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ABOUT THE JOURNAL

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It is important to highlight especially the multinational dimension of the year-book. In particular, we mean the fact that the "European Studies…" journal serves as a forum for exchange of scientific opinions, research analyses, reviews on new important publications, and other relevant information from the European study disciplines for authors and readers all over the world, which enables a better reflection of the diversity of opinions and approaches.

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ARTICLES

Qualitative Changes in the Development of the EU-China Relationships: From one-dimensional, more-limited and one-level cooperation to the all-dimensional, wide-ranging and multi-tiered Strategic Partnership

Eva Cihelková & Hung Phuoc Nguyen*

Summary: EU-China Comprehensive Strategic Partnership from 2003 intensified cooperation between the EU and China and its new dimension was started ten years later (November 2013) after the adoption of "EU-China 2020 Strategic Agenda for Cooperation". The road to this partnership and to its current developing stage was long and difficult. It highlighted a shift from one-dimensional (trade), to all-dimensional (trade, economic, political and other) from more-limited (covering a few areas) to wide-ranging (covering an extensive range of areas) and from one-level (interstate) to multi-tiered (local, interstate, supranational) cooperation. In an effort to recap almost forty years (1975–2013) of the development of EU-China relations here are this paper's objectives: to explore the major milestones in the evolution of EU-China cooperation, briefly evaluate this cooperation in different periods, which are defined by the given milestones, and to depict its shift in depth, breadth and quality of EU-China relations. Qualitative changes in the development of the EU-China relationships and reaction of mutual governance led to the current dimension of the EU-China Comprehensive Strategic Partnership, which the authors discuss in the next writings.

Keywords: EU, China, Cooperation, Relationship, EU-China relations, Partnership, Comprehensive Partnership, Comprehensive Strategic Partnership

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1. Introduction

The emergence of China (1949) and the founding of the European Coal and Steel Community (1951), additionally European Communities (EC) – European Economic Community (EEC) and European Atomic Energy Community (1957) – did not lead by themselves to the establishment and development of mutual relations. Reality of the Cold War and "different political positions and ideological beliefs created animosity between the two sides"[1]. Only after the improvement of relations of Chinese-American relations in the early 70's created conditions for the establishment of diplomatic relations between China and Member States, respectively China and the EC. EC-China bilateral cooperation did not develop quickly, not even after twenty years, i.e. until about mid 90's. It was mainly influenced by competition between two superpowers (USA and USSR), but also the subsequent freezing of relations after Chinese political events in the first half of 1989.

The situation in the Euro-Chinese relations have changed since the mid-90s as a result of the massive economic rise of Asia and the growing interest of, by then already, the European Union (EU)[2] in Asia and especially China. That moment it is going through, thanks to the economic and political reforms carried out since the end of the 1970's, a great economic boom and has established itself as a new force on the international scene. Also, the EU as a result of the remarkable development of European integration and economic power has attracted more and more interest in China. As reported by Jing Men, "China's changes attack the EU, and the EU's experience fascinates China". Since the 1990's, the mutual attraction of the two sides has brought their bilateral relationship to a new high[3]. Based on a strategic EU's approach to China and China's pragmatic approach to the EU, but also the transformation of the EU itself and China and deepening and widening cooperation were created the foundations for the development of EU-China Comprehensive Partnership, which started to be built since 1998. In 2003, this partnership developed into a Comprehensive Strategic Partnership.

Although in the text we will try to make our own definition of a Comprehensive Strategic Partnership, let us state at this point, how the Comprehensive Strategic Partnership is perceived by China and by the EU. According to the concept

[1] Men, Jing. The EU-China Strategic Partnership: Achievements and Challenges. Policy Paper No. 12, November 2007. European Union Centre of Excellence – European Studies Centre University of Pittsburgh, p. 2.

[2] EU was created by the Treaty on European Union (Maastricht Treaty) in 1. 11. 1993

[3] Men, Jing. *The EU-China Strategic Partnership: Achievements and Challenges,* cited work, p. 1.

of Chinese premier Wen Jiabao "Comprehensive" means "all-dimensional, wide-ranging and multi-layered cooperation". "Strategic" implies "long-term and stable" ... EU-China relations which transcend "the differences in ideology and social system", and are "not subjected to the impacts of individual events that occur from time to time". "Partnership" is defined as a cooperation "on an equal footing, mutually beneficial and win-win. The two sides should base themselves on mutual respect and mutual trust, endeavor to expand converging interests and seek common ground on major issues, while shelving differences on minor ones".[4] The EU did not define Comprehensive Strategic Partnership explicitly, but the Commission's Policy Paper of 2003 stated that "the EU and China share responsibilities in promoting global governance"[5] Both sides should work together "to safeguard and promote sustainable development, peace and stability." The Comprehensive Strategic Partnership allows EU-Chinese relations to move forward. In many areas, there are both policy convergence and divergence between the two sides.

