I is used for reference to the entire jurisdictional system established with the Brussels Convention, the Brussels I Regulation, the Brussels I bis Regulation.

[2] Art. 5(1) of the original text of the Brussels Convention, merely stated that in matters relating to contracts the competent courts were courts for the place of performance of the obligation in question. The provision was amended with the Convention of 26 May 1989 on the accession of

the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic (89/535/EEC) by adding to the existing text the rule that for individual contracts of employment, the place of performance of the obligation in question is deemed to be in the place where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is situated.

[3] Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (78/884/EEC), amended certain language versions of Art 5(1) clarifying that the relevant obligation is the one which forms the basis of the claim.

[4] See for instance case *Definitely Maybe (Touring) Ltd. v Marek Lieberberg Konzertagentur G.m.b.H.* [2001] 2 Lloyd's Rep. 455. The plaintiff was the English company which provided the services of the band Oasis to organisers of the concerts, while the defendant was the German company that organised two festivals in Germany. Since one of the Gallagher brothers did not perform at the festival, the festival organisers refused to pay the entire amount of the agreed price. As a consequence, the plaintiff instituted the proceedings in England. English court had to first establish the applicable law for the contract so it could decide on its competence. Under German law, a place of performance the obligation to pay is the debtor's domicile, in this case Germany, while the English law provides that the place of performance of payment is a place where money is to be received.

[5] For the similar solution, see author's previous article Vrbljanac, 2015: 741. There are also differing opinions, see for instance Wang, 2010: 52-57.

[6] For different propositions, see Hörnle, 2009: 126 and Wang, 2010: 52-57.

[7] On legal certainty as one of the cornerstones of the Brussels I system, see recital 16 of the Brussels I bis Regulation and judgment in *Owusu*, C-281/02, EU:C:2005:120, paragraph 38.

[8] This approach has already been suggested by the author, see Vrbljanac, 2015: 747.

Legislation

Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Consolidated version, OJ L 299, 31.12.1972, pp. 32-42.

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, pp. 1-23.

Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, Brussels, 9.12.2015, COM(2015) 635 final, 2015/0288 (COD).

Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, Brussels, 9.12.2015, COM(2015) 634 final, 2015/0287 (COD).

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, pp. 6-16.

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, pp. 1-32.

Judgments

Besix, C-256/00, EU:C:2002:99.

Car Trim, C-381/08, EU:C:2010:90.

Color Drack, C-386/05, EU:C:2007:262.

De Bloos v Bouyer, C-14/76, EU:C:1976:134.
Definitely Maybe (Touring) Ltd. v Marek Lieberberg Konzertagentur G.m.b.H. [2001] 2 Lloyd's Rep. 455.
Effer Spa v Kantner, C-38/81, EU:C:1982:79.
Engler, C-27/02, EU:C:2005:33
Falco Privatstiftung, C-533/07, EU:C:2009:257.
Handte v TMCS, C-26/91, EU:C:1992:268.
Industrie tessili italiana v Dunlop AG, C-12/76, EU:C:1976:133.
Leathertex, C-420/97, EU:C:1999:483.
MSG v Les Gravières Rhénanes, C-106/95, EU:C:1997:70.
Opinion of Advocate General Trstenjak delivered on 27 January 2009 in case *Falco Privatstiftung and Rabitsch*, C-533/07, EU:C:2009:34.
Owusu, C-281/02, EU:C:2005:120.
Peters v Zuid Nederlandse Aannemers vereniging, C-34/82, EU:C:1983:87.
Rehder, C-204/08, EU:C:2009:439
Wood Floor Solutions Andreas Domberger, C-19/09, EU:C:2010:137.

References

Bogdan, M. (2012) Concise Introduction to EU Private International Law (2nd edn, Groningen: Europa Law Publishing).
Cordero Moss, G. (1999) Performance of Obligations as the Basis of Jurisdiction and Choice of Law (Lugano and Brussels Conventions Article 5(1) and Rome Convention Article 4), Nordic Journal of International Law 68(4), pp. 379-396.
Fangfei Wang, F. (2010) Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China (Cambridge: Cambridge University Press).
Gliha, I. (2006) Prava na autorskim djelima nastalim u radnom odnosu i po narudžbi, Zbornik Pravnog fakulteta u Zagrebu, 56 Poseban broj, pp. 791-936.
Hörnle, J (2009) The Jurisdictional Challenge of the Internet in Edwards, L. and Waelde, C. (eds), Law and the Internet (3rd edn, Oxford, Hart Publishing, 2009) pp. 121-158.
Mankowski, P. (2012) Art. 5 in Magnus U. and Mankowski P. (eds), Brussels I Regulation (2nd revised edn, Munich: Sellier. European Law Publishers) pp. 88-294.
McParland, M. (2015) The Rome I Regulation on the Law Applicable to Contractual Obligations (Oxford: Oxford University Press).
Murray, A. (2013) Information Technology Law, The law and society (2nd edn, Oxford: Oxford University Press).
Sikirić, H. (2013) Određivanje međunarodne nadležnosti Uredbe Vijeća (EZ) br. 44/2001 od 22. prosinca 2000. o sudskoj nadležnosti i priznanju i ovrsi odluka u građanskim i trgovačkim predmetima i hrvatski Zakon o međunarodnom privatnom pravu - sličnosti i razlike, in Tomljenović, V. and Kunda, I. (eds), Uredba Bruxelles I: izazovi hrvatskom pravosuđu/The Brussels I Regulation: Challenges for Croatian Judiciary (Rijeka: Faculty of Law, University of Rijeka) pp. 41-112.
Vrbljanac, D. (2015) International jurisdiction for Internet disputes arising out of the contractual obligations in: Bottis, M., Alexandropoulou, E., Iglezakis, I. (eds.), Proceedings, 6th International Conference on Information Law & Ethics, ICIL, 2014, Lifting the Barriers to Empower the Future of Information Law & Ethics (Thessaloniki: University of Macedonia), pp. 726-752.
Watkins, R. D., Denegri-Knott, J., Molesworth, M. (2016) The relationship between ownership and possession: observations from the context of digital virtual goods, Journal of Marketing Management 32(1-2), pp. 44-70.
Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, Study JLS/C4/2005/03, Report on the Application of Regulation Brussels I in the Member States, Munich, Final Version, September 2007.

European Civil Procedure: Study JLS/C4/2005/03 – Evaluation of Application of Regulation 44/2001, National Report – Poland, Warsaw, July, 2006.

Mario Giuliano and Paul Lagarde, Report on the Convention on the law applicable to contractual obligations, [1980] OJ C282/1.

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LEXONOMICA PRESS

The Regulation on Establishing a European Account Preservation Order: A Milestone for the Effective Enforcement of Judgments in the European Union?

ANASTASIA GIALELI

Abstract Despite the abolition of exequatur in the Brussels Ia Regulation, the cross-border enforcement of ex parte provisional measures while maintaining their surprise effect is still impossible in the EU. The EAPO Regulation, which will apply as an alternative to national laws and should moreover function as a model for their modernisation, aims at compensating this shortcoming at least with regard to the attachment of bank accounts. In this article, I will point out the advantages and drawbacks of the EAPO Regulation. I will try to answer the main question as to whether the primary objective of the EAPO Regulation, i.e. finding an appropriate balance between the creditor's interest in effective enforcement of claims and the debtor's interest in being protected against an abuse of the preservation order, has been achieved. I will also examine whether the recently enacted rules should be considered as a decisive step towards the Europeanisation of civil procedure. Both questions should be answered at the current stage of development by and large in the affirmative.

Keywords: • EAPO • European Account Preservation Order • provisional measures • attachment of bank accounts • cross-border enforcement

CORRESPONDENCE ADDRESS : Anastasia Gialeli, Faculty of Law - University of Freiburg, Germany, Slovenia, email: anastasia.gialeli@jura.uni-freiburg.de.

DOI 10.4335/978.961.6399.79.1.16
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 INTRODUCTION

The European Legislature established the Brussels I Regulation (Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1) as the cornerstone in the rapidly developing field of European civil procedural law. After slightly more than 10 years, the Brussels I Regulation has recently been recast as Brussels Ia (Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1). The main achievement of this reform is the abolition of the exequatur proceedings, a step that strengthens the free movement of judgments based on the principle of mutual trust. In this regard, Brussels Ia solely facilitates the coordination of national laws and proceedings, promoting thereby the gradual establishment of an area of freedom, security and justice in the EU, but does not directly harmonise the national enforcement laws of the Member States. Yet, the creation of a EU civil procedural law is an ongoing process, which proceeds through 'bottlenecks', such as the competence limits of the EU as outlined in Article 81 TFEU and the principle of procedural autonomy of the Member States.

At the current stage of development, civil procedure itself, even in international litigation, is still governed exclusively by national law pursuant to the *lex fori* principle. The law of enforcement is traditionally closely connected to national sovereignty and thus left basically untouched by the EU legislature; therefore, it has been called the 'Achilles heel of the EU procedural law' (European Commission, Green Paper COM[2006]618 final, p 2). However, national procedural laws and especially the practices of enforcement vary considerably throughout Europe (See Hess, Study No JAI/A3/2002/02, version of 2/18/2004,). These divergences imply additional costs, time and legal barriers to the parties in cross-border cases, thus potentially deterring a creditor from asserting his claims. Thereby, the access to justice for EU citizens becomes cumbersome, which in turn weakens the functioning of the internal market. Nevertheless, the European legislature has already made some steps towards the harmonisation of civil procedure by means of the so-called 'Regulations of the Second Generation' (Small Claims Regulation, European Enforcement Order, European Payment Order), which have established uniform European procedures for specific matters supplementing national laws.

The latest one of this kind of measures of procedural integration is the Regulation No. 655/2014 of 15.5.2014 establishing a mostly uniform procedure, which enables the creditor to obtain a protective measure in the form of a bank account preservation order[1] (European Account Preservation Order, hereinafter: EAPO). The creditor can apply for the EAPO and block funds in bank accounts held by the debtor or on his behalf in every Member State, in order to prevent the transfer or withdrawal of funds if there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim will be impeded or made substantially difficult (See Recital 7 and Article 1 of the EAPO Regulation).

The main objectives (See European Commission, Proposal, COM[2011] 445 final, p 3; Recital 4 EAPO Regulation) of the Regulation are, in the short term, to facilitate cross-border debt recovery in civil and commercial matters by freezing the debtor's easily movable assets and thereby to secure the subsequent final enforcement of the claim. In the long term, the Regulation aims at contributing to the development of the EU's internal market as outlined in the Europe 2020 Strategy for Growth and to improve the efficiency of enforcement of judgments in the Union as enshrined in the Stockholm Programme of 2009 (Council, The Stockholm Programme, [2010] OJ C115/1).

The fact that the EAPO Regulation consists of 54 Articles and 51 Recitals makes it on the one hand a large and complicated piece of legislation, despite its sectoral limitation in a bank account attachment, and on the other hand constitutes a rather unusual proportionality between the sum of Recitals and Articles in EU legal acts, reflecting thereby the difficulty to find political acceptance in the details during the law-making process. Thus, the national judge may find guidelines or clarifying examples stipulated in the legally non-binding Recitals instead of in Articles.

2 Main features of the EAPO regulation

2.1 Scope and availability

The EAPO Regulation will apply by 18 January 2017 and the designed procedure will be available for creditors domiciled in a Member State bound by the Regulation. Likewise, an EAPO can only be enforced in bank accounts maintained in such a Member State irrespective of the debtor's domicile (Recital 48 and Article 4 (6) and (7)). As the UK and Denmark do not participate in the Regulation, creditors domiciled and accounts held in these Member States or in third States do not fall into the scope of the Regulation. This provision is technically consequent, but has been criticised as discriminatory based on nationality, because creditors domiciled in the UK or Denmark, cannot apply for an EAPO, in order to freeze a debtor's account held in a participating Member State, while their bank accounts maintained in such a Member State can well be seized.

Secondly, the Regulation applies according to Article 2 only to pecuniary claims in civil and commercial cross-border cases, while matrimonial and similar relationships, wills and succession, maintenance obligations arising by reason of death, insolvency, social security and arbitration are expressly excluded. However, an EAPO can be issued, in order to secure a claim related to maintenance obligations arising from a family relationship (See Župan, 2015, 163).

The cross-border element presupposes (Article 3) that the bank account is maintained in another Member State than either the Member State of the court seized of the application or the Member State of the creditor's domicile. In contrast, the creditor cannot apply for an EAPO related to a bank account maintained in a Member State, if he wants to freeze at the same time and with the same order a bank account maintained in another Member State, in which he and the court seized are located. In such a case,

the creditor has, pursuant to Recital 10, to initiate two separate proceedings, ie one for an EAPO and another for a national equivalent measure.

A third main feature of the EAPO Regulation to be pointed out is that according to Article 2 the EAPO constitutes only another option[2] for the creditor offering him an alternative to the provisional measures, ie preservation orders, provided for by national laws. Regarding the relationship of the EAPO Regulation to national law, Article 46(1) provides that all procedural issues not specifically dealt with in the Regulation will be governed by the law of the Member State in which the procedure takes place. This provision is an accurate expression of the still untouched principle of procedural autonomy of the Member States, which, although, given the large number of unclarified matters in the Regulation itself and the several explicit references to national laws, does not foster legal certainty, but may give rise to forum shopping and cause considerable divergences in the Regulation's implementation between the Member States.

The creditor who fulfils the above criteria and falls into the scope of the Regulation can apply for an EAPO at any time, ie before initiating or during the proceedings on the merits against the debtor or after having obtained a judgment[3] or another title in a Member State, in order to secure the final enforcement of this title. In the latter case, the jurisdiction to issue an EAPO lies with the courts of the Member State in which the title was issued. Otherwise, jurisdiction is vested in the courts of the Member State having jurisdiction to rule on the substance of the matter in accordance with the relevant rules of jurisdiction applicable, ie Brussels Ia. In light of the possibility of more than one court having jurisdiction on the merits, Article 16 enjoins the creditor from applying for more EAPOs in several courts simultaneously[4]. Nevertheless, it remains possible for the creditor to apply for and to obtain an equivalent national order (Art 16(2-4)). Furthermore, Article 6(2) provides for an exclusive jurisdiction with the courts of the Member State of the debtor's domicile if he is a consumer.

2.2 Issuing procedure

The procedure itself has two basic characteristics, which both constitute innovations in EU Procedural Law. On the one hand, the procedure occurs ex parte, which means that the debtor may not be heard in any stage of the procedure, but becomes aware of the preservation order only after its implementation, so that the surprise effect is secured (See Articles 11, 28 and Recital 15)[5]. Herein lies the main advantage of the EAPO Regulation in comparison with provisional measures available under Brussels Ia. Even after the recast of the Brussels I Regulation, ex parte provisional measures can circulate only after having been served to the defendant prior to the enforcement (See Article 2(a), 35 and Recital 33 of the Brussels Ia Regulation, which uphold the *Denilauler* judgment of the CJEU in case C- 125/79 [1980] ECR 1553). This condition, however, jeopardises the effective judicial protection of the creditor by a provisional measure, which is mostly based on the surprise effect, in order to prevent the debtor from transferring his funds to another Member State after he has been informed about the order. The only possibility for a creditor to maintain the surprise effect in the system of Brussels Ia is to apply for national provisional measures in the State of enforcement,

which can prove to be cumbersome, costly and lengthy because of differences in the national laws. The grade of difficulty for the creditor increases strongly if he wants to freeze more bank accounts in different States. In such a case, the only alternative is to apply for separate ex parte freezing orders in every State of enforcement, ie in every State where an account is maintained.

Furthermore, resulting from the ex parte nature of the proceedings, the decision of the court on whether it should accept its jurisdiction and issue the EAPO is based solely on the arguments and the evidence provided by the creditor. This raises the question as to what extent the court may actually investigate its jurisdiction and what pleading standards[6] in the trial systems of the Member States have to be observed. Article 7 envisages that the creditor has to submit 'sufficient evidence to satisfy the court that there is an urgent need for a preservation order [..] because there is a real risk that without such a measure, the subsequent enforcement of the creditor's claim will be impeded or made substantially more difficult' (See Article 7 and Recital 14)[7]. The conditions for obtaining an EAPO are stipulated rather generally as well and leave a wide scope of interpretation (Cf Hess, IPRax 2015, 46, 48) until the CJEU develops its case law and provides further guidance in this regard.

If a creditor applies for an EAPO before obtaining a judgment, he must also provide sufficient evidence that he is likely to succeed in the proceedings on the merits of the case. These proceedings should cover pursuant to Recital 13 any proceedings aimed at obtaining an enforceable title, including summary proceedings. Thus, the creditor has to lodge an action asking for performance, while declaratory judgments should not be deemed to be sufficient (See Hess, EuZPR, Art 10 No 2; other opinion by Rauscher/Wiedemann EuZPR, Art 10 No 4.). The creditor has to initiate such proceedings within the period of time provided for by Article 10 –figuring as a safeguard of the debtors' interests –, while by failing to do so, the EAPO should be *ex officio* revoked[8]. Striving for the promotion of the debtor's interests as a counterweight to the significant advantage of the ex parte procedure provided to the creditor, the Regulation envisages in Article 12 the requirement of security, in order to prevent abuse and ensure the compensation for any damage suffered by the debtor as a result of the EAPO, *to the extent that* the creditor is *liable* for such damages. In Article 13, a conflict-of-laws rule on the liability of the creditor is enshrined, which refers to the law of the Member State of enforcement. Besides it stipulates some grounds as 'minimum standards', where the creditor's liability should be presumed, such as if he fails to initiate proceedings on the substance of the case or to request the release of over-preserved amounts or if it is meanwhile found that the issuing of the EAPO was not appropriate. Though, the Member States can provide for more stringent liability rules, because all other aspects – such as the causality or the extent of the liability –should be governed, pursuant to the conflict-of-laws-rule, by the national law of the Member State of enforcement. Thus, the conflict-of-laws reference to the national enforcement law makes in turn the definition of the security amount to be requested by the court in the Member State of origin difficult, because the court has to determine and implement a foreign law in order to define the amount in the summary procedure before issuing the EAPO (See Hess, EuZPR, Art 12 No 3.). All these guarantees contribute to achieving a

fair balancing of the parties' interests and to deterring abuse of the EAPO against the debtor. This balance is incomplete, though, as far the jurisdiction for the debtor's compensation claim against undue freezing is not defined, many aspects of the creditor's liability are left to national laws and as generally known the security based on its nature offers incomplete protection, given that the reputational damage is irreplaceable.

The difficulties in securing debt recovery may relate not only to the diversity of the national procedures, but to the creditor's lack of information about the whereabouts of the debtor's assets as well. The EAPO Regulation tries to compensate for this gap, on the other hand, by providing that the creditor who cannot indicate an IBAN/BIC on the application for an EAPO, but has grounds to believe, that his debtor holds an account in a specific Member State may require the court to ask and obtain information from the competent authority, in order to identify the bank account. Thus, national legal systems have to establish or maintain effective mechanisms for obtaining such information, like access to public registers or a disclosure duty of the banks or the debtor accompanied by an *in personam* order prohibiting transfer of funds (Article 14)[9]. It is important that this weapon is given only to the creditor who already has a judgment against the debtor[10] and that the information obtained is provided to the requesting court and not the creditor.

2.3 Enforcement of the preservation order

The EAPO can be promptly enforced in all Member States bound by the Regulation without any special procedure or declaration of enforceability being required (See Article 22). The Regulation provides for a detailed system for the implementation by the bank based on effectiveness and speed. The enforcement procedure in general, though, should be in accordance with the procedure applicable to the enforcement of equivalent national orders in the Member State of enforcement. Apart from the duty of the creditor or the court, depending on national law, to serve the EAPO and all relevant documents on the debtor (Art 28), the Regulation obliges the creditor to request the release of possible over-preserved amounts (Art 27)[11]. Nevertheless, many aspects of the enforcement such as the preservation of joint and nominee accounts (Art 30), the amounts exempt from preservation[12] (Art 31) and the ranking of the EAPO (Art 32) are governed by the law of the Member State of enforcement. However, the provisional measure of account preservation is treated differently in the legal national orders with regards to all these points, causing discrepancies in the future implementation of the Regulation.

2.4 Remedies

The debtor may bring forward his objections against the EAPO and its enforcement for the first time after the freezing of his bank account in the amount indicated in the preservation order[13]. The Regulation distinguishes between defences that the debtor can assert against the EAPO itself provoking its revocation or modification, which should be brought in the State of origin, and defences against the enforcement of the EAPO

asking for the termination or the limitation of the enforcement, which should be decided by the competent court or authority in the State of enforcement pursuant to national law.

Hence, the debtor can apply in the State of origin for a review of the EAPO pursuant to Article 33 on the grounds that the conditions or requirements set out in the Regulation were not met, that the lack of proper service of the preservation order and of the relevant documents has not be cured, that the over-preserved amount was not released, that the secured claim has been paid or a judgment on the substance has afterwards dismissed it or that the judgment on the substance of the claim granting it, on the basis of which the EAPO was issued, has been annulled.

Article 34 provides for the grounds that legitimize the debtor to challenge the enforcement of the EAPO in the competent court of the Member State of enforcement. In particular, the debtor may request the limitation of the enforcement, because amounts exempt from the seizure under the law of enforcement have not been taken into account (Art 34 I(a)). Furthermore, the debtor can apply for the termination of the enforcement on the grounds that the account preserved is excluded from the scope of the Regulation, that the enforcement or enforceability of the title which gave rise at the first place to the issue of the EAPO has been afterwards overruled (art 34 I (b)) or that the enforcement of the EAPO is manifestly contrary to the public policy of the Member State of enforcement. Apart from that, the debtor can bring forward in the State of enforcement too all the defences mentioned above (Article 33) except for the nonconformity of the EAPO with the conditions or requirements set out in the Regulation, which should only be submitted to the State of origin.

Both parties can furthermore contest the EAPO with the argument that the circumstances that led to the issuing of the EAPO have changed, such as the agreement to settle the case (Art 36). Article 37 provides for a right to appeal against the decision on the remedy in both parties. The debtor can last but not least provide security in lieu of preservation (Art 38). The right of third parties to contest the EAPO will be governed by national law (Art 39).

3 Conclusion

The EAPO Regulation is a milestone in the legislation on European civil procedure because of several reasons. Firstly, it fills the gap left by the recast of the Brussels I Regulation with regard to the cross-border enforcement of ex parte provisional measures, enabling the creditor to secure an effective enforcement. The sectorial handling of this problem, limiting it to the attachment of bank accounts, is justified by the practical reason that this kind of provisional protection is widely used and by the fact that a debtor who is unwilling to pay would otherwise be able to conceal, withdraw or transfer funds from one State to another very quickly. Hence, the upholding of the surprise effect is crucial for the effective judicial protection of the creditor. The EAPO Regulation offers undoubtedly a useful tool to secure an effective enforcement in civil and commercial matters, which can be of great importance especially for small and

medium-sized enterprises, consumers and maintenance creditors (Cf European Commission, SEC(2011) 937 final, p 20 et seq). It constitutes a mechanism apt to promote a swift, efficient and less costly solution to disputes, in order to strengthen trust and growth within the European Union (European Commission, COM(2014) 144 final).

The European legislature bore the difficult burden of achieving the desirable result of protecting the interest of a creditor in effective enforcement while simultaneously ensuring the protection of the debtor's legitimate interests, as the latter party may be financially devastated by the freezing of his bank account. The main question is whether the fundamental rights of both parties are adequately secured: on the one hand, the right of the creditor to effective judicial protection (Art 47 Charter of Fundamental Rights) by securing the surprise effect, and on the other hand the effective judicial protection of the debtor, i.e. providing for an effective remedy and for a fair trial. Therefore, the rights of the debtor to private and family life (Art 7 ECFR), human dignity (Art 1 ECFR) and protection of personal data (Art 8 ECFR) are affected as well. Resulting from the examination of the legislative materials, it should be pointed out that the initial Proposal did not take the debtor's protection into appropriate consideration in several aspects (See also Domej, ZEuP 2013, 496, 525; Hess, FS Kaissis (2012), 399, 409; Schumacher/Köllensperger, JBl 2014, 413; Sujecki, EWS 2011, 414.). Under the pressure exercised by the European Parliament[14], the final compromise in the form of the enacted Regulation seems to have achieved a more or less fair balance by stipulating some safeguards such as the post-enforcement hearing of the debtor's objections and the right to appeal against this decision, the obligation of the creditor to provide security and the amounts exempted from seizure (Cf Paglietti, EuCML 2015, 223, 233-234.).

Thirdly, the EAPO Regulation is one more step towards the construction of a coherent European civil procedural law in the long term. Hence, although the Regulation is focused on the specific sector of provisional enforcement in bank accounts, it may offer an example to emulate -or to avoid - in future legislation. From a methodological point of view, it seems to constitute the first cautious attempt of the European Legislation to harmonise the law of enforcement itself, starting with the enforcement of provisional measures, because otherwise it would not, at the present stage, be feasible to reach a compromise respecting the procedural autonomy of the Member States. The European Parliament and the Council are contrary to the European Commission rather reluctant to far-reaching efforts to shape the national laws, achieving a useful balance, as illustrated in the modest – in comparison to the Proposal- EAPO Regulation.

Finally, the practical implementation of the EAPO Regulation may also offer lessons for the further development of common enforcement practices. The use of prescribed common forms in all languages and the on paper procedure promotes strongly the effective cooperation in civil and commercial matters in Europe, overcoming the language barrier. The implementation of the EAPO Regulation may trigger an actual communication between courts and authorities, thus making them more familiar with uniform procedures. Nevertheless, the lack of a link with the Service Regulation concerning the service of the EAPO on the debtor is counterproductive as far as coherence and developing common practices are concerned.

On the negative side, it needs to be pointed out that the text of the Regulation is extremely complicated because of several cross-references. That may lead to limited impact of the Regulation in cross-border debt recovery, similar to the Small Claims Procedure or the European Enforcement Order. However, the fact that the Regulation actually provides for a provisional measure maintaining the surprise effect may constitute the crucial factor for a broader impact in the Member States, because of the necessity and the high frequency of use of bank attachments as a first aid instrument in debt recovery.

A closer scrutiny shows some more drawbacks of this new instrument. Firstly, the balance between the parties' interests is in principle achieved but remains incomplete in the details, which in the light of the rules in favour of the creditor -cf. the rules on the implementation of the EAPO- challenges the main orientation of this instrument[15]. It is further doubtful whether allocating jurisdiction to the courts being competent to judge the merits of a case is more appropriate than allowing the courts of the Member State in which the bank account is maintained to issue an EAPO. Moreover, the methods provided for obtaining information on bank accounts which can be maintained by the Members States differ in their efficiency. This may cause difficulties and inequalities in the implementation within the Union. Furthermore, the whole account information system may well come into conflict with the national bank secrecy rules.

In general, the Regulation's numerous references to national laws may trigger divergences in its implementation by the national courts, which could be avoided by developing and adopting autonomous harmonised European rules[16]. As characteristic examples, the amounts exempt from seizure and the ranking of the account preservation order, which can strongly differ in the national legal systems, should be mentioned. Furthermore, some unclarified issues in the Regulation such as the pleading standards to be observed in the Member States can cause disorder and reveal some *fora* unduly favouring the creditor. It should be awaited whether the Regulation has the necessary quality to become a standard-setter for the modernisation of national laws[17] and the further development of EU civil procedural law as well. The answer to this question, however, is closely connected with the desired and necessary extent of further procedural harmonisation in the European Union. The EAPO Regulation offers a good example insofar as its implementation may highlight drawbacks in the exercise of mutual trust between the Member States and sharpen the focus of the European Legislature on the actual functioning of legal instruments, in order to achieve similar and not necessary uniform solutions.

Notes

[1] The first reference to the initiation of new procedural legislation on provisional measures for cross-border cases was made by the Council on its meeting in Tampere on 15&16.10.1999, followed by the commitment of the Commission and the Council, in the Programme of Measures of 30.12.2000 for the implementation of the principle of mutual recognition, to establish particularly a European system for the attachment of bank accounts, OJ [2001] C12/1, p 5.

[2] See the critical remarks on the legislative choice of the regulation as an "optional instrument" instead of the directive by Rauscher/ Wiedemann, EuZPR (2014), Art 1 Eu-KPfVO No 13

[3] Pursuant to Article 4 No 8-10 in conjunction with Recital 48 the judgment or the title should have been issued in a participating Member State and surely not in a third-State, see Hess, EuZPR Kommentar, 4th edition (2015), Art 4 EuKtPfVO No 4; Rauscher/Wiedemann, EuZPR (2014) Art 4 No 23.

[4] It is controversial, whether (in case of Art 6 (1)) the application for an EAPO in a Member State having jurisdiction on the merits should imply a choice of the jurisdiction for the action on the substance of the case, forcing thereby the creditor to initiate the future proceedings against the debtor in the same Member State (where the EAPO was issued). This question should be answered in my opinion in the negative, because of the Regulation's wording, the lack of specific rule ordering this early focusing of the jurisdiction and in the light of Article 16. Furthermore, the EAPO is still just a protective measure based on speed and limited evidence, which should not have such far-reaching effects on the case. See Rauscher/Wiedemann, EuZPR (2014) Art 10 No 6. Different opinion by Hess, EuZPR Kommentar, 4th edition (2015), Art 6 EuKtPfVO No 5, Art 10EuKtPfVO No 3.

[5] To corroborate the protection of the surprise effect, Article 14(8) provides regarding the granted access to the account information of the debtor that his notification of the disclosure of his personal data should be deferred for 30 days, in order to prevent an early notification from jeopardising the effect of the Preservation Order.

[6] In one view a prima facie case should be sufficient, while in other view a higher standard of court's satisfaction should be required. In any case the evidence should consist of documents offering direct evidence, eg contracts, invoices or written witness' statements. See Hess, EuZPR Kommentar, Art. 7 No 4 with further references; Rauscher/Wiedemann Art 9 EuKpfVO No 3.

[7] In Recital 14 (subp 4) the national judge can find some examples indicating a 'real risk', which can be taken into account in the overall assessment. Thus, the debtor's credit history or a previous dispute between the parties can pose a real risk of impeding the title's final enforcement, while the mere non-payment or contesting of the claim should not be sufficient to justify the issuing of an EAPO.

[8] If the court did not revoke the EAPO of its own motion, the debtor should pursuant to Recital 32 be able to request the revocation of the EAPO on the grounds that the requirements set out in the Regulation were not met, See next page under 4.

[9] See in this regard the closely connected "Green Paper - Effective enforcement of judgments in the European Union: the transparency of debtors' assets" COM [2008] 128.

[10] Contrary to the Proposal, where there was not made any distinction and the creditor could obtain account information even before initiating proceedings on the merits. Proposal COM [2011] 445, Article 17. See the critical remarks by Orfanidis, Die Verordnung (EU) 655/2014, (2014), 263, 290.

[11] If he neglects to do so, the debtor can apply for the modification of the EAPO pursuant to Art 33 I(d).

[12] The Regulation's choice for the law of enforcement is with good reasons not without criticism, particularly when the debtor lives in another Member State. See Wolber, Schuldnerschutz im Europäischen Zwangsvollstreckungsrecht, 2015, p 337.

[13] The Regulation does not provide any autonomous time limit for the lodging of the remedies. On the contrary, in Article 36, about the procedure for the remedies, is stipulated that the application for a review should be made 'at any time'. That prohibits the introduction of a time limit by the national laws (Article 46), see Rauscher/Wiedemann, EuZPR, Art 36 No 5; different opinion in Hess, EuZPR, Art 33 No 3, Art 35 No 2.

[14] Cf the Committee on Legal Affairs report of 20.6.2013, which adopted the draft compromise amendments of Raffaele Baldassarre (PE510.699v01-00 and PE506.176v01-00), and the position of the European Parliament adopted at first reading on 15 April 2014, PE531.381.

[15] See above under II.2.
[16] Cf regarding the combination of the minimum standard provision on the creditors' liability and the conflict-of-law rule, Hess, IPRax 2015, 46, 51; Max Planck Working Group, ECFR (2007) 254, 297.
[17] Cf about the actual limited influence of other model instruments of the European Legislation on the modernisation of national laws by Hess, Binnenverhältnisse im Europäischen Zivilprozessrecht, in von Hein/Rühl (eds.) Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union, 2016, p. 68 (85), who argues for a reciprocal influence between EU and national legal systems (p. 88 et seq).

References

Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.
Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.
Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts COM[2006]618 final.
Regulation (EC) 805/2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15.
Regulation (EC) 1896/2006 creating a European order for payment procedure [2006] OJ L399/1.
Regulation (EC) 861/2007 establishing a European Small Claims Procedure [2007] OJ L199/1.
Council, Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, [2001] OJ C12/1.
European Commission, The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union, COM[2014] 144 final.
European Commission, Proposal for a Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters COM[2011] 445 final.
European Commission, Impact Assessment, Accompanying the Proposal for a Regulation of the European Parliament and of the Council creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters, SEC(2011) 937 final.
European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, [2010] OJ C115/1.
Green Paper - Effective enforcement of judgments in the European Union: the transparency of debtors' assets" COM [2008] 128.
Case C- 125/79 *Denilauler* [1980] ECR 1553.
Hess, 'Study No JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union', version of 2/18/2004, available at <http://ec.europa.eu/civiljustice/publications/ docs/enforcement_judicial_decisions_180204_en.pdf> accessed 29 February 2016.
Mańko, Rafal, Europeanisation of civil procedure – Towards common minimum standards?, In-depth analysis, European Parliamentary Research Service EPRS, June 2015 – PE 559.499.
Domej Tanja, 'Ein wackeliger Balanceakt', ZEuP 2013, 496.
Hess, Burkhard, EuZPR Kommentar, 4th edition (2015).
Hess Burkhard, 'Der Vorschlag der EU-Kommission zur vorläufigen Kontenpfändung – Ein weiterer Integrationsschritt im Europäischen Zivilverfahrensrecht' in *Festschrift für Athanassios Kaissis* (2012).
Hess Burkhard/Raffelsieper Katharina, 'Die Europäische Kontenpfändungsverordnung: Eine überfällige Reform zur Effektuierung grenzüberschreitender Vollstreckung im Europäischen Justizraum', IPRax 2015, 46.

Hess Burkhard, Binnenverhältnisse im Europäischen Zivilprozessrecht, in Jan von Hein/Giesela Rühl (eds.) Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union, 2016, p. 67.

Max Planck Working Group, 'Comments on the European Commission's Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: The Attachment of Bank Accounts', ECFR (2007) 254.

Orfanidis Georgios, 'Die Verordnung (EU) Nr. 655/2014 des Europäischen Parlaments und des Rates über ein europäisches Verfahren zur vorläufigen Kontenpfändung' in Hopt Klaus/Tzouganatos Dimitris (eds), '*Das Europäische Wirtschaftsrecht vor neuen Herausforderungen*' (2014), 263.

Paglietti Maria Cecilia, 'Exporting and Re-importing Substantive and Judicial Models in the EU Credit Market (the EAPO)', EuCML 2015, 223, 233-234.

Rauscher Thomas, 'EuZPR/EuIPR', 4th edition (2014), EU-KPfVO (Wiedemann).

Schumacher Hubertus/Köllensperger, 'Die "Europäische Kontenpfändung" und der Schutz des Unternehmens', JBl 2014, 413.

Sujecki, Bartosz, Grenzüberschreitende Kontenpfändung in der EU, EWS 2011, 414.

Wolber Johannes, Schuldnerschutz im Europäischen Zwangsvollstreckungsrecht, 2015.

Župan Mirela, 'Cross-border recovery of maintenance taking account of the new European Account Preservation Order (EAPO)' (2015) ERA Forum 16, 163.

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When Legal Principle Meets Politics. EU Criminal Legislation and the Question of Further European Integration

MAGDALENA KANIA

Abstract The article analyses legal and political obstacles to further integration of MS in the field of criminal matters at the EU level. In the first part, it shows how the attitudes towards closer cooperation were changing in time and how it was reflected in official documents. Next part introduces the problems, mainly at the national level, arising from the ambiguous concepts of mutual recognition and mutual trust, key concepts of European integration in criminal law. Finally, it shows how the enhancement of EU institutions, mainly the Commission and the Court serves as a huge step forward from the intergovernmental approach in criminal matters, which approach used to be strongly correlated with such issues. The article highlights the problem of overlapping legal sphere and political goals, which can be differentially interpreted by MS and the EU institutions.

Keywords: • European Integration • Criminal Legislation • Criminal Proceedings • Mutual Recognition

CORRESPONDENCE ADDRESS : Magdalena Kania, PhD Student in Political Science and MA Student in Law at Jagiellonian University in Krakow, Poland, email: magdalena.maria.kania@gmail.com.

DOI 10.4335/978.961.6399.79.1.16
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

As noted by Ester Herlin-Karnell: 'The concept of European criminal law has always been very patchy and has only gained impetus in recent years' (Herling-Karnell, 2012: 1). It is corresponding with the fact, that the objectives of European integration overlap with the objectives of criminal law in general only marginally (Górski, 2005: 35). Therefore, European integration in the context of criminal matters and criminal legislation should be considered as relatively limited. International cooperation in the field of fighting against crimes was based on the principle of voluntary participation and free will to choose both scope and means of that cooperation. Furthermore, cooperation in criminal issues was perceived as *ultima ratio*. This article analyses the consequences for European integration in the field of criminal matters, concerning the gap between EU criminal legislation and the lack of full political support delivered by Member States (MS).

The article seeks to answer the following questions: (1) what was the evolution of criminal procedures legislation from Maastricht to Lisbon Treaty, which aims to fulfil democratic legitimacy criterions; (2) what are the political barriers for further integration processes in the legal sphere; (3) how the minimal standards of criminal proceedings enhance the power of supranational EU institutions. Findings show that the legal principle can be used as a political instrument – for both MS and European institutions – to enhance the relative power (or transfer the power) comparing to the other side.

2 Historical background

Historically, the standardization of criminal issues within MS has been never perceived by European Communities as a strategic goal in the legal realm. Establishing of informal TREVI groups in mid-1970s was more a political signal, rather than introduction of formal legal cooperation, what was emphasized by the fact, that of the original five TREVI working groups only two were active, while the others never met. Nevertheless, formal legal cooperation came to existence in the context of implementation of Maastricht Treaty. In order to advance cooperation in the criminal and justice sphere with respect to national sovereignty, the Maastricht Treaty created the Police and Judical Cooperation in Criminal Matters as a third pillar of European Communities. However, the possible transfer of power and sovereignty from MS to supra-state level was still an issue. Thus, after the Maastricht Treaty, any influence of supranational institutions on the process of law harmonization was limited. Institutional initiatives, including joint positions, joint actions and EU conventions, were not binding for EU member states. Strengthening of institutional position came with the Amsterdam Treaty, which created the concept of an Area of Freedom, Security and Justice and provided new legal instrument, namely framework decisions. The legal basis for the latter was art. 34 of the Treaty of The European Union - in nature similar to directives, 'binding upon the Member States as to the result to be achieved' (Treaty of the European Union) but leaving to the national authorities the choice of forms and methods, however not entailing direct effect. Amsterdam Treaty provided

simultaneously closer cooperation among MS in criminal matters, particularly in the matters of preventing and organised crime (by listing several issues, namely organized crime, terrorism, trafficking in persons, offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud) and 'approximation, where necessary, of rules on criminal matters in the Member States'. With setting up framework decisions, the Council, which was not an elected body, gained a privilege position in the field of third pillar legislation. The Council was able to pass framework decisions with the standards of unanimity voting system. Furthermore, European Parliament's involvement in third pillar was highly limited in the legislative process and, therefore, criticized for lack of transparency in the law-making and generating democracy deficit (Monar, 2002). Shortly after Amsterdam Treaty, European Council in Tampere in 1999 (Tampere European Council, 1999), Commission Communication in 2000 (European Commission, 2000) and subsequent Hague programme (Council, 2005) introduced adoption of the formula of mutual recognition into the third pillar, formula previously related to the internal market issues. Analogies to the common market are here undoubtedly obvious – specifically Commission seems to perceive the criminal law as the missing link for the final completion of the single market (European Commission, 2005). In addition, the concept of mutual recognition served as an alternative to the politically controversial notion of harmonization/approximation (Alegre, Leaf, 2004).

Before implementation of the Lisbon Treaty, EU pillar structure was ineffective in the context of clear pillar distinction for criminal law. Although mainly related to the third pillar, some criminal matters were embedded into the framework of the first pillar (European Commission, 2005). From an EU law perspective, third pillar framework could not have been considered as an ideal counterpart of the first pillar of EC (Lavenex, 2010), while from the judical control perspective third pillar gained limited legal control of EU. The general problem of the imposition of criminal law provision on a first pillar legal basis became an issue in the case *Commission v Council* (Commission vs Council, 2005). According to the Court's ruling, neither criminal law nor the rules of criminal procedure fall within the Community's competence, however criminal law could be a matter for the EU legislator 'when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for' some first pillar issues, like environmental policy in this case. Therefore, Court transferred the competence to harmonize criminal offences to the first pillar, using certain criteria to ensure its applicability in the field of the environment and opening the gate to further competence to harmonize penalties for these offences (Neagu, 2009: 548).

The Lisbon Treaty sought to resolve that legal ambiguity concentrated around the criminal legislation within the EU by several reforms. Firstly, due to abolishment of pillar structure, the argument of double regulation was undermined. Secondly, the entire legislative procedure has been evaluated and the Council's unanimity voting system in the criminal issues has been replaced with the ordinary legislative procedure. Therefore, European Parliament, as directly elected body at MS' level was given the same position as the Council in legislation process, which aimed to strengthen fulfilling democratic

criterions. Thirdly, Lisbon Treaty increased national parliaments' power in the legislation process in general.

3 Mutual recognition as a key concept of criminal issue in the European union

Despite the fact, that Lisbon Treaty was considered as a milestone for further European integration, the EU legislation in criminal matters remains limited in scope. The central concept of European integration in criminal law, as noted above, is the concept of mutual recognition. According to the Commission (European Commission, 2009), the principle of mutual recognition comprises two elements: mutual trust between MS and development of common standards (Fichera, 2013: 2). From the MS' perspective the concept of mutual recognition itself may appear as blurry idea, while there is no definitional consensus on that matter. In the light of providing common minimal standards, the maximum sanction as a punishment was adopted by some regulations, Directive on the protection of the Euro and other currencies (Directive 2014/62/EU), Council framework decision on combating fraud and counterfeiting of non-cash means of payment (Decision 2001/413/JHA), or Council framework decision on combating corruption in the private sector (Framework Decision 2003/568/JHA). Common definitions were adopted for such issues as terrorism (Framework Decision 2002/475/JHA), organized crime (Framework Decision 2008/841/JHA), human trafficking (Framework Decision 2002/629/JHA, illicit drug trafficking (Framework Decision 2004/757/JHA), or sexual exploitation of children and child pornography (Framework Decision 2004/68/JHA). The crucial aspect of criminal legislation lies here within the concept of criminal responsibility – MS are anchored in different legal traditions, which results in the lack of compatibility in the matters and scopes of criminal responsibilities set by MS. Considering the mutual recognition in criminal proceedings, it appears legally controversial, while the essence of mutual recognition is not only the execution or recognition of criminal rulings, but the automatic recognition of all procedural decisions, including identical ones. It raises several problems of supranational intervention, both at legal and political level.

4 Obstacles to effectiveness in mutual recognition implementation

First, state as a border of jurisdiction – judgments on criminal matters, which were taken within the territory of one MS appears to have direct legal effects in other MS. Basing on the concept of state constitutionalism, arisen from the Westphalian political and legal order, anyone with an affiliation to a specific national territory possess a right to demand full legal protection from his or her state, which is crucial in such sensitive matter as in criminal law. Simultaneously, while individuals are sharing freedoms and transnational values at the European level, the most distinctive feature of legal territorial adherence is simply affiliation to jurisdiction (Górski, 2005: 40).

That raises the second concern, namely the standing question about procedural guarantees. One of the leading objective of criminal law is civil liberties safeguarding, meaning procedural safeguards for suspected or accused persons. Efficient application

of the principle of mutual recognition is plausible in cases where criminal proceedings instituted against the same person on the basis of the same circumstances in two or more MS safeguard. Therefore, safeguarding of minimal legal standards applicable to criminal proceedings in MS could be only a result of effective direct consultations between competent institution of the MS (Jurka, Zajančkauskiene, 2015: 99). To overcome this legal ambiguity the Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (Framework Decision 2009/948/JHA) has been adopted. As stated by the Commission, above mentioned Framework Decision established the framework for national authorities to 'enter into direct consultations when parallel proceeding are discovered, in order to find an effective agreement about which of the Member States involved is best placed to continue to prosecute the crime' (European Commission, 2014). And a prior condition to effective consultation is always based on political will, when it comes to find a consensus in the context of various national legal systems, traditions and cultures.

Third, and finally, framework decisions should be examined in terms of proper implementation. Aforementioned Commission's Report raises a problem of timely implementation, with possible reciprocity problem, when MS with proper implementation cannot benefit from their cooperation provisions in the relations with MS abstained from implementation. As a consequence all MS 'will have to rely on the random and often lengthy practice of traditional mutual legal assistance in criminal matters without a reliable guarantee of a timely detection of *bis in idem* cases' and, as emphasized, that practice 'increases significantly a risk of double jeopardy'.

Following issue is the question of the vague concept of mutual trust between MS. Since there is no effective instrument to measure mutual trust in the legal terms, it can be assumed, that visible demonstration of mutual trust is strongly correlated with the current political atmosphere. Therefore, mutual trust could be perceived as a political support for specific direction of legal integration. Contrary, an attitude of hesitation vis-à-vis mutual trust represents lack of thereof. Consequences of unwillingness to demonstrate mutual trust are tangible in the theoretical and practical application of the law (Jurka, Zajančkauskiene, 2015: 85). As Krisztina Karsai aptly pointed out '[t]he mutual confidence placed in other Member States' judicial systems as a principle is in an ideal case a declaration which defines an existing phenomenon and custom. Nowadays this is only an illusion' (Karsai, 2008: 42).

5 Mutual recognition and supranational institutions

Aforementioned controversies relying on the concept of mutual recognition and minimal standards in criminal matters highlight the inter-state possibilities to play a political card in the overall process of legal adaptation. The last part of this article analyses the concept of minimal standards of criminal proceeding from the perspective of enhancement of supranational institutions. The main assumption is that due to limited legal capability of European institutions to regulate the criminal law binding for MS, European institutions prefer to exercise their legal authority within the set of limited issues, and with preference to transfer the power to the supranational level. In

particular the Commission 'appears to have viewed the criminal laws as the answer to problems with European integration' (Herling-Karnell, 2012: 15).

There is no doubt that the concepts such as mutual trust, mutual recognition, and common standards appear in the institutional discourse, and in rhetoric such concepts are correlated with other significant political values for the European integration as economy, security, fundamental human rights or more generally common values. Few examples illustrate this correlation. In his statement Commissioner Reicherts said that '[t]he successful economic recovery of Europe depends on the continued development of a common area of justice. Consumers must be able to trust that their rights are protected and businesses must be able to rely on a legal framework (…). An efficient judicial system makes life easier for businesses and investors' (MEMO/14/333, 2014). For First Vice-President Frans Timmermans '[t]wo aspects are particularly vital when it comes to trust and mutual recognition: security and fundamental rights' (SPEECH/14/1701). Viviane Reding, EU Justice Commissioner noted that '[t]here can be no area of justice and no mutual trust without common fundamental-rights standards based on our common values (SPEECH/13/986, 2013)', highlighting some other time the importance of solid European judical system both for citizens and business (IP/14/233, 2014). Legal principle serves as complementary to political values, so fundamental that cannot be questioned under no circumstances. Basing on that, supranational institutions broaden the legal horizons of mutual standards.

It is not only pure rhetoric, what can be experienced in the context of the Commission engagement in criminal issues at the European – supranational – level. Profound changes have been made in the EU Area of Justice in the past few years, mainly due to the steps taken by the Commission. Since 2010, the Commission introduced more than 50 initiatives in the area of justice , and delivering 95% of the Stockholm Programme (IP/14/233, 2014). As an institutionalised entity to introduce new initiatives, the Commission is gaining more power in the terms of shaping future criminal laws. Most recent initiatives initialised by the Commission concern issues on EU rights for victims of crime (Directive 2012/29/EU, 2012), stronger fair trial rights for suspects in criminal proceedings (Directive 2012/13/EU, 2012) or proposal of the establishment of a European Public Prosecutor's Office (European Commission, 2013) to protect euro in the EU budget from criminals. Probably the most political instrument introduced by the Commission was the EU Justice Scoreboard, 'a new comparative tool to promote effective justice systems in the European Union and thereby reinforce economic growth' (IP/13/385, 2013). That justice instrument is simply designed to control the functioning of national justice systems with the goal of achieving more effective system of justice for citizens and business. In March 2015 third EU Justice Scoreboard was published (European Commission, 2015).