This paper proposes three objectives: first, to explore the major milestones in the evolution of EU-China relationship, secondly, briefly evaluate the cooperation in different periods, which are defined by the given milestones, and thirdly, to capture the shift in the depth, breadth and quality of the EU-China relations. The main milestones in the EU's relations with China will be considered: the establishment of diplomatic relations between the parties in 1975 and the adoption of the fundamental document of the EU[6] in 1994, changing the relationship of the EU towards Asia. Furthermore, adoption of the first long-term strategy for developing relations with China[7] (1995), which initiated the path to a Comprehensive Partnership (it was decided in 1998), and accepting EU strategy[8] (2001), which was to inform about the status of implementation of the priorities of the Comprehensive Partnership and to develop further on this partnership. Country

[4] Wen stresses importance of developing EU-China Comprehensive Strategic Partnership. People's Daily Online, 7 May 2004. [2016-11-11] Available at: http://english.people.com.cn/200405/07/eng20040507 _142556.html. Cited from Men, Jing. *The EU-China Strategic Partnership: Achievements and Challenges,* cited work, p. 6.

[5] *A maturing partnership – shared interests and challenges in EU-China relations*. Commission Policy Paper for Transmission to the Council and the European Parliament (updating the European Commission's Communications on EU-China relations of 1998 and 2001). COM(2003) 533 final, Brussels, 10. 9. 2003.

[6] *Towards a New Asia Strategy*. Communication from the Commission to the Council. COM(94) 314 final, 13 July 1994.

[7] *A Long Term Policy for China-Europe Relations*. Communication of the Commission. COM(1995) 279/final. Brussels, 5. 7. 1995.

[8] EU Strategy towards China: Implementation of the 1998 Communication and Future Steps for a More Effective EU Policy. Communication from the Commission to the Council and the European Parliament. COM(2001) 265 final, Brussels, 15. 5. 2001.

Strategy Paper: China 2002–2006[9], which began to be implemented in 2002, reflected a shift of China from traditional developing country to a transitional economy. In 2003, both sides adopted Policy Papers,[10] which created the conditions for the declaration of the EU-China Comprehensive Strategic Partnership. The partnership, incorporated in these documents and in the Communication from the Commission to the Council and the European Parliament (2006)[11], which objective was a Closer Strategic Partnership between the EU and China, expired in 2013. In that year an essential document was accepted which has laid the foundation for co-operation after year 2013 (until 2020) and the same document is used to govern the current cooperation between the two parties – the "EU-China 2020 Strategic Agenda for Cooperation".[12] The above clearly shows the periods during which they analysed the mutual EU-China relations: 1975–1994, 1995–2002, and 2003–2013. In the end we will try to evaluate, from where the mutual cooperation had shifted and how its quality had changed.

2. Main milestones of the evolution EU-China relations

2.1. The beginnings of relationships EEC/EC and China

Until 1974, trade relations between the European Economic Community and the People's Republic of China (PRC), developed on the basis of *bilateral trade agreements between Member States of the EEC and China*. Since 1974 the EC Commission has been the bearer of the common commercial policy and be responsible for States implementing trade relations, sent in November this year to China the Memorandum of readiness of the EEC to conclude a trade agreement. After the two sides in 1975 have established formal diplomatic relations, and China was accredited missions and the first Chinese ambassador by the EEC, began to be negotiated *Trade Agreement*, which entered into force in June 1978. It was a five-year preferential trade agreement, automatically renewable on an

[9] *Country Strategy Paper – China 2002–2006*. Commission working document. [2016-11-11] Available at: https://eeas.europa.eu/china/csp/02_06_en.pdf.

[10] *A maturing partnership – shared interests and challenges in EU-China relations*, cited work; China's EU Policy Paper. Beijing: Information Office of the State Council of the People's Republic of China. October 2003. [2016-10-20] Available at: http://en.people.en/200310/13/eng20031013_125906.shtml.

[11] *EU – China: Closer Partners, growing responsibilities*. Communication from the Commission to the Council and the European Parliament. Brussel, 24. 10. 2006. COM(2006) 632 final.

[12] *EU-China 2020 Strategic Agenda for Cooperation*. [2016-11-14] Available at: eeas.europa.eu/china/docs/eu-china_2020_strategic_agenda_en.pdf.

annual basis that both sides should accord most-favoured-nation treatment. Its part was the Joint Committee. This agreement, however, could not be considered to be too effective due to the then Chinese establishment and direction of the economy.[13]

EC relations with China have affected the transformation of the economic system, launched by the end of 1978, and its conditional changes of orientation of China's economic development. As a result, the (first) Agreement on Textile Trade (1979) was signed, the EEC Generalized System of Preferences (GSP) has been extended on China (1980), the First Inter-Parliamentary Meeting between Delegations of the European Parliament and of the National People's Congress of China (1980) took place and the first Science and Technological Cooperation Program has launched (1983). In 1983, there were also accredited China missions by two other communities – by the European Coal and Steel Community (ECSC) and by the European Atomic Energy Community (EURATOM) and were introduced regular Ministerial-level Meetings to discuss all aspects of EC-China relations. Also first cooperation projects in China were launched. The extensive reform program that led, among other things, to the opening of China to foreign trade, technology and investment, enabled by the end of 1984 to negotiate a new general agreement.

Agreement on Trade and Economic Cooperation[14], which was signed in May and came into force in October 1985, was, like the previous Trade Agreement non-preferential character and was automatically renewed on a yearly basis. Nevertheless it was an open agreement, which did not exclude any form of economic cooperation within the competence of the EEC. Economic cooperation covering a range of sectors and industries, which included: industry, mining, agriculture, science and technology, energy, transport and communications and environmental protection. To fulfil the content of economic cooperation, various instruments were introduced, which include among others the realization of joint ventures, exchange of economic information, joint research, cooperation between financial institutions, technical assistance, organizing seminars and symposia, investment promotion and contacts between entrepreneurs, commercial and industrial officials and so on. The content of the agreement formed part of the program of assistance to developing countries in Asia and Latin America. To ensure compliance with the agreement it has been established at the ministerial level (European Commissioner for Trade and Chinese Minister of Commerce) Trade and Economic Joint Committee, whose task was to detect and investigate

[13] EEC-China Join Committee. European Commission. Press Releases Database. [2016-10-05] Available at: <http://europa.eu/rapid/press-release_MEMO-87-3_en.htm>.

[14] Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China. *Official Journal* L 250, 19/9/1985, s. 0002–0007.

new possibilities for the development of trade and economic cooperation and to prepare appropriate recommendations.[15]

In October 1988, the Delegation of the European Commission was opened in Beijing.

During April – June 1989 there was a popular uprising at Tiananmen Square. After suppression of student protests, the relationships of the EC and China were frozen for more than one year (including the imposition of a series of sanctions, including still continuing an arms embargo). Ties were renewed "step by step" during the years 1992–1994. These steps included the launch of an Environmental dialogue and the establishment of a new bilateral Political dialogue on sensitive regional and international affairs.[16] Political dialogue has become the foundation for a complete normalization of relations between the newly formed European Union and China. In 1994, this form of communication was accompanied by an exchange of letters into Agreement on Trade and Economic Cooperation, which confirmed the status of China as an emerging power on the international scene. "Since then, foreign ministers, political directors and experts from both sides are closely involved in a regular and constructive political dialogue. This working mechanism helps maintain an effective and important channel of direct communication between the two sides".[17]

2.2. The New Asian Policy of the EU and EU-China Comprehensive Partnership

Until the mid-90's Asia (including Japan) experienced an enormous economic upturn. Its economic potential became stronger, that has changed a proportion of economic forces in the world. Asia began to affect not only the global economy but also world politics. Bilateral relations of the European Union to the Asian countries, which although considerably increased over time, were not adequate to economic power of Asian countries and political interests of the EU on the region. Based mainly on local bonds (ASEAN, SAARC, China) and in terms of proportion of development aid and economic cooperation were very unbalanced. Economic cooperation represented only about 12% of EU's aid for Asia.[18] The EU was aware that if it did not choose a more coordinated and dynamic

[15] For more information, see Cihelková Eva (2003). *Vnější ekonomické vztahy Evropské unie.* 1. vyd. Praha: Press C. H. Beck, s. 508. ISBN 80-7179-804-5.

[16] Up until 1994, the EU's political dialogue with China was limited to short annual meetings in the margins of the United Nation General Assembly.