A new chapter for supranational law came into existence with the end of the Lisbon Treaty transition on 1st December 2014 in the context of police and judical cooperation in criminal matters. Since then, the normal powers of the Commission and of the European Court of Justice apply to the acts in this field in the same manner as to the other areas of EU law. What does it mean in practice relies mainly in the sphere of law

interpretation and strengthening supranational control. The Court can play its full role – national courts are able since then to turn to the Court for preliminary rulings, in the case of doubts about the proper interpretation or application of any instruments. These rulings, as in the other legal areas, are binding for MS. The Court is also serving a role of an ultimate reference point. When any MS neglects its duties in the context of proper implementation of EU legislation, it can be brought to the Court. It is related to the new task of the Commission which is responsible for controlling if agreed rules are transposed into national legislation and, if MS fails to transpose, Commission is responsible for bringing that to the Court. While the Court's ruling can impose specific sanction, the overall process is a huge step forward from the previous intergovernmental approach.

6 Conclusion

However, it is still a long way to fulfil the criteria of effective European integration in criminal matters. Limited scope of control, which only recently went on the path to enhance European institutions' authority remains one of the leading problem at the EU level. Simultaneously, MS with accordance to the concept of mutual recognition must rely on mutual trust and therefore manifest clear political will to cooperate in the field of criminal legislation. On the worse-case scenario, it can be played as a political card, while legal interpretation is not always obvious. While considering criminal law as crucial and sensitive policy of nation states, with different legal traditions and cultures, EU institutions (mainly the European Commission) do not intend to foster common standardization at the EU level in that area. Instead, they prefer to adopt minimalistic laws, and common lowest denominator strategy, concerning rather procedural issues, and using step-by-step approach which embeds more particular issues under the EU legislation flag. Political mechanism of merging legal principles with unquestionable political values, like economy growth, market, security or human rights gives an effective, but still limited impetus to further potential *Europeisation* of criminal law. Furthermore, by harmonized minimal standards in criminal procedures EU institutions are trying to circumvent the democratic legitimacy of criminal legislation, while both the Commission and the Council, playing crucial role in the overall process, are not democratically elected bodies at the national level, and are not a reflection reflects MS preferences articulated by citizens. Rising power of European Parliament in the legislative procedures is insufficient so far, and EP cannot fully face the problem of democracy deficit. However, since Maastricht Treaty a lot have been done towards greater 'Europeisation'. Recent enhancement of the Court in criminal matters generates new opportunities for the European *constitutionalisaton* of criminal law – *constitutionalisation* based not on legislation, but on *jurisprudence*.

EU legislation and cases

Case C-176/03 *Commission v Council* [2005] ECR I-7879
Consolidated Version of the Treaty of the European Union [1997] OL C340/01
Council 2005/C 53/01 The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1

Council Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment [2001] OJ L149/1
Council Framework Decision 2002/475/JHA on combating terrorism [2002] OJ L164
Council Framework Decision 2002/629/JHA on combating trafficking in human beings [2002] OJ L203
Council Framework Decision 2003/568/JHA on combating corruption in the private sector [2003] OJ L192
Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography [2004] OJ L13/44
Council Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2004] OJ L335/8
Council Framework Decision 2008/841/JHA on the fight against organised crime [2008] OJ L300/42
Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings [2009] OJ L328/42
European Parliament and the Council Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L142/1
European Parliament and the Council Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57
European Parliament and the Council Directive 2014/62/EU on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA [2014] OJ L151/1

References

Adam Górski, *Common Values in Criminal Law versus Constitutional Obstacles to Their Accomplishment. Deliberation on Methods and Aims of Europeisation of Criminal Law* (Centrum Europejskie Natolin 2005)
Ester Herling-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart Publishing 2012)
Contributions to edited books
Jorg Monar, 'Decision-Making in the Area of Freedom, Security and Justice' in Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002)
Sandra Lavenex, 'Justice and Home Affairs' in Helen Wallace, Mark Pollack and Alasdair Young (eds), *Policy-Making in the European Union*, (OUP 2010)
Journal articles
Krisztina Karsai, 'The Principle of Mutual Recognition in the International Cooperation in Criminal Matters' (2008) 42 Proceedings of Novi Sad Faculty of Law 1/2
Massimo Fichera, 'Criminal law beyond the state: The European model' (2013) 19 ELJ 2
Norel Neagu, 'Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law' (2009), 15 ELR 4
Raimundas Jurka and Jolanta Zajančkauskienė, 'Jurisdiction Collisions in the Criminal Proceedings of European Union Member States' (2015) 8 Baltic Journal of Law and Politics 1
Susie Alegre and Marisa Leaf, 'Mutual Recognition in European Judical Cooperation: A Step Too Far Soon? Case Study – The European Arrest Warrant' (2004) 10 ELR 2
Reports, Communications
Communication from the Commission to the Council and the European Parliament COM (2000) 495 final Mutual Recognition of Final Decisions in Criminal Matters (Brussels, 26 July 2000)

Communication from the Commission to the European Parliament and the Council COM (2005) 583 final/2 on the implementations of the Court's judgment of 13 September 2005 (Case C-176/03 Commission v Council (Brussels, 24 November 2005)

Communication from the Commission to the European Parliament and the Council COM (2009) 262 final An area of freedom, security and justice serving the citizens (Brussels, 10 June 2009)

Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM (2015) 116 final The 2015 EU Justice Scoreboard (Brussels, 9 March 2015)

European Commission, COM (2013) 534 final Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (Brussels, 17 July 2013)

Report from the Commission to the European Parliament and the Council COM(2014) 313 final on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (Brussels, 2 June 2014)

Tampere European Council 1999 Presidency Conclusions, <www.europarl.europa.eu/summits/tam_en.htm> accessed 20 February 2016

European Commission IP/13/285 EU Justice Scoreboard: European Commission broadens the scope of its analysis of Member States' justice systems (Brussels, 27 March 2013)

European Commission IP/14/233 Towards a true European area of Justice: Strengthening trust, mobility and growth (Strasbourg, 11 March 2014)

European Commission MEMO/14/333 Zero tolerance for counterfeiting the euro: European Commission proposal clears final hurdle (Brussels, 6 May 2014)

European Commission SPEECH/13/986 Three Steps and a Leap Forward: Building fair trial rights across the EU step by step, day by day (Brussels, 27 November 2013)

European Commission SPEECH/14/1701 A New Chapter for Cross-border Criminal Justice by First Vice-President Frans Timmermans (Rome, 13 November 2014)

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STRENGTHENING THE RULE OF LAW IN THE EU
(CONFERENCE PAPERS)

LEXONOMICA PRESS

The Right to Interpretation and Translation and the Challenges it Faces

BURKELC JURAS

Abstract European Union adopted the Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings in attempts to ensure mutual trust between parties. The Directive was implemented in Slovenian legislature in the Criminal Procedure Act, which in essence meets all the main requirements under the directive. The Directive gives the persons who are suspected or accused of having committed a criminal offence the right to interpretation and translation. In this way they are allowed and enabled to follow and actively participate in judicial proceedings in accordance with existing international standards and case-law. However, the goal of mutual trust between the Member States is not easily achieved. Problems may arise in practice due to the loose wording of the Directive or the national legislation's failure to provide for all the necessary mechanisms required under the Directive. The article presents the relevant legal framework and analyses the possible problems suspected or accused persons might have when trying to enforce their rights.

Keywords: • Right to interpretation and translation • criminal proceedings • minimum standards • national legislation

CORRESPONDENCE ADDRESS : Burkelc Juras, University of Maribor, Faculty of Law, Mladinska ulica 9, 2000 Maribor, Slovenia, email: lina.burkelc@student.um.si.

DOI 10.4335/978.961.6399.79.1.17
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

It is quite unimaginable that a person, who cannot understand the language of a certain country, could succesfully defend itself in a criminal proceeding. Not understanding the language might be one of the greatest obstacles that a person can run into. Consequently, in the face of such language barriers, that persons right to a fair trial cannot be ensured. In such cases it becomes inevitable to provide for interpretation and/or translation services, in order for the accused or suspected to understand the nature and cause of the procedure led against him and therewith also ensure the fairness of the proceedings. To solve this crucial question in the field of criminal law, European Union (hereinafter: EU) adopted the Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (hereinafter: the Directive). Interestingly enough, this is the first legislative instrument in the field of criminal law to be adopted under the Lisbon Treaty (Morgan, 20129. The adoption of these common standards was made with the goal of ensuring mutual trust between Member States, preventing barriers that disable criminal procedures from fully operating and a possible establishment of judicial cooperation in criminal matters (Damaschin, 2012). The Directive entitles all persons, who are suspected or accused of having committed a criminal offence, to interpretation and translation. They are allowed to follow and actively participate in judicial proceedings in accordance with existing international standards and case-law.

This paper deals with the current EU and national legislation on the right to interpretation and translation and discusses the challenges it may face in practice on the basis of an informal inquiry among Slovenian judges. Among discussed are the interpretation of the dubious term 'essential documents', the right to a waiver and the trouble the suspected or accused might have when evaluating the quality of the provided interpretation or translation.

2 The current legal framework of the right to interpretation and translation in EU

2.1 European Convention on Human Rights (ECHR)

The right to interpretation and translation is based in Article 6 of the European Convention on Human Rights (hereinafter ECHR), a counterpart of Articles 47 and 48 of the EU Charter on Fundamental Rights (hereinafter The Charter). Mentioned article in paragraph 3 explicitly provides that anyone charged with a criminal offence has the minimum right *'to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'* and '*to have free assistance of an interpreter if he cannot understand or speak the language used in court'*. The European Court of Human Rights (hereinafter ECtHR) has interpreted and further specified these rights in its case-law throughout the years.[1]
ECtHR held that the right to a fair trial stated in Art. 6 ECHR entitles the defendant to have knowledge of the case against him and to defend himself (Protopapa v TUR, 2009: para 80). Despite ECHR only explicitly mentioning interpretation, ECtHR clarified that the right applies not only to oral statements made at the trial hearing but also to certain

documentary material, however still not all of written documents or evidence in the procedure (Kamasinski v AUT, 1989: para 74). The role of national courts as the ultimate guardians of the fairness of the proceedings was underlined and in this regard the important role of the judge was particularly emphasized (Hermi v ITA, 2006, Cuscani v the UK, 2002). ECtHR decided that a certain degree of subsequent control over the adequacy of the provided interpretation by the Member States is most certainly required (Kamasinski v AUT, 1989: para 74).[2]

2.2 Directive on the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU)

Yet, even if EU Member States are signatories to the ECHR that element is not sufficient for safeguarding trust in the criminal systems of the Member States. It was under that idea and under more and more frequent calls from the European Parliament that EU finally made efforts to strengthen the procedural rights of suspected or accused persons in criminal proceedings (Bargiotti, 2016). It followed those efforts by finally adopting the Directive in October 2010. However, the road to the adoption was a bumpy one. This Directive was the first of a series of directives following the Resolution of the Council on a Roadmap for strengthening procedural rights of persons who are suspected an accused of having committed crimes and who – consequently – are involved in criminal proceedings. In this context, in order to regulate the minimum standards as regards the procedural rights of suspected or accused persons in criminal proceedings, in accordance with Article 82(2)(b) of the Treaty on the Functioning of the European Union, it was established that the European Parliament and the European Council are entitled to set up minimum norms regarding the rights of the persons involved in criminal proceedings. The adoption of the Directive marked a milestone in the long history of efforts by legal interpreters and translators to obtain a certain measure of official recognition (Katschinka, 2016).

Member States were obliged to transpose the Directive into their national laws by 27 October 2013. Slovenia made the necessary changes to its Criminal Procedure Act (hereinafter CPA) in December 2014 by enforcing Act Amending the Criminal Procedure Act (CPA-M) and implemented the Directive by amending Article 8 of the Code of Criminal Procedure.

2.2.1 The current regulation under the Directive

The Directive provides that from the moment of becoming a suspect and until the conclusion of the criminal proceedings, a person who does not speak or understand the language of the proceedings is offered interpretation or translation assistance.

The interpretation must be provided to the suspected or accused persons during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings (Oliveira e Silva, 2016). Where necessary for the purpose of safeguarding the fairness of the proceeding, interpretation shoud also be available for communication between suspected or accused and their legal counsel in direct connection with any questioning or hearing during the

proceedings or with the lodging of an appeal or other procedural application (Art. 2 of the Directive). Same goes for the translation of documents, with an additional requirement that the documents need to be considered essential. The Directive provides essential documents to be the documents that '*include any decision depriving a person of their liberty, any charge or indicment and any judgment*'. Apart from these documents the Directive entitles judicial authorities to establish 'ex officio' or upon request whether other essential documents must be included. In line with Art. 3 the court can also resort to oral translation or summary of these documents on condition that the fairness of the procedures applied against persons suspected or accused of having perpetrated crimes is not aggrieved. When considering this option of an oral translation, the court must also take account of the complexity of the case. This right of the accused or suspected can also be waived if he received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver. As to the right to benefit from an interpreter, the text of the Directive emphasizes the importance of offering quality services to the suspected or accused person. It asserts the accused or suspected person with the right to challenge a decision whereby interpretation or translation is refused and in Art. 2(5) also provides the right to contest the quality of the provided interpretation or translation if the quality is not sufficient to safeguard the suspected or accused persons right to a fair trial.

In the regard of the quality of the provided interpretation or translation, the Directive follows the stance of the ECtHR and tries to ensure that the accused persons are able to exercise their right to defence. It requires Member States to set up some sort of a register of independent and appropriately qualified interpreters and translators. In this regard, EULITA, the European Legal Interpreters and Translators Association, set itself the goal of contributing to activities geared to achieve high-quality standards for interpreting services in judicial proceedings and harmonizing the legal interpreting and translation regimes across Europe (Brannan, 2010). When trying to achieve their goals they have discovered that Member States that have enforced regulation on this issue, hold highly divergent views on the criteria that should be applied to legal interpreters and translators (Katschinka, 2014).

Furthermore, the text of the Directive also contains dispositions that refer to the costs of the interpretation and translation services. Thus, Article 4 of the Directive provides that Member States must cover the costs which derive from the exercise of these rights, no matter the results of the proceedings.

The Directive sets out the minimum rights of the accused or suspected persons and contains a so-called non-regression clause in Article 8. It states that nothing in the Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the ECHR, the Charter, other relevant provisions of international law or the law of any Member State which provides a higher level of protection and thereby truly establishes that the Directive provides us with the minimum of the guaranteed rights.

3 The legal situation and practice in Slovenia

In Slovenia, the right to interpretation and translation of an accused or suspected person is regulated in Article 8 of the Criminal Procedure Act. Slovenia implemented the Directive in 2014 when CPA-M came into force. The legal basis for the right to interpretation and translation in Slovenia can be found in the Slovenian Constitution. Articles 19, 29 and 62 provide the suspected or accused person, among other, with the right to use their language and script, the right to legal defence and in case they are deprived of their liberty, the right to be informed about the reasons for the deprivation in his mother tongue or other language he understands. Despite its conformity with the standards set in the Slovenian Constitution, Article 8 CPA was amended in a way that for the most part conforms and in some ways even exceeds the demanded minimum standards set in the Directive.

The article previous to the changes merely stated that parties, witnesses and other participants in the proceedings have the right to use their own languages in investigative and other judicial actions, as well as at the main hearing and that in case that a judicial action or the main hearing is not conducted in the language of these persons, they must be provided with the oral translation of their statements, statements of others and the translation of documents and other written evidence. It also stated that the suspected or accused shall be informed of their right and they may waive it. The translations were to be done by a court interpreter.

The amended Article 8 is based on the previous wording of the article and further follows the requirements of the Directive. One of the problems that can arise due to the unspecific wording of the Directive is determining which documents fall under the scope of the term ‘essential documents’. This problems were solved with the modifications of Article 8 CPA in 2014. The article now additionally more specifically determines the documents that must be translated. Essential documents under Article 8 CPA are the indicment, summons to the court, all the decisions that deprive the accused or suspected of his freedom, judgments, decisions relating to the exclusion of evidence, exclusion of judges and dismissals of the suggested evidence. All these documents are considered essential for the suspected or accused person to efficiently defend himself and for the procedure to be aligned with the right to a fair trial. The wording of the article is therefore in line with the loose specification of essential documents that is provided by the Directive and on the basis of that specification CPA precisely defines which documents fall in the scope of essential documents and are to be translated.

The court is provided with an option to order that other documents need to be translated under specific circumstances. In line with the Directive, a possibility for only allowing oral interpretation of certain non-essential parts of documents is also explicitly mentioned. However, the option only applies if these documents are not needed for the suspected or accused to fully understand the case against him and to fully exercise their right to defence.

CPA also followed the minimum standards set in the Directive when adding a possibility of the accused or suspected to contest the quality of the interpretation or

translation or the manner in which they were made, if that is the reason they are not able to fully exercise their rights or if the specific circumstances of the case call for a different approach. However, in practice it might sometimes be unclear, whether this appeal is to be made right after a certain translated document is served to the party or in the end of the proceeding, together with the appeal against the decision of the court. Furthermore, it is quite hard for the suspected or accused to determine that the quality of the translation is not sufficient, since he obviously does not know the official language of the country in which proceedings are usually held. Perhaps that is the reason why these objections are rarely met in practice. Nonetheless, due to the possibility that such situations might occur, judges take some precautionary measures to ensure that in case of an objection against an interpretation or translation of poor quality there is some sort of verification procedure possible. There are two paths a judge might take: the statement of the witnesses and of the parties of the case are being written down as they are put into words or they are taped, translated and then written down already translated. If the statements were not typed directly or taped, there would be no possibility to check what was actually said in a certain stage of the procedure and as a consequence the quality of the translation could not be verified. Naturally, another court interpreter is used for checking the quality of the contested translation.

Regarding the mechanisms, required under the Directive, it must be stated that Slovenian regulation failed to establish a special mechanism for deciding whether an appointment of an interpreter is necessary upon informed discretion. Judicial authorities decide over the requests for interpretations and translations independently by applying the wording of Article 8 to each specific case. Despite the ECtHR's opinion that judicial authorities are required to take an active approach in determining the need for interpretation, it is questionable, if the Directive did not call for some other mechanism. Following ECtHR's judgment in *Cuscani v United Kingdom*, Slovenian judges conduct a kind of colloquy with the defendant to personally determine the extent of his language ability. By doing so, the 'burden of proof' for denying the request for interpretation lies with the court. Perhaps that is the reason the judges usually grant the requests for interpretation or translation made by the suspected or accused. However, despite their common inclination to allow the translation of plenty of important documents, a problem may arise in situations where the suspected or accused demands the translation of all the documents contained in the file. A judge then needs to establish the barrier between the essential and non-essential documents by applying all the constitutional provisions, Article 8 CPA and Article 3(4) of the Directive, which allows the judge to critically assess if certain documents or passages of the documents are relevant for the puposes of enabling suspected or accused persons to have knowledge of the case against them. Besides the requirement of some sort of a register, the Directive also calls for a quality interpretation and translation in Art. 2(8) and Art. 3(9). The quality of interpretation and translation in Slovenia is achieved through a set of rules that pertinently apply the same set of strict regulation that apply for the court experts, also on court interpreters (Art. 233(4) CPA in connection with Art. 333 CPA). Art. 44(1) CPA explicitly states that provisions referring to the exclusion of judges can also be applied for the court interpreters, meaning that court interpreters can be excluded from the proceedings under the same requirements than the judges. These safety mechanisms

encourage and at the same time force the court interpreters to produce high quality translations.

Under Article 8(3) CPA persons entitled to the right to interpretation and translation shall be informed of their right to have oral statements and written documents translated for them and they may only waive that right voluntarily, unequivocally and only if they have sufficient knowledge of the language of the proceedings. The demand of putting this legal advice on the record shows us that CPA refers to the legal instruction made by the judge. Therefore, despite the fact that the wording of the Directive does not specify what kind of 'prior legal advice' should be provided to the accused or suspected, practice does not have any trouble interpreting that phrase. The court, the judge itself, informes the suspected or accused of his rights and the requirement is considered fulfiled. The suspected or accused persons can then freely decide to waive their right to interpretation and translation if they have sufficient knowledge of the language.

The amended provision still states that the translations are to be done by a court interpreter, but also provides for a possibility of no available interpreters for a certain language. The court can in these cases appoint another person, capable of translating into the language of the proceedings.[3] The wording of the provision already indicates on its own that the court normally selects a court interpreter from a list of certified independent court interpreters established by the Ministry of Justice.[4] It can happen in practice that a party requests the translations to be provided by a specific court interpreter for personal reasons, which is not an option they are provided with under the CPA. When the court then appoints an independent court interpreter from the list of court interpreters, the parties try to exclude the court-chosen interpreter from the proceedings for as long until they can achieve the appointment of the interpreter they prefer. Of course, this is merely one of the plenty possible scenarios.

The costs of the translations in the proceedings in front of Slovenian courts are in line with Art. 8(6) of the Directive not charged to the accused or suspected person. However, the CPA somehow differentiates between people who have been deprived of their freedom and those who were not. Article 7(3) CPA states that a foreigner who has been deprived of his freedom shall have the right to file submissions with the court in his language, but that does not apply for foreigners who have not been deprived of their freedom. They shall be allowed to file submissions in their language solely on the condition of reciprocity. In practice that means that the court differentiates between foreigners that have been deprived of their freedom and those who have not, when determining whose translation or interpretation was free of costs and whose was not.[5] This distinction can also be seen when examining Article 9 CPA, which determines that all the summons, orders and other writings of the court are usually served in Slovenian language, however, the court automatically, not upon any requests from the accused or suspected, provides the foreigner who has been deprived of his freedom with the writings in the language which he uses in the proceedings.

4 Conclusion

A directive with such an ambitious and important goal as to achieve trust among Member States, while at the same time only providing the minimum standards which are to be ensured by them, is bound to run into some trouble when Member States interpret it. Slovenian national legislation followed the Directive quite well. Article 8 CPA provides suspected or accused persons the right to interpretation and translation of specificially determined documents, gives them the option to waive their right, takes care of the quality of the interpretation or translation and decides over the costs.

However, some issues are better taken care of than other. The issue of the waiver of rights is not especially troublesome in Slovenia. The accused or suspected persons can waive their right to interpretation and translation if they have knowledge of the Slovenian language and they received legal advice about it. Current regulation also sufficiently guards the quality of the translation or intepretation through the pertinent application of rules demanding quality work from a court expert and the rules that give the party a possibility to request exclusion of a judge. Based on some judges personal experiences in the courtroom it can also be stated that they are aware of the specific challenges related to interpretation and translation assistance during the criminal proceedings and they are more than willing to lend a hand to the foreign parties in order to ensure the protection of their rights. However, one can also notice the fact that some of the provisions of the Directive do not have a correspondent in Slovenian national legislation, a fact which leads us to think that Slovenia did not accomplish the fulfilment of all the minimum standards imposed for procedural rights. In this regard, some recommendations can be made. It would undoubtedly benefit the clarity of the whole proceedings, if the judges, who actually represent the 'mechanism' required under the Directive, would be provided with at least some minimum linguistic training. That could improve their awareness of the linguistic difficulties of the parties and help them meaningfully assess the interpreter's skills. Perhaps establishing some sort of a mechanism for deciding when the translation or interpretation is needed would also be recommendable, since the established system gives the criminal judge a high discretionary power on the one side and a big responsibility of protection of the right to a fair trial on the other side. One might also consider enlarging the pool of available interpreters in Slovenia, especially for some less-frequently used languages.

The overall observation would be, that minimum norms set up through the Directive are also provided by domestic legislation. Under these circumstances it can be concluded that despite the noticed lacks and limitations an optimistic view of the national regulation can be shared – in Slovenia the matter is much more 'open to interpretation' than 'lost in translation'.

Notes

[1] The European Court of Justice (ECJ) also dealt with the Directive in the *Covaci* case in 2014. ECJ gave some meaningful insights and offered it's willingness to give full effectiveness to the defence rights and apply the Directive to a broad range of situations (Lamberigts, 2015).

[2] The judges of the EctHR have adopted criteria on a fair trial. Free assistance covers all of the documents which the accused may need to understand in order to be able to defend himself

properly. This interpretation shows that the need for translation does not extend to all the papers of the case. This limited conception does not prevent the ECHR from requiring the national judges not merely appoint an interpreter, but also ensure that the interpreter is performing properly (Corstens, Pradel, 2002: 434).

[3] A non-official interpreter is adequate if he has a 'sufficient degree of reliability as to knowledge of the language interpreter' (Coban v Spain, 2006). The court should not unreasonably delay the proceedings to find an authorized interpreter, when an interpreter in other language is sufficient to allow him to understand the essence of the proceeding (Sanel v the former Yugoslav Republic of Macedonia, 2010).

[4] The list of the interpreters can be accessed on the official page of the Ministry of Justice: <https://spvt.mp.gov.si/tolmaci.html>. For more on the regulation relating to court interpreters see: Courts act (as amended) and Rules on Court Interpreters (as amended); (Osolnik Kunc, 2014).

[5] That stance can also be seen through examining case-law. The court for example did not consider it had a duty to translate its writings for the foreigner that should be deprived of his liberty, but was not, because he was on the run. Judgment XI Ips 48325/2010-77.

References

Act Amending the Criminal Procedure Act, no 87/14.

Bargiotti L. (2009) Right to interpretation and translation in criminal proceedings: the legislative works restart <http://free-group.eu/2009/12/29/right-to-access-to-an-interpreter-in-criminal-proceedings-the-legislative-works-restart/> accessed on 28 February 2016.

Bargiotti L. (2010) Is the respect of minimum standard in criminal procedures utopia? <http://free-group.eu/2010/01/21/is-the-respect-of-minimum-standard-in-criminal-procedures-utopia/> accessed 3 March 2016.

Brannan J. (2010) ECHR case-law on the right to language assistance in criminal pro- ceedings and the EU response <http://eulita.eu/sites/default/files/ ECHR%20case-law%20on%20the%20right%20to%20language%20assis-tance%20in%20criminal%20proceedings_0.ppt> accessed on 24 February 2016.

Charter of Fundamental Rights of the European Union [2012] OJ C326/391

Coban v Spain App no 17060/02 (ECtHR, 6 May 2003, 25 September 2006)

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols nos 11 and 14.

Corstens G. and Pradel J. (2002) European Criminal Law, Kluwer Law International.

Council of the European Union, Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/1.

Courts act, OG RS, nos 94/2007, 1/2012 and 35/2013.

Criminal Procedure Act, OG RS, nos 32/12, 47/13, 87/14 and 8/16.

Cuscani v the UK App no 32771/96 (24 September 2002).

Damaschin M. (2012) The Right to Interpretation and Translation in Criminal Proceedings: The Exigencies Imposed by the European Union, 8 Juridica, pp. 31-43.

European Parliament and Council Directive 2010/64/EC of 20 October 2010 laying down the minimum standards on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.

Hermi v. ITA App no 18114/02 (ECtHR 18 October 2006).

Judgment XI Ips 48325/2010-77.

Kamasinski v AUT App no 9783/82 (ECtHR 19 December 1989).

Katschinka L. (2014) The impact of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings < https://www.openstarts.units.it/dspace/bitstream/10077/9841/1/9_Katschinka.pdf> accessed on 20 February 2016.

Lamberigts S. (2015) Case C-216/14 COVACI – minimum rules, yet effective protection, EU Law blog <http://europeanlawblog.eu/?p=2989> accessed 20 February 2016.

Morgan C. (2012) The new European directive on the rights to interpretation and translation in criminal proceedings in Braun S. and Taylor J.L., Videoconference and remote interpreting in criminal proceedings, Guildford, pp. 5-10.

Oliveira e Silva S. (2012) The right to interpretation and translation in Criminal Proceedings: Portugese Law Standards <https://www.academia.edu/3492933/The_right_to_interpretation_and_translation_in_Criminal_Proceedings_Portuguese_Law_Standards> accessed on 16 February 2016.

Osolnik Kunc V. (2014) The "Court Interpreter". The Case of Slovenia, XXth World Congress of the International Federation of Translators FIT <https://www.academia.edu/8429128/The_Court_Interpreter_._The_Case_of_Slovenia> accessed on 24 February.

Protopapa v TUR App no 16084/90 (EctHR, 24 February 2009).

Rules on Court Interpreters, OG RS, nos 88/10, 1/12, 35/13 in 50/15.

Sanel v the former Yugoslav Republic of Macedonia App no 21790/03 (ECtHR, 27 may 2010).

Slovenian Constitution, OG RS, 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

Treaty on the Functioning of the European Union [2012] OJ C326/47.

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(CONFERENCE PAPERS)

LEXONOMICA PRESS

A Manifesto for Creating a New Better and Human Rights Friendly Data Retention Directive

TJAŠA ZAPUŠEK

Abstract In order to successfully perform counter-terrorism measures, EU adopted Directive 2006/24/EC. Later, the CJEU declared this Data Retention Directive to be invalid, because CJEU found that it interfered in fundamental rights to respect private life and to the protection of personal data. The consequence was, that we returned to the status quo, before 2005. I have presented gaps in existing EU legislation in this specific area, my view on current situation and also introduced possible solutions. I hold the unshakable conviction that, if we want to arrive at successful international cooperation in the fight against terrorism, which is cross border phenomenon, we have to restructure the system and create binding rules and especially only one definition of terrorism and other serious crimes. In order to create obligation of sharing data, there has to be an accurate term, what is the terrorism, who are we fighting for and what actually constitutes a terrorist group.

Keywords: • data retention directive • counter-terrorism measures • international cooperation • terrorism

CORRESPONDENCE ADDRESS : Tjaša Zapušek, University of Maribor, Faculty of Law, Mladinska ulica 9, 2000 Maribor, Slovenia, email: tjasa.zapusek@gmail.com.

DOI 10.4335/978.961.6399.79.1.18
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 The impact of EU legislation on national criminal law

There is no doubt that the area of criminal law is closely connected to the nation state, its sovereignty and the monopoly of the state on the use of force. The EU's impact on criminal law of its member states bears strong marks of their state-centered context. EU criminal law is fragmented in nature and is allowed to regulate only specific aspects of criminal and criminal procedure law. Clearly, its authority level is in stark contrast with national level criminal law and criminal procedure law, which have been developed as comprehensive and coherent system of law. There has been noticed very slow progress on Commission initiatives launched in 2004.[1] However, it has been recognized, that the influence of the EU on national criminal law regulative is rising and quite a few legislative acts have been adopted on EU level in the last few years, especially after 1.December 2009, when Lisbon Treaty entered into force. Member states in the past often presented their doubts whether EU had competence, prior to the Lisbon Treaty, over criminal procedure. Despite all doubters, Treaty enabled easier decision making on EU criminal law matters. On November 30, 2009 the Justice Council 'broke the ice' and adopted so called Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.[2] The Justice Council adopted five measures, which covers the most basic procedural rights. Next step, made by European Union was the Stockholm Programme,[3] which reaffirmed the importance of the rights of the individual in criminal proceedings. Provision of those rights presents a fundamental value of the European Union and also an essential component of mutual trust between all Member States.[4] One of two primary Treaties of the European Union is Treaty on the Functioning of the European Union (TFEU), which is considered as the starting point for assessing the impact of the European Union. TFEU lays down the possibilities for the EU to act and regulate in this area, but only in the strict framework, in other words those legal bases specifically determine the type of measures the EU may adopt. The basic explanation of the fragmentation of European criminal law indicates that the European legislature has not been attributed with a general power to harmonize this area. According to the articles 82 to 89 TFEU, cooperation in criminal matters have to be based on the regulation of cross border situations and the principle of mutual recognition.[5] The EU's competence to enact measures concerning the criminal law is now specified in Article 83 TFEU[6]. First paragraph of this Article provides that the ordinary legislative procedure should apply to the making of such directives, by way of contrast to unanimity in the Council, which was the decisional rule hitherto. Article's addition, according to the pre-existing wording in Article 31 EU, is the specific requirement, that EU intervention relates to areas of particularly serious crime that have a cross-border dimension, although it might be regarded as inherent in the earlier formulations.[7] Article 83 (1) TFEU prescribes that the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Without single doubt, Terrorism is on the list of particularly serious crimes. Furthermore, more coherency, has been brought by Article 83 (2) TFEU that connects other EU policy areas to EU criminal law cooperation. It is a new article

and affirms the ECJ's approach in the jurisprudence, already mentioned above. As mentioned at the beginning of the article, the EU is empowered to approximate criminal laws and regulations to ensure the effective implementation of a Union policy in an area that has been subject to harmonization measures.[8] Whenever in one of these other EU policy fields criminalization is deemed necessary, article 83 (2) TFEU serves as an additional legal basis.[9] However, some legislation in the area, such as framework decisions of counter-terrorism measures has modest effects on Member States.[10] Because of this framework, the Member States are obliged to qualify specific actions as terrorist crimes. The framework decisions apply to acts which legislatures in EU Member States have already qualified as criminal offences. The effect of the Framework decisions is the maximization of penalties which may be imposed to such crimes. Furthermore, Framework contains a number of conditions to be applied by the Member States, but on the other hand the latter retain considerable discretion to choose which offences they want to apply. For instance the Netherlands have included recruiting for the jihad to the list of terrorist crimes, which was not a binding obligation on the basis of the Framework decisions.[11] The Netherlands attaches great importance to the national and international fight against terrorism. The main idea of a Dutch legislator was to take an action at the earliest possible stage in the causal chain that turns one person into a terrorist, rather than simply taking repressive measures when a potential terrorist becomes active. The Crimes of Terrorism Act took effect on 10 August 2004, inter alia, implementing the EU Framework Decision on combating terrorism of 13 June 2002, with the addition, that recruiting someone for jihad was brought into realm of criminal law.[12] As a conclusion, we can say that in case of counter-terrorism measures, EU law provides merely an addition to national criminal law regulative and leaves national legislators considerable policy discretion. Member states are concentrating on operational co-operation, which presents main avenue of integration next to legislative decision-making. Law enforcement officials have created operational networks. Those networks are conducting joint investigation to enforce the law and also for setting standards of co-operation.[13] According to Den Boer originally developed 'bottom-up' between the relevant authorities of the EU member states, such operational networks have been complemented by more vertical structures created on the European level to spur their operations.[14] The most important examples of vertical coordinating structures are Europol[15] and Eurojust.[16] These two bodies contribute to fulfilment of main purpose of exchanging important information between the Member States and of coordinating the implementation of joint law activities. Between legislative and operational integration in the Draft Constitutional Treaty exists a clear distinction, which suggests that the former is seen as an alternative to legal approximation. With regard to the principle of mutual recognition, network organizations such as Eurojust and Europol could fulfil the role of bundling and diffusing necessary information on laws, legal judgments, authorities or contact points. Although this would increase the transparency of legal system, it would not be able to reduce the problem of unbalanced effects of mutual recognition in the absence of legal approximation.[17] In addition, it is important to mention that Europol cannot conduct its own investigation, it is limited to supporting the EU Member States and facilitating their action. It has been written down in report iOCTA, prepared by the European Cybercrime Center, that it is crucial that national authorities of member states to trust

Europol and consequently provide the organization with data they have lawfully obtained at national level. They also stressed that European law enforcement agencies in general and Europol in particular, do not engage in any form of mass surveillance, like in the context of Snowden, as they've said. Europol needs the tools to effectively prevent serious crime and terrorism. The question remains where the boundaries of surveillance need to be drawn. Europol also mentioned that rules on public-private partnership need to be reviewed in order to make successful cooperation between companies and law enforcement more efficiency. In their report have been written quite a controversial opinion, that there are not only the security services, who are taking advantage of the Internet and our modern means of communication, cybercriminals do the same with far worse intentions.[18] Does it mean that we have to be so called victims of both of them? We cannot influence on cybercriminals, but we deserve to be considered by European Union as citizens, whose rights and duties are based on strict, human rights friendly, lawful and effective rules.

2 Gaps in existing EU law and its past mistakes

The invalidation of the Data Retention Directive and summary of the judgement[19]

Directive 2006/24 (in continuation: Directive) was a legal act of the European Union, which required member states to required telecommunication services providers in each member state to exercised control and retained significant amount of data on the use of all different forms of telecommunication by individuals, who were within the territory of European Union. Telecommunication services providers were obliged to provide and retain information for a period of between 6 months and 2 years. The Court of Justice of the European Union (in continuation: CJEU) noticed, that there were no specific and detailed rules in the Directive, which would govern the access and use of the data, which had been provided by those services. This was the main reason, why CJEU addressed the question of the validity on the Directive in the light of the EU Charter of Fundamental Rights and its rights to privacy[20] and data protection[21]. According to the CJEU in important judgement, Joined Cases C-293/12 and C-594/12, existing legislation was disproportional over-reaction to the terrorist atrocities. In addition I want to mention, that the CJEU did not focus much on the interference of this Directive with the protection of those rights, because human rights violation was obvious. They focused on the question, whether such interference should be justified. Article 52 of the Charter provides rules and limits of possibility of justified interference with Charter's rights. Any limitation on the exercise of the rights and freedoms recognized by this Charter must be laid down by law and respect the essence of those rights and freedoms. The CJEU found, that the key issue in Directive's ruling was the proportionality of the interference with the Charter rights and not general interest or the affection of right's essence. The CJEU's decision was, that according to the main aim of these rulings, there was general interest for the restriction of the Charter rights, because Directive wanted to provide public safety. Furthermore, it was decided, that according to the Article 52 the essence of the rights was not affected, because, as regards the right to privacy the content of communications was not recorded and regarding to the right to data protection, data security rules had to be respected.[22] According to the principle of

proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. Society may well accept that the rights cannot be regarded as absolute, but the very denomination of certain interests as Union rights means that any interference should be kept to the minimum. Proportionality is therefore a natural adjunct to the recognition of such rights. Furthermore, courts regard it as a proper part of their legitimate function to adjudicate on the boundary lines between state action and individual rights, even though this line may be controversial sometimes.[23] One of the aspects of the principle of proportionality was not fulfilled. While appropriateness of the interference with the right for obtaining the objective was fulfilled, because gained data might be useful for investigation, the other aspect, necessity of the measure in question, was not. At the end, the CJEU ruled, that the important objective of investigating serious crime and terrorism as such did not justify data retention. Thus, we can sum up, that for the CJEU, safety of people is not the supreme law. In judgement[24] on 8 April 2014 the CJEU gave three reasons, why the Directive's rules were not strictly necessary. The first reason was, that "rules relating to the security and protection of data retained by providers of publicly available electronic communications services or of public communications networks, it must be held that Directive 2006/24 does not provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of that data. In the first place, Article 7 of Directive 2006/24 does not lay down rules which are specific and adapted to the vast quantity of data whose retention is required by that directive, the sensitive nature of that data and the risk of unlawful access to that data, rules which would serve, in particular, to govern the protection and security of the data in question in a clear and strict manner in order to ensure their full integrity and confidentiality". We can say, that without sufficient target, it entailed an interference with the fundamental rights of practically the entire population. Secondly, the problem was, that the measure to define 'serious crime' was and still is not clear. So, when Directive was still valid, it referred generally to 'serious crime' as defined in member states national law and between member states this term was not unified. The third reason was the absence of an obligation to destroy the data and the omission of a requirement to retain them only within the EU. CJEU acknowledged that the fight against serious crimes, such as terrorism, constitutes an objective of general interest and that the Carter of Fundamental Rights of the EU lays down, not only the right of any person to liberty, but also to security. Their final decision was, that the data retention Directive should be entirely invalid and the consequence is that we return to the status quo before 2005. It gives to Member States an option, not an obligation, to retain data pursuant to the e-privacy Directive. "However, Member States' exercise of this option will still be subject to the requirements set out in this judgment, since their actions will fall within the scope of the Charter, given that the e-privacy Directive regulates the issue of interference with telecommunications."[25]

3 Possible solutions and recommendations

First of all, if we want to arrive at successful international cooperation in the fight against terrorism, which is cross border phenomenon, we have to create binding rules and especially only one definition of *terrorism* and also one definition of *other serious crimes*, for all member states. In order to create obligation of sharing and gainig data, there has to be an accurate term, what is the terrorism, who are we fighting for, what constitutes a terrorist group etc. I have collected key points of different definitions of terrorism, which are binding in their countries. For a base I used text of an Article 108[26] of Slovenian Penal Code and guidelines provided by Professor Alex P. Schmid[27].

"Terrorism presents illegal activities organized and committed by individual perpetrators, small groups, diffuse transnational networks as well as state actors or state-sponsored clandestine agents, which refers, on the one hand, to a doctrine about the presumed effectiveness of tactic of fear-generating, psychological, physical and mental transforming or abusing, manipulating political process, using coercive political violence; on the other hand to make use of the conspiratorial practice of calculated, demonstrative, direct violent action without legal or moral restraints, targeting mainly innocent civilians and non-combatants, performed for its psychological and propagandistic effects on various audiences and conflict parties in the name of diverse ideological, political, social, national or religious bases."

New Directive should be focused on the purpose of subsequent access to the data, there should be list of registered persons and only those individuals could have access the data. In order to reach high level of security, there should be constant control of access to the data by means of a court or other independent administrative authority, because of the possibility of abuse of the capacity by privileged individuals. Clearly, there has to be stronger rules on the data retention period and strict rules and obligation to destroy important data, and requirement that data have to be retained only within the EU. As we know, the new Treaty on European Union provides, at Article 19 EU that there is a right to "effective legal protection". The CJEU declared, that the right to judicial protection is one of the general principles of law stemming from the constitutional traditions of Member States. According to the fact, that with the expiration of the five year phase in period of the Lisbon Treaty, the EU's Police and Judicial Cooperation in Criminal Matters – counter-terrorism provisions become fully subjected to oversight by the CJEU, having become supranational law. As we can see, there is an urgent need for the CJEU and national court to cooperate not only in theory, but also in practice, in order to fill the gap in the judicial oversight of cross-border law enforcement and prosecution activity.

With information and guidelines provided by Organization for security and co-operation in Europe[28] I have created an organized authority structure, based on respecting sovereignty of the member states and providing EU's supremacy on counter-terrorism provisions, with cooperation and rightful division of work between EU and their Member States. In order to create manageable and functional system, it would be reasonable to separate Europol as such on two levels. In other words it means, that

Europol should found its 'branch' in every member state. As a structure, which represents security within the European Union and also a contact point between member state and European institution, it could contribute to better coordination with national constituted bodies. I think it is much more unobtrusive approach of sharing specific information.

If person has been putted on the list of suspected terrorist/criminal and it therefore in "the EU basis" we can process gained data in three different ways.

1. Results for specific suspect falls into the red area (first question-option A and third/fourth question-option A/B) according to the form below, member states would be obliged to send relevant information and documents to European institutions and center of Europol, because it would be assumed that this person presents a high risk for public security.
2. Results for specific suspect falls into the green area (third and fourth question-option C) according to the form below, member states would threat someone as suspicious person, but he/she would not be represents a high risk. Member state, who gained disputable information, would retain them and keep record of potentially new ones, for certain period of time.
3. Results for specific suspect falls into blue area (first question-option B and third/ fourth question-option D/E) according to the form below, member states would not be allowed to gain any information about the person.

- **Person under surveillance is in the basis :**
  A. Yes
  B. No

- **Source of information:**
  _____

- **Evaluating the source of information, such as the person, agency or technical equipment providing the information on the basis of five grades:**
  A. Always reliable
  B. Mostly reliable
  C. Sometimes reliable
  D. Unreliable or
  E. Untested source

- **Evaluating the validity of the information on the basis of give grades:**
  A. The information is known to be true, without reservation.
  B. The information is known personally by the source, but not by the person reporting.
  C. The information is not known personally by the source, but can be Corroborated by other information.
  D. The information cannot be judged or
  E. The information is suspected to be false.

Notes

[1] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328
[2] [2009] OJ C295/1.
[3] [2010] OJ C115/01.
[4] P Craig and G De Burca, EU Law: Text, Cases and Materials (6th edn, OUP 2015) 994
[5] Ton van den Brink, Assesing the Impact of EU Legislation on the Member States. A Legal Perspective based on the Notion of National Discretion, (Publication and year unknown) 12
[6] TFEU art. 83 (ex TEU art. 31)
[7] P Craig and G De Burca, EU Law: Text, Cases and Materials (6th edn, OUP 2015) 982
[8] P Craig and G De Burca, EU Law: Text, Cases and Materials (6th edn, OUP 2015) 982
[9] Ton van den Brink, Assesing the Impact of EU Legislation on the Member States. A Legal Perspective based on the Notion of National Discretion, (Publication and year unknown) 12
[10] Framework Decision 2002/475/JHA on counter terrorism measures (and amending Framework Decision 2008/919/JHA
[11] Article 205 of the Dutch Code on Criminal law
[12] CODEXTER, Profile of counter terrorist capacity, Netherlands [2008]
[13] Sandra Lavenex, 'Mutual recognition and the monopoly of force: limits of the single market analogy', Journal of European Public Policy, 14:5, 762 - 779
[14] Monica den Boer , 'Cobweb Europe. Venues, virtues and vexations of transnational policing', in W. Kaiser and P. Starie (eds), Transnational Europe – Towards a Common Political Space, (London, Routledge, 2005) 191-209
[15] Europol is the EU's criminal agency. Its aim is to improve the effectiveness and co-operation between the authorities of member states by sharing data and pooling inteligence to prevent and combat serious international organised crime.
[16] Eurojust is a body of senior prosecutors, judges and police officers from each member state, whose main role is to help national authorities work together on prosecution and investigation of serious crime.
[17] Sandra Lavenex, 'Mutual recognition and the monopoly of force: limits of the single market analogy', Journal of European Public Policy, 14:5, 762 - 779
[18] The internet organised crime threat assessment, iOCTA (EUROPOL, 2014) 90
[19] ECJ, (2014), Joined Cases C-293/12 and C-594/12
[20] Article 7 of the Charter of Fundamental Rights of the European Union
[21] Article 8 of the Charter of Fundamental Rights of the European Union
[22] Steve Peers, 'The data retention judgement: The CJEU prohibits mass surveilance' (EU Law Analysis, 8 April 2014
[23] P Craig and G De Burca, EU Law: Text, Cases and Materials (6th edn, OUP 2015) 554
[24] ECJ, (2014), Joined Cases C-293/12 and C-594/12, paragraphs 58-62
[25] Steve Peers, 'The data retention judgement: The CJEU prohibits mass surveilance' (EU Law Analysis, 8 April 2014)
[26] Article 108 of the Slovenian Code on Criminal Law
[27] A.P. Schmid, Handbook of Terrorism Research (London, Routledge, 2011) 86-87
[28] Source: personal contact and http://www.osce.org/

Statutes and statutory instruments

Charter of Fundamental Rights of the European Union
CODEXTER, Profile of counter terrorist capacity, Netherlands [2008]
Dutch Code on Criminal law
Slovenian Code on Criminal Law

Cases

Case-295/1 [2009]
Case-115/01 [2010]
Joined Cases C-293/12 and C-594/12, ECJ, [2014]

References

P Craig and G De Burca, EU Law: Text, Cases and Materials (6th edn, OUP 2015)
A P Schmid, Handbook of Terrorism Research (London, Routledge, 2011)
The internet organised crime threat assessment, iOCTA (EUROPOL, 2014)
H J Steiner, P Alston and R Goodman, International Human Rights in Context: Law, Politics, Morals (3rd edn, OUP 2007)
P W Singer and A Friedman, Cybersecurity and cyberwar (OUP 2014)
R Cryer, H Friman, D Robinson, E Wilmshurst, An Introduction to International Criminal Law and Procedure (2nd, CUP 2010)
Course Terrorism and Counter-Terrorism measures: Leiden University (Coursera 2015)
Course International Human Rights Law: Duke University (Coursera 2016)
Sandra Lavenex, 'Mutual recognition and the monopoly of force: limits of the single market analogy', Journal of European Public Policy, 14:5
Monica den Boer , 'Cobweb Europe. Venues, virtues and vexations of transnational policing', in W. Kaiser and P. Starie (eds), Transnational Europe – Towards a Common Political Space, (London, Routledge, 2005)
Ton van den Brink, Assesing the Impact of EU Legislation on the Member States. A Legal Perspective based on the Notion of National Discretion, (Publication and year unknown)
Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004)
Organization for Security and Co-operation in Europe
[http://www.osce.org/]
Steve Peers, 'The data retention judgement: The CJEU prohibits mass surveillance' (EU Law Analysis, 8 April 2014) [http://eulawanalysis.blogspot.si/2014/04/the-data-retention-judgment-cjeu.html]

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LEXONOMICA PRESS

EU Commission Responsibility to Monitor Member State Compliance with IEAs in the Light of the Aarhus Convention

IDA LAURIDSEN

Abstract Environmental agreements within the EU legal system are, as a rule, mixed agreements, meaning that both the EU and its Member States have acceded to the agreement. This also means that the EU and the Member States assume joint liability for the fulfilment of obligations arising from the agreement in question. The purpose of this article is to establish what responsibility the Commission of the EU has to monitor Member State compliance with IEAs that the EU and its Member States are parties to, using the Aarhus Convention as an example. EU case law has established that the Commission has a wide authority to bring Member States before the Court of Justice of the EU in cases of failures to comply with obligations of international agreements. Findings of the Compliance Committee of the Aarhus Convention show that the EU not only has a duty to correctly implement the Convention, but also in some cases monitor compliance, for example through the use of infringement proceedings. The internal legislation, the Aarhus Convention and the views of the Compliance Committee seem to differ in relation to this question, and the pragmatic view of the Compliance Committee could be used to prevent 'compliance gaps'.

Keywords: • environmental agreements • EU legal system • IEA • Aarhus convention

CORRESPONDENCE ADDRESS : Ida Lauridsen, Lund University, Department of Law, Lund, Sweden.

DOI 10.4335/978.961.6399.79.1.19
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

During recent years, international environmental agreements (IEAs) have become increasingly important for the development of EU environmental law, as the EU has become a party to a large number of IEAs.[1] Environmental agreements within the EU legal system are, as a rule, mixed agreements, meaning that both the EU and its Member States have acceded to the agreement. The reason for this is that competence is, according to Article 4 (2)(e) of the Treaty on the Functioning of the European Union (Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C 326), TFEU, shared between the EU and the Member States in environmental matters.

When acceding to an IEA, the practice of the EU is to submit a declaration of competence, clarifying the division of competence in relation to the agreement in question, and the responsibilities of the EU and the Member States respectively. Nevertheless, the argument has been raised, that the EU might in some cases have a responsibility to monitor, and perhaps enforce Member State compliance with an agreement. Specifically, the compliance committee of the Aarhus Convention (ACCC) has touched upon the issue in a number of findings concerning the EU that will be further investigated in Chapter 4 below.

The purpose of this article is to establish what responsibility the Commission of the EU has to monitor Member State compliance with IEAs that the EU and its Member States are parties to, using the Aarhus Convention (1998 Aarhus UNECE Convention on access to information, public participation and access to justice in environmental matters 38 ILM 517) as an example. Throughout Chapters 2 and 3, a traditional legal method is used, focusing on primary legal sources such as legislation and case law pertaining to the EU regulation of the topic. In Chapter 4, chosen findings of the ACCC are examined. Chapter 5 contains a discussion of the findings, and Chapter 6 concluding reflections.

The topic has previously been explored by scholars who have for example delved into the question of Commission authority to enforce IEAs and the views of the ACCC on the issue of EU competence (see e.g. Hedemann-Robinson, 2012). What my article aims to contribute to the debate, is a more comprehensive analysis of the reports of the compliance committee on the possible responsibility of the Commission to take action when Member States fail to fulfil IEA commitments.

2 Commission enforcement of IEAS

The EU Regulatory Framework

According to Article 17 of the Treaty on European Union (Consolidated Version of the Treaty on European Union [2012] OJ C 326), TEU, the Commission has the responsibility and authority to ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. Moreover, it shall oversee the application of Union law, under the control of the Court of Justice of the European Union (CJEU).

This includes IEAs, due to their status as integral parts of the EU legal order. With a few exceptions, the Commission shall also ensure the Union's external representation in accordance with the same article.

The Use of Infringement Proceedings to Enforce IEAs

Under Articles 258 and 260 TFEU, the Commission has recourse to infringement proceedings against Member States failing to comply with EU law, including obligations derived from IEAs to which the EU is a contracting party. According to Article 258 TFEU, if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. This opportunity is given the Member State through a letter of formal notice stating the issues that the Commission has found. If the State concerned does not comply with the opinion stated in the reasoned opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

To date, the Commission has been very sparse in its use of the possibility to bring EU Member States before the CJEU for failures to comply with obligations contained in mixed agreements, and even more so concerning failures to comply with environmental agreements. In fact, there has been no infringement proceeding related to the implementation or application of the Aarhus Convention in an EU Member State. Instead, the Commission seems to focus on its internal supervisory task, enforcing EU environmental legislation (Hedemann-Robinson, 2012:7). Nevertheless, there are a few cases where the Commission has taken action against a Member State failing to comply with an IEA; these will be studied in more detail below.

EU Case Law

A milestone case on this topic is the so-called *Berne Convention* case from 2004 (Case C-13/00 *Commission v Ireland* [2002] ECR I-2943). The case did not concern an environmental agreement, but the application of the Berne Convention dealing with the protection of literary and artistic works. The Commission meant that Ireland had failed to adhere to the Berne Convention and therefore also failed to comply with EU law. The Court stated that mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements. Moreover, the Court concluded that the the Member States not only have a duty to fulfil the international obligations but also, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement. During the proceedings, the UK and Northern Ireland, by a statement in intervention to support the standpoint of Ireland, claimed that the mixed character of the agreement meant that the Court had jurisdiction to rule on it only in relation to matters which had been the subject of harmonisation measures at Community level. The Court did not agree with this statement. Hence, the *Berne Convention* case established that the Commission can enforce mixed agreements through infringement proceedings when the agreement falls within EU competence. Hedemann-Robinson asserts that this case implies that it is irrelevant whether or not a specific provision has been implemented and has a counterpart within the internal legal

order of the EU and that the scope of what can be included in the EU external competence is broadened with this case (Hedemann-Robinson, 2012: 8).

The first infringement proceeding initiated by the Commission to enforce provisions of an IEA was against France in a case referred to as *Etang de Berre (Case C-293/00 Commission v France (Etang de Berre) [2004] ECR I-9323)*. The Commission brought the action against France claiming that French authorities had failed to prevent eutrophic pollution, contrary to two legal instruments. Also this judgment concerned a mixed agreement, and France meant that the CJEU lacked competence to adjudicate the matter since the material scope of the action still fell within Member State competence, as the EU had not yet implemented the IEAs through internal EU legislation. The CJEU did not agree with this assessment and instead argued in a similar way as in the *Berne Convention* case and stated that the matter, irrespective of the lack of internal legislation, in large fell within Union legislation. Finally, the CJEU concluded that the failure to comply with international agreements constituted a breach of primary EU law. The judgment moreover touched upon an important issue related to the topic of this article, namely the interest of the EU as a whole to promote compliance with obligations arising from IEAs.

3 Liability for the fulfilment of iea provisions

Liability as Regulated in EU Legislation

The question of which party, the EU or an individual Member State, shall assume liability for the fulfilment of IEA obligations is a core problem of the present study and is necessary to examine in order to be able to answer the question of whether the EU can be said to have a responsibility to enforce IEAs that it is a contracting party to in its Member States. The basic rule is that the Union and the Member States assume liability jointly for the fulfilment of the obligations of IEAs. In case C-316/91 *European Parliament v Council*, the CJEU concluded that 'the Community and its Member States as partners of the ACP States are jointly liable to the latter for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance.' One aspect to keep in mind is that the judgment concerns obligations to other contracting parties to a convention, it does not comment on liability stemming from a failure to fulfil obligations towards individuals or NGOs.

Considering the above, it seems clear that the EU institutions and the Member States share liability for failures to comply with IEAs. This corresponds with the duty to cooperate in matters related to the fulfilment and thus implementation of IEAs. However, in individual cases, it does not seem to be that simple.

Issues Related to Liability and Mixed Agreements

Hedemann-Robinson considers one of the most pressing questions relating to the responsibility in ensuring compliance with IEAs to be to what extent Member States are bound by provisions of mixed agreements in areas where the EU has not yet adopted internal legislative instruments to implement the agreement. Does the full liability then fall on the Member State, or does the EU have responsibility to ensure the fulfilment of

some obligations (Hedemann-Robinson, 2012: 7)? An important issue that might be problematic for the EU is that it might be considered responsible for shortcomings of its Member States in complying with IEAs. The failure, or non-implementation may be caused either by a Member State that is also a contracting party to the agreement, or a non-signatory Member State (Hedemann-Robinson, 2012: 8).

It should also be noted that the difficulty in establishing the responsible party for a compliance issue such as non-implementation or other is of course also problematic for the party that the IEA aims at protecting, whether it might be another contracting party, individuals and NGOs, such as in the case of the Aarhus Convention, or the environment itself. In later years, third parties have been known to demand greater clarity regarding the division of competences between the EU and its Member States in relation to mixed agreements, in order to establish the responsible party in cases of compliance issues (Hedemann-Robinson, 2012: 8).

4 The view taken by the Aarhus convention compliance committee

The Compliance Committee of the Aarhus Convention

ACCC findings are not judgments as such, they are not legally binding on the parties and if no further action is taken in relation to a draft recommendation, they solely reflect the view of the ACCC members as stipulated in Paragraph 35 of the Annex to Decision I/7. Nonetheless, these documents may provide valuable insights in the interpretation of the Convention and also signals to the parties that improvements can be made to their legislation relating to access to information, public participation in decision-making or access to justice. For the purpose of this article, the findings of the committee in two cases have been studied below. These have been chosen as they provide a good insight into the committee's argumentation regarding the responsibilities of the Commission.

The Kazokiskes case

The *Kazokiskes* case was initiated by the Lithuanian non-governmental organisation (NGO) Association Kazokiskes Community and the alleged breach was the authorisation for and financing of a landfill in the territory of the Kazokiskes village (Report by the Compliance Committee, Compliance by the European Community with its Obligations Under the Convention, ACCC/2006/17 (European Community)). The NGO initiated cases concerning compliance both by the EU and Lithuania, but only the one concerning EU compliance is studied here. The ACCC pointed out that the EU has a special structure, which separates it from the other parties to the Aarhus Convention as the function of EU legislation is dependent on action and implementation by the Member States and because of the unique distribution of powers. Hence, the ACCC came to the conclusion that the assessment of the case needed a slightly different approach to reflect these differences.

In relation to public participation in decision-making, a certain test of significance is normally used by the ACCC. The test that was instead applied by the ACCC in order to assess if the EU was complying with the Convention, was the question whether the

relevant EU legislation allowed the Member States to make decisions on landfills without a proper notification and opportunities for public participation. The EU′s responsibility was then based on whether or not it allowed for non-compliance by its Member States. The ACCC also stressed that the EU Member States had a responsibility to implement the EU legislation transposing the Convention and it seems like the ACCC meant that the EU's responsibility ended when it had legislated in accordance with the Convention. According to Àli the ACCC decided not to adopt a 'classic search for responsibility', but instead focused on a more pragmatic approach by assigning responsibility to the party that was best suited to achieve compliance in a concrete manner (Alì, 2012: 292). In this particular case, that party was Lithuania.

Moreover, the ACCC stressed that international agreements are indeed superior in rank to the secondary legislation of the EU and that they can sometimes be applied even though they have not been implemented. This does, however, not allow the EU to abstain from transposing the Convention 'through a clear, transparent and consistent framework' of EU law. This apparently applies even though the Convention in certain cases could have direct effect and though secondary law shall be interpreted in line with the Aarhus Convention. Thus, the ACCC conclusion strengthened the view that the EU cannot rely on the Member States to transpose the Convention correctly. This also has to be done in EU legislation.

It is noteworthy that the Commission had, prior to the second communication regarding the compliance of the EU was sent, stated that the Lithuanian legislation was in line with the EU law implementing the Aarhus (Alì, 2012: 292). The applicant therefore in the submitted Communication, argued that the EU had confirmed its own failure to implement the Convention, as the EU did not enforce the breach by Lithuania. Nevertheless, the ACCC came to the conclusion that the EU had not failed to comply with the Aarhus Convention and did not enter into a discussion of this particular issue but attributed the responsibility to Lithuania for the failure to provide for a proper participation in the decision-making procedure. Yet, the ACCC did not discuss the fact that the Commission considered Lithuanian legislation to fulfil the obligations of the directives in question. Neither did the ACCC discuss the possibility of the Commission to initiate an infringement procedure against Lithuania for non-compliance or mention a potential obligation to enforce compliance with international agreements. Àli interprets this as an intention to focus on how to best encourage conduct that will eventually achieve the greatest compliance with the Convention and to accommodate the EU's internal division of competences (Alì, 2012: 293).

The Irish Renewables Programme Case

The *Irish renewables programme* case concerned alleged non-compliance by the EU for having approved and funded a renewable energy programme in Ireland. The case was initiated in 2010, when an individual claimed that the EU had failed to disseminate information in accordance with Article 5 of Aarhus and failed to provide an opportunity for public participation in accordance with Article 7 of Aarhus (Findings and Recommendations with Regard to Communication ACCC/C/2010/54 Concerning Compliance by the European Union [1]). When the case came before the ACCC,

Ireland had not yet ratified the Convention, which is why only the compliance of the EU was scrutinised.

The EU argued that its liability had to be based on its competence as spelled out in the declaration that was made upon approval of the Convention. The EU then maintained that the applicant had not proved that the acts in question fell under EU competence. Interestingly, even though the ACCC had not previously required the EU to monitor compliance by its Member States, the EU argued that it had done its utmost to pursue the alleged breaches by Ireland in relation to EU law implementing the Convention. However, Ireland was found not to be in non-compliance. This suggests that the obligation of the EU could go beyond legislating in accordance with the Convention and could also include the enforcement of the legislation, where possible. The approach was upheld by the ACCC when it stated that the question of on which party the obligations fell needed to be divided into two parts wherein the following questions were addressed:

1. Is the legal framework of the EU compatible with the Convention?
2. Has the EU fulfilled its responsibility in monitoring the Member States´ implementation of EU law that is transposing the Convention properly?

The ACCC specifically pointed out that this test was to be made for EU responsibility regarding all Member States, including Ireland. Thus, it does not seem to matter whether or not the Member State in question is also a party to the Aarhus Convention. The ACCC continued by assessing how the EU had monitored implementation by Ireland and observed that the EU had not provided evidence on how it had evaluated the acts of Ireland in the light of Article 7 of the Convention. Instead, the EU simply submitted that Ireland had complied with the requirements of Article 7. The ACCC found that the EU had failed to comply with Article 7 of the Convention on both points, which was also endorsed by the MOP in its decision.

5 Discussion

The ACCC Approach

First, it is important to note that the ACCC recognises that the EU is a *sui generis* legal system and that it must take this into consideration when assessing allegations of non-compliance. One might conclude from the *EU Kazokiskes* case that the EU is responsible for making sure that its legislation does not allow the Member States to make environmental decisions in such a way that the Aarhus Convention is not respected. In the case, the ACCC pointed out that EU legislation must not allow for Member States' decision-making procedures neglecting proper notification and opportunities for participation. The EU cannot simply depend on the Member States to individually fulfil the obligations of the Aarhus Convention. However, it is also important to note that the Member States have an obligation to implement the EU legislation transposing the Convention. Furthermore, the ACCC seems to have adopted a pragmatic approach in assigning responsibilities, focusing on which party can best ensure compliance with the Convention.

A similar approach was taken in the *Irish renewables programme* case. In this case, however, the ACCC extended the assessment to also include an obligation to monitor implementation of EU legislation derived from the Convention. It is not certain what caused this different approach. It could be a development of how the ACCC sees the responsibility of the EU or perhaps a result of a greater responsibility of the EU when the Member State has not ratified the Convention. The latter suggestion is in line with the ACCC having a pragmatic approach to liability finding the party most likely to best ensure compliance as proposed by Àli (2012: 292).

It is clear from the cases examined that the ACCC is stepping lightly in relation to the EU. The ACCC has recalled the special nature of the EU and how it, being the only regional economic integration organisation party to the Convention, must in certain cases be treated in a different way than the other parties. The ACCC seems to focus on cooperating with the European Union as to achieve maximum effect of Convention. It appears to be a fragile balance between demanding a high level of compliance to strengthen the objective of increasing public participation, while at the same time not interfering too much with the internal structure of the Union.

International and Internal Obligations to Enforce IEAs

Hedemann-Robinson strongly argues that Commission enforcement of access to justice in the EU Member States should not be limited to the internal EU legislation that, perhaps poorly, implements the provisions of the Aarhus Convention. He claims that this leads to the result that Commission enforcement of access to environmental justice is unduly limited in scope and that enforcement of Aarhus should be attempted independently of whether or not the Union has adopted internal legislation on the subject matter. This, he bases on the fact that the Aarhus Convention is, in fact, a legally binding norm with the status of EU primary law (Hedemann-Robinson, 2012: 28).

Based on the findings above, one can conclude that it is important to distinguish between the responsibilities resulting from international law, and the ones following from internal EU legislation. In this case, the internal legislation of the EU seems to emphasise the responsibility of the Commission to ensure compliance with EU law and international agreements entered into by the Union and its Member States. The authority of the Commission to enforce an IEA is wide, and not fully limited to areas where the EU has legislated, but seemingly follows from the fact that IEAs are part of EU primary law. Thus, it is clear that nothing precludes the Commission from using infringement proceedings to enforce provisions found in IEAs that the EU is a contracting party to and that the Commission has an institutional duty to ensure that the EU Member States comply with their obligations. One important measure to take to fulfil this duty is to bring the Member States before the CJEU in cases. Yet, in relation to the Aarhus Convention, the EU has on several occasions maintained that the fulfilment of obligations arising from the Convention is the responsibility of the Member States, neglecting to bring actions against Member States failing to comply

with the Convention. Perhaps the view of the EU is that the supervision of Member State compliance with IEAs is a possibility, rather than a responsibility for the EU.

Under international law, using the example of the Aarhus Convention, it is apparent that the EU and its Member States have a lot of discretion to divide the responsibility for the fulfilment of the obligations of the Convention. This is stipulated in Article 19(4) of Aarhus. To an extent, the ACCC digresses with this view and implies that the EU could in some cases be obliged under the Convention to enforce Aarhus in its Member States. However, the ACCC does not seem to be entirely consistent in its approach, and in other cases adopts a more practical approach to the issue, focusing on which party is better suited to ensure compliance with the Convention, the EU, or an individual Member State. The question of EU liability for Member State failures to comply with IEAs is thus a complex one.

Through the Commission limiting itself to enforcing provisions of IEAs that have been implemented in internal EU legislation, there is a risk of a 'compliance gap', or a grey area in which neither the EU or the Member States take responsibility for the compliance with an IEA. The standpoint of the ACCC in relation to the Aarhus Convention bridges this 'compliance gap', through the application of a more pragmatic approach to the division of responsibility for implementation, enforcement and the attribution of liability in cases of non-compliance. Considering that the Aarhus Convention foremost grants rights to individuals and NGOs, rather than other states as contracting parties to the Convention, and that individuals and NGOs are not in the best position to demand that their rights originating in the Convention are granted, it is of utmost importance that a stronger party, such as the Commission, ensures Member State compliance with the obligations. Requiring the Commission to enforce non-compliance by Member States, could therefore be a way of protecting individuals and NGOs and enforcing their rights derived from IEAs.

6 Concluding reflections

Allowing parties the discretion to independently divide liability for non-compliance is a model with flaws, as this makes the 'compliance gap' possible. If neither the Union or an individual Member States assumes liability, then what party is to be held responsible? Moreover, it can be very difficult for an individual or an NGO to determine whether to direct a complaint towards the EU or a Member State, as the rules are, at the very least, difficult to navigate. The situation is not clearly regulated, and there has evidently been room for an independent interpretation by the ACCC on how to answer the question of liability.

An interesting aspect is that EU legislation seems to go further in obliging the Commission to enforce IEAs than is perhaps required. It is clear that the Aarhus Convention in large falls within the Competence of the EU. Evidence of this is the many Union acts adopted to implement the Convention. Following the argumentation of the judgments in *Etang de Berre* and the *Berne Convention* case, the enforcement of the

Aarhus Convention is clearly within the authority of the Commission. Thus it is not very far-fetched that it should also have the responsibility to enforce the Convention.

Notes

[1] A full list of IEAs that the EU is a party to can be found at <http://ec.europa.eu/environment/international_issues/agreements_en.htm> accessed 27 February 2016.

EU legislation and cases

Consolidated Version of the Treaty on the Functioning of the European Union (2012) OJ C 326

Consolidated Version of the Treaty on European Union [2012] OJ C 326

Case C-316/91 *European Parliament v Council* [1994] ECR I-625

Case C-13/00 *Commission v Ireland* [2002] ECR I-2943

Case C-293/00 *Commission v France* (*Etang de Berre*) [2004] ECR I-9323

References

Alì A. (2012) The EU and the Compliance Mechanisms of Multilateral Environmental Agreements: the Case of the Aarhus Convention, in Elisa Morgera (ed), *The External Environmental Policy of the European Union : EU and International Law Perspectives*, Cambridge University Press

Hedemann-Robinson M. (2012) EU Enforcement of International Environmental Agreements: The Role of the European Commission, *European Energy and Environmental Law Review* 2

Aarhus UNECE Convention on access to information, public participation and access to justice in environmental matters 38 ILM 517

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, First Meeting, Lucca, 21–23 October 2002, ECE/MP.PP/2/Add.8, *Report of the First Meeting of the Parties, Decision I/7, Review of Compliance*

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Third Meeting, Riga, 11–13 June 2008, ECE/MP.PP/2008/5/Add.10, *Report by the Compliance Committee, Compliance by the European Community with its Obligations Under the Convention*, ACCC/2006/17 *(European Community)*

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Thirty-ninth Meeting, Geneva, 11–14 December 2012, ECE /MP.PP/C.1/2012/12, *Findings and Recommendations with Regard to Communication ACCC/C/2010/54 Concerning Compliance by the European Union*

<http://ec.europa.eu/environment/international_issues/agreements_en.htm> accessed 27 February 2016

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Incorporating and Externalizing Concerns for Environmental Protection and Climate Change Mitigation through the EU Energy Policy and Regulation: The 'Values vs Interests' Dilemma of the EU Foreign Policy

DAVOR PETRIĆ

Abstract Environmental and climate policy integration in the European Union implies adaptations of the political, institutional and procedural elements in line with the environmental protection and climate change issues, mandated by the imperative of sustainable development and with aims of an overall improvement of the policy inputs and outputs. One particularly important facet in this respect is the EU energy policy and regulation. Mindful of the climate change and environmental impacts of the new technologies, and being a vanguard in the global efforts to tackle these challenges, the EU began to incorporate in the certain aspects of its energy regulation innovative environmental and climate policy approaches. This paper therefore firstly analyses the internal structural capacities of the EU to successfully integrate and export concerns for environment and climate through its energy regulation, then reviews the state of environmental and climate policy integration in the EU energy sector and the success of the attempted EU regulatory externalization, and finally addresses the inherently contradicting yet overlapping interests surrounding energy/environmental/climate policy implementation, which provide insurmountable tensions for an effective EU internal and external approach, such as competition objectives versus environmental protection, as well as proclaimed values versus geopolitical, economic or security interests.

Keywords: • European Union • environmental policy • climate policy • energy regulation • policy integration • regulatory externalization

CORRESPONDENCE ADDRESS : Davor Petrić, Graduate student of law, University of Mostar, Bosnia and Herzegovina, European studies, University of Zagreb, Croatia, email: davor5ric@hotmail.com.

DOI 10.4335/978.961.6399.79.1.20
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Environmental and climate policy integration are the respective terms for the processes of introducing the concerns for environmental protection and climate change mitigation in policy-making and regulatory practices of various sectoral policy areas. In the European Union ('EU') context, this denotes adaptations of the political, institutional and procedural elements in line with the environmental and climate issues, mandated by the imperative of sustainable development and with aims of an overall improvement of the policy inputs and outputs (Farmer, 2012). One particularly important facet in this respect is the EU energy policy and regulation. Mindful of the climate change and environmental impacts of the new technologies and industries, and being a vanguard in the global efforts to tackle these challenges, the EU began to incorporate in the certain aspects of its energy regulation innovative environmental and climate policy approaches.

Energy, environment and climate are all complex, multifaceted, inherently overlapping and inextricably linked policy areas. Energy production and consumption have significantly degrading environmental impacts, in contributing to pollution, greenhouse gas emissions, acidification and waste, which in turn fasten the climate change. The latter represents one of the most serious threats to international environmental, social and economic security, and exacerbates many of these negative effects on human health and wellbeing (European Commission, 2014). Thus, environmental depletion impacts the enjoyment of human rights and is expected to increasingly cause climate change-related displacement and migration (Scott, 2014b). These respective topics – human rights, migrations, and environment – are among the ones discussed in depth in the various contributions to the present Conference Book of Papers, which exemplifies the close correlation between the issues in question, and justifies an integrated and holistic approach to addressing their interplay.

Even though the very origins of the European integration lie in matters related to the various aspects of energy (European Coal and Steel Community and the European Atomic Energy Community), a paradigmatic shift in regulatory governance context over energy issues towards the EU level occurred only in the last couple of decades. Boosted by the external challenges requiring integration of environmental and climate concerns in the EU policies, the Union gradually started incorporating various tools and mechanisms into its energy law and regulation.

Environmental and climate policy are nowadays seen as one of the success stories of the EU, advancing from virtually not being mentioned at the very beginnings of the European Communities, to being devised as the most progressive policies in the world (Farmer, 2012). The EU has thus produced a large and ever expanding body of environmental and climate policy which includes 'some of the most stringent mandates and regulatory standards globally' (Selin and Van Deveer, 2015: 311). Ratio for including environmental and climate objectives in its policies and regulation has been: ensuring sustainable development and hindering environmental contamination,

elimination of contradictions between and within policies, and establishing mutually supportive and reinforcing policies (Oberthür and Roche Kelly, 2008). Therefore, to be able to effectively respond to environmental and climate challenges requires a coherent and consistent approach across different policy sectors, especially the pertinent ones such as the energy. EU energy policy indeed paid stronger attention to alleviating the environmental pressures, ie combating climate change, through shifting to renewable sources of energy, improving energy efficiency and focusing on de-carbonization of the industry. However, along these concerns for environmental and climate sustainability, it addresses additional likewise important interests of eg economic competitiveness and energy security. Faced with the financial crisis in the last decade, the EU energy policy and regulation was dominated by the economic and social issues as the key drivers, while the environmental and climate concerns were treated as peripheral (Dupont and Oberthür, 2012).

At present EU energy policy consists of certain aspects of energy regulation (eg production, distribution, sale and consumption), which are scattered along several policy areas, among which are the environmental protection, climate change and sustainable development, with some falling under either exclusive, shared or complementary EU competence, while in some instances the EU has no competence at all. EU energy policy is therefore seen as a 'conglomerate of loosely coupled sectoral regimes' (Lavenex, 2014: 887), which carry different identities (determined by the market, environment or climate), occupy different functional spaces, and had developed external dimensions of their own. The energy-environment-climate interplay in the EU is hence an inherently heavily politicized issue and potentially results in a very contentious politics.

This brief contribution structurally proceeds as follows:
After the introductory remarks, the EU attempts to incorporate environmental and climate change concerns in its energy law and regulation are reviewed and discussed, followed by the analysis of the instances of this regulation's external effects in a wider global setting. For the conclusions, the outcomes of these processes are elaborated, and on the example of energy policy and regulation extended to a contemporary debate on the future of the EU integration. As for the research materials and methods of analysis, the existing information available in the primary (EU founding Treaties, legal documents, policy papers, strategies) and secondary sources (academic contributions, ie books and articles) were described and interpreted in an attempt to connect the variables observed into a broader theoretical context relevant for the present political and academic discourse in the EU.

2 Overview of the environmental and climate policy integration in the eu energy regulation

It is often contested that the level of policy integration depends on the characteristics of the policy issue (Nilsson, Strambo and Månsson, 2014). Environmental and climate policy integration in the EU energy policy and regulation is thus described as ambitious

in inputs, ie strategies and integration rhetoric, yet short in outputs, ie accomplishments in practice (Selin and Van Deveer, 2015). The importance of a high level of political commitment for successful integration of environmental and climate policy objectives in the energy regulation is widely recognised (Dupont and Oberthür, 2012). This departs from the liberal intergovernmentalist theory which focuses on the intergovernmental politics and Member State preferences (Schimmelfennig, 2012). With regards to the aforementioned, what can be observed in the EU is the division between the great majority of old Member States proponents of the single market with high environmental and human health standards, contrary to the majority of new Member States pushing for the promotion of economic growth through increased investment and trade (Selin and Van Deveer, 2015).

Internal structural capacities of the EU which determine the likelihood of the successful integration and externalization of concerns for environment and climate in its energy regulation are in general favourable. EU has the internal market sizeable enough so to be able to efficiently introduce environmental and climate sensitive policies without risk of economic underperformance. EU's regulatory and institutional capacity are the additional elements in favour of the integration of environmental and climate objectives in its energy policy. Regulatory propensity in enforcing strict standards is also backed by the EU practice on adopting environmentally and climate risk-averse policies, in light of the rather high level of general public awareness on importance of the issues of environmental protection and climate change mitigation. State of research and scientific development in the EU also follow the above mentioned dynamics, especially in the Commission's reliance on the technical expertise in preparing the impact assessments of the policy and regulatory proposals.

On the other hand, the current budgetary capacity of the EU allocated for the environmental and climate objectives' promotion through other sectoral policies is not supportive for the successful outcome of these processes. Global financial crisis followed by a sovereign debt crisis in Europe resulted in severe budgetary cuts and austerity measures, where the focus shifted to reviving the economic growth and tackling unemployment, hindering the prospects of further environmental and climate policy integration in the EU (Dupont and Oberthür, 2012). The time perspective in the field of environmental and climate policy strategies is as well important, where a long-term perspective is essential for achievement of successful integration of these concerns in the EU policy (Tosun and Sandoval, 2011). EU's strategic documents, however, exemplify a rather short-term perspective (eg strategies and benchmarks for the period until 2020), given that the domestic electoral cycles incentivise a short-term policies with primary concerns of re-elections, thereby decreasing the possibility for successful environmental and climate policy integration.

Finally, regarding the choice and design of the policy instruments, in order to increase the possibility of achieving successful integration of environmental and climate concerns in the EU energy policy and regulation, it is crucial to designate compatible, coordinated, non-conflicting and mutually reinforcing mechanisms (Tosun and

Sandoval, 2011). Environmental and climate policy formulation in the EU and integration in other sectoral policies are guided by several principles, including: the polluter pays principle, the precautionary principle, the subsidiarity and proportionality principles, and the effort-sharing principle (Selin and Van Deveer, 2015: 317). The EU has thus introduced a mix of command-and-control style of approach (eg environmental management instruments) and market-based instruments (energy taxation, green levies, etc), coupled with a limited use of suasive policy instruments such as voluntary agreements and eco-labels (Selin and Van Deveer, 2015: 317).

However, the effective implementation of these policy instruments is hindered given that the energy policy is still only regulated in a limited fashion by the EU supranational authority, notwithstanding the ever growing energy interdependence of its Member States which requires more Union-level action. On the other hand, environment and climate are also an area of shared competence, but in this domain the expansion in both quantity and scope of substantial decision-making power from national to EU level is more notable, and presently majority of the environmental and climate policies are formulated within EU bodies (Selin and Van Deveer, 2015: 311). In addition, Member States' different political and economic interests and varying institutional histories and capacities impact the prospects of the successful integration of environmental and climate policy objectives in the EU energy regulation. Here it also may be noted that the lack of coordination between EU and national energy policy measures creates tensions which could not address the interplay and trade-offs between different environmental and climate targets and policy tools employed from the different regulatory levels.

When one reviews the state of environmental and climate policy integration in the EU energy sector, the point of departure are the regulatory efforts from the early 1990s advancing through several phases of introducing energy legislation. In parallel with the measures for liberalization of the European energy markets and establishment of the EU internal energy market, most recently concretized in the so-called Third Energy Package of directives and regulations, the EU proceeded with an establishment of common norms and standards for the environmental and safety regulations. This major reform covered integration of environmental and climate policy in the EU energy law, based on the Commission's advocacy of the EU's commitment to place these concerns at the centre of the new EU energy policy and regulation (Morata and Sandoval, 2012). It was predicated on the necessity to reduce emissions, lower the energy consumption, rely on cleaner locally produced energy, limit the EU's exposure to increased volatility of energy supply and prices, and stimulate innovation technology and jobs in making the EU energy market more competitive (European Commission, 2014).

With this important piece of legislation being introduced, namely the '20-20-20' Energy-Climate Package, the EU committed to reach the following binding targets by 2020: cutting greenhouse gases emissions by 20 percent of 1990 levels; reducing energy consumption by 20 percent through increased energy efficiency; increasing renewable energy use by 20 percent (Nilsson, Strambo and Månsson, 2014: 4-5). The greater reduction of emissions to 30 percent of 1990 levels was made conditional on a global

and comprehensive agreement with comparable commitments from other developed countries. Thus, in the 2030 Framework for climate and energy, the EU Member States have agreed on new EU-wide targets and policy objectives for the period between 2020 and 2030 (European Commission, 2014). These targets include: 40 percent cut in greenhouse gas emissions compared to 1990 levels; at least a 27 percent share of renewable energy consumption; and at least 27 percent energy savings compared with the business-as-usual scenario (European Commission, 2014). Overall EU's objective by 2050 is to reduce emission by 80-95 percent.

The core of the energy-climate package as in force at present comprises four pieces of complementary legislation (Peeters, 2014: 41-42):

1) Renewable Energy Directive, with binding national targets which collectively lift the average renewable share across the EU to 20 percent by 2020, and contribute to decreasing the EU's dependence on imported energy and reducing greenhouse gases emissions;
2) Revised and strengthened Directive on EU Emissions Trading Scheme ('ETS') the EU's key tool for cutting emissions cost-effectively, described by EU officials as the 'cornerstone of the EU climate policy' (Skjærseth & Wettestad, 2009: 102);
3) Effort Sharing Decision, containing individual greenhouse gas emissions reduction targets for Member States reflecting their relative wealth, governing sectors not covered by the ETS, such as transport, housing, agriculture and waste;
4) Directive for the promotion of energy efficiency and development and safe use of carbon capture and storage, containing amended guidelines on state aid for environmental measures.

Since 2015 and the entry into a new institutional cycle, the key priorities of the EU's Strategic Agenda is the work towards an Energy Union with a forward-looking climate policy towards 2030 (International Energy Agency, 2014: 12). Among the core priorities of the envisaged EU Energy Union is a greater integration of environmental and climate objectives in regulatory practices, both national and EU-wide, while entrenching the EU's leadership in global environmental and climate diplomacy. The EU environmental and climate policy in the international arena has been as of yet rather inward looking, but more recently it has grown into a leading role on global environmental and climate governance (Farmer, 2012). The international environmental and climate action has in general remained fragmented and customised to specific economic conditions and level of development of particular countries. However, the EU's role was crucial in turning the Kyoto Protocol into an operative international agreement in the face of US and other developed countries' firm opposition (Farmer, 2012). The Kyoto's successor was negotiated at the Conference of Parties (COP21) in Paris in December 2015, again under the prominent leadership of the EU. Parties came forward with their proposed contributions to limit the global temperature increase to below 2°C (European Commission, 2014).

The formerly presented measures of the EU energy policy and regulation, driven by the concerns for environmental protection and climate change, and instituted internally and externalized on various levels (regional and global) with an aim to promote and safeguard these interests, have echoed in numerous instances and drew lot of controversies in a broader international setting. EU thus sought to 'export, transfer, upload and globalize' (Scott, 2014a: 96) its advanced and stringent environmental and climate standards through the energy regulation using combination of formal and informal instruments, eg via market mechanisms and policy diffusion. The EU is thus overwhelmingly depicted as a dominant global regulator, whose internal market and institutional characteristics contain features that predispose the EU with considerable capacity for externalizing its internal policies and regulatory measures to the international arena (Damro. 2012: 684). A growing academic literature dealing with this phenomenon exists, describing it with the concepts of 'the Brussels Effect' (Bradford, 2012), 'de facto and de iure incidental external effect' (Perišin, 2014), 'Europeanisation' (Schimmelfennig, 2014), etc. This is often used as a guise for the agenda influenced by the political-economy interests with an aim of creating a level playing field for European companies on international markets (Selin and Van Deveer, 2015). Two such striking examples in different dimensions selected for discussion under the following headings have been the effects of the ETS in the International Civil Aviation Organisation ('ICAO'), and significance of the energy-environment interplay within the framework of negotiations of the Transatlantic Trade and Investment Partnership ('TTIP') with the USA.

2.1 EU ETS in the ICAO: Regulatory Externalization Driven by the Market Competitiveness and Cloaked under Environmental and Climate Change Concerns

EU ETS in practice went beyond any other instance of inter-state cooperation on the protection of the environment and climate change mitigation within the context of the United Nations Framework Convention on Climate Change or the World Trade Organisation. The ETS was enforced with an intention to achieve cost-effective reduction of greenhouse gas emissions within the EU. In modelling it, the EU adopted both market-based and regulative instruments: ETS represents a so-called 'cap-and-trade' system for different industry sectors, in which the cap is determined by the policy maker but the allocation of reductions is delegated to the market (Nilsson, Strambo and Månsson, 2014: 5). Eventually, virtually all globally traded emission credits went through the EU ETS. In addition, the EU through its ETS managed to successfully export low-carbon strategies in a number of major emitting states. A growing number of them has integrated EU-like 'cap-and-trade' schemes into their national climate policies; New Zealand, Australia, Canada and Japan being among them (Skjærseth and Wettestad, 2009: 102).

The initial application of the ETS revealed mixed trends: whereas emissions from 'large point sources have indeed been reduced, at the same time emissions from some mobile and/or diffuse sources, especially those transport related, have increased substantially'

(de Sadeleer, 2013: 448). Thus, extending its application in the first instance solely to power plants and energy-intensive industrial sectors which account for about forty percent of the EU's CO2 emissions, the ETS continued to progressively draw in all major polluting industries, including aviation. Therefore, the EU Aviation Emissions Directive as the extension of the ETS required all airlines, EU and foreign, to purchase carbon permits equalling their greenhouse gas emissions for all their flights arriving at or departing from the EU territory (Bradford, 2012: 30). Subsequently, in the ICAO, we witnessed the long-waited emergence of consensus on delivering the global emission aviation scheme. In a step towards global cooperation on aviation emissions, the ICAO agreed in 2013 to develop a global system of market-based measures governing greenhouse gases emissions for international aviation. The decision on a multilateral mechanism is thus to be delivered at the ICAO's next meeting in 2016, and implemented by the ICAO members by 2020 (Perišin, 2015: 116). The EU-brokered agreement was influenced by the EU regulatory propensity in enforcing the strict standards of environmental protection in aviation emission scheme, and driven by concern for protection of domestic industry. This was in turn supported by the EU market size, ie significance of the EU aviation industry and air traffic share in the world trade.

However, in this instance the EU's struggled to exercise this sort of a regulatory unilateralism in contrast to its proclaimed dedication to multilateralism in international relations. Thus, from a less optimistic viewpoint this was seen as an example of EU regulation which had significant implications for third-parties, and yet another instance of EU regulatory unilateralism which raised lot of discontent voices and threats of hostile action against the EU. This produced negative effects in a form of (threats of) concrete retaliations, and possible violations of the international law, ie WTO provisions (Bartels, 2012).

2.2 The Outcome of the USA-EU TTIP Negotiations: Internal Energy Security vs Externalization of Environmental and Climate Interests

Since 2013, a significant and extensive bilateral free trade agreement between the EU and the USA is being negotiated – the TTIP. These negotiations could possibly be stalled by the environmental and energy issues, caused by the EU regulatory propensity in enforcing the strict standards of environmental protection in its energy regulation. Possible positive effects could realize if the EU manages to incorporate its risk-averse standards in the final version of agreement.

The final version of the TTIP will inevitably incorporate provisions dealing with the energy issues. Topics expected to be covered by the outcome of the negotiations include market access and non-discrimination, trade in sustainable energy, and energy security (Leal-Arcas & Filis, 2015: 38). For the most part the agreement will focus on non-tariff barriers, eg public interest safeguards such as environmental and public health concerns (Sierra Club, 2014: 1-2). The TTIP negotiations are taking place against the backdrop of international developments, changing energy outlook and deteriorating climate and

environment. Over the past decade the USA became a net energy exporter, and is projected to increase natural gas exports significantly in the coming years. At the same time, the EU is primarily preoccupied with the issues of energy security and diversification of its energy mix and supply sources. Paradigm-changer for the USA have been the new technologies, namely horizontal drilling and hydraulic fracturing, so-called 'fracking' (Perišin, 2014: 380). This process entails water, chemicals and proppants being pumped at high pressure into the well in order to open fractures in the rock and release the shale gas (Gandossi, 2013: 8-9).

The TTIP once in place would simplify and expedite the export procedure of US natural gas to the EU. What is questionable is how this shift in energy trade regime could be reconciled with the substantial concerns about the environmental impact of 'fracking' and present EU energy and environmental policy and regulation, or perhaps it is fundamentally contrary to the EU regulation in question. With this in mind, several EU Member States have decided to ban the exploration and production of shale gas, citing environmental concerns as the reason (Gandossi, 2013: 3). These dynamics overall have therefore made this issue one of the focal points of the TTIP negotiations, not to mention one of the most heavily debated and controversial in the process.

In general, as the recent International Panel on Climate Change reports present, global dependence on fossil fuels must end in order to avoid catastrophic climate impacts, specifying that in order to do so roughly two thirds of existing fossil fuel reserves must stay in the ground, global greenhouse gas emissions must fall by 40 to 70 percent below 2010 levels, and countries must urgently scale up renewable energy development and deployment (Sierra Club, 2014: 6). More 'fracking' in the USA as a consequence implies large amounts of 'hazardous, smog-forming and climate-altering pollutants emitted into the air' (Sierra Club, 2014: 3), as a side-effect of such exploitation technique. 'Fracking' also poses significant threat for underground water supplies through aquifer contamination, and entails risks to the public health, extended surface footprint, and geological depletion of the land (Gandossi, 2013). Therefore, greater reliance on the shale gas in the EU, either through imports from the USA or domestic exploitation, and at the crucial time for tackling decisively the global climate crisis, could potentially undermine the environmental objectives of the EU and of the entire international community which is in this respect during the last decade led by the EU itself.

By envisaging imposition of limits to invoking trade obstacles based on environmental or climate concerns, the agreement could restrict the ability of both regulatory authorities to adopt and enforce risk averse policies and legislation addressing the challenges for environmental protection and climate crisis mitigation (Sierra Club, 2014: 6). This is of utmost importance not only given the implications of overwhelming volume of trade in energy goods between the USA and the EU, but also due to the fact that the EU and USA subscribe to different standards of the risk aversion. If the stringent environmental and climate standards will be omitted from the final adopted version of the TTIP, this will undermine the EU environmental and sustainable

development strategy and contradict its energy policy and regulations, causing serious loss of credibility of the EU foreign policy in international arena. If the EU, however, manages to successfully export its energy and environmental regulations in a final version of bilateral agreement with the USA, it will therefore include certain stricter safeguards related to environmental, climate and health protection. Building on the latter scenario, differences in regulatory practices and risk assessment in the EU and the USA may lead to more trade disputes in the WTO or other international fora.

3 Concluding remarks

In the end, assessing the environmental and climate policy integration in the EU energy regulation reveals perennial problems of incomplete and uneven implementation of legislation in these policy areas. It sheds light on the apparent lack of serious political will on the part of the Member States to incentivize efforts on implementation of regulations enumerated above, severely restricting prospects of a successful EU regulatory externalization. Given that the environmental law is still in its infancy, the present political elites struggle with a clear vision regarding the level of protection to achieve, and remain torn between the disharmonious 'environmental law and policy, ie policy commitments and a swathe of legal requirements' (de Sadeleer, 2013: 447).

So even though it is rhetorically recognized that there is a need to incorporate environmental and climate concerns in the EU energy policy, the EU simultaneously seeks to achieve low energy prices and improve competitiveness of its industrial sector. It could be that inherently contradicting yet overlapping interests surrounding these processes provide insurmountable tensions for an effective EU internal and external approach, such as perceived incompatibility of the EU's competition objectives as opposed to environmental and climate aims. In practice, EU struggles with its declared policy goals and values as opposed to economic and geopolitical realities. However, considering that the long-term carrying capacity of the nature is a precondition for any other policy, environmental and climate objectives should always be prioritised and fundamental changes to European and global energy systems pursued (Selin and Van Deveer, 2015). This trade-off between competitive markets and the need for public intervention in the pursuit of climate and energy policies, should be weighed and eventually reconciled in the future (Peeters, 2014). Supranational concerted action in establishing efficient monitoring and enforcement mechanisms which aim to support environment-related technology transfer and improve standards for products sold globally is warranted in order to avoid problems such as the recent Volkswagen emissions scandal (de Sadeleer, 2013: 447).

The present discussion also stresses the instances of the EU's unilateralism as legitimized by invoking 'normatively desirable and universally applicable' values, ie protection of environment and mitigation of climate change (Bradford, 2012: 37). From this perspective, the EU regulatory externalization reflected 'altruistic purposes of a benign hegemon, acting in the collective interest to provide a global public good State' (Bradford, 2012: 38). But the EU also disguised under climate and environmental

concerns a motive to 'level the playing field' and not to place its industries into comparative disadvantage, which did not remain unaddressed by its trading partners.

Additionally, similar to other policy areas and integration efforts, consolidation and incorporation of environmental and climate objectives in EU energy regulation was not left unaffected by the contemporary crisis of integration. The present tension surrounding energy/environmental/climate policy implementation extends in its similarities and importance to a fundamental tension underpinning the EU entire integration processes, ie questions of the economic essentials vs deeper political integration, and social security and welfare vs the economies of scale, trade expansion and global competitiveness, elaboration of which surpasses capacities of the present paper. Hence, in the context of the present discussion, delegating more regulatory authority to the EU level implies loss of sovereignty, especially controversial in vital sectors for national legislators such as energy, but also environmental protection. Thus, a gap coming from within the EU between 'different visions of the future for the Union' (Bradford, 2012), described as the internal checks and growing ideological divisions, in the end present the greatest challenge and impediment for the more efficient EU policies, undermining the integrative capacity, coherence and effectiveness of the energy, environmental and climate policies in the EU.

References

Bartels, L. (2012) The Inclusion of Aviation in the EU ETS: WTO Law Considerations, Issue Paper No. 6, International Centre for Trade and Sustainable Development, Programme on Trade and Environment, pp. 1-48.

Bradford, A. (2012) The Brussels Effect, Northwestern University Law Review, 107(1), pp. 1-68.

Damro, C. (2012) Market Power Europe, Journal of European Public Policy, 19(5), pp. 682-699.

de Sadeleer, N. (2013) The Principle of a High Level of Environmental Protection in EU Law: Policy Principle or General Principle of Law? in: Miljörättsliga perspektiv och tankevändor. Vänbok till Jan Darpö & Gabriel Michanek (Uppsala, Iustus Förlag), pp. 447-465.

de Sadeleer, N. (2016) Harmonizing Car Emissions, Air Quality, and Fuel Quality Standards in the Wake of the VW Scandal: How to Square the Circle? European Journal of Risk Regulation (1), pp. 1-14.

Dupont, C. and Oberthür, S. (2012) Insufficient Climate Policy Integration in EU Energy Policy: The Importance of the Long Term Perspective, Journal of Contemporary European Research, 8(2), pp. 228-247.

European Commission (2014) Communication 22/01/2014 on a Policy Framework for Climate and Energy in the Period from 2020 to 2030 [2014] COM/2014/015 final.

Farmer, A. (Ed.) (2012) Manual of European Environmental Policy, Institute for European Environmental Policy (Earthscan/Routledge London).

Gandossi, L. (2013) An Overview of Hydraulic Fracturing and Other Formation Stimulation Technologies for Shale Gas Production, European Commission, Joint Research Centre, Institute for Energy and Transport, Luxembourg: Publications Office of the European Union, pp. 1-60.

International Energy Agency (2014) Energy Policies of IEA Countries – European Union (Review), Executive Summary, IEA Publications Paris, pp. 1-13.

Lavenex, S., (2014) The Power of Functionalist Extension: How EU Rules Travel, Journal of European Public Policy, 21(6), pp. 885-903.

Morata, F. and Solorio Sandoval, I. (2012) Introduction: The Re-Evolution of Energy Policy in Europe, in: Morata F. and Solorio Sandoval I. (Eds.) European Energy Policy: An Environmental Approach (Edward Elgar), pp. 1-24.

Nilsson, M., Strambo, C. and Månsson, A. (2014) A Qualitative Look at the Coherence between EU Energy Security and Climate Change Policies, Conference on Balancing Competing Energy Policy Goals, British Institute of Energy Economics, St John's College, Oxford, pp. 1-22.