[17] Men, Jing. EU-China Relations: from Engagement to Marriage? *EU Diplomacy Papers*, 7/2008. College of Europe, Department of EU International Relations and Diplomacy Studies.

[18] Towards a New Asia Strategy, cited work. p. 2.

approach to Asia, it would lose the opportunity to participate in the Asian rise and prosperity. European companies would therefore be deprived of part of the profits, which would weaken their competitiveness on a global scale. The EU's interest in Asia did not result only from the growing economic and political power of the continent, but also the efforts to enhance its own influence at the expense of the United States and Japan, had strengthen their relations in Asia since the late 80's under the Asia-Pacific Economic Cooperation (APEC). In July 1994, the European Council adopted a general document entitled *Towards a New Asia Strategy*[19], which became the basis for a reassessment of the current EC/EU approach towards Asia. This document attempted to show the urgency of formulating the EU's approach to Asia, and encourages the development of a discussion that would lead policy-makers at national and European level to pay Asia a priority attention it deserves. It was the first joint and balanced views on relations between the EU and Asian partners. Formulated general objectives for the development of cooperation between the two sides, specified priorities for action and created an institutional base in the form of an extensive forum within which there is a consultation between European and Asian partners at political and expert level – Asia-Europe Meeting (ASEM).

As a result of the document adopted by the Commission in 1995, the first long-term strategy for the development of relations between the EU and China entitled *a Long Term Policy for China-Europe Relations*[20] which was dedicated to respect the long-term EU relations with China, the country with the global and regional, economic and political influence. In the Communication of the Commission underlined the importance of China for Europe and identified a number of areas of common interest, which is supposed development of closer relations. It was the political relations of constructive engagement, human rights, Hong Kong and Macao matters; in the economic relations of the booming Chinese economy, and the unique Chinese economic system, China membership of the World Trade Organisation; cooperation strategy and policy approach adapted to a changing China. Wherever there is a need for greater mutual understanding, identifying common interests and better cooperation, it is necessary to develop a dialogue. Since 1995 there was a launch of, for instance, specific Dialogue on human rights. Within the EU, it is necessary to strengthen the coordination of individual activities and to support awareness in China about the EU.

In 1998, the Commission adopted a decision on strengthening the EU's relations with China, under which prepared the strategic document *Building*

[19] Towards a New Asia Strategy, cited work.

[20] *A Long Term Policy for China-Europe Relations*, cited work.

a Comprehensive Partnership with China[21]. Taken into account the political and economic development of China and its transformation into a regional and global dimensions, especially after 1995, and in accordance to which new priorities were set for the so-called EU-China Comprehensive Partnership. This Comprehensive Partnership in principle meant more intensive involvement of China into the international community through enhanced political dialogue; to support China's transition to an open society based on the rule of law and respect for human rights; deeper integration of China into the world economy through its increased integration into the world trading system and to support economic and social reforms in the country; continued development of the Chinese due to EU funding and to increase an awareness of the EU in China.[22] The progress in the implementation of the Comprehensive Partnership has informed the European Commission of the EU Council and the European Parliament in 2000 the adoption of the *Report on the Implementation of the Communication Building a Comprehensive Partnership with China*.[23] The programme's priorities and contents was reviewed in order to keep up with the pace of constant change, as well as to improve the impact and visibility of EU assistance to China.[24] The condition for achieving the objectives of the partnership was to improve the Political dialogue, which began to be realized based on regular annual EU-China Summits, held alternately in Beijing and in selected EU Member State.[25] The result of the first four Summits (1998–2001) was the signing of the sectoral Agreement on Scientific and Technological Cooperation (1998) and the Bilateral Agreement on China's WTO Accession (2000). In September 2001, was established by the New Information Society Working Group, December 11, 2001 China becomes the 143rd member of the World Trade Organisation.[26]

In May 2001, the Commission decided on the basis of relevant reports on the adoption of the *EU Strategy towards China: Implementation of the 1998*

[21] *Building a Comprehensive Partnership with China.* Communication from the Commission. COM(1998) 181 final, Brussels, 25. 3. 1998.

[22] Ibid, p. 4.

[23] *Report from the Commission to the Council and the European Parliament on the Implementation of the Communication – Building a Comprehensive Partnership with China*. COM(2000) 552 final. Brussels, 8. 9. 2000.

[24] Ibid, p. 2.

[25] The overall framework for the political dialogue was first formalised in 1994 through an Exchange of letters; the first-ever EU-China Summit, at heads of government level, took place on 2 April 1998 in London.