Oberthür, S. and Roche Kelly, C. (2008) EU Leadership in International Climate Policy: Achievements and Challenges, Italian Journal of International Affairs, 43(3), pp. 35-50.

Peeters, M. (2014) Governing towards Renewable Energy in the EU: Competences, Instruments, and Procedures, Maastricht Journal of European and Comparative Law, 21(1), pp. 39-63.

Perišin, T. (2014) Pending EU Disputes in the WTO: Challenges to EU Energy Law and Policy, Croatian Yearbook of European Law and Policy (10), pp. 371-382.

Perišin, T. (2015) EU Regulatory Policy and World Trade: Should All EU Institutions Care What the World Thinks? European Constitutional Law Review, 11(1), pp. 99-120.

Schimmelfennig, F. (2012) Europeanization beyond Europe, Living Review in European Governance, 7(1), pp. 5-31, available at: <http://www.europeangovernance-livingreviews.org/Articles/lreg-2012-1/>

Schmitt, S. and Schulze, K. (2011) Choosing Environmental Policy Instruments: An Assessment of the „Environmental Dimension" of EU Energy Policy, in: Tosun, J. and Solorio Sandoval, I. (Eds.) Energy and Environment in Europe: Assessing a Complex Relationship, European Integration Online Papers 1(15), Article 9, available at: <http://eiop.or.at/eiop/index.html>

Scott, J. (2014a) Extraterritoriality and Territorial Extension in EU Law, American Journal of Comparative Law, 62(1), pp. 87-126.

Scott, M. (2014b) Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights? International Journal of Refugee Law, 26(3), pp. 404-432.

Selin, H. and Van Deveer, S. (2015) Broader, Deeper and Greener: European Union Environmental Politics, Policies, and Outcomes, Annual Review of Environment and Resources Journal (40), pp. 309-335.

Sierra Club and Power Shift (2014) Energy Trade in the Trans-Atlantic Trade and Investment Partnership: Endangering Action on Climate Change, Business and Human Rights Resource Centre, TTIP Background and Commentaries on Social and Environmental Impacts, pp. 1-9.

Skjærseth, J. B. and Wettestad, J. (2009) The Origin, Evolution and Consequences of the EU Emissions Trading System, MIT Global Environmental Politics, 9(2), pp. 101-122.

Tosun, J. and Solorio Sandoval, I. (2011) Exploring the Energy-Environment Relationship in the EU: Perspectives and Challenges for Theorizing and Empirical Analysis, in: Tosun, J. and Solorio Sandoval, I. (Eds.) Energy and Environment in Europe: Assessing a Complex Relationship, European Integration Online Papers, 1(15), Article 7, available at: <http://eiop.or.at/eiop/index.html>

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Water Pricing as a Method of Water Management

DUŠAN ALEKSIĆ

Abstract This paper explains the use of water pricing in order to prevent extensive use of water and cover all the costs incurred. Firstly, the water pricing instruments and the requirements needed for their proper functioning are discussed. A right policy of water pricing should have clear goals, and should be conducted in a suitable manner in order to fulfil its purpose. After that, water policy of the European Union (EU) and the legal basis for use of the water pricing method are presented. The Water Framework Directive (WFD), which is the first EU instrument that provides an overall regulation of freshwater resources use, sets the scene for an adequate water pricing policy. This paper also includes comments on results of surveys concerning Member States' results in conducting these policies. It is necessary to establish a solid basis for the implementation of adequate water pricing policies in order to reduce water resources exhaustion in the future.

Keywords: • water pricing • water management • environmental policy • water framework directive • water tariffs • recovery of costs

CORRESPONDENCE ADDRESS : Dušan Aleksić, Master student in Environmental law, University of Belgrade, Faculty of law Belgrade, Serbia, email: dusan92aleksic@yahoo.com.

DOI 10.4335/978.961.6399.79.1.21
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Water is an essential element needed for human survival. Not only is it crucial for biological existence of every human being, but it is also of great significance for the complete ecosystem, society, and various economic activities (Leflaive X and others, 2012: 2311). Freshwater accounts for only 2.5% of the Earth's total supply of water, and most of it can be found only frozen – in the form of glaciers and ice caps. The remaining freshwater, which is unfrozen, is mainly found as groundwater (Green Facts).

All around the world, available sources of water are being rapidly reduced. This is the result of two principal contributors - human activity and natural forces. Although scientists constantly warn us that we need to do our best to manage and protect water adequately, the level of public awareness is still not high enough, and the economic criteria often prevails.

Unfortunately, Europe is no exception to this. The European continent is covered by several million kilometres of flowing waters and more than a million lakes (Universitat de Barcelona). Each of these waters has its own characteristics and specific environmental problems. Their quality is a complicated issue, which is underlined by the influence of different pressures and multi-cause/multi-effect relationships. Most of Europe's freshwater are at risk from different threats, such as modifications of rivers, water pollution and above all - extensive use of existing sources.

When asked to list the five main environmental problems that Europeans are worried about, the results for the EU25 show that almost half of the respondents (47%) are worried about 'water pollution' (European Commission, 2005: 5). All this clearly shows that it is necessary to establish a stable and balanced plan for the future, in order to save water resources that still exist. An action on the level of the entire European Union is needed if we want to make changes that are necessary. A relatively new approach to this issue is an economic one, which includes setting right prices for the water used, in order to encourage users to act economically (Jones T).

This paper first includes an explanation of the idea of water pricing, and a detailed discussion on various issues pertaining to this field (2, 3.). This is followed by the elaboration of the legal aspects of EU's water policy (4.). Furthermore, an analysis of inclusion of water pricing in Member States' water policies is presented (5.).

2 System of water pricing

One of the basic principles of economics is that anything scarce and in demand commands a price (Brabeck-Letmathe, P., 2013). Water is becoming a scarce resource, thus water pricing is increasingly seen as an acceptable instrument of public policy in this area.

Traditionally, the objectives of various water policies have been related to economic and social issues, such as the protection of population and economic assets from floods, providing the population with adequate supply of drinking water, as well as sewage

collection transport and disposal, and providing certain economic activities, such as industry and agriculture, with water as an input for production. However, in recent years, environmental policy objectives are being included in the water policy agenda.

Various market-based methods that can make water more sustainable over the long term include in particular water-use charges, pollution charges, tradable permits for water withdrawals or release of specific pollutants, and fines in certain cases (UNEP, 2004). All this can lead to 'internalisation' of the full marginal costs (including environment costs) into decisions that affect the use of water and its quality (Environmental Economics, 2016).

Namely, there is a circular relationship between the price, demand, system design, and costs. Under-pricing water could cause its inefficient use, which would result in under-recovery of revenues, lead to inadequate reserve levels, and demand for reliance on outside funding sources. On the other hand, overpricing water could harm its consumers, discourage further economic development, result in revenue over-recovery, and encourage the use of water system revenue to cover non-water related expenses (Roth, E.). Hence, setting the right price promotes sustainable systems by recovering adequate revenue, encouraging efficient use of water, and ensuring sufficient water supplies in the future.

The introduction of water pricing mechanisms must be done carefully, and some important issues have to be considered, such as clarifying the objectives of water pricing, integrating water pricing into a full water financing strategy, assigning institutional roles, selecting the number and the type of instruments, getting the process right and above all keeping the instruments effective (EUWI, 2012: 19-21).

Member states should be guided by several important principles when defining their water pricing policy. Firstly, the environmental sustainability principle calls for prevention of depletion of critical natural capital. Secondly, the financial sustainability principle guarantees long-term reproduction of physical assets. Thirdly, the economic efficiency principle ensures that water is allocated to the most beneficial uses and economic resources are not wasted. Finally, the principle of social equity enables access to affordable water in fair and equitable conditions (Frone, S., 2012).

There are several ways to charge the price of water:

- Firstly, taxation – these are compulsory payments that are usually not in proportion with the benefits provided by government.
- Secondly, water tariffs - these are the prices charged to customers for water supplied through a piped network (EUWI, 2012: 8). Water tariff structures are methods of calculating water price. Water can either be charged according to the volume actually used, or a fixed charge can be set (either equal for everyone, or related to some other factors) (Roth, E.). According to a 2012 Eurobarometer survey 84% of EU citizens agree with volumetric charging of water (Flash Eurobarometer, 2012: 52). Water tariff levels play a small role in achieving the desired environmental objectives of water pricing, since they depend on various circumstances, i.e. customers personal income (Roth, E.).

Finally, water charges - which are usually payments related to a specific service, such as wastewater collection and treatment. While revenues from taxation go to the general budget, revenues from charges are spent on purposes related to the object of the charge (EEA Report No 16, 2013: 8). Abstraction charges are the prices charged for the direct abstraction of water from ground or surface water. They are useful ways to create ear-market budgets and gear low-cost finance of water investment (Massarutto, A., 2007). A pollution charge is a charge on discharges according to their quality (Roth, E.).

Each of these methods has its advantages and disadvantages, and all the particular circumstances of the region should be taken into consideration when deciding how to regulate these issues.

Subsidies can be defined as the difference between actual costs underlying calculations of the water price and full costs (Roth, E.). Environmental subsidies exist when the environmental damage costs are not included in the water price.

3 Water pricing in light of human right to water

The human right to water has been recognized by international community, and must be considered within a human rights framework. This right is explicitly referred to in the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities. In 2002, the United Nations Committee on Economic, Social and Cultural Rights adopted its general comment No. 15 on the right to water, defined as the right of everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses, and four years later, the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted guidelines for the realization of the right to drinking water and sanitation. The United Nations Development Programme (UNDP) has underlined that the starting point and the unifying principle for public action in water and sanitation is the recognition that water is a basic human right (Committee on Economic, Social and Cultural Rights, 2003).

Various national constitutions protect the right to water or outline the general responsibility of the State to ensure access to safe drinking water and sanitation for all, and courts from various legal systems have also adjudicated cases related to the enjoyment of the right to water

However, it is important to point out that most of the constitutions guaranteeing the right to water are those of developing countries. In these states, this right, although written in constitution, usually remains only a legal norm that is not applied in practice. In the developed countries, access to water is usually not that problematic, so there has been no need to place it in their national constitutions.

The problem that may arise here is the state's right to make the price of water too high. In this way, it violates poor citizen's basic human right. Thus, it is necessary to provide subsidies and grants for those who cannot pay the regular price for the use of water.

Another issue is whether states have the right to charge the price of water itself, or they can only charge the price of services in the providing process. Namely, if we see water as a common heritage, belonging to all the citizens, than it wouldn't be the property of state. Thus, countries cannot ask the citizens to pay for something that rightfully belongs to them. However, even if this is to be a widely accepted concept, countries would still have the right to take adequate measures in order to save water from unnecessary use and exploitation, and to save water sources, no matter if they are the property of state or of its citizens.

4 European union's water policy

To begin with, it is important to emphasise that the EU's water legislation had three stages of development (2.1.). A solid legal ground that set the foundations for adequate water pricing is found in the Water Framework Directive (2.2.).

4.1 Development of EU's water legislation

One of the first environmental sectors regulated in the context of the EU better governance activities was the water sector. There are three distinct legislative waves that shaped what is now European water policy. Firstly, during the 1970s and 1980s, water policy of EU was regulated using a primarily regulatory approach. Secondly, since the increasing eutrophication of sea and fresh waters was seen as the main problem of water pollution within the EU, in the 1990s two new legal instruments were adopted. Finally, this process was concluded by adopting the Water Framework Directive (WFD) in 2000. The Directive was meant to concentrate, rationalize and standardize European water protection legislation, as well as to improve its overall efficiency.

In 1973, the first five-year Environmental Action Programmes (EAP) was initiated (Confartigianato: 5). This laid down the main principles and objectives of the European Commission's (EC) environmental policy. Moreover, from the end of the 1970s, in several Directives, based primarily on a regulatory approach, various measures for the prevention, as well as reduction of water pollution have been introduced (Lange, U., 2003: 26). The legal basis for introducing these acts is the original EC Treaty.

The second wave in the evolution of European water policy came in 1990s as a consequence of the increasing eutrophication of sea and fish waters, and in the general bad state of water resources (European Parliament, 2007: 3). In order to solve this issue EU adopted two completely new legal instruments. They set strict rules when it comes to the treatment of waste water and the use of nitrates in agriculture.

Waste Water Treatment (Directives 91/271/EEC and 98/15/EEC) was set as an obligation of every settlement, including the smallest ones. Additionally, measures limiting the amount of animal fertilizer used on fields became obligatory (Nitrate Directive 91/676/EEC). With the implementation of the Directive concerning integrated pollution prevention and control (96/61/EC), a new rule for emissions control was also formulated (European Parliament, 2007: 3).

Furthermore, some important aspects of water protection are found in the new Drinking Water Directive, adopted in November 1998, which reviewed the quality standards and, where necessary, tightened them (Petrescu-Mag, R.: 12).

Despite all the efforts previously made, water sources were coming under increasing pressure from the on-going growth in demand for sufficient quantities of good-quality water for a wide range of uses. Thus, a directive able to protect and improve the quality of water was needed.

The Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy, or in short - the EU Water Framework Directive (WFD) was adopted on 23 October 2000. It was published in the Official Journal (OJ L 327) on 22 December 2000 and entered into force the same day (Integrated River Basin Management for Europe). This is a result of the process lasting more than five years, which included discussions and negotiations between a wide range of experts, stakeholders and policy makers.

Following many European sectorial directives in the aquatic environmental field over recent decades, it pursues an integral approach for a uniform European water policy for the first time (VGB Power: 3). The Directive establishes rules which were meant to stop the deterioration in the status of Europe's water bodies, and achieve good status of rivers, lakes and groundwater. The plan was not only to reduce pollution in these water bodies, but also to restore the ecosystems in and around these bodies of water, and to guarantee sustainable water usage by individuals and businesses.

The main advantage of the framework directive approach is that it was meant to rationalise the Community's water legislation by replacing some of the earlier directives. Thus, following many EU's sectorial directives in the water field over recent decades, it pursues an integral approach for a uniform EU water policy for the first time. Also, in contrast to previous directives, the WFD is not usage-oriented but has an ecological focus (Landy, M., 2008: 25).

The novelty of this Directive is the obligation for the states to ensure the costs of water services are recovered, so that the resources are used efficiently and polluters pay (Eur-Lex).

4.2 Legal basis for water pricing

As already mentioned, one of the Directive's paramount innovations is the introduction of water pricing into the legal acts of the EU. This is an additional step, taken in order to reflect one of the basic principles of environmental law - the polluter pays principle.

Namely, Article 9 of the Directive is named 'Recovery of costs for water services'. In the beginning of this Article it is stated that '*Member States shall take account of the principle of recovery of the costs of water services, including environmental and*

resource costs, having regard to the economic analysis conducted according to Annex III, and in accordance in particular with the polluter pays principle'.

Also, Article 9 sets two goals for the Member states that were to be achieved by 2010. Firstly, all states should ensure "*that water-pricing policies provide adequate incentives for users to use water resources efficiently and thereby contribute to the environmental objectives of this Directive'*. And secondly, each state must ensure that "*an adequate contribution of the different water uses, disaggregated into at least industry, households and agriculture, to the recovery of the costs of water services, based on the economic analysis conducted according to Annex III and taking account of the polluter pays principle*'.

This sets the requirement for Member States to ensure that the price charged to water consumers, such as for the abstraction and distribution of fresh water, and the collection and treatment of waste water, should reflect the true costs incurred. Namely, environmental costs are costs connected with the actual or potential deterioration of natural assets due to economic activities, and they can be viewed from two different perspectives – as the costs associated with economic units actually or potentially causing environmental deterioration by their activities, or as the costs incurred by economic units independently of whether they have actually caused the environmental impacts (UN, 1997).

Since the 1970s, advocating the polluter-pays principle in water policy has become the norm rather than the exception, although the level of application of this principle remains highly heterogeneous. Furthermore, the focus was on financial aspects rather than on economic costs. It is only in the early 1990s (not long before the Directive's negotiations were initiated) that attention started switching to the economic value of water.

Cost recovery is about the amount of money that is being paid for water services. The principle, however, extends not only to the financial costs of the provision of water services, but these costs should also include the costs of associated negative environmental effects, as well as forgone opportunities of alternative water uses (European Commission, 2012: 27).

In the next paragraph of the Article 9, it is stated that countries are allowed to '*have regard to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected*', while achieving objectives of this Directive.

This allows some derogation, such as those for some less-favoured areas, or as a mean to provide basic services at an affordable price (Introduction to the new EU Water Framework Directive).

This article contains one more obligation for Member states – that is to '*report in the river basin management plans on the planned steps towards implementing paragraph 1 which will contribute to achieving the environmental objectives of this Directive and on*

the contribution made by the various water uses to the recovery of the costs of water services'.

4.3 WATECO

When adopting the Water Framework Directive, few countries had experience in water economics. For that purpose, a specific guidance on water economics (WATECO) was developed in 2001-2004. Namely, a working group has been created for dealing specifically with economic issues, and, the main objective of this working group named WATECO (for WATer and ECOnomics) was the development of a specific non-legally binding and practical guidance for supporting the implementation of the economic elements of the Water Framework Directive. The members of WATECO have been economists, technical experts and stakeholders from European Union Member States and from a limited number of candidate countries to the European Union.

The Water Framework Directive in clear way integrates economics into water management and water policy decision-making – while achieving its environmental objectives, the Directive calls for the application of economic principles, economic approaches and tools and instruments (e.g. water pricing). The Directive distinguishes human activities into 'water services' and 'water uses' -water services include all services (public or private) of abstraction, impoundment, storage, treatment and distribution of surface water or groundwater, along with wastewater collection and treatment facilities; Member States shall account for the recovery of the costs of water services according to Article 9; On the other hand, water uses are all activities that have a significant impact on water status, according to the analysis of pressures and impacts developed in accordance to Article 5 and its Annex II. Member States are to ensure an adequate contribution of the different water uses, disaggregated into at least industry, households and agriculture, to the recovery of the costs of water services (Article 9); some activities, having no significant impact on water status, are neither water services nor water uses. By contrast to the approach taken for water services, the Directive does not specify a list of water uses to be considered. Basically, only the activities that cause significant impacts on water bodies and therefore pose a risk to achieving good status are covered by the definition of water uses. General experience shows that navigation, hydropower generation, domestic, agriculture and industrial activities are important water uses which may cause significant impacts and therefore have to be taken in consideration.

However, neither is the wording 'water services' clear enough. Namely, In August 2006 the European Commission received a complaint to the effect that the Federal Republic of Germany was interpreting the definition of 'water services' referred to in Article 2(38) of Directive 2000/60 as meaning that the services in question were restricted to the supply of water and the collection, treatment and elimination of waste water, thereby narrowing the scope of Article 9 of that directive, relating to the recovery of the costs of water services. In particular, according to that interpretation, impoundments, inter alia for the purposes of hydroelectric power generation, navigation and flood protection, do not come within the scope of water services and are therefore not taken into account for the application of the principle of recovery of costs under Article 9 and

Annex III(a) of that directive. On 7 November 2007 the Commission sent the Federal Republic of Germany a letter of formal notice in which the Commission made clear that the German legislation was not compatible with several provisions of Directive 2000/60 and that the Member State was incorrectly applying the concept of 'water services'. The Commission considered, in essence, that, in the interest of protecting water resources, the various uses of water had to have a price. Accordingly, the Member States have an obligation to provide for a pricing structure for the different water uses, even if they are not supplies of services in the conventional sense of the term. Thus, for example, mere navigation should be subject to a fee. It is thus clear that measures for the recovery of the costs for water services are one of the instruments available to the Member States for qualitative management of water in order to achieve rational water use. Though, as rightly pointed out by the Commission, the various activities listed in Article 2(38) of Directive 2000/60, such as abstraction or impoundment, may have an impact of the state of bodies of water and are therefore liable to undermine the achievement of the objectives pursued by that directive, it cannot be inferred therefrom that, in any event, the absence of pricing for such activities will necessarily jeopardize the attainment of those objectives. In that regard, Article 9(4) of Directive 2000/60 provides that the Member States may, subject to certain conditions, opt not to proceed with the recovery of costs for a given water-use activity, where this does not compromise the purposes and the achievement of the objectives of that directive. It follows that the objectives pursued by Directive 2000/60 do not necessarily imply that Article 2(38)(a) thereof must be interpreted as meaning that they all subject all activities to which they refer to the principle of recovery of costs, as maintained in essence by the Commission. In such circumstances, the fact that Germany does not make some of those activities subject to that principle does not establish by itself, in the absence of any other ground of complaint, that that it has failed to fulfill its obligations under Articles 2(38) and 9 of Directive 2000/60. In the light of all the above considerations, the Commission's action was dismissed (EWA Newsletter).

Also, the Information sheet points out seven important issues when it comes to analyzing and reporting on costs recovery: defining the water services, identifying providers, users and polluters, calculating financial costs of water services, identifying and estimating the environmental and resource costs of the water services, calculating the recovery rate of the economic costs of water services, and identifying the cost recovery mechanism.

5 Implementation of water pricing policies in member states

A study named 'Assessment of cost recovery through pricing of water' from 2013, whose main objective was to provide practical knowledge on the current status of the implementation of the cost-recovery principle in Member States, provides us with some useful information (EEA Report No 16, 2013):

Households use around a third less water when they are charged for the actual amount of water they use. Nevertheless, many Members States still use flat-rate charging which provides no incentive for users to be economical. Use of drinking water is not significantly influenced by changes in price, but when using water for gardening or

swimming pools, citizens are much more responsive. Some examples of water use responding to pricing are found in Denmark and Czech Republic. Namely, urban water prices in Denmark increased by 54% between 1993 and 2004 along with infrastructure investments. Over a decade water use per person per day fell by almost 20% to 125 litres, one of the lowest levels of any OECD country. Water prices in the Czech Republic increased in real terms since 1990, resulting in a 40 % decrease in domestic water use.

When it comes to use of water for agriculture, in the majority of EU farmers are allowed to use unlimited water for a flat charge. Volumetric charging reduces the amount of water used by agriculture by 10-20%, according to some studies. Household water tariffs are usually designed to recover the financial costs, but agricultural water use is often heavily subsidised, so the price covers as little as 20% of costs in some cases.

When the price of using water does not recover the full cost, some of the cost may be passed on to others. For example, if industry pollutes water, and does not pay for its cleaning, these costs are imposed on the rest of society. Low-income households must also have access to affordable water services. However, service providers may end up with poor infrastructure if they are underfunded because of artificially low prices for all users.

6 Conluding remarks

In order for the water pricing policy to be successful, it is necessary to ensure the application of a common framework for water pricing. Furthermore, it is of paramount importance to educate the citizens on the issues concerning water pricing. Institutions should make further researches in the field of the price elasticity of water demand for different uses and under different socio-economic and water management conditions. Also, Member States should widen the policy debate on water costs recovery and consider some alternative economic instruments for achieving the same goals.

When creating an adequate water pricing system, one should not deviate from some basic requirements which are to be met. Firstly, it is crucial that at least a substantial part of the water bill is variable – the price should be charged according to the amount of water used, since the bigger the variable part is, the greater will be the incentive to save water. Then, volumetric rates are to be used, and the rules for their calculation should be determined transparently by an independent institution. The prices charged should be high enough to provide incentives for water service suppliers to invest in improvements and innovations in this area. Moreover, when determining the rates, Member States have to take into consideration regional variations in water scarcity and other relevant conditions, so that all water users are treated equally.

Water pricing presents one of the crucial components of water saving system. A permanent solution for the problem of water resources scarcity may only be resolved if water pricing is combined with other water management methods. This should be one of the main focuses of the future EU's environmental activities.

References

European Environment Agency (EEA) Report No 16 (2013) Assessment of cost recovery through water pricing

Flash Eurobarometer (2012) Attitudes of Europeans towards Water-related Issues

Confartigianato, EU Environmental Issues and Policies Guidelines

Eur-Lex, Good-quality water in Europe (EU Water Directive), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al28002b>, accessed 15 February 2016

'Introduction to the new EU Water Framework Directive, <http://ec.europa.eu/environment/water/water-framework/info/intro_en.htm>, accessed 15 February 2016

European Parliament (2007) Study for the European Parliament's Committee on Environment, Public Health and Food Safety: Simplification of European Water Policies

European Commission (2005) The attitudes of European citizens towards environment

United Nations Environment Programme - UNEP (2004) The Use of Economic Instruments in Environmental Policy

Brabeck-Letmathe, P. (2013) Conservation Oriented Water Pricing, Water challenge blog, <https://www.water-challenge.com/posts/Conservation-oriented-water-pricing>, accessed 15 February 2016

Environmental Economics, ECON 101: Negative Externality, <http://www.env-econ.net/negative-externality.html>, accessed 15 February 2016

Frone, S. (2012) *Issues on the Role of Efficient Water Pricing*

Green Facts – Facts on Health and the Environment, Water Resources, <http://www.greenfacts.org/en/water-resources>/, accessed 15 February 2016

Jones, T. (2003) Pricing Water, OECD Observer No 236

Landy, M. (2008) *A Methodology to Quantify the Environmentally Compatible Potentials*, The European Topic Centre on Air and Climate Change

Lange, U. (2003) *Recommendations for a Coordinated Implementation of the European Water protection*, Dublin

Leflaive, X. and others (2012), *The Consequences of Inaction*, OECD

Massarutto, A. (2007) *Abstraction Charges: How Can The Theory Guide Us?*, Paris

Petrescu-Mag, R., *Water Legal Provisions with Special Focus on the Quality of Fresh Waters*, AACL BIOFLUX

European Union Water Initiative - EUWI (2012) *Pricing Water Resources to Finance their Sustainable Managemen*,

Roth, E. (2001) *Water Pricing in the EU*, EEB

VGB Power *The EU Water Framework Directive - and its Possible Effects on Hydropower*

Integrated River Basin Management for Europe, The EU Water Management Directive, <http://ec.europa.eu/environment/water/water-framework/index_en.html>, accessed 15 February 2016

--Universitat de Barcelona, Geografia d'Europa: European Rivers, Reservoirs and Lakes, <http://www.ub.edu/medame/riemblag.html>, accessed 15 February 2016

Water Framework Directive 2000/60/EC [OJ L 327]

United Nations – UN (1997) Glossary of Environment Statistics, Studies in Methods, Series F, No 67, New York

EWA Newsletter (2014), European Water Association, Issue 37

Committee on Economic, Social and Cultural Rights (2003) General Comment No. 5: The Right to Water (Arts. 11 and 12 of the Covenant)

CENTRAL EUROPEAN LAW CONFERENCE FOR STUDENTS,
STRENGTHENING THE RULE OF LAW IN THE EU
(CONFERENCE PAPERS)

LEXONOMICA PRESS

Wildlife Trafficking

JELENA PECOTIĆ

Abstract Wildlife trafficking is defined as international and non-international illegal trade in wild animals and plants and derived products, and closely interlinked offences such as poaching. Many plant and animal species are affected by wildlife trafficking, bringing some species to the brink of extinction. Moreover, impacts of wildlife trafficking globally are not limited to biodiversity, it also affects economic development, the rule of law, political stability and global security as it is used for funding terrorism. Low levels of awareness about the problem, a low risk of detection and low sanction levels make it particularly lucrative for criminals. The EU plays an important role as a destination market, transit hub and partially also as a supply region of illegal wildlife products. Although the EU incorporated CITES into its legislation and with its own legislation went beyond the CITES provisions, the illegally wildlife trade remains insufficiently enforced. The problem lays in the lack of awareness, insufficient budgeting, low prioritisation and low levels of cooperation.

Keywords: • Wildlife trafficking • Poaching • Terrorism • Environmental crime • EU Wildlife Trade Regulation

CORRESPONDENCE ADDRESS : Jelena Pecotić, Faculty of Law, University of Zagreb, Croatia, Slovenia, email: jelenapecotic@gmail.com.

DOI 10.4335/978.961.6399.79.1.22
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Environmental crime[1]typically refers to 'any breach of a national or international environmental law or convention that exists to ensure the conservation and sustainability of the world's environment' (Elliott, Lorraine, 2007). Combined estimates from the Organisation for Economic Co-operation and Development (OECD), the United Nations Office on Drugs and Crime (UNODC), United Nations Environment Programme (UNEP) and INTERPOL place the monetary value of all environmental crime at between US$70 and US$213 billion each year (Unep.org, 2016). This paper will focus on one branch of environmental crime- wildlife trafficking. Wildlife trafficking is defined as international and non-international illegal trade in wild animals and plants and derived products, and closely interlinked offences such as poaching.[2] The impacts of wildlife trafficking affect biodiversity, economic development and it represents a major threat to the worldwide security.

2 Wildlife trafficking and its impacts

2.1 Impact on biodiversity

'Humans are behind the current rate of species extinction, which is at least 100–1,000 times higher than nature intended'(Wwf.panda.org, 2016). WWF's 2014 Living Planet Report found wildlife populations of vertebrate species (of mammals, birds, reptiles, amphibians, and fish) have declined by 52% between 1970 and 2010(Wwf.panda.org, 2016).Illegal wildlife trade is surely one[3] of the main reasons that many species are endangered(Bradshaw, Sodhi and Brook, 2009). In order to avoid unforeseeable consequences on different ecosystems the continued illegal trade needs to be stopped (Lawson, Vines, 2014) .The scale of wildlife trafficking has grown immensely in the last decade. Examples below illustrate the scale of trafficking in some species[4] listed in the Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora(CITES): "According to seizure records and arrivals at sanctuaries, wildlife trafficking claimed about 1,800 great apes between 2005 and 2011;a estimated one million pangolins were illegally traded between 2000 and 2014; over 4000 tonnes of rosewood, suspected to have been illegally exported from Madagascar, were seized by authorities in various transit and destination countries between November 2013 and April 2014"(SWD/2016/ 38 final).

2.2 Wildlife on the market

According to UNODC Sub-Saharan Africa and South-East Asia are the major supply regions for several of the largest illicit animal markets. On the demand side the largest consumers of illegal wildlife are China[5], the United States, and the European Union (Unodc.org, 2016).The most lucrative animals and animal products include elephant[6] ivory, tiger bones[7], Tibetan antelope, bear gallbladders, rhino[8] horns, and exotic birds and reptiles. "Generally, demand for animal products falls into three categories: traditional Chinese medicine, commercial products, and exotic pets" (Haken, 2011). In Asia, many people believe that products made with certain animal parts have medical and mystical powers. Also, study made by the National Geographic showed that the

motivations among ivory enthusiasts are consistent across all the countries[9] that were surveyed—'most notably, the belief that ivory is the "perfect gift," fuelled by the perception that it's "rare, precious, pure, beautiful, exotic, and importantly, that it confers status to not only the receiver but the giver. A sizeable portion of people in China (44%) and the Philippines (39%) view ivory as a token of good luck'(National Geographic.org, 2015).As China's economy continues to grow so does 'the Chinese middle class which has grown to outnumber the U.S. middle class for the first time, with 109 million Chinese adults now counted in that category compared to 92 million American'(Credit Suisse, 2016). Therefore, significant number of Chinese people are able to buy ivory and rhino horn which increases the demand for it, further causing market price increase and more elephants being killed. 'Data from the Elephant Trade Information System (ETIS) also confirm that China's involvement in this illegal trade rose from 3% in 1996 to 40% in 2011' (Underwood, Burn and Milliken, 2013). According to analysis conducted by the MIKE[10] Programme, trends in consumer spending in China are strongly correlated with the Proportion of Illegally Killed Elephants (PIKE)" (CITES, IUCN / SSC African Elephant Specialist Group and TRAFFIC, 2013).

2.3 Impact on elephant and rhino population

The growing demand for ivory products and rhino horns caused an uprising of overall killing rates over natural birth rates of rhinos and elephants. The number of African elephants plummeted from 1.2milion in the 1970 to less than 500,000 in 2011 (Haken, 2011). An estimated 20,000 - 30,000 elephants have been killed illegally every year since 2011, if the current rate continues- the forest elephants will go extinct in 2023 (SWD/2016/ 38 final). Elephants are having an important role in balancing the ecosystem as they are one of the most important seed dispersers. 'The local reduction or disappearance of elephant populations will result in (a) a limited set of (highly-specialized) plant species being poorly dispersed or not dispersed at all; and (b) many species being dispersed in lower quantities and especially at shorter distances e though perhaps in a more scattered pattern. The expected result is a simplification of the community level interaction network, an increase in the vulnerability of ecosystem function, and changes in the demography and distribution of a considerable number of plant species." (Terborgh et al., 2008). Elephants are poached for their tusks which can be used in traditional medicine or for crafting items such as: chop-sticks, jewellery, ornaments, hair accessories, etc. The wholesale price of raw ivory in China tripled from 2010 to 2014 reaching the value of US$2,100 per kilogram (Save the Elephants, 2016).

In Vietnam, rhino horn is a recreational drug and as such used by wealthy people as a detoxifying beverage and body-rejuvenating tonic. In China, rhino horn is used in Traditional Chinese Medicine to treat fever, pain, rheumatism, convulsions and other disorders (IUCN.org, 2012).Although, scientific studies (Nowell, 2012)have yet failed to prove that rhino horn have medicinal value, the craze remains. All five remaining rhino species are listed on the *International Union for Conservation of Nature* (IUCN) Redlist of threatened species, with three out of five classified as critically endangered[11] and only 29,000 rhinos survive in the wild (Rhinos, 2015). The population of rhinos has declined due to increased poaching- only in South Africa rhino poaching increased from

333 to 1215 between 2010 and 2014 (an increase of almost 400% in four years) (South African Department of Environmental Affairs, 2015) . 'It is forecast that at current rates of increase in rhino poaching, populations of the White rhino in South Africa, which holds roughly 93% of the global population, could be extinct by 2025' (Challender, MacMillan , 2014).In 2006 the value of rhino horn in the black market was around US$760 per kilogram and it drastically increased reaching the price of US$65,000 per kilogram in 2012 (WWF, Dalberg, 2012).

2.4 Wildlife trafficking and its economic and security impacts

In 2011 report made by Global Financial Integrity estimated that illegal trade in wildlife was worth between US$7.8 billion and US$10 billion annually and placed as the fourth most lucrative transnational crime (Haken, 2011). Wildlife trafficking is very alluring to organized crime organisations because of its low sanction levels and low detection rate. Many studies (UNDP.org, 2010) have shown that in the Andean region, South and Central Asia and Central Africa illegal armed groups (terrorist and criminal groups) such as: Harakat ul-Jihad-I-Islami-Bangladesh , Jamaatul Mujahedin Bangladesh, Janjaweed militia, Al-Shabaab, Joseph Kony's Lord's Resistance Army and Boko Haram are funded in part by poaching elephants (Bigelow, 2014).For example: according to an investigation in 2011, Al-Shabaab generated between US$200,000 and US$600,000 a month from tusks. About 40% of that money made Al-Shabaab's total operating budget (Karlon, Crosta, 2012) .The poached ivory is exchanged for money, weapons and ammunition. Poaching threatens the livelihoods and economic growth opportunities of local communities. 'High ranking officials of the Rapid Intervention Battalion (BIR), Cameroon's special forces, told WWF: "It is highly unfortunate that the military had to be called in to address this situation, but the reality is that we are dealing with well-armed and highly trained individuals, who do not hesitate to terrorize local populations to achieve their aims"'(Wwf.panda.org, 2012). On the other hand, rangers who are supposed to protect the environment and people mostly undergo insufficient training, operate with inadequate equipment and are underpaid. Therefore, rangers are often overpowered by heavily armed poachers and many of them are killed[12]. Local people are being exploited by criminal organisations seeking to recruit hunters with knowledge of the local terrain. In the absence of economic opportunities, local people have little choice when they face a well organised trafficking organisation offering them significant source of income. MIKE data analysis has found that three factors consistently emerge as very strong predictors of poaching levels and trends: 'poverty at the site level, governance at the national level and demand for illegal ivory at the global level' (SWD/2016/38 final) . Research also suggests that there may be a greater motive to facilitate or participate in the illegal killing of elephants in areas where human livelihoods are insecure (SWD/2016/38 final).'Also, it shows that poaching levels decrease as livestock or crop density increase. Relationships between poverty, food security and Proportion of Illegally Killed Elephants (PIKE) [13] highlight a close linkage between the well-being of local communities and the health of elephant populations'. Analysis under the MIKE programme shows that, at national level, the factor most strongly correlated with the proportion of illegally killed elephants is governance, as measured by Transparency International's Corruption Perceptions Index (CPI).High poaching levels are more prevalent in countries where governance is weaker

(CITES, IUCN / SSC African Elephant Specialist Group and TRAFFIC, 2013).Weak government relates to weak territory control and high ratio of corruption. High ratio of corruption undermines the rule of law therefore it inhibits economic development[14] (SWD/2016/38 final). It also undermines the states effort to develop tourism as a significant source of income (Traffic.org, 2014).Corruption can occur at all levels of government and every stage of the illegal wildlife product trafficking chain. For example: "In 2015, the former wildlife director and head of the CITES Management Authority of Guinea was arrested in relation to an allegation of corruption and fraud relating to the issuance of CITES export permits" (Interpol.org, 2015).

3 Wildlife trafficking regulated internationally

Growing awareness of the widespread impacts of the illegal wildlife trade has led to increased international attention in recent years and the EU, along with the United Nations[15], Interpol, Europol, World Bank, World Customs Organisation and other wildlife agencies so as non-governmental organisations, are bringing together global leaders and stakeholders to help root out the trade.

The main international legal instrument to regulate wildlife trade is The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) that entered in force on July 1975. CITES is an international agreement to which States (countries) adhere voluntarily. States that have 'joined' CITES are known as Parties and currently there are 182[16]Parties. CITES is legally binding on the Parties as it provides framework to be respected by each Party, which has to adopt its own domestic legislation to ensure that CITES is implemented at the national level (Cites.org, 2016). CITES`s aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival and it grants various degrees of protection to more than 35,000 species of animals and plants (Cites.org, 2016).Species are listed in three Appendices depending on the degree of protection they need. In the Table 1 (Ec.europa.eu, 2016) below, it is shown what is the requirement for specie to be listed in the Appendices and what permits it needs to be imported, exported or re-exported.

Table 1: CITES Appendices

Appendix	**Includes**
Appendix I	• Species that are threatened with extinction and are or may be affected by trade. Commercial trade in wild-caught specimens of these species is illegal (permitted only in exceptional licensed circumstances). • Any trade in these species requires export and import permits.

Appendix II	• Species that are not necessarily threatened with extinction, but may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with the survival of the species in the wild. • International trade in specimens of Appendix II species may be authorized by the granting of an export permit or re-export certificate. • No import permit is necessary for these species under CITES.
Appendix II	• Species included at the request of a Party that already regulates trade in the species and that needs the cooperation of other countries to prevent unsustainable or illegal exploitation • International trade is allowed only on presentation of the appropriate permits or certificates.

4 The EU and wildlife trafficking

4.1 The EU and wildlife trade

"The legal trade of wildlife products into the EU alone was worth an estimated €93 billion in 2005 and this increased to nearly €100 billion in 2009" (Traffic.org, 2016). The EU is a transitional region and an end market for legal and illegal wildlife trade. The EU is also a source or export region for wildlife products exported illegally to non-EU countries (SWD/2016/38 final).[17] Although most of the wildlife products imported into the EU are of legal origin[18], the reports of large seizures at the EU borders between 2011 and 2014 submitted by EU countries to the European Commission show that the EU is a major end market for illegal wildlife products (COM/2016/087 final).[19]

4.2 The EU Legislation on wildlife trade

4.2.1. Wildlife Trade Legislation

The EU became a Party to the CITES in 2015 becoming it´s 181st member. "All EU Member States were Parties to CITES before the EU joined as a Party and they spoke whit one common position at CITES meetings. Building on the existing good cooperation with EU Member States, the EU accession will reinforce visibility and accountability of the EU as the EU will be speaking at The Conference of the Parties (on issues of EU competence)"(Ec.europa.eu, 2016). Provisions of the CITES Convention is implemented through set of Wildlife Trade Regulations:

"The Basic Regulation is Council Regulation (EC) No 338/97 which regulates trade therein, it incorporates CITES provisions into EU law. It lays down the provisions for import, export and re-exports as well as internal EU trade in specimens of species listed in its four Annexes (see below Table 2).

The Implementing Regulation that implements Council Regulation (EC) No 338/97 are: Commission Regulation (EC) No 865/2006 (as amended by Commission Regulation (EC) No 100/2008, Commission Regulation (EU) No 791/2012 and Commission Implementing Regulation (EU) No 792/2012).

The Permit Regulation: Commission Implementing Regulation (EU) No 792/2012 of 23 August 2012 laying down rules for the design of permits, certificates and other documents provided for in Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating the trade therein and amending Regulation (EC) No 865/2006.

In addition to this core legislation, a Commission Recommendation to Member States (Commission Recommendation No 2007/425/EC identifying a set of actions for the enforcement of Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, commonly referred to as the 'EU Enforcement Action Plan') specifies further the measures that should be taken for enforcement of the EU Wildlife Trade Regulations'' (Ec.europa.eu, 2016).
The EU adopted several directives in relation to wildlife and nature conservation. The Birds Directive :Directive 2009/147/EC on the conservation of wild birds aims to protect all European wild birds and the habitats of listed species, in particular through the establishing of Special Protection Areas. The Habitats Directive: Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora. The Habitats Directive was adopted to help maintain biodiversity and it protects over 1000 animals and plant species and over 200 types of habitat by establishing Special Areas of Conservation. Special Protection Areas together with the Special Areas of Conservation form a network of protected sites across the EU called Natura 2000[21] (Ec.europa.eu, 2016).These two directives prohibit sale and transport of numerous wild species that abide in the EU. Wildlife trafficking is also regulated with the adoption of Directive 2008/99/EC on the protection of the environment through criminal law. "The Directive requires that the Member States consider wildlife trafficking as a criminal offence , but it does not specifies what should be the level of sanctions and does not establish common forms but is asking the Member States for proportionate, effective and dissuasive criminal sanctions" (SWD/2016/38 final). It is shown below in Table 3 and Table 4 the varying approach of sanctioning illegal wildlife trade in the EU.

4.2.2. Differences between Council Regulation (EC) No 338/97 and CITES

The EU goes beyond than the CITES provisions in regulating wildlife trade as it is seen below in the Table 2. The EU provided protection for some non-CITES listed species as well as it provided stricter protection in CITES-listed species by giving them better level of protection than the CITES granted.

Table 2: Annexes of the Regulation (EC) No 338/97 (Ec.europa.eu, 2016).

Annex	Includes	Type of trade	Documents required
Annex A	• All CITES Appendix I species • Some CITES Appendix II and III species, for which the EU has adopted stricter domestic measures • Some non-CITES species	Import	**Export permit** issued by country of export and **import permit** issued by the EU MS* of destination.
		Export	Export permit issued by the EU MS of export and import permit issued by country of destination.*
		Re-export	**Re-export certificate** issued by the EU MS and **import permit** issued by the country of destination.*
Annex B	• All other CITES Appendix II species • Some CITES Appendix III species • Some non-CITES species	Import	Export permit issued by country of export and import permit issued by the EU MS of destination**
		Export	Export permit issued by the EU MS of export
		Re-export	Re-export certificate issued by the EU MS of re-export
Annex C	• All other CITES Appendix III species	Import	Export permit or certificate of origin and import notification presented to Customs office upon introduction into the EU.
		Export	Export permit from the EU Member State of export.
		Re-export	Re-export certificate from the EU Member State of re-export.
Annex D	• Some CITES Appendix III species for which the EU holds a reservation • Some non-CITES species	Import	Import notification presented to Customs office upon introduction into the EU
		Export, Re-export	No documents required unless the species is listed in Appendix III of

			CITES

Notes:
**EU Member State*
***the import permit is only required when the species is listed in Appendix I of CITES.*
****the export permit is only required when the species is also listed in Appendix II of CITES*

4.3 Implementation and enforcement

4.3.1 Main obstacles to unified approach

Member states are differently affected by illegal wildlife trade which depends on their geographical position. Member States placed on the borders of EU have higher rate of illegal trade and/or if they are hosting large trade hubs (sea ports or airports). Three Member states reported 59% of the total number of seizures across the EU while eighteen Member States together reported less than 6% of total seizures for 2012 (SWD/2016/38 final). Therefore, some Member States face greater responsibility in detecting wildlife trafficking than other Member States. They are more likely to have greater implementation gap than Member States where the trade is not enhanced.

Moreover, Member States have different economic and financial means which affects its implementation. While some Member States do not have problems in financing CITES implementation, other Member States including Croatia, Ireland and Malta have specifically stated that the shortage of resources makes it difficult to implement CITES (SWD/2016/38 final) . Another problem is the lack of awareness and prioritisation given to wildlife trafficking reflected in the shortage of human and technical resources given at the national level. "CITES management authorities are often understaffed; 61 % of Member States report fewer than 10 staff members spending anything between 10 % and 100 % of their time on CITES issues. Moreover, only 70 % of Member States say their enforcement authorities have access to specialised equipment, expertise and resources, and several of those say they need significantly more resources" (SWD/2016/38 final).

4.3.2 Sanctioning illegal wildlife trade

There are considerable differences in systems used to enforce the EU Wildlife Trade Regulations. Maybe the best indicator how important illegal trade in the EU is: the difference in the implementation and which is the level of cooperation i.e. the level of fines and imprisonment.

Table 3: Prison sentences imposed in the EU in 2013-2014 for wildlife trade offences *(SWD*/2016/38 final)

For the column detailing maximum imposable sentence, each line represents a separate piece of national legislation and the subsequent sentence imposed.

MS	Maximum imposable sentence	Longest sentence imposed (years)	No. of sentences
AT	**Int**: 2 years; **Neg**: 1 year		0
BE	5 years	4 years (1 year suspended) – appealed	4
BG	**Int**: 5 years	0.5 years (suspended)	1
CY	3 years		0
CZ	8 years	3.5 years (on probation)	8
DE	5 years	1 year	2
DK	**Int**: 1 year		0
EE	5 years*^^		0
EL	**Int**: 10 years; **Neg**: 1 year	0.5 years	2
	2 years^		
	20 years		
ES	**Int**: 2 years	0.92 years	3
	5 years		
FI	2 years**	1 year (conditional) – appeal	1
FR	1 year; 7 years*	Details not known	2
	3 years; 10 years*		
HR	5 years		0
HU	**Int**: 3 years; **Neg**: 2 years		0
IE	**Sum**: 1 year; **Ind**: 2 years		0
IT	1 year^	1 year	2
LT	4 years		0
LU	6 months		0
LV	2 years		0
MT	2 years		0
NL	**Int**: 6 years; **Neg**: 1 year	3 years (conditional)	9
PL	**Int**: 5 years; **Neg**: 2 years	Details not known	0
PT	3 years		0
RO	3 years		0
SE	4 years		0
	6 years		
SI	3 years; 5 years*		0
SK	8 years		0
UK	**Sum**: 6 months; **Ind**: 5 years	1 year	5
	7 years		

Notes:
Int: Intentional conduct; Neg: negligent conduct; Sum: Summary Convictions; Ind: Convictions on Indictment
** If conducted as an organised criminal group*

*** 4 years if several cases together*
^ May be doubled for repeat offences
^^ Abuse of official position

Table 4: Maximum fines imposable and applied in 2013-2014 *(SWD*/2016/38 final)

MS	Maximum fines imposable for private persons (EUR)	Highest fine imposed in 2013-2014 (EUR)
AT	1 800 000	0*
BE	300 000	90 000
BG	10 000	2 500
CY	1 700	0*
CZ	Unspecified	1 500
DE	1 800 000	18 000
DK	Variable	10 000
EE	Unspecified	1 500
EL	500 000	5 300
ES	Unlimited	225 000
FI	Variable	250 000
FR	150 000	900
HR	13 160	500
HU	308 106	0*
IE	100 000	500
IT	103 000	5 000
LT	37 650	-
LU	Unspecified	-
LV	28 000	700
MT	4 659	2 000
NL	81 000	50 000
PL	175 000	0*
PT	37 500	37 500
RO	3 575	8 700
SE	Variable	9 700
SI	16 690	7 000
SK	331 930	0*
UK	Unlimited	19 471

Note:
'Variable' fines depend on many factors, including the income of the person, which makes it impossible to assign a set figure. However, it is unclear if these 'variable' fines have an upper limit, so they have been considered separately from countries that clearly reported unlimited fines;
0 - these countries did not provide clear information on fines applied in 2013-2014;*
'-' – these Member States clearly reported that they had not issued fines in 2013-2014

From the Table 3 and Table 4 above we can see:
1) That some Member States did not provide clear information's therefore the existent scale of wildlife trafficking in the EU is unknown. "Between 2011-2012 and 2013-

2014, 12 Member States reported that they had not provide d detailed information on significant cases of illegal trade or information on convicted illegal traders and persistent offences" (SWD/2016/38 final). "The analysis of fines actually imposed for wildlife trade crime in the EU in recent years is hampered by poor and inconsistent reporting by Member States. (...) due to the many uncertainties, this assessment can provide only a partial picture of fine levels applied in practice (SWD/2016/38 final)." "It hampers Europol's efforts to conduct regular and accurate threat assessments of wildlife trafficking" (SWD/2016/38 final). The nature of illegal wildlife trade is that it is mobile; it affects many countries on various levels. The illegal trade routes are frequently changed because they are abusing countries with low enforcement for import, export and re-export of illegal specie and/or derived product. When the illegal specie and/or derived product entered the EU and is placed on the EU market it is difficult to identify it. Therefore, unified and coordinated enforcement must exist to enhance wildlife trafficking.

2) The fines and prison sentences manifestly differ in Member States. The maximum imposable prison sentence in Greece is 20 years whereas in Luxembourg the maximum imposable prison sentence is 6 months. The maximum imposable fine is unlimited in United Kingdom and Estonia, while the maximum imposable fine is EUR 1 700 in Cyprus.

3) The sanctions that were applied in 2013-2014 were much lower than the maximum imposable sanctions. "The severity of fines and prison sentences imposed in the EU fails to reflect the seriousness of the crimes and the value of the wildlife on the international (black) market, and lack deterrent effect" (SWD/2016/38 final). Also, having the information that wildlife trafficking can be extremely lucrative it is certain that the rates of undetected offences are high. One of the factors of that low detection rate and low sanctions on environmental offenders is the lack of sufficient expert knowledge. Through the enforcement chain there are many obstacles for a wildlife trafficking case to be convicted: from having appropriate technical expertise and specialised knowledge to identify wildlife trafficking, to the judges that should recognise the severity of offences.

4.4 The EU's global fight against wildlife trafficking

The European Commissioner for Maritime Affairs and Fisheries Karmenu Vella pointed out in his speech that: "The EU has the largest diplomatic network in the world. We are also the biggest donor for development aid, and the biggest trading block. That means we have three very powerful levers, and we intend to use them (Ec.europa.eu, 2016)". "The EU has been actively promoting effective implementation of the CITES Convention by the eight countries benefiting from the Generalised Scheme of Preferences (GSP) + arrangements. The countries enjoy lower tariffs for their exports of a number of products to the EU, provided that they have ratified and effectively implemented a number of international conventions, including CITES" (SWD/2016/38 final). The EU also provides financial support for many international organisations fighting illegal wildlife trade, for example: The European Commission is supporting International Consortium on Combating Wildlife Crime (ICCWC) with 1.73 million

EURO their work. (Ec.europa.eu, 2016). Moreover, they are financing source countries : the EU has committed over EUR 500 million for biodiversity in Africa over the past 30 years, with a portfolio of ongoing projects worth approximately EUR 160 million (SWD/2016/38 final).

Also, the EU is addressing the supply of and demand for illegal wildlife products by supporting various campaigns to raise consumer awareness, recognising that the consumers dictate the trade.

5 Concluding remarks

To sum up, we can conclude that the impacts of wildlife trafficking are causing significant problems, not necessarily connected at first glance. The local people live in fear of poachers, unable to seek government protection because of states' lack of funds and/or corruption. Animals are facing extinction by mass murdering which outnumbers the birth rates. Also, the money earned from poaching provides funds for terrorism which threatens world security. The problem is that criminal organisations are not stopped by boundaries; they operate beyond them, often changing states in order to avoid prosecution. The role of the EU is significant as it is a large market of wildlife products. Moreover, it is recognised globally as a supporter of sustainable development. The EU is aware of the shortcomings from current approach and its legislation, as well of the insufficient cooperation between Member States, Member States and the EU and other global actors. Therefore, The European Commission adopted a Communication on the EU Action Plan against Wildlife Trafficking (COM/2016/087 final) to step up the fight against wildlife trafficking internally and globally. The Action Plan is to be implemented jointly by the EU (Commission services, EEAS, Europol, Eurojust) and it's Member States until 2020 (Ec.europa.eu, 2016). It has three priorities:
Priority 1: Preventing wildlife trafficking and addressing its root causes.
Priority 2: Implementing and enforcing existing rules and combating organised wildlife crime more effectively.
Priority 3: Strengthening the global partnership of source, consumer and transit countries against wildlife trafficking.

Notes

[1] "Five areas are considered to be of major importance: illegal trade in wildlife; illegal logging and its associated timber trade; illegal, unreported and unregulated (IUU) fishing; illegal trade in controlled chemicals (including ozone-depleting substances); and illegal disposal of hazardous waste. New types of environmental crime are also emerging, for example in carbon trade and water -management." (UNEP, 2012)

[2] ''Poaching, in law, the shooting, trapping, or taking of game or fish from private property or from a place where such practices are specially reserved or forbidden'. (Britannica.org,2016)

[3] 'The major ''systematic drivers'' of modern species loss are changes in land use (habitat loss degradation and fragmentation), overexploitation, invasive species, disease, climate change (global warming) connected to increasing concentration of atmospheric carbon dioxide, and increases in nitrogen deposition.' (Sodhi, Brook and Bradshaw, 2009)

[4] A major problem is that for many lesser-known species the data isn't sufficient to know the true spread of the extinction

[5] 'It is assumed that as much as 70% of illegal ivory goes to China.' (Brown, Wang, 2014)

[6] African elephant is in CITES listed : Appendix I (18/01/1990), except populations of Botswana, Namibia and Zimbabwe (Appendix II, 18/09/1997) and South Africa (Appendix II, 19/07/2000) (IUCN 2015)
[7] The world's tiger population has fallen from 100,000 a century ago to less than 3500 today existing in wildlife and poaching is considered as one of the main reasons. (IUCN 2015)
[8] White rhino is listed in CITES Appendix I and II, Black rhino is listed in CITES Appendix I. (IUCN 2015)
[9] The ''Monitoring the Illegal Killing of Elephants' (MIKE) programme under CITES aims to measure levels and trends in the illegal hunting of elephants and to determine the factors causing or associated with changing trends. MIKE has been implemented since 2001 and operates at over 80 sites, spread across 44 elephant range countries in Africa and Asia.''(SWD/2016/ 38 final)
[10] Critically endangered: Black rhino-5 050 species left, Javan rhino-around 60 species and Sumatran rhino -100 species left. (Rhinos.org, 2016)
[11] 'In DRC's Virunga National Park around 140 rangers have been killed in the last 15 years. More than 1,000 rangers have been killed worldwide and many more injured over the last 10 years'. (Iucn.org, 2014)
[12] 'MIKE evaluates relative poaching levels based on the Proportion of Illegally Killed Elephants (PIKE), which is calculated as the number of illegally killed elephants found divided by the total number of elephant carcasses encountered by patrols or other means, aggregated by year for each site'. (Cites.org, 2016)
[13] For example,' the non-payment or underestimation of tax and customs duties by illegal traders'. (SWD/2016/ 38 final)
[14] The UN Office on Drugs and Crime (UNODC), (CITES) Secretariat , International Criminal Police Organization (INTERPOL), World Bank, World Customs Organization (WCO) in 2010 formed an International Consortium on Combating Wildlife Crime (ICCWC) . (Ec.europa.eu, 2016)
[15] The last Party that accessed CITES is the Republic of Tajikistan, becoming its *182nd* Party in January 2016. (Cites.org, 2016)
[16] 'One of the most serious problems the EU currently faces as a source region for illegal export of wildlife is the large-scale smuggling of European eels (Anguilla anguilla).European eels are classed as 'critically endangered' on the IUCN Red List, and its population has fallen by 90% since the 1960s/70s'. (SWD/2016/ 38 final)
[17] "The legal trade in wildlife goods is a vital part of the global economy. In 2009 the global trade in live reptiles (including turtles and snakes but excluding skins) was estimated to be worth EUR 25.5 million, of which the EU's share was EUR 7.5 million (about 30% in terms of value), while the global trade in live ornamental fish was worth EUR 267.5 million, of which the EU's share was EUR 87.1 million". (SWD/2016/ 38 final)
[18] The main commodities exported illegally to the EU that were seized between 2011 and 2014 include: medicinal products derived from plants and animals; live reptiles (over 6000); reptile bodies, parts and derivatives (over 9600); live birds and eggs (over 500 specimens seized); mammal bodies, parts and derivatives; live plants, mainly orchids, cacti, euphorbias and cycads (78,000); and corals, caviar, timber products, dead birds and invertebrates. (SWD/2016/38 final)
[19] Network of protected areas known as Natura 2000, stretches across all the Member States and covers over 18% of the EU's land area. (Ec.europa.eu, 2016)

References

Bigelow, K. (n.d.). *Last days of ivory*. [video] Available at: http://www.lastdaysofivory.com [Accessed 5 May 2016].

Brown, S., Wang, S. (2014, January 6). ' China crushes tons of illegal ivory', CNN. Retrieved from: <http://edition.cnn.com/2014/01/06/world/asia/china-ivory-stockpile/>[Accessed 1 May 2016].

Campos-Arceiz A., Blake S. 'Megagardeners of the forest - the role of elephants in seed dispersal', Acta Oecologica 37 (2011) 542-553. <http://faculty.washington.edu/timbillo/Readings%20and%20documents/CO2%20and%20Forests%20readings/Campos%20Arceiz%202011%20Elephant%20seed%20dispersal.pdf > [Accessed 5 May 2016].

Challender, D. W. S. and MacMillan, D. C. (2014), 'Poaching is more than an Enforcement Problem'. Conservation Letters, 7: 484–494. doi: 10.1111/conl.12082 <http://onlinelibrary.wiley.com/doi/10.1111/conl.12082/full>[Accessed 3 May 2016].

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Action Plan against Wildlife Trafficking , 2016, COM/2016/087 final <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:87:FIN>[Accessed 5 May 2016].

Commission Staff Working Document on the EU Action Plan against Wildlife Trafficking, (SWD/2016/ 38 final), 2016. < http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2016:38:FIN > [Accessed 5 May 2016].

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

Credit Suisse Research Institute:' Credit Suisse Wealth Report' 2015. <https://www.credit-suisse.com/ch/en/about-us/research/research-institute/news-and-videos/articles/news-and-expertise/2015/10/en/global-wealth-in-2015-underlying-trends-remain-positive.html>[Accessed 3 May 2016].

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version of Directive 79/409/EEC as amended)

DG Environment ', The EU Action Plan against Wildlife Trafficking, in Brussels', 26.02.2016 < https://ec.europa.eu/commission/2014-2019/vella/announcements/eu-action-plan-against-wildlife-trafficking-brussels_en>[Accessed 5 May 2016].

DG Environment,'The European Union and Trade in Wild Fauna and Flora' <http://ec.europa.eu/environment/cites/legislation_en.htm>[Accessed 5 May 2016].

DG Environment ,'Nature and biodiversity law '
<http://ec.europa.eu/environment/nature/legislation/index_en.htm>[Accessed 1 May 2016].

DG Environment, 'Nature and biodiversity' http://ec.europa.eu/environment/nature/index_en.htm [Accessed 1 May 2016].

DG Environment, 'The EU Approach to Combat Wildlife Trafficking' <http://ec.europa.eu/environment/cites/traf_steps_en.htm> accessed: 29. February 2016[Accessed 1 May 2016].

DG Environment, 'The Differences between EU and CITES Provisions in a Nutshell', <http://ec.europa.eu/environment/cites/pdf/differences_b_eu_and_cites.pdf>[Accessed 5 May 2016].

DG Environment, 'Permits, Certificates and Notifications' <http://ec.europa.eu/environment/cites/info_permits_en.htm>[Accessed 5 May 2016].

Elliott, Lorraine, 2007, 'Transnational environmental crime in the Asia Pacific: a 'un (der) securitized' security problem?' The Pacific Review, 20: 4, 499 — 522 <http://ips.cap.anu.edu.au/sites/default/files/IPS/IR/TEC/Elliott_L_Transnational_environmental_crime_Asia_Pacific_undersecuritized_security_problem.pdf>[Accessed 5 May 2016].

Encyclopaedia Britannica<http://www.britannica.com>[Accessed 5 May 2016].

Haken, J., 2011. Transnational Crime in the Developing World. Global Financial Integrity. < http://www.gfintegrity.org/report/briefing-paper-transnational-crime/>[Accessed 5 May 2016].

International Rhino Foundation <http://rhinos.org/>[Accessed 5 May 2016].

INTERPOL 'Strategic Report Environmental Crime and its Convergence with other Serious Crimes', 2015, < http://pfbc-cbfp.org/news_en/items/INTERPOL-report.html>[Accessed 5 May 2016].

International Union for Conservation of Nature (IUCN) 2015. '*The IUCN Red List of Threatened Species*'. *Version 2015-4*. <http://www.iucnredlist.org> [Accessed 5 May 2016].

IUCN, 'Panthera tigris',<http://www.iucnredlist.org/details/15955/0>[Accessed 2 May 2016].

IUCN, 'Rhino Poaching Brochure',<https://cmsdata.iucn.org/downloads/factsheet_rhino_poaching.pdf>[Accessed 2 May 2016].

IUCN, 'Rising murder toll of park rangers calls for tougher laws', 2014 <http://www.iucn.org/?17196/Rising-murder-toll-of-park-rangers-calls-for-tougher-laws>[Accessed 3 May 2016].

Karlon, N.,Crosta, A., ' Africa's white gold of Jihad: Al-Shabaab and conflict ivory'<http://elephantleague.org/project/africas-white-gold-of-jihad-al-shabaab-and-conflict-ivory/>[Accessed 3 May 2016].

Lawson, K., Vines, A., 'Global Impacts of the Illegal Wildlife Trade the Costs of Crime-Insecurity and Institutional Erosion', 2014 <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0214Wildlife.pdf>[Accessed 2 May 2016].

National Geographic, '100 Million Sharks Killed Every Year, Study Shows on Eve of International Conference on Shark Protection', 2013, <http://voices.nationalgeographic.com/2013/03/01/100-million-sharks-killed-every-year-study-shows-on-eve-of-international-conference-on-shark-protection/>[Accessed 5 May 2016].

National Geographic, Globescan, 2015. 'Reducing Demand for Ivory: An International Study '< http://press.nationalgeographic.com/files/2015/09/NGS2015_Final-August-11-RGB.pdf>[Accessed 1 May 2016].

Nowell, K. 'Species trade and conservation. Rhinoceroses: Assessment of rhino horn as a traditional medicine' <https: //cites.org/eng/com/sc/62/E62-47-02-A.pdf>[Accessed 4 May 2016].

South African Department of Environmental Affairs <https://www.environment.gov.za/mediarelease/molewa_waragainstpoaching2015>[Accessed 4 May 2016].

Sodhi N.S., Brook B.W. & Bradshaw C.A.J. 2009.' Causes and consequences of species extinctions'. In: Princeton Guide to Ecology (Levin S.A., editor). Princeton University Press. pp. 514-520.

< http://press.princeton.edu/chapters/s5_8879.pdf>[Accessed 5 May 2016].

Save the Elephants,' Statistic'<http://savetheelephants.org/about-elephants/statistics/>[Accessed 3 May 2016].

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 'What is CITES?' <https://www.cites.org/eng/disc/what.php>[Accessed 1 May 2016].

CITES, 'CITES getting ready for sharks and rays', 2013 <https://cites.org/eng/news/pr/2013/20130914_shark_ray.php>[Accessed 1 May 2016].

CITES CoP16 Document 53.1 on MIKE, 'Monitoring the Illegal Killing of Elephants – Addendum', <https://cites.org/eng/cop/16/doc/E-CoP16-53-01.pdf>[Accessed 3 May 2016].

CITES, 'Data and Reports '<https://cites.org/eng/prog/mike/data_and_reports> [Accessed 3 May 2016].

CITES, 'The 182nd Party to CITES: Tajikistan' (2016)<https://cites.org/eng/182nd_Party_Tajikistan>[Accessed 2 May 2016].

CITES Secretariat, IUCN / SSC African Elephant Specialist Group and TRAFFIC International:' Status of African elephant populations and levels of illegal killing and the illegal trade in ivory: A report to the African Elephant Summit', 2013, <https://cmsdata.iucn.org/downloads/african_elephant_summit_background_document_2013_en.pdf>[Accessed 4 May 2016].

The Directorate-General for Environment (DG Environment), 'EU Accession to CITES'<http://ec.europa.eu/environment/cites/gaborone_en.htm>[Accessed 5 May 2016].

Traffic, 'EU wildlife trade'<http://www.traffic.org/eu-wildlife-trade>[Accessed 5 May 2016].

Underwood, F.M., Burn, R.W. and Milliken, T. (2013). 'Dissecting the Illegal Ivory Trade: An Analysis of Ivory Seizures Data'. PLoS ONE 8(10): e76539. doi:10.1371/journal.pone.0076539 <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3799824/>[Accessed 4 May 2016].

United Nations Environment Programme (UNEP), 'Transnational Environmental Crime - a common crime in need of better enforcement', 2012, <http://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?article_id=95> [Accessed 5 May 2016].

UNEP:' Illegal Trade in Wildlife and Timber Products Finances Criminal and Militia Groups, Threatening Security and Sustainable Development ', 2014
<http://www.unep.org/newscentre/Default.aspx?DocumentID=2791&ArticleID=10906&l=en>[Accessed 4 May 2016].

UNEP (2013), 'Elephants in the Dust' <http://www.unep.org/publications/contents/pub_details_search.asp?ID=6303>[Accessed 1 May 2016].

United Nations Office on Drugs and Crime report 2010: 'The Globalization of Crime-A Transnational Organized Crime Threat Assessment' < https://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf>[Accessed 5 May 2016].

Wikipedia, 'Al-Shabaab', https://en.wikipedia.org/wiki/Al-Shabaab_ (militant_group) accessed: 28. February 2016

Wikipedia, 'Birds Directive'< https://en.wikipedia.org/wiki/Birds_Directive>[Accessed 5 May 2016].

World Wide Fund For Nature (WWF): 'How many species are we losing?' <http://wwf.panda.org/about_our_earth/biodiversity/biodiversity/> [Accessed 1 May 2016].

WWF- Living Planet Report: The Living Planet Index, 2014 <http://wwf.panda.org/about_our_earth/all_publications/living_planet_report/living_planet_index2/> [Accessed 1 May 2016].

WWF / Dalberg. 'Fighting illicit wildlife trafficking: A consultation with governments.' WWF International, Gland, Switzerland,2012<www.dalberg.com/documents/WWF_Wildlife_Trafficking.pdf>[Accessed 2 May 2016].

Young African Leaders Initiative, 'The Many Benefits of Community-Based Conservation' 2015, <https://youngafricanleaders.state.gov/the-many-benefits-of-community-based-conservation/>[Accessed 2 May 2016].

CENTRAL EUROPEAN LAW CONFERENCE FOR STUDENTS,
STRENGTHENING THE RULE OF LAW IN THE EU
(CONFERENCE PAPERS)

LEXONOMICA PRESS

Challenges of Bosnia and Herzegovina Constitutional Reform on the Path to the EU membership

HARUN IŠERIĆ

Abstract For a long time a key condition for Stabilization and Association Agreement (SAA) to entry into force was implementation of European Court for Human Rights (ECtHR) in case Sejdić-Finci v Bosnia and Herzegovina (B&H) and Zornić v B&H. According to the judgment of the ECtHR, B&H constitution discriminates national minorities (Roma and Jews) and citizens of B&H from being members of Presidency and House of Peoples. In the judgment in the case of Zornić v B&H, the ECtHR highlighted their expectations from B&H to establish a democratic constitutional arrangement without discrimination based on ethnicity. For almost five years, a key condition for progress of Bosnia on EU path was implementation of Sejdić-Finci judgment. After 2014 general elections, Germany and UK presented a new EU approach toward B&H, known as German-UK initiative. That initiative overshadowed condition for constitutional changes by request for socio-economic reforms. Result of new approach was seen already in June 1, 2015 when SAA entered into force. Since October 2014 constitutional reform has been completely marginalized. Yet, European Commission in its B&H progress report 2015 states that the Constitution remains in breach of the ECHR as stated in the Sejdić-Finci ruling of the ECtHR, and needs to be amended.

Keywords: • constitution • Sejdić-Finci • Zornić • human rights • Stabilization and Association Agreement • EU • integration • German-UK Initiative

CORRESPONDENCE ADDRESS : Harun Išerić, president of European Law Students' Association (ELSA) Sarajevo, Sarajevo, Bosnia and Herzegovina & student assistant at Faculty of Law University of Sarajevo at Department of Civil Law, Sarajevo, Bosnia and Herzegovina, email: harun.iseric@gmail.com.

DOI 10.4335/978.961.6399.79.1.23
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction – Bosnia and Herzegovina Constitution

Bosnia and Herzegovina Constitution is annex four of international agreement: General Framework Agreement for Peace in Bosnia and Herzegovina[1], i.e. the Dayton agreement. Agreement was signed and entered into the force in Paris on December 14th, 1995. The Constitution brought changes in territorial arrangement of B&H. Country got divided into two entities: Republika Srpska (RS) and Federation of B&H (FB&H). The Preamble of the Constitution states the following: *Bosniaks, Croats, and Serbs, as constituent peoples (along with 'Others'), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows...* From this provision we can recognize three groups: constituent peoples, others and citizens of Bosnia.

Constituent peoples are: Bosniaks, Croats and Serbs. Describing term constituent people, Constitutional court of B&H stated that means that it "prohibits any special privileges for one or two of these peoples, any domination in governmental structures or any ethnic homogenization through segregation based on territorial separation."[2] The European Court for Human Rights defining term "Others", states that it includes members of ethnical minorities, persons who do not declare themselves as members of any of the groups due to mixed marriages, mixed parenthood of due to other reasons.[3] Citizens are those who declare them self as citizens of B&H.[4] Very frequently, the principle upon which the new constitutional and legal order of Bosnia and Herzegovina is established, is called ethnic-territorial principle. The principle is best presented through two state institutions: Presidency and House of Peoples. Collective head of state is the Presidency of Bosnia and Herzegovina. The Presidency of Bosnia and Herzegovina consists from three members: one Serb who is directly elected from territory of Republika Srpska, one Bosniak and one Croat who are directly elected from territory of the Federation of Bosnia and Herzegovina. The Parliamentary Assembly of Bosnia and Herzegovina is composed of two houses: the House of Representatives and the House of Peoples. The House of Representatives is the lower house. The House of Peoples is the upper house. It has 15 delegates: 2/3 from the Federation (five Croats and five Bosniaks) elected by the lower house of the Parliament of the Federation, 1/3 from Republika Srpska (five Serbs) chosen by the National Assembly of Republika Srpska. The House of Peoples, the upper house, is in terms of power is completely equal to the lower house, the House of Representatives. Both houses have to ratify international documents, accept a law, adopt state budget in order for them to come into force. That makes it distinctively powerful and different from other upper houses in both Europe and the world.[5] To summaries, only those who declares them self as member of three constituent peoples can be candidate and become a member of any of these two institutions. This ethnical principle is related to territorial principle: Bosniak and Croat, members of the Presidency and the House of Peoples are exclusively from the territory of Federation of Bosnia and Herzegovina, and Serb, member of the Presidency and the House of Peoples, is exclusively from the territory of Republika Srpska. Prima facie, following forms of discriminations can be found in constitutional provisions of Bosnia and Herzegovina:

1. Discrimination of 'Others' and citizens of Bosnia and Herzegovina in terms of composition of the Presidency and the House of People
2. Discrimination of the constituent peoples in terms of the House of People related to**:** Bosniaks and Croats because they cannot be elected from the territory of Republika Srpska; Serbs, because they cannot be elected from the territory of Federation of Bosnia and Herzegovina.
3. Discrimination of constituent peoples regarding the Presidency of Bosnia and Herzegovina due to the following: Bosniaks and Croats cannot be elected on the territory of RS, and Serbs cannot be elected from the territory of the Federation of B&H.

Discrimination of others and citizens is confirmed by the judgment of the European Court for Human Rights in the cases of *Sejdić-Finci v B&H*[6] and *Azra Zornić v B&H*[7]. The judgment in the case of *Ilijaz Pilav v B&H*, for the discrimination of constituent peoples, is to be announced in coming months.

In Article II of the Constitution, *Human rights and fundamental freedoms*, it is stated that the European Convention on Human Rights and Fundamental Freedoms and its Protocols are directly applied in Bosnia and Herzegovina, and shall have priority over all other law. Hence, the Convention and Protocols have the power of constitutional regulations. While considering the direct application of the Convention and its advantages over legislation, the Constitutional Court of Bosnia and Herzegovina determined that the Convention does not have the advantage over other constitutional regulations.[8] This ruling of the Court was overturned by ECtHR in cases *Sejdić-Finci* and *Zornić*. In April 2002, Bosnia and Herzegovina became a member of the Council of Europe. When it became a member of the Council of Europe, Bosnia and Herzegovina committed itself to reviewing the election law regarding norms of the Council of Europe, and making changes where it is required within a year, with help from the Venice Commission. Bosnia and Herzegovina was among the first member countries of the European Council to ratify Protocol No. 12, general prohibition of discrimination[9]. This protocol has so far been ratified by only 8 out of 28 EU member states. It is absurd that Bosnia and Herzegovina was the first country to be convicted of breaching the Protocol.

2 Sejdić and Finci v Bosnia and Herzegovina[10], Azra Zornić v Bosnia and Herzegovina[11] and Ilijaz Pilav v Bosnia and Herzegovina

The first judgment of the Court, in which it found the violation of the Article 1 of Protocol No. 12, was case *Sejdić-Finci v Bosnia and Herzegovina*. The judgment was announced by the Grand Chamber in December 2009. The applicants were Dervo Sejdić, of Roma ethnicity, coordinator of Council of Roma in B&H and Jakob Finci, of Jewish ethnicity, president of Jewish community in B&H. They argued that they cannot run for the position of a member of the Presidency of Bosnia and Herzegovina and the House of Peoples because of their origins, and thus referred to the prohibition of discrimination (article 14), the right to free elections (article 3 of Protocol No.1), and the general prohibition of discrimination (article 1 of Protocol No.12). Court stated that

a fact that "the present case raises the question of the compatibility of the national Constitution with the Convention is irrelevant in this regard."[12] Strasbourg's Court concluded that Bosnia and Herzegovina might not be held responsible for passing these regulations, but can surely be held responsible for them still being valid.[13] The basis of discrimination is the ethnic origin which represents one type of racial discrimination. The government based its arguments on the attitudes of the Court in the case *Ždanoka v Latvia*[14], and the historical context in which the Constitution of Bosnia and Herzegovina was created. The European Court first tested the applicability of Article 14 in relation with Article 3 of Protocol No.1 regarding elections for members of the House of Peoples. Since Article 3 of Protocol No.1 is referring only to elections for legislative authority, it is necessary to state whether the House of Peoples is legislative authority.[15] Deciding whether something is a legislative authority is based on *constitutional structure, state's constitutional tradition and extent of legislative jurisdiction.* Considering the constitutional authorization (equal participation in legislation, ratification of international agreements, budget approval, etc.), being the decisive factor for the Court, Article 14 in relation with Article 3 of Protocol No. 1 is applicable. Discrimination against ethnical origin is a sort of race discrimination. The Court[16] stated that none of the various acts, which can be exclusively or in a critical volume based on ethnical origin of an individual, can be objectively justified in the contemporary democratic society established on principles of pluralism and respect of other cultures. With these constitutional regulations one goal from the preamble of the ECHR - establishment of peace. However, the Court emphasizes the improvement and development which Bosnia and Herzegovina has made after signing the General Framework Agreement for Peace in Bosnia and Herzegovina - with establishing single military force, joining NATO's Partnership for Peace, signing the Stabilization and Association Agreement with European Union and membership in Security Council of UN. Accordingly, long-term inability of the applicants to run for a member of the House of Peoples does not have an objective and acceptable justification, and it violates Article 14 related to Article 3 of Protocol No.1. Regarding the elections for the Presidency of B&H, the applicants adverted to Article 1 of Protocol No.12, which prohibits discrimination with regard to all the rights provided by the law. Since the constitutional regulations prevent candidacy for the Presidency, Article 1 of Protocol No.12 is applicable. By not distinguishing the differences regarding the discrimination, i.e. disaffiliation to any of the constituent peoples, the Court confirmed that there is no difference between the House of Peoples and the Presidency, and that the precondition, which refers to the suitability of candidacy for the elections for the Presidency, represents violation of Article 1 of Protocol No.12.[17]

Five years after *Sejdić-Finci* judgment, the European Court announced the judgment in case *Azra Zornić v Bosnia and Herzegovina*. The applicant, Azra Zornić declares herself as a citizen of Bosnia and Herzegovina, hence, not as a member of constituent nation, nor a member of 'Others' (like Dervo Sejdić and Jakob Finci), but of the third group stated in the preamble - the citizens of Bosnia and Herzegovina. In her appeal, she states that due to her affiliation she cannot run for a member of the Presidency of Bosnia and Herzegovina and cannot be a delegate in the House of Peoples of B&H, which leads to violation of Article 1 of Protocol No. 12 and Article 14 related to Article

3 of Protocol No. 1. Government repeated similar arguments form *Sejdić-Finci* case. Government stated that the constitutional structure was established after *the most destructive conflict in the modern history of Europe*, in order to establish peace and dialogue among three ethnical groups. The government also stated that the applicant had willingly decided not to declare herself as a member of any of the constituent peoples, and she could at any time choose to change that decision in case she would like to participate in the political life of Bosnia and Herzegovina. "The Court claimed that this case is identical to *Sejdić-Finci.* Although, unlike the applicants in that case, who were of Roma and Jewish origin respectively, the present applicant does not declare affiliation with any particular group, she is also prevented from running for election to the House of Peoples on the ground of her origin."[18] The Court confirmed the applicant's assertions. In the judgment the Court, in a very sharp tone, emphasizes that eighteen years after the end of the war, there could no longer be any reason for the maintenance of the contested, discriminatory provisions. "The Court expects that democratic arrangements will be made without further delay.... the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina*."*[19]

Ilijaz Pilav declares himself as a Bosniak. He lives in Srebrenica, in the territory of Republika Srpska. This is a case of discrimination of constituent peoples in relation to the territory they live on. This particulars case refers to a Bosniak living on the territory of Republika Srpska who was not permitted to run for a member of Presidency from Republika Srpska because he declares himself as a Bosniak. Given the attitude of the Court set out in the judgment *Sejdić-Finci v Bosnia and Herzegovina* it is expected that B&H will be found guilty for violation of the ECHR.

3 Bosnia and Herzegovina and European Union relationship[20]

In June 2003 during the summit in Thessaloniki, EU has recognized Stabilization and Association process (SAP) as a framework for EU course on Western Balkans. A key instrument of SAP is Stabilization and Association Agreement (SAA) between countries of Western Balkans and EU. SAA between B&H and EU was signed on June 16, 2008. By article 70 of SAA Bosnia undertook obligation by singing SAA to start harmonization of its legislation with acquis communautarie[21]. SAA entered into force in June 1, 2015. A key reason for such long period of seven years, between signing and entering into the force of SAA, was EU insisting on implementation of European Court for Human Rights decision in case *Sejdić-Finci v Bosnia and Herzegovina*. General affairs Council meeting Conclusion from 2010 on stabilization and association process emphasized a need of Bosnia and Herzegovina to align its constitutional framework with the European Convention on Human Rights.[22] This how implementation of *Sejdić-Finci* was put on the top of the EU agenda. EU Foreign affairs council in 2011 stated that Bosnian needs to bring the Constitution into compliance with the European Convention of Human Rights. „A credible effort in this regard is key to fulfil the

country's obligations under the Interim/Stabilisation and Association Agreement."[23] President of the European Council Herman Van Rompuy in March 2012 made a statement in which he stated that EU strongly encourages Bosnia and Herzegovina to fully implement the ruling of the European Court of Human Rights in the *Sejdić – Finci* case, and *thus open the door for its further European integration.*[24] EU Foreign affairs Council in 2012 repeated once again a need of Bosnia and Herzegovina to bring its Constitution into compliance with the European Convention of Human Rights.

„A credible effort in this regard remains necessary for the entry into force of the SAA .....would be key elements for a credible membership application to be considered by the EU."[25] General affairs Council Conclusions from 2012 on stabilization and association process reiterated that B&H, as a matter of priority, needs to bring its Constitution into compliance with the European Convention of Human Rights. „A credible effort in this regard remains necessary for the entry into force of Stabilisation and Association Agreement.....would be key elements for a credible membership application to be considered by the EU.[26] EU Foreign affairs council in 2013 expressed its regret by the failure of B&H political leaders to implement over the three years the ECtHR ruling in the *Sejdić-Finci* case, placing B&H in breach of its international obligations. Council „urges Bosnia and Herzegovina, as a matter of priority, to bring its Constitution into compliance with the European Convention on Human Rights. A credible effort in this regard remains necessary for the entry into force of the Stabilisation and Association Agreement (SAA). Full implementation of the *Sejdić-Finci* ruling is a key element for a credible membership application to be considered by the EU."[27] After a visit to the B&H in February 2014, Commissioner for Enlargement and European Neighbourhood Policy, Štefan Füle made a statement in which he discussed implementation of *Sejdić-Finci* judgment: „Implementation of this judgment is .... international obligation of Bosnia and Herzegovina that, following the will of the Member States, is now a key to progress on the EU path. ...It means the full entry into force of your Stabilisation and Association Agreement. It means the possibility for Bosnia and Herzegovina to submit a credible application for EU membership.[28] EU Foreign affairs council in 2014 repeated once again that "Implementation of the Sejdić-Finci judgment of the European Court of Human Rights also remains to be addressed."[29] European Union in all B&H progress reports from 2010 to 2014 addresses implementation of *Sejdić-Finci* decision.

They use the same sentence in each report: "Credible efforts towards the implementation of the ECtHR decision in the Sejdić-Finci case in order to comply with the ECHR remains essential."[30] European Commission in 2013 progress report states that all EU member States have ratified the SAA, "but the Council has refrained from taking a decision on its entering into force due to the country's failure to implement the Sejdić-Finci ruling of the ECtHR".[31] Progress report from 2014 reports that „full implementation of the Sejdić-Finci ruling is a key element for Bosnia and Herzegovina's membership application to be considered as credible by the EU. Moreover, the compliance of the country's Constitution with the European Convention on Human Rights as regards the Sejdić-Finci judgment remains to be ensured." In report from 2015 it is visible deviation of EU in strict insistence in *Sejdić-Finci*

implementation. „The Constitution remains in breach of the European Convention on Human Rights, as stated in the Sejdić-Finci ruling of the European Court of Human Rights, and needs to be amended.“[32]

At the same time, others were arguing block of Bosnia on EU path with following arguments:

a. *Sejdić-Finci* in not an issue of institutional “racism”,
b. Bosnian is not violating fundamental human rights,
c. *Sejdić-Finci* is not an issue of Bosnia systematically violating its international obligations.[33]
d.

It is worth noting that only 8 out of the 28 EU member states have so far ratified protocol 12. The EU’s principled position on this judgement and Bosnian compliance relies on a principle that most EU members have still not accepted.[34] Another argument in that respect was that similar legislative provisions exist in Belgium, South Tyrol (Italy) and Cyprus.[35]

4 German-UK initiative

After general elections in 2014, Germany and UK have launched a new EU approach towards B&H, known as “German-UK Initiative”. The Initiative focus are socio-economic reforms compared to previous *Sejdić-Finci* implementation and constitutional reform. This new approach 'resequences' EU conditionality: it 'sidelines' the *Sejdić-Finci* precondition. Although still on the agenda, the ruling appears to have gone from the top to 'the back seat', to be paid special attention 'at a later stage'.[36] The Council agreed on a renewed EU approach towards Bosnia and Herzegovina on its EU accession path throughout which all conditions, including the implementation of the *Sejdić-Finci* ruling will have to be met. The Council calls on B&H political leadership to anchor the reforms necessary for EU integration in the work of all relevant institutions.[37] At the same time, Council stated that when requesting the Commission's Opinion on the membership application, the Council will ask the Commission to pay particular attention to the implementation of the *Sejdić-Finci* ruling.[38] Presidency of B&H had made a written commitment to conduct requested reforms on January 29, 2015. Commitment has three points. The last point refers to the implementation of *Sejdić-Finci* decision. It states that in the “later stage” more attention will dedicated to the implementation of the Judgment.[39] Commitment was confirmed by Parliamentary Assembly of B&H on February 23rd, 2015. This was a main condition of Council of EU in order for SAA to enter into the force. SAA entered into the force on June 1, 2015. Critics of German-UK Initiative reflects in a claim „that human rights and popular accountability are essential ingredients if B&H is to fulfil its outstanding international obligations and take on new ones such as EU and NATO membership.“ (Fernandez, Perry and Bassuener, 2015) Democratic Policy Centre recommends to EU should refocus co-ordinated and coherent efforts toward constitutional reform by spelling out clear rewards for compliance (e.g., EU candidate status) and clear sanctions for non-compliance (e.g., suspension of EU funds). Those EU member states that are concerned by the near-complete absence of conditionality from the German-British

initiative should make it clear that they will not accept B&H candidacy for EU membership without full implementation of the *Sejdić-Finci* ruling. (Fernandez, Perry and Bassuener, 2015)

5 Conclusion

European Union insistence on implementation of *Sejdić-Finci* judgment resulted with four years of stagnation of B&H on EU integration process. Four years after, neither progress on constitutional reform was made or on EU path. German-UK initiative came at the right time as the last train for B&H EU accession. Together with Kosovo, Bosnia was the only country of the Western Balkan that had no statute of candidate state for EU accession. Even it could look like EU gave up on human rights in B&H, *Sejdić-Finci* is still on the agenda.. It is part of the written commitment of B&H from January 2015. It is unquestionable that Bosnia will have to implement *Sejdić-Finci* judgment before it joins to the EU. Two main condition for B&H to submit a credible application were: adoption of Mechanism of coordination of EU integration process and adjustment of SAA due to fact that Croatia has joined EU in period between signing and entering into the force of SAA. Mechanism was adopted on the January 26, 2016[40] and adjustment of SAA is in progress. The new EU approach resulted with the historical day for B&H. On February 15, 2015, B&H had submitted its EU membership application.

Notes

[1] The General Framework Agreement for Peace in Bosnia and Herzegovina (Initialled on 21 November 1995 and signed and entered into the force on 14 December 1995) <http://www.oscebih.org/dejtonski_mirovni_sporazum/EN/> accessed 15 February 2016.

[2] U 5/98 III, § 60.

[3] *Azra Zornić v B&H* (App no 3681/06) ECHR 15 July 2014 § 8.

[4] *Azra Zornić v B&H* (App no 3681/06) ECHR 15 July 2014 § 8.

[5] According to one comparative study from 1997, House of peoples of B&H, together with American Senat, is only upper house that has bigger power than lower house of Parliament. (Hodžić Edin & Stojanović Nenad, Kako reformirati Dom naroda Parlamentarne skupštine BiH? Izazovi izvršenja presude u predmetu Sejdić i Finci protiv BiH (Analitika, 2011) <http://www.analitika.ba/bs/publikacije/analiticki-sazetak-br-2-kako-reformirati-dom-naroda-ps-bih> accessed 20 January 2016).

[6] *Sejdić & Finci v B&H* (App no 27996/06 & 34836/06) ECHR22 December 2009.

[7] *Azra Zornić v B&H* (App no 3681/06) ECHR 15 July 2014.

[8] U 5/04 & U 13/05.

[9] The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. No one shall be discriminated against by any public authority on any ground such as those mentioned before.

[10] *Sejdić-Finci v B&H* (App no 27996/06 & 34836/06)ECHR 22 December 2009.

[11] *Azra Zornić v B&H* (App no 3681/06) ECHR 15 July 2014.

[12] *Sejdić-Finci v B&H* (App no 27996/06 & 34836/06) ECHR 22 December 2009 § 29.

[13] Ibid., § 30.

[14] *Ždanoka v Latvia* (App no 58278/00) ECHR 16 March 2006.

[15] Judge Mijović, in is partly concurring and partly dissenting opinion discuses applicability of article 3 Protocol 1 on House of Peoples. Judge points out that Court concluded before that article 3 Protocol 1 is applicable only on House of Parliament which composition is result of direct elections. Judge Mijović, finally concludes that there are no elections for House of Peoples – its members are chosen by entities parliaments.

[16] *D.H. and Others v Czech Republic* (App no 57325/00) ECHR 13 November 2007 § 176.

[17] Judge Mijović, from Bosnia, and judge Hajiev, had partially concurring and partially dissenting opinion. Judge Boneli in his distinguished opinion dramatically described his disagreement: *The Court did not affirm that the risk of civil war, avoidance of massacre or maintenance of territorial unity, has a social value big enough to justify certain limitations of rights of these two applicants. I cannot support the Court which sows ideals, but reaps bloodshed.*

[18] *Azra Zornić v B&H* (App no 3681/06) ECHR 15 July 2014, § 30.

[19] *Azra Zornić v B&H* (App no 3681/06) ECHR 15 July 2014 § 43.

[20] More available in: Danijela Lakić, 'Status Bosne i Hercegovine u procesu pristupanja Evropskoj uniji', (2015) 12(1) Megatrend review 257.

[21] Stabilisation and association agreement between the European communities and their member states, of the one part, and Bosnia and Herzegovina, of the other part [2015] L 164/2 <http://europa.ba/wp-content/uploads/2008/06/SAA-EU-BiH-eur-lex.europa1.pdf> accessed 15 January 2016

[22] GENERAL AFFAIRS Council meeting, Council conclusions on enlargement/stabilisation and association process, 14th December 2010 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/genaff/118487.pdf> accessed 20 January 2016.

[23] FOREIGN AFFAIRS Council meeting, Council conclusions on Bosnia and Herzegovina, 21 March 2011, <http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_20131028123534O5bos.pdf> accessed 20 January 2016.

[24] Press Statement by the President of the European Council Herman Van Rompuy following the meeting with the Chairman of the Presidency of Bosnia and Herzegovina, Mr. Bakir Izetbegović, (http://europa.ba/, 21 March 2012) <http://europa.ba/?p=19934> accessed 22 January 2016.

[25] FOREIGN AFFAIRS Council meeting, Council conclusions on Bosnia and Herzegovina, , 25 June 2012 <http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2014100911285090bos.pdf> accesse 25 January 2015.

[26] 3210th GENERAL AFFAIRS Council meeting , Council conclusions on enlargement and stabilisation and association process, 11 December 2012 <http://europa.ba/wpcontent/uploads/2015/05/delegacijaEU_2014100911274743bos.pdf> accessed 27 January 2016.

[27] FOREIGN AFFAIRS Council meeting, Council conclusions on Bosnia and Herzegovina, 22 July 2013, <http://europa.ba/wpcontent/uploads/2015/05/delegacijaEU_2014100911121598bos.pdf> accessed 22 January 2015.

[28] Bosnia-Herzegovina - EU: Deep disappointment on Sejdić-Finci implementation (europa.eu, 18 February 2014) <http://europa.eu/rapid/press-release_MEMO-14-117_en.htm> accessed 15 February 2016.

[29] FOREIGN AFFAIRS Council meeting, Council conclusions on Bosnia and Herzegovina, , 14 April 2014, <http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2014100911051069bos.pdf> accessed 23 January 2015.

[30] European commission, Bosnia and Herzegovina 2010 progress report, 9 November 2010, <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/ba_rapport_2010_en.pdf> accessed 15 February 2016.

European commission, Bosnia and Herzegovina 2011 progress report, 12 October 2011, < http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ba_rapport_2011_en.pdf> accessed 15 February 2016.
European commission, Bosnia and Herzegovina 2012 progress report, 10 October 012, <http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/ba_rapport_2012_en.pdf> accessed 15 February 2016.
European commission, Bosnia and Herzegovina 2013 progress report, 16 October 2013, <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ba_rapport_2013.pdf> accessed 15 February 2016.
European commission, Bosnia and Herzegovina 2014 progress report, 8 October 2014, <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf> accessed 15 February 2016.
[31] European commission, Bosnia and Herzegovina 2013 progress report, 16 October 2013, <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ba_rapport_2013.pdf> accessed 15 February 2016.
[32] European commission, Bosnia and Herzegovina 2015 progress report, 10 November 2015, <http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_bosnia_and_herzegovina.pdf>accessed 15 February 2016.
[33] European Stability Initiative „ Lost in Bosnian labyrinth – why Sejdić-Finci should not block an EU application“ (European Stability Initiative 2013) <http://www.esiweb.org/pdf/esi_document_id_143.pdf> accessed 22 February 2016.
[34] European Stability Initiative „ Lost in Bosnian labyrinth – why Sejdić-Finci should not block an EU application“ (European Stability Initiative 2013) <http://www.esiweb.org/pdf/esi_document_id_143.pdf> accessed 22 February 2016.
[35] European Parliament „Bosnia and Herzegovina: The 'Sejdić-Finci' case“ (European parliament, 2015)
<http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/559501/EPRS_ATA(2015)559501_EN.pdf> accessed 23 February 2016.
[36] European Parliament „Bosnia and Herzegovina: The 'Sejdić-Finci' case“ (European parliament, 2015)
<http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/559501/EPRS_ATA(2015)559501_EN.pdf> accessed 23 February 2016.
[37] Foreign Affairs Council meeting, Council conclusions on Bosnia and Herzegovina, 15 December 2014, <http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2014121515000547eng.pdf> accessed 24 February 2016.
[38] Foreign Affairs Council meeting, Council conclusions on Bosnia and Herzegovina, 15 December 2014 <http://europa.ba/wpcontent/uploads/2015/05/delegacijaEU_2014121515000547eng.pdf> accessed 24 February 2015.
[39] Foreign Affairs Council meeting, Council conclusions on Bosnia and Herzegovina, 15 December 2014 <http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2014121515000547eng.pdf> accessed 24 February 2015.
[40] Decision on system of coordination of EU integration process in B&H 2016.
Constitutional court of Bosnia and Herzegovina decisions
U 5/98 III.
U 5/04.
U 13/05.
Cases before European Court for Human Rights
Azra Zornić v B&H (App no 3681/06) ECHR 15 July 2014.
D.H. and Others v Czech Republic (App no 57325/00) ECHR 13 November 2007.
Sejdić-Finci v B&H (App no 27996/06 & 34836/06) ECHR 22 December 2009.

Ždanoka v Latvia (App no 58278/00) ECHR 16 March 20

References

Bosnia-Herzegovina - EU: Deep disappointment on Sejdić-Finci implementation (europa.eu, 18 February 2014) <http://europa.eu/rapid/press-release_MEMO-14-117_en.htm> accessed 15 February 2016.

Decision on system of coordination of EU integration process in B&H 2016.

European commission, Bosnia and Herzegovina 2010 progress report, 9 November 2010, <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/ba_rapport_2010_en.pdf > accessed 15 February 2016.

European commission, Bosnia and Herzegovina 2011 progress report, 12 October 2011, <http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ba_rapport_2011_en.pdf > accessed 15 February 2016.

European commission, Bosnia and Herzegovina 2012 progress report, 10 October 2012, <http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/ba_rapport_2012_en.pdf > accessed 15 February 2016.

European commission, Bosnia and Herzegovina 2013 progress report, 16 October 2013, <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ba_rapport_2013.pdf> accessed 15 February 2016.

European commission, Bosnia and Herzegovina 2014 progress report, 8 October 2014, <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf> accessed 15 February 2016.

European commission, Bosnia and Herzegovina 2013 progress report, 16 October 2013, <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ba_rapport_2013.pdf> accessed 15 February 2016.

European commission, Bosnia and Herzegovina 2014 progress report, 8 October 2014, <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf> accessed 15 February 2016.

European commission, Bosnia and Herzegovina 2015 progress report, 10 November 2015, < http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_bosnia_and_herzegovina.pdf >accessed 15 February 2016.

European Parliament „Bosnia and Herzegovina: The 'Sejdić-Finci' case“ (European parliament, 2015) <http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/559501/EPRS_ATA(2015)559501_EN.pdf> accessed 23 February 2016.

European Stability Initiative „Lost in Bosnian labyrinth – why Sejdić-Finci should not block an EU application“(European Stability Initiative 2013) <http://www.esiweb.org/pdf/esi_document_id_143.pdf> accessed 22 February 2016.

Fernandez O, Perry V and Bassuener K, Making the Market on Constitutional Reform in B&H in the Wake of the EU Initiative (Democratic Policy Council, 2015) <http://www.democratizationpolicy.org/uimages/DPC%20Policy%20Brief%20-%20CR%20after%20the%20new%20EU%20initiative.pdf> accessed 22 February 2016.