[26] Fojtíková, Lenka. China's External Trade after Its Entrance into the WTO with the Impact on the EU. *Proceedings of the 1st International Conference on European Integration 2012.* Ostrava: VŠB – Technical University of Ostrava, 17th – 18th May 2012, p. 56–65. ISBN 978-80-248-2685-1.

Communication and Future Steps for a More Effective EU Policy[27] The aim was to develop a decision, not to change the strategy adopted in 1998. Furthermore, the present development of the EU and China since the last few years and especially the new setting for EU-China relations and to report on the status of implementation of the Comprehensive Partnership priorities. The document clarified the future development of EU-China relations that define concrete and practical short and medium term activities in order to achieve long-term goals of 1998.[28]

Following the intention to deepen the comprehensive partnership *Country Strategy Paper* (CSP) – *China 2002–2006* was published in March 2002, which pushed development aid, heading from the EU to China, from funding infrastructure and rural development to finance various aspects of the reform process in the country, with emphasis of human resources development. This policy reflects a shift pf China from traditional developing country to a transition economy.

2.3. EU-China Comprehensive Strategic Partnership

EU-China relationship between years 2002/2003 was partly influenced by developments in the EU, and development in China, but also a new quality of relations, which took the form of a Comprehensive Partnership. In 1999, the European Council concluded that the fundamental rights applicable at the EU level should summarize the EU Charter on Fundamental Rights to facilitate their promotion and enforcement. The Charter was formally[29] proclaimed in Nice in December 2000 by the European Parliament, the Council and the Commission. In February 2003 the Treaty of Nice came to force, which was primarily institutionally preparing the European Union for expansion by ten new countries and to ensure its functioning in the future. This agreement has also strengthened the EU's Common Foreign and Security Policy (CFSP) and European Security and Defence Policy (ESDP) and the Justice and Home Affairs (JHA) policy and other policy areas. This consolidation of European integration allows the EU to better integrate China into an increasingly wider range of areas of mutual relations.

China at that time already become the seventh largest trading partner in the world and the second largest recipient of foreign direct investment (FDI) in the world and a major player in several key economic sectors (telecoms,

[27] *EU Strategy towards China: Implementation of the 1998 Communication and Future Steps for a more Effective EU Policy,* cited work.

[28] Ibid, p. 3.

[29] The Charter is legally binding for the EU in December 2009 when the Lisbon Treaty came into force, and now has the same legal status as the EU treaties.

information society, energy). Its acceptance into the WTO was another impulse for acceleration of economic and social reforms, with particular emphasis on coping with the growing urban and rural unemployment, continuing pressure on the social security system and the emerging tensions in society. The political situation in China was affected by upcoming changes leadership (16th Communist Party Congress in autumn 2002) and continued issue of Taiwan. EU-China relations have been strengthened in many ways and increased importance of China not only as an economic actor in the world, created new opportunities for European businesses. Moreover, the political role of China in the world increased. Opening of the Chinese economy and entry into the international environment, however, involves some problems and the political system in China remains different in comparison with other countries with which the EU is developing its partnerships. The EU therefore decided in the next period to focus on China's long-term strategic plans (in line with China's Two Centenary Goals[30] and the 12th Five Year Plan) and to develop their Comprehensive Strategic Partnership. Relations between the EU and China in 2003, thus reflecting the strategic mission and spirit of cooperation, the possibility to focus on the development and mutual benefits of all-dimensional, multi-tiered, and wide ranging manner.

The prerequisite of the EU-China Comprehensive Strategic Partnership in order to be declared was the adoption of two policy papers. The first was the Policy Paper *a maturing partnership – shared interests and challenges in EU-China relations*[31], which was adopted by the European Commission in September 10th, 2003 basically as its fifth Communication. The second was a *Policy Paper on the EU*[32], adopted by the Chinese Government in 13th October 2003. While EU policy paper included the evaluation of a new maturity in EU-China relations, and suggestions, updating the EU's approach to China, the China's Policy Paper takes a different approach. This is not peculiar to communities in many states with the Common Foreign and Security Policy, mostly interstate

[30] The institutional version was adopted in 2012. It is firstly a doubling of GDP and GDP/p. by 2021 (compared to 2010) and to transform China to "moderately prosperous society", and secondly, the increase in GDP/p. at the level of modern developed countries (about 55.500 USD) until 2049 in constant dollars in 2014. Cited from: Ding, Lu. China's "Two Centenary Goals": progress and challenges. EAI Background Brief No. 1072. 22 October 2015.