FOREIGN AFFAIRS Council meeting, Council conclusions on Bosnia and Herzegovina, 25 June 2012 <http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2014100911285090bos.pdf> accessed 25 January 2015

FOREIGN AFFAIRS Council meeting, Council conclusions on Bosnia and Herzegovina, 21 March 2011, <http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2013102812353405bos.pdf> accessed 20 January 2016.

FOREIGN AFFAIRS Council meeting, Council conclusions on Bosnia and Herzegovina, 22 July 2013, <http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2014100911121598bos.pdf> accessed 22 January 2015

FOREIGN AFFAIRS Council meeting, Council conclusions on Bosnia and Herzegovina, 14 April 2014, <http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2014100911051069bos.pdf> accessed 23 January 2015

Foreign Affairs Council meeting, Council conclusions on Bosnia and Herzegovina, 15 December 2014, <http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2014121515000547eng.pdf> accessed 24 February 2016.

Foreign Affairs Council meeting, Council conclusions on Bosnia and Herzegovina, 15 December 2014 <http://europa.ba/wpcontent/uploads/2015/05/delegacijaEU_2014121515000547eng.pdf> accessed 24 February 2015.

Foreign Affairs Council meeting, Council conclusions on Bosnia and Herzegovina, 15 December 2014 <http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2014121515000547eng.pdf> accessed 24 February 2015.

GENERAL AFFAIRS Council meeting, Council conclusions on enlargement/stabilisation and association process, 14th December 2010 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/genaff/118487.pdf> accessed 20 January 2016.

GENERAL AFFAIRS Council meeting, Council conclusions on enlargement and stabilisation and association process, 11 December 2012 <http://europa.ba/wpcontent/uploads/2015/05/delegacijaEU_2014100911274743bos.pdf> accessed 27 January 2016.

Hodžić E and Stojanović N, 'Kako reformirati Dom naroda Parlamentarne skupštine BiH? Izazovi izvršenja presude u predmetu Sejdić i Finci protiv BiH' (Analitika, 2011) <http://www.analitika.ba/bs/publikacije/analiticki-sazetak-br-2-kako-reformirati-dom-naroda-ps-bih> accessed 20 January 2016.

Lakić D, 'Status Bosne i Hercegovine u procesu pristupanja Evropskoj uniji', (2015) 12(1) Megatrend review, 257.

Press Statement by the President of the European Council Herman Van Rompuy following the meeting with the Chairman of the Presidency of Bosnia and Herzegovina, Mr. Bakir Izetbegović, (http://europa.ba/, 21 March 2012) <http://europa.ba/?p=19934> accessed 22 January 2016.

Stabilisation and association agreement between the European communities and their member states, of the one part, and Bosnia and Herzegovina, of the other part [2015] L 164/2 <http://europa.ba/wp-content/uploads/2008/06/SAA-EU-BiH-eur-lex.europa1.pdf> accessed 15 January 2016.

The General Framework Agreement for Peace in Bosnia and Herzegovina (Initialled on 21 November 1995 and signed and entered into the force on 14 December 1995) <http://www.oscebih.org/dejtonski_mirovni_sporazum/EN/> accessed 15 February 2016.

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(CONFERENCE PAPERS)

LEXONOMICA PRESS

Administrative Capacity in Countries Acceding to the European Union on the Example of Ukraine

IRYNA HNASEVYCH

Abstract Public administration is the foundation and stimulus of all reforms and changes in the state. It is the most important state mechanism to ensure human rights, democracy and the rule of law. Ineffective and corrupted public administration leads to unemployment, poverty, discrimination and as a result to a falling democracy. History of Public Administration of Ukraine as a post-communist country, unfortunately, plays a negative role in the formulation of new rules and legal norms. However, The Revolution of Dignity (Euromaidan) in 2013-14 and the entry into force of the Association Agreement with the EU have created unique opportunities for radical changes in the public sector. The first part of the article is devoted to short analysis of administrative capacity, its definition and criteria. The second part concerns the understanding of the term "administrative capacity" in the doctrine of administrative legislation of Ukraine, and the obligations of Ukraine as a candidate country, as well as the experience of the Member States in the area of public administration reform.

Keywords: • administrative capacity • administrative reform • public administration

CORRESPONDENCE ADDRESS : Iryna Hnasevych, graduate student from Ternopil National Economic University, Faculty of Law (Ternopil, Ukraine). Currently a PhD student at Jagiellonian University at the Department of International Public Law (Cracow, Poland). Graduate student of School of Polish and European Law, School of French Law, FLEX alumny (Future Leaders Exchange Program, USA). Research interests: fragmentation of international law, constitutionalization of international law, values in international law., email: irynahnasevych@gmail.com.

DOI 10.4335/978.961.6399.79.1.24
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

The Revolution of Dignity (Euromaidan) in 2013-14 and the Association Agreement with the European Union have created the opportunities for radical changes in the public sector. History of Ukrainian public administration as of a post-communist country plays a negative role in the formulation of new rules and legal standards. Choosing the European direction, the experience of EU Member States and in particular the countries of Central and Eastern Europe is of great importance for Ukraine.

It is worth noting that despite the similarity of Ukraine to some of the Central and Eastern European countries (in terms of geographical, mental indication or otherwise) there are also discrepancies. These differences can serve as special distinguishing characteristics of the State, among other countries, but not always in a positive sense, as they may even interfere with the integration process. Ukraine happens to be a very extraordinary country in the context of recent events. Military intrusion, the annexation of the Crimean Peninsula and inflation caused a very negative impact on the course of the reforms and integration processes of the State.

Public administration is the foundation and stimulus of all reforms and changes in the country. For this reason, the reform of the public administration itself should be carried out first in order to bring it to European and international standards. Since the process of European integration has introduced a number of relatively new terminology for the doctrine of Ukrainian law its development is crucial to implement further necessary practical changes.

The first part of the essay is devoted to the analysis of administrative capacity, the definition and criteria. The second part concerns the understanding of the concept of "administrative capacity" in the doctrine of Ukrainian administrative law and obligations of Ukraine as a candidate country.

2 Definition and criteria's of the administrative capacity.

The definition of the term 'institutions' may be described as 'general principles, standards and procedures that govern life, mutual relations and work of the members of the society'.[1] The concept of 'institutional and administrative capacity' is related to the human capital in the public sector, and to the positive effects of implemented public policies. States and governments are committed to work to improve institutional and administrative capacity in order to overcome the traditional inefficient solutions typical for the public administration and their usually unfavourable image as of structures detached from society.

The presence of the relevant sectorial administrative capacities in order to ensure application of the *acquis communautaire*, has always been part of the assessment of the candidate countries, although in previous enlargements it has never been the key issue during the preparation and negotiations on membership. The administrative capacity of the candidate countries had been considered sufficient (Austria, Finland and Sweden),

or as such that does not interfere with the accession (previous extension of the Mediterranean countries and the extension 1973). Assessment of the overall administrative capacity is a relatively new problem in the process of EU enlargement.[2]

The acceding countries in May 2004 had to deal with the assumptions of a different character. The administrative capacity has become a key issue in the accession negotiations. This was related to the criteria contained implicitly in the report of the EU Council in Copenhagen in 1993 and explicitly in Madrid in 1995.[3] The administrative capacity has involved not only the countries of Central and Eastern Europe, but also the Mediterranean countries, such as Malta and Cyprus. There were several reasons for such changes that led to a new approach to the assessment of administrative capacity: firstly, the evolution of the European Community concerning the decision making on the Single European Act (1986),[4] secondly, the subsequent implementation of the Single Market in 1993. This was justified by the fact that the lack of discrepancies between the administrative capacities of the Member States could serve to avoid serious disruptions in the functioning of the single market.[5]

The administrative capacity is becoming increasingly important as a criterion for new countries applying for membership of the European Union (EU). Although the EU has no direct powers to regulate or monitor the administrative capacity of the Member States, and especially the candidate countries, there are at least two ways in which the EU makes an impact on the style and direction of the administrative processes in the political systems of countries of the Union. Firstly, Member States are required to take the necessary measures to comply with membership obligations.[6] SIGMA criteria's seem to be crucial for national administrations, which must be able to successfully participate in the process of EU policy-making; to effectively implement the EU directives and regulations and to make budgetary commitments arising from participation, for example, in the Common Agricultural Policy, in the European Social Fund or other programs imposing financial obligations. If governments do not fulfil their obligations, they may be fined by the judgment of the European Court of Justice. In this way, sufficient administrative capacity is a necessity for governments, because its failure may have significant legal and financial consequences for the country.[7]

Secondly, it should be noted that the customs of administrative cooperation between Member States and between them and the European Commission in Brussels, can have an impact on the harmonization of administrative systems, not only in terms of the development of similar institutions, but at a deeper level of values, assumptions and experiences. It can be argued that we are witnessing the development of 'European administrative space', however the space with a great diversity.

Although governments that want to bring their country towards EU membership may be willing to respond to the challenges, which the Commission presented in the pre-accession phase, there is also a critical look at the *modus operandi* of the EU. First, there is the position that in some candidate countries policy orientation towards approximation to EU standards can distort the national political settings.[8] Another argument is against external monitoring mechanism, namely its subjectivity. It is

claimed that all assessments made concerning administrative capacity, are subjective to the extent that they are expressed by individuals on the basis of information provided by organisations and are assessed on the basis of vague criteria not reflecting the specific circumstances of a particular country. Nevertheless, the existence of the possibility of assessing the administrative capacity can be used to measure progress in a particular country and to make comparisons between countries in fulfilling the conditions for administrative capacity particularly when accession negotiations in one country were performed faster than in others.[9]

Coming back to the definition of administrative capacity, it can be determined as a level of skills and expertise varied depending on the level, position, duties, and the functional scope of the employee of the public administration, which together ensure the effective development and implementation of European integration policy. Administrative capacity represents a high potential of public administration and the increase of the competitiveness of the State, thereby contributing to the transformation of the State into the equal partner of the EU.[10]

For the first time, "administrative capacity" has been defined as a separate criterion for membership in the Commission on candidate countries in July 1997.[11] Particularly, the Commission aimed for the following reforms in the public administration of the candidate countries: reform of legislation concerning the public service; the establishment of a professional public service; political neutrality of the public service; reforms aimed to bring financing in the public sector.

From that point the institutional capacity measures played an important role at the stage preceding the accession of new member States. A joint initiative of the EU and the OECD under the name SIGMA, funded by the EU, now helps in the creation of institutions, legal frameworks and procedures that meet the requirements of the latest European *acquis* in this field.

According to the criteria established in Copenhagen and Madrid, membership in the European Union should provide stable, efficient and effective democratic institutions. List of institutions and requirements for them are gradually formulated in the results of research of experts mainly in the SIGMA program, including political institutions guaranteeing democracy and the rule of law, ensuring human rights, stability and social development; effective legislative, executive and judicial branches with clearly defined powers and limits of competence; an independent and efficient judicial system; developed system of executive power, capable of ensuring implementation of the obligations of the state to citizens; local authorities (municipalities) available for the citizens; developed civil society; independent media and others.[12]

The level of stability, democracy and socio-economic development is evaluated according to various criteria, including: the effectiveness of political institutions; the level of cooperation between them; the variability of authorities; the practice of conducting elections; the status of the opposition; the effectiveness of the judicial system; the level of citizens' fundamental rights; the fight against corruption; public

control over the army and security service. SIGMA program has defined six key areas that provide the efficiency of public administration: 1) strategic project of public administration reform; 2) policy development and coordination, harmonization of procedures and decision-making; 3) public Services and Human Resource Management; 4) the responsibility of public administration; 5) implementation of services; 6) management of public funds.[13]

It is worth mentioning studies in the field of administrative capacity. The study of the European Institute of Public Administration[14] analysed paradigm shift in public administration systems and summarized the most common approaches to the provision of services in the public sector of the Member States. The development of common competence framework was performed by the Centre for Public Leadership of the Dutch Institute of Public Administration. On the basis of individual studies it identifies a framework of basic knowledge, competencies, abilities, skills and approaches to work - necessary for the leaders of the various institutions that operate in the public administration of the Member States.

3 European administrative space and the administrative capacity in the doctrine of the Ukrainian law.

The administrative law of Ukraine is going through a difficult period of development under the influence of globalization and regional integration. Very important is the aspect of current European integration, since the accession to the political, informational, economic and legal space is of exceptional importance for the external policy of Ukraine. The signing of the Association Agreement with the European Union, especially in the conditions of a difficult political and economic situation represents that Ukraine is now committed to implement the reforms set out in the Agreement. Public administration reform is not only one of the criteria for the admission of Ukraine to the group of EU countries, but a prerequisite for the functioning as a State.

The analysis of implementation of these criteria's in historical and legal terms (referring to the experience of the Member States) gives grounds to state that at the level necessary for accession to the Union their implementation is possible only after a complex public administration reform and the reform of administrative law of Ukraine.

The experience of countries of Central and Eastern Europe in the field of administrative reform also indicates the necessity of reflection on the new rules, ideas, and legal concepts and their implementation into the State legal system in order to ensure a higher level of human rights. Therefore it is very important to clarify the content of a relatively new concept for the Ukrainian doctrine of administrative law – 'European administrative space'. Even though this term has not yet received proper interpretation in the current regulations 'European legal space' is considered to be a system of standards and mechanisms for their implementation in the legal systems of European countries (developed within European regional organizations such as European Union, Council of Europe, the Organization for Security and Cooperation in Europe).[15]

Claudio Radaelli researching the problem of formulating a European administrative space believes that the term 'Europeanisation' should be used in relation to the processes of creation, dissemination and institutionalization of formal and informal rules, procedures, models of state policy, their style, ways of implementation, common views and standards that were identified and consolidated at European level. However, Radaelli emphasizes that Europeanization does not imply neither the convergence nor harmonization, but is the result of cooperation between European law and policy on one side, and the national law and the public service on another.[16]

At this stage of the development of administrative law in Ukraine it is of great importance to explain the categories 'administrative capacity' and 'public administration'. The introduction of these concepts to the study of administrative law in Ukraine has great value in the context of improving the effectiveness of the national public administration in accordance with the SIGMA program (and the criteria's established in Madrid and Copenhagen).

In the doctrine of Ukrainian administrative law there are various interpretations of the notion 'capacity' and 'public administration'. This fact reflects the great influence of language discrepancies, which in the practice of law are of great substantial importance.[17]

Concerning the concept of 'public administration', in European administrative doctrine it has a wider meaning than the analogue translated in Ukrainian law, that justifies the influence of the Soviet and post-Soviet legal doctrine.

In the Recommendation of the Committee of Ministers of the Council of Europe on public responsibility from 18 September 1984 years No. (84) 15, the 'public authorities' (Public Authorities) means:

- 'Any entity governed by public law in any form and at any level (in this state, region, province, municipality or autonomous public entity);
- Any private person in the exercise of public authority functions'.[18]

The introduction of the equivalent notion of 'public administration' in the Ukrainian practice of administrative law is essential for the uniform interpretation of its meaning, as it occupies an important place in the European integration process.

4 The administrative capacity of Ukraine as an acceding country.

With the enlargement of the EU on the post-communist area in May 2004 the prospect of Ukraine approaching to the European Union has taken a more distinct character. This resulted from several factors: firstly, Ukraine became a direct neighbour of the EU; secondly the accession of post-communist countries to the EU, including the former countries of the Soviet system, demonstrated the effectiveness of the implementation of national reform strategies; thirdly, more supporters of Ukraine's accession to the EU appeared among the Member States, who considered European integration of Ukraine essential and drew attention of the EU to the need of support of this initiative.

Important is the fact that since the accession of the first countries of Central and Eastern Europe, the EU has gained a lot of experience in the creation of conditions and mechanisms for their implementation taking into account the features of post-communist countries. Europeanization that initially existed only as a theoretical concept became a clear practical dimension, the characteristics of which can be evaluated qualitatively and quantitatively.[19]

With the next enlargement in May 2004 there was established the European Neighbourhood Policy (ENP), which included Ukraine. The main instrument of the ENP towards Ukraine became the Action Plan Ukraine – EU which had to bring relations between Ukraine and the EU to a qualitatively new level. Implementation of action plan (for 3 years) provided assistance in the implementation of the principles of the plan, and had to support the further rapprochement of Ukraine to the EU by adjusting the Ukrainian legislation, norms and standards to the EU legislation.[20]

The comparative report of the Centre of Eastern Partnership of the EU in Estonia on public administration in the partner countries, describing the situation in Ukraine, underlined that for the previous three years Ukraine has moved away from European principles of public administration and did not show any significant progress in the field of public administration reform. However, compared to previous situation, it began to change for the better. The Revolution of Dignity in 2013-14 and the entry into force of the Association Agreement with the EU have created opportunities for radical changes in public sector management. Furthermore, the initiative of Ukraine to perform such reforms is widely supported by the Ukrainian people and the international community.[21]

The State managed to carry out democratic election of the President and Parliament, which now must meet social expectations on realization of large-scale reforms, primarily in the field of fight against corruption and building an effective, politically unbiased and professional civil service. The new government in 2014 adopted a number of anti-corruption laws and regulations, including the medium-term anti-corruption strategy. At the same time, the new civil service law is under preparation in close cooperation with the relevant experts of civil society. In addition, the Government announced the launch of the policy of decentralization and reform of the judiciary, creating quite a good platform for the solution of the existing problems.

Despite the external threats, requiring rebuilding the army on the principles of modern standards in order to continue the fight against the foreign intervention in the East, Ukraine has a unique chance for the success of comprehensive reforms, especially those that concern the judiciary and public administration. This opportunity will remain open for only a short period of time, and therefore the State should take decisive reform measures to finally break up with the legacy of the past and to move towards European standards of administration and management.

It is also important to look critically at performance of the discussed criteria's and requirements of Ukraine's accession to the EU. After Euromaidan Ukraine returned to

parliamentary-presidential political system, which means a greater role of the government formed by the coalition majority in parliament, which itself is based on the results of parliamentary elections. However, still remains the problem with checks and balances between state bodies. The new President of Ukraine initiated more changes to the constitution in order to strengthen the rights of local government and appropriate adjustment of powers of the President and the Parliament. At the same time, the judiciary of Ukraine has not received the necessary independence for the proper assessment of the effectiveness of the executives.[22]

Among the important novelties in 2014 it is worth to mention the extension of powers of the Audit Chamber to monitor the implementation of revenue and expenditure of the state budget and audit functions in government agencies. Unfortunately, the lack of qualified staff and delay with the adoption of the relevant provisions hinders the effective implementation of this type of control. At the same time, Ukraine has introduced the independent control of the executive power by civil society organizations. The government has adopted a procedure to conduct a public review of the expert activities of government agencies. Another positive feature is the effective procedure aimed to ensure the free access of citizens to public information.

As for implementing the requirements of fight against corruption, 14. 10. 2014 National Strategy for the Fight against Corruption was approved. The strategy provides greater opportunities for civil society ensuring independent monitoring of public officials and the public procurement process. However, the question of a more effective mechanism of checks and balances is still a problem to resolve, especially in the area of strengthening the independence, efficiency and impartiality of the judiciary.

Independence of the judiciary is vital for Ukraine, as a country, which shows the worst results in the entire region of the Eastern Partnership. The judicial system of Ukraine can not as it should effectively administer justice. In this regard, there can be identified three main factors: first of all, a strong political influence on the appointment of members of the High Council of Justice and the Constitutional Court, and the lack of fair and transparent criteria for election to these bodies only aggravates the situation. Secondly, it is the lack of a full judicial self-government and, finally, the judicial body is characterized by poor quality of competence and lack of responsibility for vetting process and internal changes.[23]

Difficulties in initiating a profound reform of the judiciary are derived from the problem of corruption in the system. Achieving the desired effect would mean more radical reforms and changes to the European principles of justice, especially given that this reform is crucial in the context of Ukraine's obligations under the Association Agreement with EU.

5 Conclusions

Ukraine has chosen a good, but very hard and demanding path of radical changes, without which the normal functioning of the state is not possible. The implementation

of reforms necessary for accession to the Union is at an early stage. A lot of issues have not been included, and those that were, need more experience and professionalism, especially this concerns the transparency in the development of economic policy, favouring in the decisions of government, access to public information and other.
It is possible to generalize the issues in the field of public administration to the following:

1. High level of centralisation of public administrations. This causes uncomfortable divisions of public administrations, the collapse of the administrative and financial sector and lack of proper local government at district level;
2. Lack of appropriate separation of politics from administration, weak ability of ministries to effectively perform its functions in time;
3. Inefficient civil service, a large turnover of staff; subjectivity in the provision of public services, the imposition of political functions on civil servants and, as a result, their susceptibility to the influence of political parties;
4. Inadequate regulation of the legal relationship between individuals and public authorities - the dominance of individual interests, bureaucracy and corruption.[24]

The analysis the process of administrative reforms of the Member States, in particular the countries of Central and Eastern Europe, has generated a lot of possible explanations why administrative reform programs often do not provide the desired results. Such experience is now very important for Ukraine and should be taken into account in the process of own reforms.

This analysis leads to the list of key factors that can determine the success or failure of the process of reform of the public administration. Firstly, strategies for administrative reforms are often designed 'in the phase of the project' without testing their feasibility, secondly, the involvement of stakeholders in the design process; thirdly, the civil service law as a tool for reform has been overestimated as the adoption of the law itself does not necessarily lead to changes in the functioning of the civil service.

In Ukraine, the concept of 'administrative reform' is often misunderstood. Using the term 'reform' itself does not mean that the aim of the process is to change the existing administration, although it is also worth saying that the Ukraine for a long period did not have public administration within the meaning of European administrative traditions.[25]

In post-communist countries with a long tradition of bureaucracy and a lack of public trust changing administrative culture is underestimated part of the reform program. Without this premise approaches to the reform, which have been applied in other countries, unlikely to lead to success unless they are well adapted to the local conditions.[26]

Administrative development strategies in Ukraine rely on the adoption of new regulations and the gradual replacement of older workers with new ones. Using this approach, it might take a whole generation to build new administrations. Finally, one of the most important prerequisites of the reform in Ukraine is social control. Raising

public awareness of civil rights, administrative reforms and other reforms it is often overlooked.

It is important to begin to pursue the reform of public administration as a process of long-term development rather than of short terms actions. It is also worth noting that in such difficult conditions, as is now Ukraine, there was no Member State at the stage of its accession. I believe that European Union and the international community should take this into account and support all activities towards Ukraine's democratization.

Notes

[1] Anne-Marie Theisen, Mark Delmartino 'Europejski Fundusz Społeczny i zdolność instytucjonalna organów publicznych.' <http://ec.europa.eu/esf > accessed 25 February 2016.

[2] A.J.G. Verheijen. 'Administrative capacity development. A race against time?' The Hague, [2000].< http://www.wrr.nl/fileadmin/nl/publicaties/DVD_WRR_publicaties_1972-2004/W107_Administrative_capacity_development.pdf> accessed 25 February2016.

[3] Madrid European Council Presidency Conclusions (1995) <http://www.europarl.europa.eu/summits/mad1_en.htm> accessed 25 February 2016.

[4]The Single European Act (SEA) [1986] OJ L 169 <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_singleact_pl.htm> accessed 25 February 2016.

[5] With the SEA (1 January 1993) the transformation of the common market in the single market became possible. The establishment of new competencies and reform of the institutions SEA has opened the way to political integration and economic and monetary union, has presented the conditions for the formulation of the European administrative space.

[6] Treaty on the Functioning of the European Union. Official Journal[2012] C 326 , P. 0001 – 0390.

[7] Edward Moxon-Brown. 'Administrative capacity in the European Union: how high can we jump?'
<https://www.coleurope.eu/content/rd/devoffice/acad/cooperation/EITC/Paper%20Moxon-Browne.pdf.> accessed 25 February 2016.

[8] Olena Orżel Ewropeizacja system publicznogo administruwannia krajin Centralnoi i Schidnoi Ewropy u konteksti pidgotowky do czlenstwa w ES. Wisnyk nacionalnoi akademii derżawnogo uprawlinnia. [2010] №5.

[9] Ibidem.

[10] A.J.G. Verheijen. 'Administrative capacity development. A race against time?' The Hague, [2000].< http://www.wrr.nl/fileadmin/nl/publicaties/DVD_WRR_publicaties_1972-2004/W107_Administrative_capacity_development.pdf> accessed 25 February2016.

[11] Chapter 4: 'Administrative capacity: This chapter examines the current state of the public administration in Bulgaria, including relevant aspects of the judicial system, and assesses the current and prospective ability to carry out the functions required of it in a modern, democratic state, with a particular focus on the need to administer matters related to the acquis.' Commission Opinion on Bulgaria's Application for Membership of the European Union. Brussels. July, 15. 1997. < europa.eu/.../press-release_DOC-97-11_en.pdf.> accessed 25 February2016.

[12] Organisation for Economic Co-operation and Development (OECD) (1999), "European Principles for Public Administration", SIGMA Papers, No. 27, OECD Publishing..<doi:10.1787/5kml60zwdr7h-en.> accessed 25 February2016.

[13]Ibidem.

[14] Founded in Maastricht in 1981, has centers in Luxembourg and Barcelona, the European Institute of Public Administration (EIPA) is a leading European center of excellence in the field of European integration and the new challenges of public administration.
[15] Alla Puchtecka *Ewropejskyj administratywnyj prostir i pryncypy werkhowenstwa prawa*. Monografia. (Kyiv, 2010, p.140)
[16] New space for Public Administration and Services of General Interest in an Enlarged Union – study intended for the Ministers responsible for Public Administration of the Member States of European Union, Luxembourg, 8 June 2005,.8,9. (Carried out under the responsibility of the European Institute of Public Administration, EIPA (NL) with collaboration of the National Center for Scientific research, CNRS (F) and the Universite Cotholique de Louvain, UCL (B). <www.eurpan.org.> accessed 25 February 2016.
[17] N. Rudik 'Ewropeizacija publicznogo uprawlinnia w Ukraini w konteksti obumowlenosti ES' Aspekty publicznogo uprawlinnia. (№1-2,2014,33).
[18] Recommendation of the Committee of Ministers of the Council of Europe No. R (84) 15 relating to public liability. <http://www.dhv-speyer.de/stelkens/Materialien/Recommendation_No_R(84)15.pdf> accessed 25 February 2016.
[19] Natalia 'Rudik Ewropeizacija publicznogo uprawlinnia w Ukraini w konteksti obumowlenosti ES.Aspekty publicznogo uprawlinnia.' (№1-2,2014, 33).
[20] A look at the EU – UA Association Agreement. <http://eeas.europa.eu/top_stories/2012/140912_ukraine_en.htm.> accessed 25 February 2016.
[21] Estonian Center of Eastern Partnership. Public administration in EU Eastern Partners: comparative report [2014] < http://eceap.eu/en/portfolio-items/public-administration-in-eu-eastern-partners-comparative-report-2014/> accessed 25 February 2016.
[22]Dorota Pyszna 'The Management of Accession to the European Union – EU-Related Decision and Policy-Making' <http://www.vilaggazdasagi.hu/workingpapers/ wp-128.pdf > accessed 25 February 2016.
[23] Estonian Center of Eastern Partnership. Public administration in EU Eastern Partners: comparative report 2014. <http://eceap.eu/en/portfolio_category/public-administration-reform.> accessed 25 February 2016.
[24] Ibidem.
[25] Christoph. Knill *The Europeanisation of National Administrations: Patterns of Institutional Change and Resistence* (Cambridge University Press, 2001, 258).
[26] Anna Gawrich I. Melnykovska, R. Schweickert 'Neighbourhood Europeanization trough ENP. The Case of Ukraine' (KFG Working Paper Series, №3, August 2009,27).

References

Gawrich A., Melnykovska I., Schweickert R. (2009) Neighbourhood Europeanization trough ENP. The Case of Ukraine , KFG Working Paper Series, №3, p. 27.
Knill C. (2001) *The Europeanisation of National Administrations: Patterns of Institutional Change and Resistence* , Cambridge University Press, p. 258 .
Moxon-Brown E. Administrative capacity in the European Union: how high can we jump?, <https://www.coleurope.eu/content/rd/devoffice/acad/cooperation/EITC/Paper%20Moxon-Browne.pdf.> accessed 25 February 2016.
Orżel O. (2010) Ewropeizacja system publicznogo administruwannia krajin Centralnoi i Schidnoi Ewropy u konteksti pidgotowky do czlenstwa w ES, Wisnyk nacionalnoi akademii derżawnogo uprawlinnia, №5.
Puchtecka A. (2010) *Ewropejskyj administratywnyj prostir i pryncypy werkhowenstwa prawa*, Monografia, Kyiv, p.140.
Pyszna D. The Management of Accession to the European Union – EU-Related Decision and Policy-Making, < www.vki.hu/workingpapers/wp-128.pdf > accessed 25 February 2016.

Rudik N. (2014) Ewropeizacija publicznogo uprawlinnia w Ukraini w konteksti obumowlenosti ES, Aspekty publicznogo uprawlinnia, №1-2, p. 33.

Theisen A.-M., Delmartino M. 'Europejski Fundusz Społeczny i zdolność instytucjonalna organów publicznych, <http://ec.europa.eu/esf > accessed 25 February 2016.

Verheijen. A.J.G. (2000) Administrative capacity development. A race against time?, The Hague, < http://www.wrr.nl/fileadmin/nl/publicaties/DVD_WRR_publicaties_1972-2004/W107_Administrative_capacity_development.pdf> accessed 25 February2016.

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Minority Protection within the European Union

BOLDIZSAR SZENTGALI-TOTH

Abstract The protection of national minorities has played a crucial role during the accession process of the European Union, as part of the Copenhagen criteria, candidate states shall have complied with certain standards concerning national minorities. Paradoxically, the European Union has not elaborated a consistent legal framework from this area. As a result, there is a significant difference between the requirements of minority protection as regard member states, and the criteria which shall be fulfilled by candidate countries in this field. This paper would focus on the European standard for candidate countries and argues for a unitary and more precise minority policy across Europe, which could promote the credibility and transparency of European supervision on this matter. Firstly, I would outline the development of the European framework for the protection of national minorities, especially the weaknesses of the current concept. Secondly, I would highlight the role of minority protection during the accession process: how the approach of the EU has been modified from this issue, and why? Finally, I would use the example of the Serbian development to demonstrate, how the European efforts work at practice for the protection of minorities in candidate states.

Keywords: • minority protection • legal framework • minority • EU

CORRESPONDENCE ADDRESS : Boldizsar Szentgali-Toth, University Eotvos Loránd University 1053 Budapest, Hungary, email: totboldi@gmail.com.

DOI 10.4335/978.961.6399.79.1.25
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

The Treaty from the European Union not only expressly provides for the respect of human rights, but also clearly highlights the protection of national minorities in Europe. The protection of national minorities has played a crucial role during the accession process of the Community, as part of the Copenhagen criteria, candidate states shall have complied with certain standards concerning national minorities. Paradoxically, the European Union has not elaborated a consistent legal framework from this area.

As a result, there is a significant difference between the requirements of minority protection as regard member states, and the criteria which shall be fulfilled by candidate countries in this field.[1] This paper focuses on the European standard for candidate countries and argues for an, unitary and more precise minority policy across Europe, which could promote the credibility and transparency of European supervision on this matter.
In the first chapter, I outline the development of the European framework for the protection of national minorities, especially the weaknesses of the current concept. The second chapter highlights the role of minority protection during the accession process: how the approach of the EU has been modified from this issue, and why? Finally, in the third chapter, I use the example of the Serbian accession process to demonstrate, how the European efforts works at practice for the protection of minorities in candidate states.

2 The European framework for the protection of minorities

As the background of my subsequent arguments, I outline firstly certain short-comings of the European legal framework for the protection of minorities. Instead of the long enumeration of relevant legal instruments, after a brief introduction, I focus on certain characteristic of the European regime, which is worth contemplating from my perspective.

1. The minority protection in Europe as a legal framework is based on certain references of the treaties. Article 2. of the Treaty on European Union reads as follows:
   „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."
   Moreover, article 21. of the Charter of Fundamental Rights protects also national minorities from discrimination:

Article 21
Non-discrimination
1. 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.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (which has been signed by all member states) also protects individuals from national minorities:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

2. Apart from these key provisions, certain directives,[2] framework decisions,[3] and resolutions of the European Parliament from linguistic issues[4] and compose the whole legal framework. We shall mention also two conventions of the European Council: the European Charter for the protection of minority and regional languages, and the Framework Convention for the protection of national minorities.
3. There is not any European definition of national or ethnic minority therefore, it is not clear, which communities and which individuals shall be protected as minorities, or members of minorities. The recognition of minority status is an exclusive competence of member states consequently the EU could protect only directly those minorities, who has particular status in their country. We shall raise several questions here: shall we treat immigrant minorities the same, as indigenous people?[5] Or a group which constitutes minority in the whole state could be the majority within a particular region.[6]
4. Traditionally, within the European cooperation, the importance of the protection of minorities had been played down.[7] This tendency had been based on two main considerations.

A. Firstly, the original purpose of the cooperation was primarily the economic development the protection of human rights had been reinforced only as components of a broader economic setting.[8] In the *Nold* case, the European Court of Justice (ECJ) concluded the mission of the Community for the protection of human rights.[9] Since than, the role of the EU at the protection of human rights has increased remarkably, but the economic aspect is still dominant.
B. Secondly, the issue of national minorities is very closely related to the sovereignity of member states. The political and cultural status of these groups has a clear impact on the internal governmental structure of the state. The member states maintained their very large margin of movement to determine their administrative structure and public services. France refuses the official recognition of even linguistic minorities, while Switzerland as a state is based on multi-nationalism.[10]

5. The European system of minority protection mainly focuses on the individual aspect of minority rights the European protection of collective rights is very restrictive.[11] The Treaties, the anti-discrimination directives,[12] and several other legal instruments declare the prohibition of discrimination against the members of national minorities. However, due to the long history of ethnic conflicts and

oppression, collective rights for minorities have been considered as a thread for territorial integrity, stability and peace. After the second world war, the international legal order have not recognized collective minority rights, it was supposed to be replaced by the individual protection.[13] Although this approach has been slightly modified during the subsequent decades, there is still a fear from the recognition of collective rights in the international level.

6. The European Parliament noted in several of its resolutions, that [Protecting national minorities in an enlarged EU is a major issue and . . . it will not be achieved simply by fighting against xenophobia and discrimination;...][14] The EU tries to balance the lack of direct collective protection with supplementary mechanisms, anti-discrimination policies are amongst these instruments. Besides this, the EU support financially the cohesion of poorer regions (often resided by minorities), and funds certain cultural and research projects concerning national minorities.In light of these concerns, I turn now to the specialities of the accession process from the perspective of national minorities.

3 Minority protection as a precondition of accession of the European union

After some preliminary references, minority protection has been an integral part of the primary sources of the EU legal order since the framing of the Maastricht Treaty. This change was motivated by the on-going enlargement process: the 15 member states prepared for the accession of former communist countries from Central Europe. For the candidate states, minority protection was an important requirement from the very beginning of the cooperation with EU respectively. At the end of the 1980s, the agreements on trade, commerce and Cooperation with Hungary[15] and Poland[16] contained clear references to the protection of ethnic minorities.

The European leaders realized that within the enlarged European space, minority protection would have a completely different role, than in the former European cooperation.[17] Most of the old member states provided a more or less democratic and relatively peaceful treatment of their minorities. By contrast, the central European model is different. „Typically, Central and Eastern European Constitutions affirm the unitary character of the state and the principle of non-discrimination on, among other grounds, language, race, nationality and ethnic origin. Moreover, most of them contain specific clauses of minority protection, which are not self-executing, but require an intervention by the legislator."[18] Due to ethnic tensions, several bloody armed conflicts occurred during the twentieth century, and the war in Yugoslavia showed, that ethnic diversity is still a huge problem for this region. On this basis, the Badinter-Committee stated the respect for national minorities as a precondition of recognition of new states.[19]

The Copenhagen Criteria also prescribed the proper treatment of national minorities for the candidate states.[20]

Apart from the different historical background, the accession brought the remarkable roma minority of Central European countries into the picture. The roma is the largest ethnic group of Europe without any background of an independent nation-state there

fore they are more marginalized, than other minorities. Moreover, the vast majority of roma communities can be found in poorer member states, and their members usually live within low conditions. The EU has worked out a special system of protection for roma communities,[21] and a number of cases has been decided before the ECJ and ECTHR, where the discrimination of roma people were involved.[22]
Theoretically, recent candidate states, such as Serbia, Ukraine, Macedonia, and others shall demonstrate that they respect properly their national minorities. However, there is not any cohesive European standard, which could be reinforced during the accession process. For instance, there is a huge pressure on candidate states to ratify the Framework Convention on the protection of national 0minorities, while this step is not required from member states.[23]

Cultural and linguistic rights are protected at least by the Charter of Regional Languages, and the Framework Convention, and most candidate countries demonstrated major steps forward in this regard. However, the issue of recognition of minorities, or their political status is not raised during the accession process. As a result, the legal mandate of candidate states covers only such communities, which are recognized by them selves. In other words, the personal scope of minority protection is subject to the candidate states, even during the accession process. In addition, during the accession process, only the individual autonomy and the cultural rights of the group are concerned, the political status and representation of minorities is irrelevant. What is more, candidate states could limit their legal obligations even in the cultural field: they are entitled to select, with which provisions of the Charter of Minority Languages they intend to comply.

Although these points, the minority protection within the Common Foreign and Security Policy is more efficient, especially towards candidate countries, than for current member states. Accession means an increased pressure for those states to reach compromises from minority issues, and attempt to close ethnic-based past tensions with their neighbours. We can mention a range of examples here from the German-Polish reconciliation to the Serbian-Croatian settlement process.

To sum up, I would like to highlight the moment of accession as an unique opportunity to promote the status of minorities in candidate countries. EU make serious efforts to use this tools properly, however the lack of unique European standard is a large obstacle of further development. For future references, we shall define the personal scope of European minority protection, and determine clearly, which cultural and political rights shall be provided for minority communities.

4 The development of status of minorities in serbia during the accession negotiations

Serbia has been a candidate member state since March 2012. During the negotiations, the main issue was the heritage of the war against Croatia and Bosnia, and the cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY). Nevertheless, due to the big number of ethnic minorities in Serbia, the status of these groups was also highlighted. The most populous minority is the Hungarian they mostly live in Vojvodina, the northern part of the country. Apart from Hungarians, we can found also a Romanian, Croatian, Bosnian, Albanian and Bulgarian community in Serbia.[24]

The oppression of minorities had been increased during the war in the 1990s lots of members of minorities were forced to military service, while the civil population was insulted by the armies.[25] The public discussion remained sharply nationalist during the subsequent years, cultural and political autonomy was denied from minorities. After the NATO intervention in Kosovo, Serbia have looked for EU membership, and started to harmonize it's policies to the European standards. In 2006, Serbia ratified both the Charter of minority languages, and the Framework Convention for the protection of national minorities. Two years later, the country officially applied for full membership, and since than, several positive steps have been conducted for the compliance with international standards. For instance, the Serbian president met with his Croatian counterpart, and the two leaders apologized from the past incidents between the two countries.[26] Shortly after that, in 2010, a new act has been adopted from the cultural autonomy of national minorities.[27] [28] To set an example, before 2010, the Hungarian minority has been represented only by a political party organised on ethnic grounds. After 2010, the council of each recognized minority has been elected, and these bodies are entitled to decide on cultural, linguistic and symbolic issues. Regional radio and television channels have been also provided for minorities.[29]

Shortly after this, a new statute was adopted from the status of Vojvodina, and in such towns, where the proportion of a minority language exceed twenty percent, that minority language is also recognized as official. Accordingly, citizens may communicate with authorities in minority languages. For instance in Subotica (Szabadka), the Hungarian language enjoies also official status.[30]

Before granting the official candidate status for Serbia, Romania made an objection: it was considered, that Serbia mistreat the Romanian minority close to the Romanian border, and impose linguistic restrictions on this group. This excuse was probably based on political considerations by the Romanian government, but finally, the Serbian authorities had to demonstrate, that they are ready to respect the linguistic rights of the Romanian community.[31]

After having been granted the candidate status, the removal of obstacles from the accession of Serbia was continued, even in the field of minority protection. In the summer of 2013, the Hungarian and the Serbian president apologized for the past incidents between the two nations and the Serbian government repealed the statute,

which declared the Hungarian minority as collectively guilty for the incidents against Serbs.[32] Furthermore, there is an on-going discussion for the compensation of Hungarian and Serbian victims of past incidents in Vojvodina during the 1940s.

5 Conclusion

This paper reflected on certain short-comings of the current European framework for the protection of national minorities, and amongst them, on the difference between old member states and central European countries, including the current candidates for membership. Undoubtedly, the EU is more effective for the protection of minorities in candidate countries, than within the EU. Candidate states shall conduct remarkable steps for the protection of national minorities for the compliance with accession requirements. The accession process usually promotes significantly the cultural autonomy of minorities, and emphasises measures against ethnic-based discrimination. Nevertheless, the lack of precise regulation reduces the efficiency of these mechanisms there is not any unitary system of requirements for candidate states. The applicant countries could decide which ethnic groups are recognized as minorities, and what are the precise rights, which are provided. A further issue, that the monitoring mechanism during the accession process neglect, the political status of minorities, only the individual aspect, and the cultural dimension are highlighted. In my view, after an extensive discussion between the EU, the candidate countries, and the representatives of national minorities, the precise definition of national minority for the purpose of accession process shall be agreed, and the required rights for these communities shall be enumerated. As Bogdandi notes: „The defence of the Union's foundational values (Art. 2 TEU) is largely left to national and international institutions."[33] Precision opens up the perspectives of a real and effective European supervision.

Notes

[1] The Road Not Taken: The European Union as a Global Humanrights Actor. Gráinne de *Búrca*, The *American Journal of International Law*, Vol. 105, No. 4 (October 2011), Pp. 670.

[2] Council Directive 78/2000/EC

[3] For example: 2008/913/JHA
Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law

[4]Katalin *Szajbély*, Judith *Tóth:* Kisebbség védelem az Európai Unióban [Minority protection within the European Union.] 2002.
www.hhrf.org/kisebbsegkutatas/kk_2002_02/cikk.php?id=1134
Last accessed: 06.06.2015.

[5] Santa Clara v Martinez, 436 U.S. 49

[6] Ford v Quebec, [1988] 2 S.C.R. 712

[7] de *Búrca*, (2011), pp. 649-693

[8] In two judgements the ECJ found, that measures for the protection of minorities in South Tyrol violated the European law: Case C-274/96 Bickel and Franz and C-281/98, Case of Angonese

[9] Case 4/73, *Nold* [1974] ECR 491

[10] Susanna *Mancini* and Bruno de *Witte*: Language Rights as Cultural Rights: A European Perspective, in Francesco Francioni and Martin Scheinin (eds.), Cultural Human Rights, Martinus Nijhof f Publishers, 2008, Pp. 250-260

[11] *Mancini* and de *Witte*, cited above, pp. 249

[12] Directive 2000/43/EC
[13] Susanna *Mancini:* Secession and Self-Determination, in Oxford Handbook of Comparative Constitutional Law (M. Rosenfeld & A. Sajo eds., OUP, 2013)
[14] Adding bite to a bark: the story of article 7, e.u. enlargement, and jorg Haider
Wojciech *Sadurski, Columbia Journal of European Law*, 2010, vol. 16, 416.
[15] https://books.google.hu/books?isbn=9041105840 -, last accessed: 06.06.2015.
[16] www.ejil.org/pdfs/12/1/503.pdf,
Last accessed: 06.06.2015.
[17] *Sadurski,* cited above, Pp. pp. 387
[18] *Mancini,* de *Witte,* cited above, Pp. 265.
[19] Love: *International Law*, 2007. Pp. 154
[20] European Council on Copenhagen - 21-22 JUNE 1993- Conclusions of the Presidency, DOC/93/3.
[21] http://www.fra.europa.eu/fraWebsite/home/pub-cr-roma-housing_en.htm
[22] James A *Goldston*, "The Struggle for Roma Rights: Arguments that have Worked" 32 (2010)
[23] De *Burca,* cited above, Pp. 671
[24] www.osce.org › Resources/ 30908
Last accessed: 06.06.2015.
[25] Prosecutor v. Radislav Krstic International Criminal Tribunal for the Former Yugoslavia, IT-98-33
[26] www.bbc.com/news/world-europe-17913357
[27] https://freedomhouse.org/report/freedom-world/2010/serbia#.VXijlVI0aSo
[28] This served the compliance with art. 5. and 15. of the Framework Convention
[29] Art. 9. of the Framework Convention
[30] Art. 10. of the Framework Convention
[31] http://www.balkaninsight.com/en/article/serbia-s-vlachs-minority-hit-the-spotlight
[32]
http://www.mfa.gov.hu/kulkepviselet/YU/en/en_Hirek/Historical+reconciliation+between+Hungary+and+Serbia.htm?printable=true
[33] Armin von *Bogdandi:* Reverse solange - protecting the essence of fundamental rights against eu member states, *Common Market Law Review,* 2012, vol. 49, no. 2, pp. 490

References

Armin von *Bogdandi:* Reverse solange - protecting the essence of fundamental rights against eu member states, *Common Market Law Review,* 2012, vol. 49, no. 2.
James A *Goldston*, "The Struggle for Roma Rights: Arguments that have Worked" 32. 2010.
Love: *International Law*, 2007.
Susanna *Mancini* and Bruno de *Witte*: Language Rights as Cultural Rights: A European Perspective, in Francesco Francioni and Martin Scheinin (eds.), Cultural Human Rights, Martinus Nijhof f Publishers, 2008.
Susanna *Mancini:* Secession and Self-Determination, in Oxford Handbook of Comparative Constitutional Law (M. Rosenfeld & A. Sajo eds., OUP, 2013)
Wojciech *Sadurski:* Adding bite to a bark: the story of article 7, e.u. enlargement, and jorg Haider, *Columbia Journal of European Law*, 2010, vol. 16,
Katalin *Szajbély*, Judith*Tóth*: Kisebbség védelem az Európai Unióban [Minority protection within the European Union.] 2002.
The Road Not Taken: The European Union as a Global Humanrights Actor. Gráinne de Búrca, *The American Journal of International Law*, Vol. 105, No. 4 (October 2011),

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The Justiciability of European Values: Are We Underestimating Article 2 TEU?

ELISABETH HOFFBERGER

Abstract Recently, significant violations of fundamental principles, such as democracy, rule of law and human rights have taken place within several European Union's Member States' domestic legislation. This begs the question of how these tendencies could be overcome in legal terms. With the Lisbon Treaty coming into force in 2009, Art 2 TEU, calling upon both the European Union and Member States to adhere to basic fundamental values, was attributed an entirely new meaning: From then on, the European Court of Justice' jurisdiction extended even to the EU Treaty, including Art 2 TEU. The question arises how and in what way the justiciability of Art 2 TEU could contribute to overcoming the ongoing internal crisis within the European Union. In this regard, two different concepts are currently being discussed: Murswiek suggests that an infringement procedure based on Art 2 TEU could be instituted against an EU-Member State. Bogdandy proposes that individuals themselves shall be given the possibility to directly invoke Art 2 TEU if an EU-Member State does not offer sufficient human rights protection within the domestic system. Both systems offer advantages and disadvantages in both legal and political terms. The following paper aims to address these challenges in order to foster the protection of core fundamental values enshrined in Art 2 TEU.

Keywords: • fundamental principles • TEU • EU

CORRESPONDENCE ADDRESS : Mag. Elisabeth Hoffberger, Johannes Kepler University Linz, Austria, email: elisabeth.hoffberger@jku.at.

DOI 10.4335/978.961.6399.79.1.26
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 The Justiciability of European Values – Are We Underestimating Art 2 TEU?

Within the past few years the EU has been faced with several challenges in her internal as well as external relations. While the Union has partly resumed accession negotiations with Serbia and other candidate countries, she is also facing challenges concerning her own Member States. The new Hungarian Constitution, promulgated on April 25th, 2011, established a new political order in some parts contradictory to core European values, such as democracy and rule of law.[1] This trend seems to sprawl to other EU—members, e.g. Romania, Greece and Poland. It remains to be seen what will happen in other Member Countries where elections will be held in the following years. This political development, where Member States resort to undemocratic mechanisms in order to maintain internal political power, begs a decisive question: Can the European Union insulate undemocratic constitutions?

One possible instrument to do so is to invoke Art 7 TEU foreseeing an early-warning mechanism which can lead to the suspension of membership rights. As history has shown, the European Union has considered applying Art 7 TEU (e.g. Austria in the "Haider-Era" or Italy in the "Berlusconi-Era"), but she never acted upon her intentions. The main problem is that Art 7 TEU is a truly political instrument requiring an absolute majority in the European Parliament and a majority of four-fifths in the Council. It is doubtful whether the European Parliament will vote to the disadvantage of a government belonging to the same political bloc as the European Parliament's majority.[2] Another instrument is the Fundamental Rights Charter. In the past, the limited scope of application has led to several difficulties. The Charter only comes into play if a certain situation is governed by EU-law. In case a constitutional reform violating democratic values is not implementing EU-law, the Fundamental Rights Charter therefore cannot be applied. The ECJ has indeed widened the Charter's scope of application, but this has merely led to some inconsistencies. All in all the application of the Fundamental Rights Charter cannot cover all possible aspects of illiberal developments at the domestic and sometimes purely internal level of EU-Member States.[3] Due to the aforementioned problems, other potential instruments to protect from undemocratic constitutions shall be taken into consideration. Among legal scholars another concept has been invoked: The concept of the justiciability of European values based on Art 2 TEU. This concept concerns two different aspects. The first aspect is the possibility of the European Commission instituting infringement proceedings against EU-members based on Art 2 TEU, which has been strongly promoted by Dietrich *Murswiek*. The second aspect is the possibility of EU-citizens invoking Art 2 TEU themselves if deprived from rights enshrined in Art 2 TEU that cannot be argued in front of national courts. The second concept, which has been developed by Armin *Bogdandy* et al. is called the "Reverse-Solange-Doctrine" and shall be elaborated later.

2 Murswiek and the extension of the Court's Jurisdiction to Art 2 TEU

The ratification of the Treaty of Lisbon in 2009 changed much with regard to the European Court of Justice' competence of jurisdiction. Before Lisbon, the Court had no

competence to adjudicate on matters not covered by the EC Treaty. After Lisbon, the pillar structure of the EU dissolved and jurisdiction now extends to all EU Treaties (TEU and TFEU), in accordance with Art 275 and 276 TFEU.[4] *Murswiek* argues that the Court's jurisdiction even extends to Art 2 TEU, which reads as follows: »*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.*«[5] This so-called »homogeneity clause«[6] was primarily aimed at setting the standards for the accession of new Member States to the EU. Recent developments, such as increased human rights violations, undemocratic legislation and a lack of rule of law within domestic jurisdictions, have raised the question whether an infringement procedure based solely on Art 2 TEU in conjunction with Art 258 or 259 TFEU could be instigated against EU-Member States.[7]

Murswiek answers this question in the affirmative, contending that in case fundamental principles are being violated by an EU-Member, even in purely internal situations, an infringement procedure can be instigated against that State, solely referring to Art 2 TEU.[8] In this regard *Murswiek* emphasizes the article's directly applicability,[9] compelling National Courts and public authorities to refrain from applying any national law not in conformity with Art 2 TEU.[10]
The assessment that the ECJ has jurisdiction with regard to core fundamental values is backed by recent ECJ jurisprudence. In 2008, in *Kadi & Al Barakaat*[11] the ECJ exercised jurisdiction referring to human rights as an integral part of »constitutional principles« which can by no means be invalidated by an international agreement.[12] Thus, the European Court of Justice had already adjudicated on legal matters explicitly referring to constitutional principles even before the Lisbon Treaty had come into force. This fact could be a strong signal that the Court might in future again refer to these constitutional principles, now enshrined in Art 2 TEU.[13]

2.1 Criticism

However, *Murswiek'*s assertion of the justiciability of Art 2 TEU has been harshly criticized. First and foremost, critics referred to the article's indeterminate nature when negating any form of justiciability. The terms »human rights«, »democracy« and »rule of law« are tenuous and vague in their very nature, leaving too much room for interpretation.[14] *Heintschel* argues that because of this indeterminate nature, the violation of Art 2 TEU itself cannot lead to an infringement procedure, although Art 2 TEU is binding for both the EU and the Member States. According to *Heintschel*, Art 2 TEU only serves as an additional instrument for the interpretation of other, justiciable EU norms and as a yardstick for domestic legislation.[15] *Frenz* shares this view, contending that Art 2 TEU does not consist of justiciable values but constitutes the EU's commitment to a community of values shaping internal and external relations.[16] Art 2 TEU frames the inalienable »essence« of the EU, comparable to the German »eternity clause« of Art 79 para 3 German Grundgesetz.[17] *Obwexer* counters that, while the value of Art 2 TEU might indeed require further concretisation, this does not avert

the article's justiciability. On the contrary, Art 2 TEU sets a minimum standard which has to be further concretized by the ECJ. This is particularly true for Art 2 sent 1 TEU, referring to, e.g., human rights, democracy and rule of law. Sent 2, on the other hand, entails very weak and vague descriptions, such as pluralism, tolerance and solidarity, which could not be adequately concretized by the EJC and should therefore not be justiciable.[18] According to *Murswiek*, the justiciability of Art 2 refers to the entire article, the only difference being that the values enshrined in sentence 2 are significantly more indeterminate. Though *Murswiek* affirms the ECJ's jurisdiction with regard to the entire Art. 2 TEU, surprisingly, he at the same time contends that the justiciability of sentence 2 infringes upon the principle of rule of law and, in further consequence, the principle of democracy.[19] It might thus be more reasonable to divide Art 2 TEU into two categories: a justiciable nucleus (Art 2 sent. 1) and a non-justiciable periphery (Art 2 sent. 2).[20]

Moreover, Art 4 para 2 TEU shall be taken into consideration, requiring the EU to regard the Member States' constitutional pluralism. It might be argued that the justiciability of Art 2 TEU could only be applied to the extent it does not undermine the concept of constitutional pluralism. However, this assessment cannot be upheld. On the contrary, Art 2 TEU in fact sets a limit to the principle of constitutional pluralism. Constitutional pluralism only has to be taken into consideration by the EU to the extent that core European values are not being violated by national constitutions, even with regard to purely internal matters.[21]

Another argument precluding the justiciability of Art 2 TEU is the precedence of Art 7 TEU foreseeing a merely political mechanism if a Member State consistently and unrepentantly violates the rights enshrined in Art 2 TEU, in the worst case leading to the deprivation of voting rights. In this regard Art 7 TEU is being considered »lex specialis« in relation to Art 2 TEU.[22] As mentioned above, Art 7 is a political instrument requiring an absolute majority in the European Parliament and a majority of four-fifths in the Council.[23] *Murswiek* argues that Art 7 TEU does not precede any infringement procedure invoked by the European Commission or an EU Member State. First and foremost, Art 7 cannot be regarded a more special provision because it only applies if a State unrepentantly, incessantly and obstinately violates fundamental principles, such as human rights, democracy and rule of law, whereas Art 2 TEU applies in case values are being violated in a less systematic and unrepentant manner.[24] This viewpoint is shared by *Ruffert* stating that the infringement procedure based on Art 2 TEU is used in case of individual infringements, whereas the procedure according to Art 7 TEU applies in case of serious, long-lasting violations of the values enshrined in Art 2 TEU.[25] *Scheppele* argues that an infringement procedure based on Art 2 TEU never comes into play in case of a single fundamental rights violation but only in case of systematic breaches of values, even though the violation of fundamental rights must be concrete enough for the ECJ to exercise jurisdiction.[26]
Another argument why Art 7 TEU cannot be »lex specialis« is that the procedure foreseen in Art 7 is a political instrument incapable of replacing or substituting an official judicial procedure.[27]

2.2 Transferring constituent powers

Following *Murswiek*'s assessment might indeed have far-reaching consequences, the most important being the transferal of constitutent powers from the Members States to the EU. According to *Murswiek*, the justiciability of Art 2 TEU degrades national constitutions to »federal constitutions«, modifying the European Confederation of States to a European Federation as such with an overarching, main constitution and 28 federal constitutions creating a »compound of constitutions«. Though Art 50 EUV offers Member States the possibility to withdraw from the Union, it cannot be a compensatory instrument retrieving the full dimension of state sovereignty.[28]

Moreover, *Murswiek* argues that the factual transformation of constitutent powers contradicts Germany's constitutional law.[29] The transferal of constitutent powers, induced by the concept of the justiciability of Art 2 TEU, may very likely contradict other constitutional laws as well. In case of the Hungarian Constitution, for instance, a transferal of competences to the EU is inadmissible if the referral leads to the dissolution or termination of the State or if fundamental constitutional principles are affected by the transferal of competences.[30] It could be argued that the justiciability of Art 2 TEU, giving the ECJ the possibility to decide on constitutional aspects even in case of purely internal matters, would affect fundamental constitutional principles of the Hungarian Constitution. Thus, affirming the justiciability of Art 2 TEU might cause significant problems with regard to the constitutional laws of the Member States.

Nevertheless, from the viewpoint of international law, the situation is less problematic. According to the commonly known principle of »*pacta sunt servanda*«, which is also applicable to the Union Treaties, the Member States are bound by the treaty and have to fulfil the obligations therein, even if the treaty contradicts national law.[31]

Another indication that Member States would probably not allow for such a transferal of constitutent powers is the failure of the 2004 Draft Treaty establishing a Constitution for Europe. The Treaty never came into being and the European Council was asked to present an adequate alternative reformist treaty without turning the EU into a federation.[32]

2.3 Outlook

It might still be questionable whether Art 2 TEU can be the legal basis for an infringement procedure. However, the Treaty of Lisbon and the extension of the European Court of Justice' jurisdiction as well as recent ECJ jurisprudence have shown that there is an ongoing process towards enhanced protection of fundamental values. However, the justiciability of Art 2 TEU bears the risk of being incongruous to the national constitutions of the Member States. Especially the principle of state sovereignty, a doctrine common to the constitutions of all Member States, might contradict the justiciability of Art 2 TEU factually leading to the transfer of constitutent powers to the EU. The EU's ongoing refusal to invoke Art 7 TEU may increasingly

draw the ECJ's attention to Art 2 TEU, whether in conformity with the national constitutions or not.

3 Bogdandy's Reverse-Solange-Principle

Bogdandy et al. developed another concept affirming the justiciability of Art 2 TEU called the »Reverse-Solange-Doctrine«. Inspired by the German Federal Constitutional Court's Solange Doctrine,[33] individuals shall have the right to redress violations of fundamental values before national and EU Courts if the violation goes hand in hand with an undermining of the »substance« of Union citizenship according to Art 20 TFEU.[34] In this regard, individuals shall have the possibility to directly refer to Art 2 TEU in conjunction with Art 20 TFEU before national Courts in order to seek redemption for violations suffered that could not be redressed by other legal instruments at the domestic level. If legal protection cannot be safeguarded at the domestic level, individuals shall then have the right to seek redress before EU Courts directly referring to Art 2 TEU in conjunction with Art 20 TFEU. The possibility to directly invoke Art 2 TEU in conjunction with Art 20 TFEU shall only apply as a last resort, when all other legal instruments cannot sufficiently safeguard the individual's fundamental rights enshrined in Art 2 TEU and Art 20 TFEU. The concept is backed by the recent ECJ judgment »Ruiz Zambrano«, stipulating that »Art 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union«.[35] It shall be mentioned at this point that the ECJ's judgement did not associate fundamental rights violations with the »substance» of Union-citizenship. However, *Bogdandy* claims that the violation of fundamental rights could in fact undermine the »substance« of Union citizenship, even in purely internal matters or in cases outside the scope of the Fundamental Rights Charter.[36] The doctrine shall apply only if it cannot be presumed that the individual's rights are being sufficiently safeguarded in the Member State concerned.[37]

Nevertheless, *Bogdandy* does not give a final answer to the question how »substance of Union-citizenship» could be defined. He only refers to media freedom, which is as an integral part of the Union's fundamental rights and which is imperative for the democratic legitimation of the EU, in order to give an example how the violation of fundamental rights could lead to the violation of the substance of Union-citizenship. Moreover, Bogdandy makes more general comments contending that a fundamental rights violation falls under the EU's law and the substance of Union-citizenship if the practical meaning and effective exercise of Union-citizenship is being undermined.[38] According to *Bogdandy*, further concretization has to be undertaken by the ECJ's judicial lawmaking.[39]

It should be borne in mind that *Bogdandy* only refers to one specific value in order to affirm the possible violation of the »substance» of Union-citizenship: media freedom as a human right. It is highly questionable whether and, if answered in the affirmative, how the violation of values like democracy and rule of law could also lead to the violation or limitation of the »substance» of Union citizenship. It is true that both the

Member States and the EU share an *acquis communautaire* of common principles and values[40] alleviating the assessment of the exact content of Art 2 TEU. Nevertheless, it might be difficult to assess in which way the violation of democratic principles and rule of law might amount to the violation of the »substance« of Union-citizenship. *Bogdandy* gives no answer to this question and it remains to be seen which values could really come into play when applying the »Reverse-Solange-Doctrine«. Although the formulation of Art 2 TEU is rather vague and it remains unclear whether Art 2 para 2 TEU should be considered justiciable at all, it will be the European Court of Justice' responsibility to further define and shape Art 2 TEU.[41] *Bogdandy*, however, seems to exclusively refer to human rights endowing the individual with concrete rights that can be addressed before national and EU Courts. Nevertheless, it cannot be ruled out that some human rights aspects, such as media freedom, also affect principles like democracy and rule of law.[42]

3.1 Criticism

In general, three main objections have been raised against *Bogdandy's* proposal: First, the question arises whether the extension of the European Court of Justice' competence to Art 2 TEU read in conjunction with Art 20 TFEU amounts to *ultra vires*. Second, it is regrettable that third-country-citizens cannot apply the »Reverse-Solange-Doctrine«. Third, the question remains whether the »Reverse-Solange-Doctrine« could possibly undermine the ECtHR's jurisprudence.
Regarding the first argument, it is questionable whether the European Court of Justice can extend its jurisdiction to Art 2 TEU without having an official textual mandate. Moreover, *Kochenov* contends that in applying the »Reverse-Solange-Doctrine« the Court would arrogate competences of a »Human Rights Court.«[43] *Bogdandy* argues that the principles of »judicial lawmaking« and the concept of the »development of law« shall be applied by the Court in order to affirm the Court's jurisdiction. Judicial lawmaking of the European Court of Justice is generally permissible and will only find its limits where basic principles would be overthrown or shifted into a completely different direction.[44] According to *Bogdandy*, the application of the »Reverse-Solange-Doctrine« will not lead to »structural shifts« rendering judicial lawmaking impermissible.[45]

Another aspect that should be taken into consideration is whether Art 7 TEU has precedence over the application of »Reverse-Solange«. Many scholars argue that Art 7 TEU is a special procedure superseding any other form of law enforcement. In this regard, attention should be drawn to Art 269 TFEU stating that »the Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.« It could be argued that the political procedure according to Art 7 TEU does not allow for a judicial procedure, at least when it comes to individuals' complaints.[46]

It should furthermore be borne in mind that Art 7 TEU directly refers to Art 2 TEU. This could mean that individuals referring to Art 2 TEU in conjunction with Art 20 TFEU are not allowed to seek redress before the ECJ, because Art 269 TFEU does not allow for individuals' complaints when grave fundamental rights breaches according to Art 7 TEU are at stake. This argument might be too far-reaching and lead to an inadmissible limitation of the Court's jurisdiction, which has to be interpreted narrowly[47] lest the ECJ's function as a constitutional court be undermined.[48] It might be true that individual complaints solely based on Art 7 TEU are impermissible due to the restrictive wording of Art 269 TFEU, but that does not mean that individuals cannot refer to Art 2 TEU in conjunction with Art 20 TFEU.[49]

As already mentioned, *Bogdandy's* proposal of a »Reverse-Solange-Doctrine« was criticized due to its inapplicability to Non-EU-citizens. This argument might be true in terms of moral and socio-political aspects, but in legal terms preferential treatment of EU-citizens in contrast to Non-EU-citizens can be justifiable.[50]

Regarding the question whether the application of the »Reverse-Solange-Doctrine« would undermine the ECtHR's jurisprudence, *Bogdandy* holds that the EU cannot shift her own responsibilities to an external body, such as the European Court of Human Rights. The application of »Reverse-Solange« would only be a complementary mechanism in order to protect fundamental rights but would not undermine the ECtHR in any way.[51]

3.2 Outlook

Bogdandy's proposal seems to be a well-developed and progressive argument. However, *Bogdandy's* exclusive reference to human rights and Union-citizenship without giving a final response as to how other values, such as democracy and rule of law, could possibly violate the »substance« of Union citizenship, leaves fundamental questions unanswered.

4 Concluding Remarks

Protecting human rights, democracy and rule of law in times like these might be more challenging than ever. Due to domestic legislation often violating fundamental values, the EU now has the responsibility to acknowledge constitutional pluralism on the one hand and foster the protection of fundamental values on the other hand. It is questionable whether the European Court of Justice' jurisdiction should extend to article 2 TEU in its entirety or if there should be a difference between values enshrined in sentence 1, such as human rights, democracy and rule of law, and those included in sentence 2, such as tolerance, pluralism and solidarity. Despite *Murswiek's* assessment, the majority of authors seem to affirm (if at all) only the justiciability of Art 2 sentence 1 TEU. It remains to be with course the ECJ will take in case it exercises jurisdiction with regard to an infringement procedure based solely on Art 2 TEU.

Bogdandy's »Reverse-Solange-Doctrine« might be another helpful instrument to overcome the ongoing tendencies of anti-democratic legislation or violations of the rule of law, even in purely internal situations. However, it is highly questionable in which way the violation of democracy and rule of law could at the same time lead to the violation of the substance of Union citizenship. The political arena in some Member States might be in upheaval at the moment, but the two concepts addressed in this paper offer solutions that will probably be taken into consideration by the European Union in some way or another. It is for these reasons that the question raised at the outset can be affirmed: Yes, we are currently underestimating Art 2 TEU.

Notes

[1] Bojan Bugarič, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge' (2014) LSE 'Europe in Question' Discussion Papers No. 7/2014 <http://www.lse.ac.uk> accessed 29 February 2016.

[2] Stelio Mangiameli and Gabrielle Sabutelli in Hermann Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer, Heidelberg 2013) Art 7 TEU.

[3] Clara Rauchegger, 'The Interplay between the Charter and National Constitutions After Akerberg Fransson and Melloni' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a binding Instrument* (Hart Publishing, Oxford 2015) 95 ff.

[4] Paul Graig and Grainne de Búrca, *EU LAW* (6th edn, Oxford University Press, Oxford 2015) 19 ff.

[5] Consolidated Version of the European Union [2012] OJ C 326/1.

[6] Dietrich Murswiek, 'The Stealthy Development of the Treaty on European Union into the Supreme European Constitution' (2009) 8 NVwZ 481, 482.

[7] See also Kim Lane Scheppele, 'What Can the European Commission Do When Member States Violate Basic Principles of the European Union?' (2013) Working Paper Princeton University No. 11/2013 <http://ec.europa.eu/justice> accessed 23 February 2016.

[8] Cf. Walter Obwexer in Heinz Mayer and Karl Stöger (eds), *EU Kommentar* (Manz, Wien 2016) Art 2 EUV.

[9] Murswiek (n 3).

[10] Ibid.

[11] 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.

[12] Meinhard Hilf and Frank Schorkopf in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (C.H. Beck, München 2015) Art 2 EUV.

[13] Ibid.

[14] Cf. Gunnar Beck, *The Legal Reasoning of the Court of Justice* (Hart Publishing, Oxford 2013) 166.

[15] Wolff Heintschel von Heinegg in Christoph Vedder and Wolff Heintschel von Heinegg (eds), *Europäischer Verfassungsvertrag* (Nomos, Basel 2007) Art 2 EUV.

[16] Walter Frenz, *Handbuch Europarecht* (6th edn, Springer, Wien 2011) 567.

[17] Ibid. 554.

[18] Cf. Obwexer (n 5).

[19] Murswiek (n 3) 483.

[20] Matthias Niedobitek, *Grundlagen der Union* (De Gruyter, Berlin 2014) 1764.

[21] Cf. Koen Lenaerts, 'EU Values and Constitutional Pluralism: The EU System of Fundamental Rights Protection' [2014] 34 PYIL 135, 159.
[22] Rudolf Geiger in Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds), *European Union Treaties* (C.H.Beck, Munich 2015) Art 2 TEU.
[23] Cf. Dia Anagnostou, *Rights and Courts in Pursuit of Social Change* (Hart Publishing, Oxford 2014) 117.
[24] Cf. Glòria Budó, 'EU Common Values at Stake: Is Art 7 an Effective Protection Mechanism?' (2014) CIDOB Barcelona Center for International Affairs, <http://www.cidob.org/> accessed 28 Februar 2016.
[25] Matthias Ruffert in Christian Callies and Matthias Ruffert (eds), *EUV/AEUV* (5th edn, C.H.Beck, München 2016) Art 7 EUV.
[26] Scheppele (n 4).
[27] Murswiek (n 3) 483 ff.
[28] Ibid.
[29] Ibid.
[30] Cf. Nóra Chronowski, 'Concept of Sovereignty, EU Membership and Hungarian Constitutionalism' in Jaroslaw Mietwiejuk and Krzysztof Prokop (eds), *Evolution of Constitutionalism in the Selected States of Central and Eastern Europe* (Temida 2, Bialystok 2010).
[31] Kirsten Schmalenbach in Oliver Dörr and Kirsten Schmalenbach (eds) *Vienna Convention in the Law of the Treaties* (Springer, Wien 2012) Art 26 VCLT.
[32] Ernst Ulrich Petersmann, 'Constitutional Finality of European Integration' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?* (Springer, Wien 2008).
[33] German Federal Constitutional Court, *Solange I* 37/271 *Solange II*, 73/339.
[34] Armin von Bogdandy et al., 'Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States' (2012) CMLR 489, 496.
[35] Case C - 34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-1177.
[36] Cf. Art 51 para 1 FRC 2000/C 364/01.
[37] Bogdandy (n 32) 497.
[38] Ibid. 496.
[39] Ibid.
[40] Petersmann (n 20) 339.
[41] Hilf and Schorkopf (n 16).
[42] Bogdandy (n 32) 497.
[43] Dimitriy Kochenov, 'On Policing Article 2 teU Compliance – Reverse Solange and Systemic Infringements Analyzed' (2013) 6 PYIL 113, 147.
[44] Cf. Jan Komárek, 'Judicial Lawmaking and Precedents in Supreme Courts', LSE Legal Studies Working Paper No. 4/2011 <https://www.pravo.unizg.hr> accessed 23 February 2016.
[45] Bogdandy (n 31) 469.
[46] Bernhard Schima and Andreas Huber-Kowald in Heinz Mayer and Karl Stöger (eds) *EUV Kommentar* (Manz, Wien 2016) Art 269 AEUV.
[47] Ibid 13.
[48] Kotzur (n 19) 905.
[49] Cf. Armin von Bogdandy and Pál Sonnevend, *Constitutional Crisis in the European Constitutional Area* (Nomos, Berlin 2015) 249.
[50] Bogdandy (n 32) 541.
[51] Ibid.

References

Dia Anagnostou, *Rights and Courts in Pursuit of Social Change* (Hart Publishing, Oxford 2014).

Gunnar Beck, *The Legal Reasoning of the Court of Justice* (Hart Publishing, Oxford 2013).

Nóra Chronowski, 'Concept of Sovereignty, EU Membership and Hungarian Constitutionalism' in Jaroslaw Mietwiejuk and Krzysztof Prokop (eds) *Evolution of Constitutionalism in the Selected States of Central and Eastern Europe* (Temida 2, Bialystok 2010).

Rudolf Geiger in Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds) *European Union Treaties* (C.H.Beck, Munich 2015).

Paul Graig and Grainne de Búrca, *EU LAW* (6th edn, Oxford University Press, Oxford 2015).

Wolff Heintschel von Heinegg in Christoph Vedder and Wolff Heintschel von Heinegg (eds) *Europäischer Verfassungsvertrag* (Nomos, Basel 2007).

Stelio Mangiameli and Gabrielle Sabutelli in Hermann Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer, Heidelberg 2013).

Meinhard Hilf and Frank Schorkopf in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (C.H. Beck, München 2015).

Walter Frenz, *Handbuch Europarecht* (6th edn, Springer, Wien 2011).

Walter Obwexer in Heinz Mayer and Karl Stöger (eds), *EU Kommentar* (Manz, Wien 2014).

Ernst Ulrich Petersmann, 'Constitutional Finality of European Integration' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?* (Springer, Wien 2008).

Matthias Ruffert in Christian Callies and Matthias Ruffert (eds), *EUV/AEUV* (5th edn, C.H.Beck, München 2016).

Kirsten Schmalenbach in Oliver Dörr/Kirsten Schmalenbach (eds), *Vienna Convention in the Law of the Treaties* (Springer, Wien 2012).

Armin von Bogdandy et al, 'Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States' [2012] CMLR 489.

Bojan Bugarič, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge' (2014) LSE 'Europe in Question' Discussion Papers No. 7/2014 <http://www.lse.ac.uk> accessed 29 February 2016.

Koen Lenaerts, 'EU Values and Constitutional Pluralism: The EU System of Fundamental Rights' [2014] 34 PYIL 135.

Glòria Budó, 'EU Common Values at Stake: Is Art 7 an Effective Protection Mechanism?'[2014] CIDOB Barcelona Center for International Affairs.

Dimitriy Kochenov,' On Policing Article 2 TEU Compliance – reverse Solange and Systemic Infringements Analyzed' [2013] PYIL 113.

Jan Komárek, Judicial Lawmaking and Precedents in Supreme Courts, LSE Legal Studies Working Paper No. 3/2011.

Dietrich Murswiek, 'The Stealthy Development of the Treaty on European Union into the Supreme European Constitution' [2009] 8 NVwZ 481.

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Constitutional Act as a Threat to the Rule of Law

IZTOK ŠTEFANEC

Abstract The constitution of every legal order should clearly determine the competence of the constitutional body, the legislator and other state bodies to adopt general legal acts. Historical documents show that drafters of the Slovenian constitution deliberately excluded substantive constitutional acts from the Slovenian legal system. In Slovenian legal order, the only substantive constitutional act apart from the constitution itself is The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia. The principle of rule of law requires that the constitution provide sufficient legal basis for adoption of a substantive legal act. The consequences in the case of abuse of constitution-making powers may be devastating for the constitutional democracy and the rule of law. Too wide regulation at the constitutional level may also cause problems for the stability of the constitutional order.

Keywords: • constitutional law • substantive constitutional act • constitution • constitutional amendment • constitutional body • collision of constitutional norms • constitutional order • system of general legal acts

CORRESPONDENCE ADDRESS : Iztok Štefanec, University of Ljubljana, Faculty of Law, Slovenia, email: iztok.stefanec@pf.uni-lj.si.

DOI 10.4335/978.961.6399.79.1.27
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

For assessing the extent to which the State respects the principle of democracy, the rule of law and human rights, one should examine closely the State's attitude towards the constitution, the constitutional court and the coherence of the system of general legal acts, especially of those at the constitutional level.

The constitution is the fundamental and supreme general legal act of a legal order. Its function is to determine the basic state bodies and fundamental rules on law-making competences and procedures. The competences of the parliament and the rules on legislative procedure are without doubt very important. However, the rules on the constitutionalising of legal matters might be of even greater importance. For the principle of rule of law to be efficient it is of crucial importance that these rules are clear and precise. The substance that is embedded in legal acts at the constitutional level is, in general, immune from constitutional review. It therefore comes as no surprise that politics like to flirt with the power of regulating the substance at the constitutional level (for example to amend the constitution).

The consequences in the case of abuse of constitution-making powers may be devastating for the constitutional democracy and the rule of law of a State. In such cases, e.g., the competences of the constitutional court may be completely encroached or a serious infringement of human rights may occur (for example, when a clearly discriminatory constitutional norm is adopted).

In the paper I try to argue that within the Slovenian constitutional order there is no sufficient legal basis for adopting a substantive constitutional act. I briefly discuss some of the dangerous consequences of misuse of constitutional acts and of widespread regulation at the constitutional level. Such practice may lead to disparities and collisions between the constitutional norms, or in extreme cases, even to parallel constitutional systems. Constitutional acts may, if misused, put the rule of law in danger.

2 Legal systems with substantive constitutional acts

Even in legal systems that have a written constitution as the supreme legal act, the constitution itself cannot be the only act at this supreme, i.e. constitutional level of that particular legal system. If for no other purpose, constitutional acts are required for amending the constitution. Comparative and Slovenian constitutional law shows that constitutional acts are also commonly used for determining the implementation of new constitutions (e.g., see Article 174 of Slovenian constitution)[1] or amendments to constitution. The third function of constitutional acts is regulation of constitutional matters (i.e. *materia constitutionis*) in a separate act apart from the constitution.[2] However, this third type of constitutional act is not present in every legal system and where it is it can cause several problems in regard to consistency of the legal system, when not adopted properly and with sufficient legal basis.

With the term 'substantive constitutional act' I describe the constitutional act that is used for regulation of constitutional matters apart from the constitution in a separate legal act of constitutional level (i.e. with the same, constitutional power). Where legal systems use substantive constitutional act it usually determines the fundamental rules on elections, functioning of the constitutional court, charter of human rights, etc (Kaučič, 2001: 132, 134).

In the legal systems where the parliament has the power to overpower the constitutional court in an easy manner and/or its competence for adopting the legal norms at the constitutional level (i.e. constitutional norms) is broad, open and readily accessible the legal system sooner or later becomes opaque. The Yugoslavian technique of amending the constitution should be an important lesson in this regard. Amending the constitution by adopting the amendments to the constitution is originally used to add new text to the constitution and to leave the original wording intact. The amendments added to the constitution are in function of supplementing, concretization, precise elaboration, etc. This technique of amending the constitution is therefore not suitable for changing the original text of the constitution.[3]

3 The Yugoslavian lesson on amending the constitution

Amendments to the Yugoslavian constitution in 1971 and in 1988 to 1990 have largely affected the original text of the constitution (through adding the new text). At the end, the wording as a whole was incoherent, fragmented and unclear to such an extent that it became practically incomprehensible even for lawyers (Grad, 1989: 9, 10; Kaučič, 2001: 125). Legal theory warns that extensive changing of the constitution by 'adding' amendments creates parallel constitutional systems, causing great difficulties when consolidating and interpreting various parts and norms of the constitution (Cerar, Novak *et al*, 2004: 145).

Adoption of an entirely new constitution was inevitable as further amending of the Yugoslavian constitution became clearly impossible (Grad, 1989: 10, 11). Precisely this historical lesson was an important argument for the Slovenian constitutional body when opting between possible techniques of changing the constitution. The Constitution of the Republic of Slovenia[4] is changed in the same way as legislation: by changing the original text through erasing, adding or changing its paragraphs, articles (Cerar, Novak *et al*, 2004: 141, 145). Preparing the consolidated version is generally not too demanding.

The above reasoning regarding the relationship between the constitution and amendments to it is also fully applicable to the relationship between the constitution and substantive constitutional acts (as defined above) or, in fact, constitutional norms in any legal act at the constitutional level. Difficulties that arise from regulating constitutional matters in other constitutional acts than constitution are mainly identical.

4 The Austrian experience

The Austrian experience confirms this premise as well. The Austrian constitution is not codified (i.e. constitutional matters are not regulated in a single written supreme legal act, but in various constitutional acts). The list of constitutional acts is not exhaustive, but rather open-ended. Article 44 of the constitution explicitly provides for adopting of constitutional acts or even just provisions within the legislation that would enjoy the status of constitutional norms. These norms have to be explicitly designated as such.[5] The number of constitutional norms has increased significantly over the years and the legal system eventually became opaque. The reform of the system of constitutional acts was inevitable and was introduced in 2008. The number of norms at the constitutional level was significantly lowered. However, the competence for adopting constitutional norms within legislation remained unchanged. As a consequence, the Austrian system of constitutional acts is, according to the legal theory, very complex and ambiguous (Eberhard, Lachmayer, 2008: 113, 117; see also Stelzer, 2011: 22, 27, 32).

5 Argumentum a cohaerentia

Argumentum a cohaerentia highlights the fact that an increasing of number of acts and norms at the constitutional level brings confusion, incoherence and a threat to stability of the legal system and its legal certainty. In this respect, it is worthy to highlight Article 79 of German Constitution.[6] Paragraph 1 of the article sets out the condition for amending the constitution: it is possible to do so only when the law explicitly states it is amending certain provision of the constitution. This provision of the German constitution prevents it from being implicitly and vaguely amended and preserves the coherence of the constitutional order, especially its supremacy, integrity and unity (*Grundgesetz Kommentar*, 2012: vol 2, Art 79; 194, 198). Such provision in the (Slovenian) constitution would probably not eliminate all the disadvantages discussed above. However, it could contribute to the interpretative superiority and integrity of the constitution as a supreme legal act. This would increase the power of the constitutional court as the question of constitutionality of a constitutional amendment could become more relevant.

6 Some comparative insight: search of the legal basis for substantive legal acts

It is very important for the rule of law that the constitution precisely limits the constitutional body regarding the conditions, under which the substantive constitutional act may be adopted. Italian constitution, for example, foresees the possibility to adopt a substantive constitutional act in several cases.[7] Some of legal theory considers that it is also possible to adopt a substantive constitutional act in other cases that are not explicitly referred to in the constitution, when it is required to do so in order to supplement the constitution or even redefine its original substance – despite the fact that no general clause could be found in the constitution, granting such competence of the constitutional body (Prakke, Kortmann, 2004: 518, 528, 529). Nonetheless the Italian constitution provides for the substantive constitutional act as a systemic tool for coherent concretization and further regulation of constitutional matters.

The Swedish constitution comprises of four constitutional acts. The fundamental one, The Instrument of Government (adopted in 1974) lists them exhaustively in Article 3. Should the parliament intend to adopt an additional constitutional act, it would first (or simultaneously) have to amend Article 3 of The Instrument of Government by adding it to the list in order to ensure an adequate legal basis (Prakke, Kortmann, 2004: 806, 807). The competence of the Russian parliament to adopt a substantive constitutional act is also limited only to cases explicitly foreseen by the constitution.[8] In the same manner the Portuguese and the Romanian constitutions foresee the adoption of organic laws: only via explicit mandate given in specific clauses.[9]

What is the important common characteristic of the presented legal orders? Their constitutions consistently and explicitly regulate the jurisdiction of the parliaments for adopting organic laws or substantive constitutional acts. The majority of them determine such competence exhaustively and individually for specific constitutional matters. In other legal orders, the constitution provides for such power of the parliament at least in a general clause.

It becomes apparent that constitutions respect the view of legal theory, which holds that law-making competences at the legislative and constitutional level should be determined in the constitution (or if not, at least in another appropriate legal act, for example, in the Rules of procedure of the parliament). For functioning of the legal system and implementing the principle of rule of law it is of crucial importance that these rules are clear and unambiguous.

7 The discretion of constitutional body?

The constitutional body as a sovereign is, to some extent, free to decide what should be regulated at the constitutional level. However, it should be emphasized that this does not rank the constitutional body even above the constitution. It is very important to point out that even the constitutional body is bound by the constitutional norms while they are still in force. They may not be simply ignored. If the constitutional body intends to act contrary to valid constitutional norms, it should first amend them (appropriately to the objective pursued).

There would not be remaining a lot of the rule of law and legal certainty if the parliament could adopt general legal acts or perform other legal actions for which it had not explicitly been given the powers. A constitutional body may regulate at the constitutional level only through prescribed procedures and forms, given by the constitution (or law in general), otherwise it acts arbitrarily and in breach of the constitution (in particular of the principle of rule of law). This stems also from the view that individuals are free in their behaviour except for the conduct that is prescribed by law; on the contrary, authorities may to act only if the law allows them to do so. The state bodies may exercise their powers only within a strictly delineated legal framework and should apply sufficient legal criterion, justifying that they are entitled to act in a certain way (Pavčnik, 2011: 99). As a consequence, the parliament is not allowed to adopt a new, unforeseen type of general legal act with different legal nature (without prior determining its legal basis).

8 Substantive constitutional act in Slovenian legal order

When adopting the new constitution of newly independent Republic of Slovenia, the constitutional body was indeed free to shape the system of general legal acts. It could choose substantive constitutional acts to regulate important legal matters in other constitutional acts besides the constitution itself.

However, the *travaux préparatoires* show that at the beginning of drafting the constitution the constitutional body planned to include the legal basis for adoption of more than 20 substantive constitutional acts for regulating various constitutional matters. In fact, the option of including constitutional norms in the legislation (the same as Austrian constitution) has also been discussed (Cerar, Perenič, 2001: vol 1; 69, 140). In the end this was intentionally left out of the text as the 'founding fathers' expressed several concerns regarding the system that widely uses constitutional acts for regulating important issues (Cerar, Perenič, 2001: vol 3; 864, 869). The explanation of the final draft of the Slovenian constitution before its adoption stated:

> *The draft of the constitution does no more foresee 'constitutional acts' as relevant concerns were raised regarding their legal nature and position in the legal system. Instead, the constitution in certain cases prescribes that more important law should be adopted by the qualified majority.*[10]

Nevertheless, they enjoy the same legal force as other legislation.[11] Historical interpretation shows why Slovenian constitution includes no explicit provision for adoption of substantive constitutional acts and why this was precisely the intention of the constitutional body. The Rules of procedure of the National Assembly of Republic of Slovenia does not include it either. There is no sufficient legal basis for adoption of a substantive constitutional act *de constitutione lata* as this type of general legal act is not incorporated into the Slovenian legal system. In the Slovenian legal order the only substantive constitutional act apart from the constitution itself is The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia.[12] It is important to mention that it was adopted before the new Slovenian constitution, which established a new legal order and delineated the system of general legal acts.

9 Conclusion

The Constitution and Rules of Procedure of the National Assembly do not regulate the legal basis for adoption of a substantive constitutional act, neither as a systemic act for regulating constitutional matters nor as an act for specific and individual cases. Instead, legislation adopted with qualified or (more commonly) simple majority is introduced. The retained regulation of matters at the constitutional level is also advisable from the perspective of ensuring the principle of rule of law, legal certainty and coherence of the constitutional order. Weaknesses typical for the technique of changing the constitution by adding the amendments are also common in the constitutional orders that regulate various constitutional matters in substantive constitutional acts. This can lead to disparities and collisions between the constitutional norms which are difficult to solve

by means of interpretation, or in extreme cases, even to parallel constitutional systems. This considerably reduces legal security, predictability and can also weaken the stability of the constitutional order.

The National Assembly of the Republic of Slovenia, the Slovenian constitutional body, has so far deliberately avoided the adoption of substantive constitutional acts. If it would intend to do so in the future, the principle of rule of law and the principle of constitutionality would require prior providing an adequate legal basis in the constitution.

Notes

[1] The Constitution of the Republic of Slovenia 1991, Official Journal of the RS, 33/91, 42/97, 66/00, 24/03, 69/04, 68/06 and 47/13.

[2] More on constitutional acts in Slovenia (in Slovenian language) see Igor Kaučič, 'Ustavni zakon v slovenskem ustavnem sistemu' [2001] Zbornik znanstvenih razprav 122, 134.

[3] The original text of the Constitution of the USA has been changed in that manner only in exceptional cases. However, this has always been done only in accordance with the principle *lex posterior derogat legi priori* and in the way that the amendment has not interfered with fundamental substantial basis and principles of the constitution. On changing the constitution via adding the amendments see (in Slovenian language) Franc Grad, 'Introduction' in Borut Šinkovec (eds), '*Integralno besedilo Ustave Socialistične federativne republike Jugoslavije in amandmajev I do XLVIII k ustavi SFRJ*', 8, 9; (in Slovenian language) Igor Kaučič, 'Ustavni zakon v slovenskem ustavnem sistemu' [2001] Zbornik znanstvenih razprav 124, 125.

[4] The Constitution of the Republic of Slovenia 1991, Official Journal of the RS, 33/91, 42/97, 66/00, 24/03, 69/04, 68/06 and 47/13.

[5] Article 44, par. (1): '*Constitutional laws or constitutional provisions contained in simple laws can be passed by the National Council only in the presence of at least half the members and by a two thirds majority of the votes cast; they shall be explicitly specified as such ('constitutional law', 'constitutional provision').*' Federal Constitutional Law <www.vfgh.gv.at/cms/vfgh-site2/english/downloads/englishverfassung.pdf> accessed 8 March 2016.

[6] Article 79, par. 1: *'This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty regarding a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.*' German Constitution <https://www.btg-bestellservice.de/pdf/80201000.pdf> accessed 8 March 2016. See also Lucas Prakke, Constantijn Kortmann, *Constitutional Law of 15 EU Member States* (Kluwer 2004) 317.

[7] For instance see Article 71, 96, 116, 132, 137. Italian constitution <http://en.camera.it/application/xmanager/projects/camera_eng/file/costituzione-aggiornata_EN_10_10_12.pdf> accessed 8 Marh 2016.

[8] For instance see Articles 56, 66, 70, 84, 88, 103, 114, 118. Russian constitution <http://eng.constitution. kremlin.ru/#article-125> accessed 8 March 2016.

[9] Organic law is usually adopted with qualified majority and possess superior legal force in comparison with other legislation (but lower than the constitution). See Article 112 and 166, Portugal constitution <www.tribunalconstitucional.pt/tc/en/crpen.html> accessed 8 March 2016. See also Lucas Prakke, Constantijn Kortmann, *Constitutional Law of 15 EU Member States* (Kluwer 2004) 687. The Article 73 of the Romanian constitution determines the types of general legal acts that may be adopted by the parliament. By doing so it delineates the parliament

regarding its law-making powers. <http://www.ccr.ro/en/constitutia-romaniei-2003> accessed 8 March 2016).

[10] See (in Slovenian language) Poročevalec Skupščine Republike Slovenije, XVII [1991] 30, Ljubljana, 12 December 1991, 16.

[11] See for example Articles 80, 90, 98, 124, 148 of The Constitution of the Republic of Slovenia 1991, Official Journal of the RS, 33/91, 42/97, 66/00, 24/03, 69/04, 68/06 and 47/13.

[12] The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, Official Journal of the RS, 1/91, 19/91.

References

Austrian constitution: Federal Constitutional Law <www.vfgh.gv.at/cms/vfgh-site2/english/downloads/englishverfassung.pdf> accessed 8 March 2016.

Cerar, M., Novak, A. et al (2004) Ustavne razprave: izbor gradiv Državnega zbora Republike Slovenije 1996 – 1997, vol 1 (Ljubljana: Državni zbor Republike Slovenije).

Cerar, M., Perenič, G. (2001) Nastajanje slovenske ustave: izbor gradiv Komisije za ustavna vprašanja 1990–1991, vol 1, 2, 3 (Ljubljana: Državni zbor Republike Slovenije).

Eberhard, H., Lachmayer, K. (2008) Constitutional Reform 2008 in Austria, Vienna Online Journal on International Constitutional Law, 2(2), pp. 112–123 <https://www.icl-journal.com>.

German Constitution: Grundgesetz <https://www.btg-bestellservice.de/pdf/80201000.pdf> accessed 8 March 2016.

Grad, F. 'Introduction' in Šinkovec, B. (1989) Integralno besedilo Ustave Socialistične federativne republike Jugoslavije in amandmajev I do XLVIII k ustavi SFRJ (Ljubljana: Uradni list SR Slovenije).

Italian constitution <http://en.camera.it/application/xmanager/projects/camera_eng/file/costituzione-aggiornata_EN_10_10_12.pdf> accessed 8 Marh 2016.

Kaučič, I. (2001) Ustavni zakon v slovenskem ustavnem sistemu, Zbornik znanstvenih razprav, 61(1), pp. 121–138.

Münch, I., Kunig, P., Arnauld, A (2012) Grundgesetz Kommentar, 6th supp. edn., vol 2 (München: C. H. Beck).

Pavčnik, M. (2011) Teorija prava: prispevek k razumevanju prava, 4th supp. edn. (Ljubljana: GV Založba).

Poročevalec Skupščine Republike Slovenije (1991), 17(30), Ljubljana: Skupščina Republike Slovenije.

Portuguese constitution <www.tribunalconstitucional.pt/tc/en/crpen.html> accessed 8 March 2016.

Romanian constitution <http://www.ccr.ro/en/constitutia-romaniei-2003> accessed 8 March 2016).

Russian constitution <http://eng.constitution. kremlin.ru/#article-125> accessed 8 March 2016.

Stelzer, M. (2011) The Constitution of the Republic of Austria: A Contextual Analysis (Oxford, Portland: Hart Publishing).

The Constitution of the Republic of Slovenia 1991, Official Journal of the RS, 33/91, 42/97, 66/00, 24/03, 69/04, 68/06 and 47/13.

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(CONFERENCE PAPERS)

LEXONOMICA PRESS

Bridging the Information Inequality between Individuals and Organisations by Simplifying Data Handling Policies

LORI DOLORES KREGAR

Abstract As a result of users blindly agreeing to organisations' lengthy and impenetrable terms of service and privacy policies, large information inequality between individuals and organisations has formed. This article proposes a solution to the lengthy documentation by obliging service providers to include a summary of the most important points of the privacy policy and terms of service. Minimal information contained in the summary should include (1) which information is stored and for how long, (2) whether an individual is able to delete the data stored, (3) whether individual's personal data will be sold to or shared with third parties, (4) cases in which individual's data will be disclosed to governments, (5) whether individuals are notified about updated terms, (6) as well as additional clauses related to data that might impact an individual's rights in any way. A better and more transparent, bullet-point outline of the terms would allow users to make rational, informed decisions about which services they use and what data they share. This would enable a mechanism of supply and demand to weed out intrusive services as users would be informed enough to reject them, thus decreasing their supply.

Keywords: • information inequality • big data • privacy

CORRESPONDENCE ADDRESS : Lori Dolores Kregar, Faculty of Economics, University of Ljubljana, Slovenia, email: ldkregar@yahoo.com.

DOI 10.4335/978.961.6399.79.1.28
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Article 12 of the Universal Declaration of Human Rights states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." However, with the rise of big data analytics, the science of analysing massive datasets and making conclusions about the information contained in the dataset, this basic human right is being violated. Countries are failing their citizens by not establishing better controls on privacy and data handling by companies as well as by governments.

2 Big data analytics and corporations

Big data analytics can on the basis of information collected about a user online (such as website visit history, search history, location tracking, card usage, social media usage, image recognition etc.), quite accurately assess an individual's age, gender, interests (Duhaime-Ross, 2014), location and movement patterns (Kirmse et al., 2011), residence location, location at home (which room one is staying at as well as when is one away from home, Nest Labs, 2016), whether one is pregnant (Duhigg, 2012), ill or has got a genetic disease (e.g. Huntington's chorea, National Human Genome Research Institute, 2011) etc.

Some pieces of information are gathered by a single company, while others are separate and gathered by different systems that may be isolated. However, one should not be fooled into safety and anonymity of the seemingly separate data. Imagine one realises they have cancer and starts doing research on the disease, looking into treatments and available medication. Although one's medical record is separate, a search engine that tracks one's search and location history can easily identify that one is looking extensively into cancer treatments, spends a lot of time in the hospital and can also determine their identity or age and gender group. In such manner, a search engine can quite accurately predict whether a user has cancer, although the search engine never had access to the individual's medical record.

Companies do not always gather data on their own; they also buy datasets (Brown, 2015) and merge with or acquire companies that hold complementary data. The combined dataset often provides a basis for better models. For example, in 2012, Google decided to merge its products in order to treat individuals as single users across all their products, which was used to provide better advertising, location-based reminders, spelling suggestions for friends' names etc. (Rao, 2012). Although products are separate, the data pipelines behind each user interface are all connected to single data repository. Google's changes were user-friendly as users were required to comply with a single privacy policy, but simultaneously their privacy was severely violated as data was merged and Google was prosecuted by several European watchdogs for the profiling of individuals (CNIL, 2014; HmbBfDI, 2014). The European authorities fined the internet giant with some of the heftiest penalties in history and often the highest penalty possible under the national law, but even a few millions paid in fines in total did

not significantly affect the company that has revenues of over $15 billion per quarter (Alphabet Inc, 2016).

Information gathered by a search engine may be used to narrow the results one searches for, making them more accurate and providing individuals with better service. Tailor-made services provide a better customer experience and thus higher customer satisfaction. However, customers might not want to share the data as they are personal and if a company *knows* the information, individuals would justifiably feel their right to privacy has been violated. Many diseases, life events or interests bare a stigma and individuals may wish to keep them private, including from the omniscient companies who track user data. In addition, people would justifiably feel abused and harassed if companies would use the sensitive information in a manner that maximises the company's profits. Lastly, companies which hold sensitive user data are sometimes targets of hacking attacks, thus users are guaranteed little protection in the case of their accurate user profiles being leaked.

3 Big data analytics and the government

Governments also take advantage of data analytics and predictive modelling as a lot of information about citizens is secretly gathered and analysed. PRISM, a US government programme disclosed by Edward Snowden in 2013, intercepts communications that run through several large Internet companies (Gellman, Poitras, 2013). Until then, individuals globally were unaware that their online activities are being tracked to such an extent and stored indefinitely, that the information is being analysed and that the government of the United States of America, as well as some of their allied governments, require no specific authorisation to access information aggregated by commercial organisations.

It is becoming increasingly apparent that there is little strategy to these programs and rather than using analytics to find potential security threats, governments indiscriminately supervise all citizens. Such indiscriminate surveillance is proving itself to be an ineffective practice for finding terrorists, as most recently demonstrated by the Paris terrorist attacks on November 13th 2015. The police investigation showed that at least some of the terrorists were using unencrypted communication (Timm, 2015) meaning ubiquitous surveillance is not meeting its expectations as a counter-terrorist measure. Gathering and analysing information about (innocent) citizens and making conclusions through the use of advanced analytics in fact poses a significant threat to an individual's freedom. Examples include discriminating citizens for "crimes" they have not committed but are predicted to do so, e.g. the No Fly List, which is composed by the US government's Terrorist Screening Centre. Individuals who appear suspicious according to specific algorithms are placed on the list and then prohibited to fly into the USA, yet children younger than 5 years have also appeared on the list (Ackerman, 2014). A historical example of surveillance abuse is Stasi, the Ministry for State Security in the German Democratic Republic. It was an institution responsible for spying on the citizens and punishing opponents of the communist system, depriving individuals of their rights because their opinions seemed threatening to the system.

4 Individuals and compliance with data handling policies

The European Commission Report about Data Protection which was published in June 2015, has revealed several important findings, including:

- only a minority (15%) of Europeans feel they have complete control over the information they provide online; 31% think they have no control over it at all
- most Europeans believe that providing personal information online is an inevitable part of obtaining access to online services or products, however only a fifth of the population fully reads privacy statements
- surveys show that people rarely read privacy statements fully, usually because they find them too long or not understandable enough
- over half of respondents disagree with the statement, "providing personal information is not a big issue for you" (57%)
- a majority of people are uncomfortable about Internet companies using information about their online activity to tailor advertisements.
- nine out of ten Europeans think that it is important for them to have the same rights and protection over their personal information, regardless of the country in which the public authority or private company offering the service is based
- 69% of people say they their explicit approval should be required in all cases before their data is collected and processed.

5 Discussion

Data analytics will provide increasingly better insights as technology develops further, processing power increases and data storage prices continue to drop. It is not a role of the jurisdiction to hinder technological progress, but rather to protect citizens and their basic human rights as well as empower them with information, in order to tilt the scale towards a more balanced society.

Over the past decade, companies have profited greatly from analysing customer data and using the information to power the company's business model and thus increase shareholder value. However, the report by the European Commission quoted above suggests that individuals feel insecure about how data is used and feel that they do not have much control over it. The notion of information inequality has got a twofold meaning in this article: firstly it implies that companies have more information available for decision making than individuals, and secondly, that companies are those who can trade information and directly profit from it, whereas individuals indirectly benefit from using the services the company provides.

It is necessary the European legislation assist people by making legal matters more understandable. Internet users need to be empowered in the information inequality between themselves and corporations or governments. Better knowledge of data handling policies would allow consumers to make rational decisions, therefore creating precedence for the market mechanism to promote better and more customer-friendly policies and limit those with data policies that are too intrusive. Moreover, improved

knowledge would also expose individuals to fewer data privacy threats, thus leading to fewer lawsuits and decreasing costs of legal proceedings. Lastly, it would increase people's trust in the European legislation.

In response to the need for better information, data handling policies need to be presented in a shorter and clearer form. The privacy statement and terms of service should remain the same, in its contract form with clauses, however a clear and straightforward summary of important information about how data will be handled by the organisation should also be presented to the reader on the same page as their compliance to terms of service and privacy policy is required.

This basic abstract should, in the form of a few bullet points, include information from both terms of service and privacy policy if a clause in any of the documents pertains to an individual's data privacy. The list would include (1) which information is stored and for how long, (2) whether an individual is able to delete the data stored, (3) whether individual's personal data will be sold to or shared with third parties, (4) cases in which individual's data will be disclosed to governments, (5) whether individuals are notified about updated terms, (6) as well as additional clauses related to data that might impact an individual's rights in any way.

(1) Which information is stored and for how long
It is important for users to be aware of this because it is a basic human right, as no one is to be subject to arbitrary interference with one's data. The users should be informed about the extent to which they are tracked, namely, if identifiable user information is stored and to what data about the user or device functionality the company (i.e. service provider) has access to. A clear distinction must be made regarding which data about a user the service provider has access to; for example, it was revealed by Edward Snowden in 2013 that the US government tracks communication and could access time of call and identities of both parties engaging in a conversation, but not the actual call recording. Therefore, it is necessary users are made aware of which data a company can access.
Users must be aware of the exact nature of data stored also because of possible data breaches or theft. If a company does not use sufficient security measures and customer data is stolen, the users should be immediately aware of what information is under threat and the General Data Protection Regulation aims to legally force companies to notify users immediately after a data breach has been identified. This will allow them to react fast and to start a procedure to protect their privacy to the greatest possible extent (e.g. credit card cancellation, account shut down, password change etc.).

(2) whether an individual is able or unable to delete the data stored

This clause would only apply if the General Data Protection Regulation would not be passed by the European parliament, as the Regulation states that users have a right to be forgotten and their data will be deleted if users ask the company to do so (General Data Protection Regulation, 2012).

(3) whether an individual's personal data will be sold to or shared with third parties
Since companies hold sensitive information about their users, it is relevant for the users to know whether any other organisation will also have access to their data. This needs to be disclosed regardless of whether companies will perform data anonymisation or not. Data anonymisation is not fail-safe and despite deleting some crucial data from a dataset, individuals can still be identified using the rest of information available (Ohm, 2009).

(4) in which cases, if at all, will governments be provided an individual's data
This clause is especially relevant since many governments scrutinise their citizens and it has been revealed that governments have established ways to gain user data from several corporate sources (Gellman, Poitras, 2013). Therefore, it is necessary for a company to let users know under which conditions their data will be handed over to government(s)

(5) whether individuals are notified about updated terms
This would ideally be part of the upcoming General Data Protection Regulation, but it can alternatively be part of the proposed bullet-point terms of service and privacy policy. There is a history of companies making changes to their policy, which was followed by public backlash (e.g. against Google and Facebook), therefore pointing to the fact that users are sensitive about the issue and dislike user-unfriendly practices. Consequently, it would be better for users to be notified of whether they will be alerted about updated terms and if there will be a period for filing complaints and suggestions.

(6) additional clauses related to data
This should include who owns the copyrights to content published by individuals, what happens to a users data if a company goes bankrupt, in which case will you account be suspended as well as any other information relevant to users in regard to the data they share.

Regarding copyright on users' content it is important to be cautious about social media, where companies are only facilitating user interactions and do not create any content. It is necessary for users to be informed about who owns the rights to published content, whether companies plan to re-use said content for their own purposes, whether content is exclusively owned and whether there are restrictions on sharing said content.

6 Final Recommendation

Even with the short, bullet-point version of the terms of service and privacy policy, it might turn into a lengthy document, too long for users to actually read. In order to improve this, colour coding should be introduced, from green to red, corresponding to user-friendly and user-unfriendly, respectively. Each bullet-point should not be have more than 50 to 60 characters per line and should not be longer than 2 lines (Ruder, 1967).

7 Conclusion

It is increasingly obvious that news ways of communication are becoming popular and as a society, we favour services that are simple and intuitive to use.
People do not read complete websites but merely scan them (Russel, 2005) therefore graphic information is becoming an increasingly popular means of communication, as conveyed by the rise of memes and "emojis" (pictographs depicting emotions). For example, Buzzfeed and Facebook as well as many other online products allow users to comment on content with reactions, which represent some of the basic human emotions, and Oxford Dictionaries made the emoji "Face with Tears of Joy" *word* of the year.
Analogous to companies providing service to their clients, governments provide service to their citizens, and the legislation they enforce is part of this service. However, there is only a single government in one country, therefore creating no competition and providing few incentives to improve. It is relevant for the government to realise this systemic flaw and pursue practices to improve their services, or alternatively be forced to improve services through the European legislation. Although the solution proposed by this article will not enable a mechanism of supply and demand regarding governmental web-products, it will be more transparent and user-friendly.
Short, colour coded version of the terms of service and privacy policy will allow individuals to make informed decisions about their compliance and also reject some services because of unacceptable terms. By exploiting the market mechanism of supply and demand, services with unacceptable conditions will not be in demand, which will decrease their supply.

Companies have built a lot of capital on the lax laws of privacy protection and by (ab)using clients' data, have managed to increase returns on investment as well as profitability. It is high time the European legislation does something to decrease the information inequality and provide users with a democratic leverage to favour friendly services and force out the services that do not increase consumer utility.

References

Spencer Ackerman, 'How the US's terrorism watchlists work – and how you could end up on one' (The Guardian, 24 July 2014). < http://www.theguardian.com/world/2014/jul/24/us-terrorism-watchlist-work-no-fly-list > accessed 25 December 2015

Meta S. Brown, 'When and Where To Buy Consumer Data (And 12 Companies Who Sell It)', (Forbes, 30 September 2015) < http://www.forbes.com/sites/metabrown/2015/09/30/when-and-where-to-buy-consumer-data-and-12-companies-who-sell-it/#1dcc89c0711b > accessed 16 February 2016

Deliberation No. 2013-420 of the Sanctions Committee of CNIL imposing a financial penalty against Google Inc.

Arielle Duhaime-Ross, 'Here's How Well Google's Search Engine Knows You' (The Verge, 19 September 2014)<http://www.theverge.com/2014/9/19/6409773/heres-how-well-googles-search-engine-knows-you > accessed 23 February 2016

Charles Duhigg, 'How Companies Learn Your Secrets' (New York Times, 16 Februrary 2012) <http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html?pagewanted=all&_r=0 > accessed 23 February 2016

European Commission, Special Eurobarometer 431 "Data protection" (European Commission, 2015) < http://ec.europa.eu/public_opinion/archives/ebs/ebs_431_en.pdf > accessed 23 December 2015

Barton Gellman and Laura Poitras, 'U.S., British intelligence mining data from nine U.S. Internet companies in broad secret program' (The Washington Post, 7 June 2013) < https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html > accessed 23 December 2015

Regulation Of The European Parliament And Of The Council

On The Protection Of Individuals With Regard To The Processing Of Personal Data And On The Free Movement Of Such Data (General Data Protection Regulation), COM(2012) 11 final 2012/0011 (COD)

Hamburgische Beauftrage für Datenschutz und Informationsfreiheit, Wesentliche Änderungen bei der Datenverarbeitung von Google notwendig - Datenschutzaufsicht erlässt Anordnung, (HmbBfDI, 30 September 2014) < https://www.datenschutz-hamburg.de/news/detail/article/wesentliche-aenderungen-bei-der-datenverarbeitung-von-google-notwendig-datenschutzaufsicht-erlaess.html?tx_ttnews%5BbackPid%5D=200&cHash=23a45f223d7052829a43ff507406d204 > accessed 16 February 2016

Andrew Kirmse et al., 'Extracting patterns from location history' (2011) GIS 11', p. 397-400

Paul Ohm, 'Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization' (2009) UCLA Law Review, Vol. 57, p. 1701, 2010

Oxford Dictionaries, 'Oxford Dictionaries Word of the Year 2015 is…' (Oxford Dictionaries, 16 November 2015) < http://blog.oxforddictionaries.com/2015/11/word-of-the-year-2015-emoji/ > accessed 16 February 2016

Leena Rao, 'Google Consolidates Privacy Policy; Will Combine User Data Across Services' (TechCrunch, 24 January 2012) < http://techcrunch.com/2012/01/24/google-consolidates-privacy-policy-will-combine-user-data-across-services/ > accessed 17 February 2016

Emil Ruder, 'Typographie' (A. Niggli, 1967)

Mark Russell, 'Using Eye-Tracking Data to Understand First Impressions of a Website' (2005)

Daniel J. Solove, Nothing to Hide: The False Tradeoff Between Privacy and Security (Yale University Press, 2011.) < https://books.google.si/books?hl=sl&lr=&id=aaJdKX8avUAC&oi=fnd&pg=PP2&dq=trade+off+security+privacy&ots=InwRNIagw-&sig=GsMHuG_qoOidBpeQmwVd6-cHabo&redir_esc=y#v=onepage&q=trade%20off%20security%20privacy&f=false > accessed 25 December 2015

National Human Genome Research Institute, Learning About Huntington's Disease (Last updated: 17 November 2011) < https://www.genome.gov/10001215 > accessed 23 February 2016

Nest Labs, Nest Thermostat (Nest, 2016) < https://nest.com/uk/thermostat/meet-nest-thermostat/ > accessed 15 February 2016

Trevor Timm, 'Paris is being used to justify agendas that had nothing to do with the attack' (The Guardian, 20 November 2015) < http://www.theguardian.com/commentisfree/2015/nov/20/paris-attacks-political-agenda-immigration-encryption-surveillence > accessed 25 December 2015

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 12.

CENTRAL EUROPEAN LAW CONFERENCE FOR STUDENTS,
STRENGTHENING THE RULE OF LAW IN THE EU
(CONFERENCE PAPERS)

LEXONOMICA PRESS

Insurance Distribution Directive – Upcoming Changes in EU Insurance Market

NIKOLA FILIPOVIĆ

Abstract Insurance intermediaries play key role on insurance market. They form a vital link between insurers and policyholders and their actions can reduce informational asymmetry between customers and insurance undertakings. Harmonising obligations of the intermediaries and distributors in general can facilitate, and indeed is one of the prerequisites for integration of insurance market. Insurance Distribution Directive aims both at achieving approximation of national laws but also horizontal integration of different financial markets though creating a coherent basis for the regulation of mandatory disclosures and selling practices at European level. It is more detailed, wider and more profound instrument than its predecessor, however it remains activity based and minimum harmonisation Directive which leaves space for member states to implement provisions differently, which could result in market remaining fragmented, although less than it is now.

Keywords: • insurance market • integration • insurance intermediaries • insurance distribution

CORRESPONDENCE ADDRESS : Nikola Filipović, University of Graz, Institute for Corporate Law and International Commercial Law, Austria. Belgrade Business School – Higher Education Institution for Applied Studies, Serbia, email: nikolafilipovic84@gmail.com.

DOI 10.4335/978.961.6399.79.1.29
ISBN 978-961-6399-79-1 © 2016 LeXonomica.Press
Available at http://books.lexonomica.press.

1 Introduction

Insurance sector remained one of the most important financial sectors despite the financial crisis. Europe was the largest insurance market in the world in 2014, with a 35% share in terms of total amount of premiums collected on the European continent, which is around 1 196bn Euros.[1] Premiums collected, create one of the foundations of the whole European economy. It is the largest single pool of investment in the European Union that accounted for more than 8.5 trillion Euros in 2013. Intermediaries represent a vital link between insurance companies and consumers, in the EU almost 80% of all insurance contracts are concluded through some sort of intermediary (brokers or agents).[2]

On November 24th European Parliament formally voted and approved the text of the Insurance Distribution Directive[3] (in further text - IDD), which replaced previous, Insurance Mediation Directive[4] (in further text - IMD) that regulated the sector of insurance intermediation within the single market. The IDD was published in the official Journal of European Union L 26 on 02.02.2016. as the Directive(EU) 2016/97 on insurance distribution. Under this document, member states are given period of 24 months to implement rules from the new directive in their national legal systems, which means that new rules on insurance distribution will be implemented in early 2018. This new Directive represents part of the "package" of regulations that aims to reform EU market in financial sector and restore trust of the consumers in the financial market that also includes MiFID2, Solvency 2 and PRIPS. As such IDD was heavily influenced by political consensus reached within EU on financial issues that is reflected in the MiFID 2 Directive, and some provisions of the MiFID2 found their way in the IDD. This is also the result of the attempt not just to harmonise national laws in this area, but also to closer align the rules of different financial sectors in the single market. This paper will begin with an overview of the current regulatory framework of the insurance mediation/distribution in the single market, as well as pointing out issues and open questions before proceeding to discuss new directive in this area and its potential effects and final remarks.

2 Insurance intermediaries under Insurance mediation Directive from 2002

First Insurance Mediation Directive from 2002 sought to address the issue of duties of insurance intermediaries to their customers, as well as the professional standards and corporate aspects of the intermediary activities. This approach was flawed, because it addressed only certain types of sales of insurance (through intermediaries, whether they are agents or brokers), while direct sale of insurance (from the insurance company) remained unaffected.

It was a relatively short document, consisting of 17 articles divided in 4 chapters. It takes an activity based approach, meaning that it defines activity of insurance mediation but not the subjects that pursue the activity. Insurance mediation is defined as activity of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the

administration and performance of such contracts, in particular in the event of a claim. Insurance intermediaries are defined as natural or legal persons who, for remuneration, take up or pursue insurance mediation.

Article 12 of IMD regulates information requirements for intermediaries, demanding that they disclose their identity and address, register in which they have been included and information about holding of capital or voting rights in insurance undertakings (and vice versa, holding of capital and voting rights of the intermediary by the insurance undertakings) and procedures about out-of-court redress. Further, it is demanded from the intermediary to disclose whether they provide advice on the basis of fair analysis, if not whether are they under contractual obligation to conduct mediation exclusively with one or more insurance undertakings. Paragraph 3 further demands that intermediary, at least specify, in particular on the basis of information provided by the customer, the demands and the needs of that customer as well as the underlying reasons for any advice given to the customer on a given insurance product, prior to the conclusion of any specific contract. However neither in Article 12, nor in the entire Directive has the advice (scope and content of this obligation) been defined.

Choice of legislative technique led to a number of questions. Third Life[5] and Non-Life[6] Insurance Directives determined information that insurance undertakings themselves need to disclose to policyholders before conclusion of the contract.[7] Since IMD does not distinguish between agents and brokers (they are collectively considered intermediaries), the question of the relationship between these directives was raised, should information requirements prescribed for insurance undertakings also apply to intermediaries, and if so to what categories of intermediaries? While it would make sense for the agents to be burdened with such information requirements, since they act in the name and on behalf of insurance undertakings, it would be more difficult to argue that the brokers, as independent commercial subject also need to abide to these requirements. Vice versa, the question was also if something is duty for agents (to provide advice since as we have seen it is obligation of all "intermediaries"), can that duty be extended to insurance undertakings themselves, by applying analogy that agent should not (and maybe cannot) have more duties than his principal. Even ECJ had to deliver opinion on the matter, clarifying obligations of intermediaries and insurance undertakings, ruling that duty to provide advice is specific obligation of intermediaries and not of insurance undertakings, however when it comes to disclosure of information insurance undertakings can communicate required information to policyholder by a third party i.e. intermediary.[8] In other words if such duty is to be prescribed by the national law, scope of duty to provide advice and content of such obligation would not be the same for insurance undertaking, agent or insurance broker.[9] Some other instruments, like Principles of European Insurance Contract Law (PEICL) had come very close to establish duty to provide advice even for the insurance undertakings, however their optional nature means that such provisions are not binding unless the parties themselves agree to apply them.

Furthermore the IMD did not regulate very important question of remuneration for the services of intermediaries. Importance of this question was raised by newly

implemented duty to provide advice as well as the general idea that intermediaries should act in such manner to reduce information asymmetry between insurance undertakings and consumers, in other words, to act as protectors of the consumer's interests. Considering that standard business practice is that intermediaries are remunerated by means of commission and that in insurance such commission is usually paid by the insurance undertaking, there is a possibility that an intermediary might be exposed to conflict of interest that could have detrimental effect on the policyholder and his interest. Despite the fact that remuneration and conflict of interest have been subject of great interest in some other jurisdictions,[10] EU did not regulate this important area. Possibility of arranging contingent commission has been pointed out as one of the most important sources of the potential conflict of interest.[11] Such commissions depend on the volume and quality of risk intermediary directs at insurer, and present powerful economic stimulant to direct policyholders toward the insurer who offers the best commission rather than the one most suited for the policyholder.

2.1 Effects and need for new regulation

Insurance Mediation Directive was a first attempt to harmonise very sensitive field of insurance, and its effects must be measured in that respect. Fact that even within the EU there are fundamentally different approaches to insurance as industry,[12] and differences in common law and civil law institutes of agency, representation and mediation should also be taken into account.[13] The Directive neglected some very important institutes. There is no definition of advice, no regulating of remuneration which led to wide variety of solutions in national legal systems. The duty to provide advice was implemented differently and the advice itself was defined in number of different ways in national legal systems. Some national laws like German, require from both insurance undertakings and brokers to provide advice but "only if situation gives occasion" that is if they assess that the personal situation of the policyholder and the complexity of insurance product offered, requires so and even then the broker and insurer are allowed to take into account relation between time and effort and the amount of premiums policyholders pays.[14]

It remained unclear who should pay for the specific obligation of "providing advice" implicitly imposed on intermediaries. Croatia for example[15] banned intermediaries from taking any form of remuneration from their clients, probably due to the fact that bundled commission can be found in one part of the premium and similarly so in Slovenia.[16] On the other hand, Denmark and Finland implemented "net quoting" system of remuneration, which prohibits brokers from taking any remuneration from insurance companies, on the basis that only economic independence of the broker can grant impartial and objective service to their clients.[17] The fact that intermediaries represent both advisors of the policyholder and sale channel for the insurance undertakings must be taken into consideration when debating conflict of interest and remuneration rules. The essential question is which one of these two functions intermediaries perform should prevail.[18] Conclusion in the second decade of XXI century is that the insurance market does not function in the EU the way Commission conceived it in the 1990s

when Directives were drafted,[19] and that there is a need for a new regulatory framework in this field.

Despite some omissions IMD set up basic standards for intermediaries concerning their organisation, professional requirements and underlined consumer protection and harmonisation of insurance market as one the key goals to be achieved through implementation of the directive. IMD introduced "single passport" system, although decentralised one, the permission to pursue insurance mediation form competent authority of one member state should allow pursue of activities on entire single market in the EU. Due to the fact that the obligations of intermediaries varied so greatly across the single market, the proclaimed freedoms were not truly achieved. However this problem should also be observed in the wider context of insurance market. Insurance companies still prefer to conduct their businesses through subsidiaries rather than providing cross border services. It is unlikely that intermediaries can contribute to providing cross border services if the insurance companies themselves are not too keen on doing so.

3 Insurance distribution Directive of 2016 – new rules on insurance distribution

In 2016 new Directive in this field was enacted, after lengthy negotiation process, debate and numerous changes from the first draft in 2012. IDD is significantly wider and more detailed instrument that its predecessor reflecting in sheer number of provisions it contains – 46, almost triple the number of articles IMD had. It contains provisions registration and organisational requirements (Chapters II and IV), freedom of intermediaries to provide services (Chapter III), information requirements and conduct of business rules (Chapter V), special requirements for distribution of insurance based investment products (Chapter VI), and sanctions for distributors for the breach of obligations set up by the directive (Chapter VII). It remains a minimum harmonisation instrument and leaves significant space for member states to adopt more stringent provisions in order to achieve higher level of consumer protection and transparency. Following changes in the sector of European financial supervision, IDD vests lot of power to EIOPA, especially with regard to cross border distribution of insurance, and development of guidelines and delegated acts as provide by IDD with regard to conflict of interest, distribution of investment based insurance products and product oversight governance.

3.1 Scope and definitions

First and the most obvious change is in the name of the new directive Insurance *Distribution* Directive instead of Insurance Mediation Directive 2, as it was planned at the beginning of the work in 2012, reflecting the change in doctrinal approach and the scope of IDD. It aims to regulate not only indirect sales through intermediaries but all sales in order to create a level playing field for all subjects involved in process of insurance distribution, as well as granting equal treatment to all policyholders, regardless of the means of purchase (from intermediary or insurance undertaking), thus

increasing overall level of consumer protection on insurance market, hence the change in the name and the activities defined. Second important change in the scope of the Directive is the change in object of protection. Instead of applying only to consumers, the rules of IDD will apply to all *customers*. Consumers, as they are defined in relevant acts of the acquis, i.e. Consumer rights directive, are natural persons, thus rendering the principles of consumer protection inapplicable to legal persons that purchase insurance. Legal persons, however, could be small and medium enterprises as well as the multinational corporations and putting them all together under same legal regime might seem unfair. SMEs might have no more legal or financial knowledge required to assess complex insurance products than a natural person would. In this regard, IDD follows already established rules in the Second Directive on Market in Financial Instruments (MiFID2)[20] providing the same level of protection to all clients regardless of their legal status (whether they are natural or legal person) with the only exception of professional clients as they are defined Annex II of the Directive.[21] IDD uses the expression *customer*, while MiFID2 uses the expression *client*. IDD does not provide definition of the customers but rather invokes Annex II of the MiFID2 as the reference which speaks of professional clients. To what effect this difference in terminology will affect the proclaimed goal of achieving better harmonisation of rules in different financial sectors remains to be seen. Decision to extend protection to entities other than consumers can be traced back to Principles of European Insurance Contract Law, that defined consumer in broader sense as "the person who acts for purposes which are outside his trade, business or profession", introducing the protection to weaker party in general, not only protection of the party that can qualify as consumer, similarly to German Insurance Contract Law French Code des Assurance law and the Greek law on insurance contract.[22]

The rapid changing world of information technology and the utilisation of these technologies in every aspect of commercial practices contributed to the decision of the legislators, to remain consistent with activity based approach in the IDD, despite the criticism that was directed at such choice for the IMD. The need to address all possible subject that might pursue activities of distribution not the least price comparison websites, and need to establish uniform set of rules in order to grant same level of consumer protection prevailed, thus resulted in distribution being defined as: advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim, including the provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media. Intermediary is consequently natural or legal person, other than insurance or reinsurance undertaking or their employees and other than an ancillary insurance intermediary, who, for remuneration, takes up or pursues the activity of insurance distribution. In other words rules set out in IDD shall apply, regardless of the form, legal status, or method of pursuing activities defined as insurance distribution by any subjects. Activities of

insurance distribution can be pursued either by intermediaries or by undertakings themselves when they sell insurance products directly to the policyholders.

IDD also provides definition of advice as: provision of a personal recommendation to a customer, either upon their request or at the initiative of the insurance distributor, in respect of one or more insurance contracts, as well as the definition of remuneration as any commission, fee, charge or other payment, including an economic benefit of any kind or any other financial or non-financial advantage or incentive offered or given in respect of insurance distribution activities.

Elaborating and defining such concepts such as advice and remuneration, which were omitted from the IMD should guarantee a significantly higher level of harmonisation of national laws.

3.2 Obligations, remuneration and conflict of interest of the distributors

The preamble of the IDD underlined two goals that are to be achieved, more integrated insurance market and a higher level of consumer protection. Consumer protection in general is achieved through high levels of transparency in contacts between intermediaries (and insurers) and potential policyholders. This is achieved primarily through disclosure of relevant information to policyholder and providing him with the necessary advice so they can make informed decision. Duty to provide advice was introduced in IMD and was mandatory duty for insurance intermediaries but not for the insurance undertakings. There were two problems with this approach. Firstly, duty to provide advice was in theory conceived as one of the mechanisms that would allow for higher consumer protection in practice, however, around 70% of insurance products were sold without appropriate advice.[23] Secondly, imposing such obligation only for intermediaries but not for undertakings created unequal playing field, that is to say, different levels of protection for consumers. If they purchased insurance from insurance intermediaries, they were granted higher level of protection due to (intermediary) obligation to provide advice. Extending mandatory obligation to provide advice on insurance undertakings themselves would without doubt increase the cost of insurance services due to the fact that insurers would need to dedicate more time and resources to each individual policyholder, as well as to invest significantly more in training of their staff and employees who are in contact with potential policyholders.[24] This led to re-evaluation of the position on the imposing mandatory obligation of advice for all distributors. Instead, IDD opted for advice to be optional service provided to customers. IDD sets up rule that one of the information to be disclosed to customers, both by insurance undertakings and insurance intermediary is whether they provide advice or not on the insurance policy. However Member states have freedom to make advice a mandatory obligation for certain types of insurance products or even for all types of insurance products sold on their national market. There is a potential risk that member states in implementing rules of IDD in the national legal systems may use this possibility and apply this rule extensively, as previously stated, there is high risk that implementing such requirement would lead to increased price of insurance.

Special attention is given to conflict of interest and management of conflict of interest. Conflict of interest is managed primarily through duty of intermediaries to disclose sources of potential conflict of interest to customers. This includes: information about holding of capital and voting rights in insurance undertakings in question and also ownership of capital and voting rights of the insurance undertaking in the intermediary in excess of 10%, in relationship with contract proposed or advised upon, whether the advice is provided on the basis of a fair and personal analysis or the intermediary is under a contractual obligation to conduct insurance distribution business exclusively with one or more insurance undertakings, in which case it is to provide the names of those insurance undertakings or if intermediary is not under a contractual obligation to conduct insurance distribution business exclusively with one or more insurance undertakings and does not give advice on the basis of a fair and personal analysis, they should provide the names of the insurance undertakings with which it may and does conduct business. Most importantly intermediaries are now obliged to disclose the exact nature of remuneration they receive in relation to insurance contract and whether they work on a basis of: commission and if so if the remuneration they receive is included in the premium (bundled premium), fee as form of remuneration paid directly by the customer, on the basis of any other type of remuneration, including economic benefit of any kind offered or given in relation to insurance product, or on the basis of any combination of three previously mentioned methods. Insurance undertaking must communicate to its customer the nature of the remuneration received by its employees in relation to the insurance contract. Overarching principle of the IDD is that all distributors must act „fairly, honestly and professionally and always in the best interest of customers". There is no duty to disclose exact amount of the remuneration, unless the intermediary pays for advice himself by means of fee. It would appear that prevailing opinion was that requiring from intermediaries to disclose the exact amount of remuneration when they are paid by means of commission from the insurance undertakings, would not contribute significantly to overall level of consumer protection, considering complexity of such payment schemes and amount of information customer already receives. From the aspect of transparency some criticism may be directed at this approach, but it would seem that placing this additional requirement might create an informational "overload" of the policyholders.

IDD further sets up standards of sale where no advice is provided. Prior to the conclusion of an insurance contract, the insurance distributor shall specify, on the basis of information obtained from the customer, the demands and the needs of that customer and shall provide the customer with objective information about the insurance product in a comprehensible form to allow that customer to make an informed decision. IDD requires a standardised insurance product information document ("PID") to be provided to the customer before the conclusion of the insurance contract, on paper or another durable medium, in case of sale of non-life insurance. Information that insurance distributors must disclose to customers before the conclusion of an insurance contract are, including, but not limited to, its identity, address and registration detail. The requirements are different depending on whether the business is an insurer or intermediary. Information provided to customers must be fair, clear and not misleading.

S3.3 Special rules for distribution of investment based insurance products – horizontal harmonisation of financial markets

Insurance based investment products (in further text - IBIP) represent a special type of insurance product where the insurer, directly or indirectly provides the insured with investment services. This usually happens through life insurance product tied to investment funds (or combined with some other financial instrument) where the return and interest of the premiums depends on the success of the investment. Such policies have double function, they provide coverage against insured risk, but are also a type of an investment service. The insured bears the investment risk but acts both as an investor and as an insured.

Such hybrid nature of insurance based investment products presented another problem to be solved in this directive. The objective of EU is to introduce a horizontal approach that will provide a coherent basis for the regulation of mandatory disclosures and selling practices at European level, irrespective of how the product is packaged or sold.[25] It was possible that essentially the same product would be sold according to different rules depending on the rules of market it was sold on. Objective was to raise the protection of the policyholder to the level of protection retail investors enjoy. Before IDD disclosure requirements for insurance based investment products were neither the same as the disclosure requirements which exist with regard to investment products sold by investment firms, nor were (are) their providers supervised and regulated by the same entity and legislation.[26]

IDD demands that the intermediaries and insurance undertakings who are carrying on the distribution of insurance-based investment products to maintain and operate effective organisational and administrative arrangements with a view of taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of its customers. This is a change from first draft made in 2012 that demanded from intermediaries and undertakings to: „identify, prevent, manage and disclose conflicts of interest when providing insurance mediation“, which would essentially mean that distributor would have to prevent any conflict of interest all the time which would be practically impossible. Conflict of interest could as well rise from the circumstances outside of control of the distributor, for instance in case where two of his clients have accident and claim damages against each other covered by policies procured through same intermediary. In such cases, considering that the intermediary has the obligation to assist in the administration and performance of insurance contracts on behalf of his customers, in particular in the event of a claim, he could face conflict of interest that he not induce or contributed to.

Where organisational or administrative arrangements made by the insurance intermediary or insurance undertaking are not sufficient to ensure with reasonable confidence that risks of damage to customer interests will be prevented, the insurance intermediary or insurance undertaking should clearly disclose to the customer the general nature or sources of the conflicts of interest.

In order to manage conflict of interest distributor shall disclose information to the customer on: periodic assessment of the suitability of the insurance-based investment products recommended to the customer, appropriate guidance on, and warnings of, the risks associated with the insurance-based investment products or in respect of particular investment strategies proposed and information on all costs and related charges to be disclosed, information relating to the distribution of the insurance-based investment product, *including the cost of advice.* This implies that advice can be paid either by the customer or by the third party, as long as the customer is informed about the price, that is remuneration received by the intermediary for the advice. This is both different from general rules established by IDD (demanding only the nature of the remuneration to be disclosed, but not the amount), as well as the rules in MiFID2 directive, where under the Article 24(7) and (8) investment firms are prohibited from accept and retain fees, commissions or any monetary or non-monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients, i.e. independent advice. This was prescribed in order to strengthen the protection of investors and increase clarity to clients as to the service they receive, however it would seem such ban will not exist in insurance market.

Out of 4 delegated acts that are to be adopted after the enactment of IDD, 3 will be from the area of insurance based investment products. The first one will be on the issue of methods of assessing the suitability and appropriateness of insurance-based investment products for their customers. Second on the criteria for assessing whether inducements paid or received by an insurance intermediary or an insurance undertaking have a detrimental impact on the quality of the relevant service to the customer, and the criteria for assessing compliance of insurance intermediaries and insurance undertakings paying or receiving inducements with the obligation to act honestly, fairly and professionally in accordance with the best interests of the customer. The third act will define steps that insurance intermediaries and insurance undertakings might reasonably be expected to take to identify, prevent, manage and disclose conflicts of interest when carrying out insurance distribution activities, and on establishing appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of the customers or potential customers of the insurance intermediary or insurance undertaking.

4 Final remarks – what changes IDD brings

Distributors are subject to an overarching duty to act honestly, fairly and professionally in the best interests of their customers. Distributors cannot remunerate or assess the performance of their employees in a way that conflicts with their duty to act in the customer's best interests. The IDD precludes any remuneration arrangement that could incentivise the sale of a particular product to a customer when a different product would better meet the customer's needs. In order to create a level playing field, direct sales by insurance undertakings must also disclose the nature of remuneration received by employees of the insurance undertaking in relation to that insurance contract. Advice is no longer mandatory obligation for intermediaries but rather optional one to be provided if the customer desires so.

IDD elaborates in more details rules and institutes related to insurance distribution which should help in further harmonisation and market integration. It remains activity based in its approach, which means that national laws of member states shall define specific obligations of each individual type of intermediaries, combined with the freedom member states are given to establish more stringent provisions in order to achieve higher level of consumer protection and the fact that member states are entitled to impose limitations and prohibition on the receipt of fees, commission or non-monetary benefits received by distributors from third parties, it is doubtful that much higher level of integration will be achieved

When it comes to harmonisation of different financial sectors, "horizontal harmonisation", it is clear from provisions that IDD was highly influenced by solutions of MiFID2. However due to specific needs of insurance market some differences persist, not the least that IDD does not prohibits ban on independent advice (for IBIPs) the way MiFID2 does, and the difference phrasing of who the object of protection is, while MiFID2 speaks of *clients*, IDD speaks of *customers.*

It is worth pointing out that EIOPA is vested, in accordance with Article 41 of IDD, to compile a report for the purpose of assessment whether the scope of IDD remains appropriate with regard to the level of consumer protection, the proportionality of treatment between different insurance distributors and the administrative burden imposed on competent authorities and insurance distribution channels. Following enactment of Solvency II directive, EIOPA has used its rights under Article 16 of Regulation 1094/2010 on establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) to issue guidelines and recommendations to member states in order to ensure the common, uniform and consistent application of Union law.[27] It is very likely that EIOPA will use these rights extensively in the following period to establish „soft law" framework with guidelines and recommendations for uniform application of IDD.

IDD is an improvement and a step in right direction when it comes to integration of insurance market, however it is very likely that the market will remain fragmented albeit less than it is now. To what extent will this fragmentation be bridged though soft law instruments of EIOPA remains to be seen.

Notes

[1] Insurance Europe, 'European Insurance — Key Facts ' (*Insurance Europe - European (re)insurance Federation*, August 2015) <http://www.insuranceeurope.eu/sites/default/files/attachments/European%20Insurance%20-%20Key%20Facts%20-%20August%202015.pdf> accessed 14.02.2016

[2] London economics, 'Insurance Intermediaries in Europe – 2012 update Report to BIPAR' (*BIPAR - The European Federation of Insurance Intermediaries*, September 2012) <www.bipar.eu/en/download/media/934/le-report-update2012.pdf> accessed 14.02.2016.

[3] Directive on Insurance Distribution [2016] OJ L 26

[4] Directive on Insurance Mediation [2002] OJ L 009

[5] Directive on Life Assurance [2002] OJ L 345, Article 36
[6] Directive on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance [1992] OJ L 228
[7] For comparison between Directives and individual laws of member states see: Jovan Slavnić and Slobodan Jovanović, Obaveza davanja predugovornih informacija i informacija posle zaključenja ugovora o osiguranju potrošačima usluga osiguranja prema direktivama EU i zakonima država članica : prilog raspravi o regulisanju ugovora o osiguranju u novom Građanskom zakoniku Srbije' [2008] 3(2008) Insurance Law Review 26-51
[8] Koch, Hummel and Muller v Swiss Life (Lichtenstein) AG (2013) C277/12 ECJ E-11/12, the case in question involved three individuals, two from Germany one from Austria who purchased unit-linked life insurance products via three different brokers from the defendant, Swiss Life AG based in Lichtenstein. The plaintiffs paid insurance premiums which were invested according to investment strategies, however the capital (premiums) were wiped out in very short period of time and plaintiffs brought claim for damages on the grounds that the structure of the products and risk involved were not transparent enough, and that they couldn't determine the level of risk involved. In other words, they claimed they were not informed and advised properly. Referring court sought clarification on the scope of insurance undertaking's duty to give advice and inform and the role of intermediaries in the purchasing of insurance.
[9] Jovan Slavnić, Contemporary aspects of insurer and insured duties common to all types of land insurance contracts. in Jovan Slavnić and Slobodan Jovanović (eds), *Proceedings, Challenges in Harmonisation of the Serbian Insurance Law with the European (EU) Insurance Law* (Insurance Law Association of Serbia 2012) 184-188
[10] Peter Kochenburger and others, 'Conflict of interest of insurance brokers, recent developments in US and China and prospects for the regulation in the European Union' [2010] 1(2010) Insurance Law Review 8-16
[11] COM(2007) 556 final, from 25.9.2007, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Final Report on Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on business insurance, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0556&from=EN> accessed 14.02.2016.
[12] Some scholars like Albert Michelle and Herman Cousy argue that there are two very distinct types of insurance cultures in EU and that governing ideas of these insurance cultures are somewhat mutually exclusive. On the one hand there is a culture of "alpine" insurance, named after alpine countries in which the system was created(Germany, Italy, Austria and Switzerland) dominated by the idea of solidarity and security, the selection of risk is reduced to the lowest possible level, and segmentation of risks is not conducted. Insurance supervision is accomplished by evaluating an individual product, control is directed to the policy, prices, premiums and insurance conditions themselves. Before a sale of insurance policy can begin, it is necessary to check if the premium is high enough to form adequate reserves. By rule, contracts are long-term and automatically renewable. The price is not formed on the free market, but according to the decision of the appropriate government body. Typical intermediary of the "alpine" insurance culture is agent. On the other hand, "maritime" insurance tradition is typical for Great Britain but also for Netherland. Here no government body interferes with the determination of prices. The price is formed according to the negotiations and market laws of supply and demand. The price of the products that is being sold as well as the coverage, are negotiable and the intermediary in these negotiations is the broker. Supervision is not performed over individual policies, but by controlling the solvency of the insurance company. The market is considered more competitive, contracts are short-termed enabling the insured to change the insurer and in that manner express their dissatisfaction, while precisely because of that the insurers strive to offer cheaper premium or better insurance conditions. See: Herman Cousy, The making of the EU internal market for insurance: a clash of cultures? in Slobodan Jovanović, Slavnić Jovan and Pierpaolo

Marano (eds), *Proceedings: Serbian Insurance Law in Transition to European (EU) Insurance Law* (Insurance Law Association of Serbia 2013) 21-31

[13] Common law legal system does not recognises the idea of commissioned agent (an indirect representation) that exists in civil law, nor does it clearly delineates between agents and intermediaries, which are all considered agents. See: Roy Goode and Ewan McKendrick(ed), *Goode on Commercial Law* (4th edn, Penguin Books 2010) 177-181

[14] §6(1) and §61(1) der VersicherungVertragGesetsz –VVG, vom 23. November 2007, EGRL 65/2002 (CELEX Nr: 32002L0065)

[15] Article 428 of the Insurance Law of Republic of Croatia, NN 30/15

[16] Šime Ivanjko, Legal relationship between broker and insurance company. in Slobodan Perović (ed), *Pravni Život 11/2012* (Serbian Association of Lawyers 2012) 409-415

[17] Danish FSA, 'Act no 401, Insurance Mediation Act' (*The Danish Financial Supervision Authority*, 25 April 2007) <https://www.finanstilsynet.dk/graphics/Finanstilsynet/Mediafiles/newdoc/Oversaettelser/Act%20401_Insurance%20Mediation%20Act.pdf> accessed 16.02.2016.

[18] Nikola Filipović and Milan Bjelić, Role of Intermediaries in Modern Insurance. in Wolfgang Rohrbach (ed), *Versicherungsgeschichte Österreichs, Band XII* (Tornik 2015) 292-301

[19] Wolfgang Rohrbach, On the fonts of history of the Austro-Serbian insurance: 200 years of insurance agents' [2011] 1(2011) Insurance Law Review 35-36

[20] Directive on market in financial instrument [2014], L 173

[21]Directive on market in financial instrument [2014], L 173, Annex II lists Credit institutions, Investment firms, Other authorised or regulated financial institutions, Insurance companies, Collective investment schemes and management companies of such schemes, Pension funds and management companies of such funds, Commodity and commodity derivatives dealers, Locals, Other institutional investors; Large undertakings that meet that meet size criteria with regard to balance sheet total , net turnover or own funds; National and regional governments, including public bodies that manage public debt at national or regional level, Central Banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations; Other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions; as the clients that are considered to be professional. They are however allowed to request non-professional treatment and investment firm may agree to provide a higher level of protection

[22] Ioannis Rokas, 'Principles of European insurance contract law (PEICL) as a settled and balanced system of policyholder protection' [2013] 1(2013) Insurance Law Review 37-41

[23] Press Release European Commission, 'Commission proposes legislation to improve consumer protection in financial services' (*European Commission*, 3 July 2012) <http://europa.eu/rapid/press-release_IP-12-736_en.htm?locale=en#footnote-1> accessed 24.02.2016.

[24] Loris Belanić, Duty to Inform and Counsel Insurance Service Consumers in European Law. in Slobodan Jovanović and Pierpaolo Marano (eds), *Proceedings: Modern Insurance Law: Current Trends and Issues* (Insurance Law Association of Serbia 2014) 83-96

[25] Kyriaki Noussia, '"Packaged Retail Investment Products" (PRIPS) in insurance and the proposed revision of the Intermediaries directive (IMD II)' [2011] 1(2011) Insurance Law Review 69-72

[26] Ioanis Rokas, 'Distribution by banks & other distributors of investment policies a focus on the distributed product' [2011] 1(2011) Insurance Law Review 21-28

[27] Stefan Sawatzki, EIOPA's role in supervision of the European insurance sector. in Marano and others (eds), *Proceedings: Insurance Law, Governance and Transparency: basics of the legal certainty* (Insurance Law Association of Serbia 2015) 147

References

COM(2007) 556 final, from 25.9.2007, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Final Report on Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on business insurance, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0556&from=EN>

Danish FSA, 'Act no 401, Insurance Mediation Act' (*The Danish Financial Supervision Authority*, 25 April 2007) <https://www.finanstilsynet.dk/graphics/Finanstilsynet/Mediafiles/newdoc/Oversaettelser/Act%20401_Insurance%20Mediation%20Act.pdf>

Directive on Insurance Distribution [2016] OJ L 26

Directive on Insurance Mediation [2002] OJ L 009

Directive on Life Assurance [2002] OJ L 345

Directive on market in financial instrument [2014], OJ L 173

Directive on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance [1992] OJ L 228

Herman Cousy, The making of the EU internal market for insurance: a clash of cultures? in Jovanović Slobodan, Slavnić Jovan and Pierpaolo Marano (eds), *Proceedings: Serbian Insurance Law in Transition to European (EU) Insurance Law* (Insurance Law Association of Serbia 2013)

Insurance Europe, 'European Insurance — Key Facts ' (*Insurance Europe - European (re)insuranceFederation*, August 2015) <http://www.insuranceeurope.eu/sites/default/files/attachments/European%20Insurance%20-%20Key%20Facts%20-%20August%202015.pdf>

Insurance Law of Republic of Croatia, NN 30/15

Ioanis Rokas, 'Distribution by banks & other distributors of investment policies a focus on the distributed product' [2011] 1(2011) Insurance Law Review

Ioannis Rokas, 'Principles of European insurance contract law (PEICL) as a settled and balanced system of policyholder protection' [2013] 1(2013) Insurance Law Review

Jovan Slavnić and Slobodan Jovanović, Obaveza davanja predugovornih informacija i informacija posle zaključenja ugovora o osiguranju potrošačima usluga osiguranja prema direktivama EU i zakonima država članica : prilog raspravi o regulisanju ugovora o osiguranju u novom Građanskom zakoniku Srbije' [2008] 3(2008) Insurance Law Review

Jovan Slavnić, Contemporary aspects of insurer and insured duties common to all types of land insurance contracts. in Jovan Slavnić and Slobodan Jovanović (eds), *Proceedings, Challenges in Harmonisation of the Serbian Insurance Law with the European (EU) Insurance Law* (Insurance Law Association of Serbia 2012)

Koch, Hummel and Muller v Swiss Life (Lichtenstein) AG (2013) C277/12 ECJ E-11/12

Kyriaki Noussia, '"Packaged Retail Investment Products" (PRIPS) in insurance and the proposed revision of the Intermediaries directive (IMD II)' [2011] 1(2011) Insurance Law Review

London economics, 'Insurance Intermediaries in Europe – 2012 update Report to BIPAR' (*BIPAR - The European Federation of Insurance Intermediaries*, September 2012) www.bipar.eu/en/download/media/934/le-report-update2012.pdf

Loris Belanić, Duty to Inform and Counsel Insurance Service Consumers in European Law. in Slobodan Jovanović and Pierpaolo Marano (eds), *Proceedings: Modern Insurance Law: Current Trends and Issues* (Insurance Law Association of Serbia 2014) 83-96

Nikola Filipović and Milan Bjelić, Role of Intermediaries in Modern Insurance. in Wolfgang Rohrbach (ed), *Versicherungsgeschichte Österreichs, Band XII* (Tornik 2015)

Peter Kochenburger and others, 'Conflict of interest of insurance brokers, recent developments in US and China and prospects for the regulation in the European Union' [2010] 1(2010) Insurance Law Review

Press Release European Commission, 'Commission proposes legislation to improve consumer protection in financial services' (*European Commission*, 3 July 2012) <http://europa.eu/rapid/press-release_IP-12-736_en.htm?locale=en#footnote-1>

Roy Goode and Ewan McKendrick(ed), *Goode on Commercial Law* (4th edn, Penguin Books 2010)

Šime Ivanjko, Legal relationship between broker and insurance company. in Slobodan Perović (ed), *Pravni Život 11/2012* (Serbian Association of Lawyers 2012)

Stefan Sawatzki, EIOPA's role in supervision of the European insurance sector. in Marano and others (eds), *Proceedings: Insurance Law, Governance and Transparency: basics of the legal certainty* (Insurance Law Association of Serbia 2015)

VersicherungVertragGesetsz –VVG, vom 23. November 2007, EGRL 65/2002 (CELEX Nr: 32002L0065)

Wolfgang Rohrbach, On the fonts of history of the Austro-Serbian insurance: 200 years of insurance agents' [2011] 1(2011) Insurance Law Review