[31] Commission Policy Paper for Transmission to the Council and the European Parliament *a maturing partnership – shared interests and challenges in EU-China relations* (updating the European Commission's Communications on EU-China relations of 1998 and 2001). COM(2003) 533 final, Brussels, 10. 9. 2003.

[32] China's EU Policy Paper. Beijing: Information Office of the State Council of the People's Republic of China. October 2003. [2016-10-20] Available at: http://en.people.en/200310/13/eng20031013_125906.shtml.

type,[33] but instead for the common foreign and security policy of the national state. Based on China's foreign policy, on the one hand, that shares common interests with the EU, but on the other hand insists on applying the principles which are rooted in differing historical and cultural background, political system and level of economic development. Therefore, for example it clearly defines strict adherence to the principle of one China access not only to Hong Kong and Macao, but also and especially to Tibet and especially to Taiwan. EU proposals should help steer policy and adopt measures in the EU over the next 2–3 years, China's proposals are less developed, but clearly defined by individual areas of cooperation. But since there is no fundamental conflict of interest between the EU and China and both documents are commensurate and compatible.

Based on these documents the EU-China Comprehensive Strategic Partnership was announced during the 6th EU-China Summit at the end of October 2003.[34] EU and China defined their mutual relationships as "maturing" and "more strategic". The EU's Policy Paper on China[35] notes that "the EU and China have an ever-greater interest to work together as strategic partners to safeguard and promote sustainable development, peace and stability … the importance both attach to the role of the UN in physical and environmental security and [to gain from] further trade liberalisation." The China's Policy Paper on EU[36] notes that "EU will play an increasingly important role in both regional and international affairs." … "The Chinese Government appreciates the importance the EU and its members attach to developing relations with China". Moreover, it says that in EU-China relations predominate agreements over disagreements, and emphasis, that China's next objective is "to enhance China-EU all-round cooperation and promote a long-term, stable and full partnership with the EU. China's EU policy objectives are: to promote a sound and steady development of China-EU political relations under the principle of mutual respect, mutual trust and seeking common ground while reserving differences, and contribute to world peace and stability; to deepen China-EU economic cooperation and trade under the principles of mutual benefit, reciprocity and consultation on an equal basis, and promote common development; to expand China-EU cultural and

[33] Within the CFSP, the EU Member States to reach a decision almost always unanimously. Influence Commission is severely limited, the European Parliament has virtually no influence and the European Court of CFSP is completely excluded. Also, the implementation of specific decisions is a general largely on the shoulders of the Member States.

[34] Zhou, Hong (ed.) (2016). *China-EU Relations: Reassessing the China-EU Comprehensive Strategic Partnership.* London: London: Springer. ISBN 978-981-10-1144-3.

[35] Commission Policy Paper for Transmission to the Council and the European Parliament *a maturing partnership – shared interests and challenges in EU-China relations*, cited work, p. 3.

[36] China's EU Policy Paper, cited work, p. 1–2.

people-to-people exchanges under the principle of mutual emulation, common prosperity and complementarity, and promote cultural harmony and progress between the East and the West".

The Sixth China-EU Summit Joint Press Statement[37] brought a review of existing relations in various fields, it suggested direction for future development of EU-China relations, and included discussion of the various views and concerns of both sides. The strategic nature of the partnership can be seen not only in the above-mentioned declarations of both parties, but also in the instruments through which subsequent cooperation should be realized. It was on such an agreement, as were agreements on Cooperation in the Galileo Satellite Navigation Program (2003), Industrial Policy Dialogue, Dialogue on Intellectual Property Rights (2003); the signing of the Memorandum of Understanding on Approved Destination Status and the Tourism Agreement (2004). On the basis of defined guidelines for the future development of EU-China relations were in late 2004 signed a Joint Declaration on Non-proliferation and Arms Control; the EU-China Customs Cooperation Agreement, Agreement on R&D Cooperation on the Peaceful Use of Nuclear Energy; and in 2005 a Memorandum of Understanding on Labour, Employment and Social Affairs; a Joint Statement on Cooperation in Space Exploitation; Science & Technology Development and Joint Declaration on Climate Change. In late 2005 was also in London held 1st EU-China Strategic dialogue. In 2006 followed the signing of the Memorandum of Understanding on Food Safety and Memorandum of Understanding on Cooperation on Near-Zero Emissions Power Generation Technology (on that occasion, held the first consultations under the Climate Change Partnership), was initiated by the EU-China Dialogue on regional cooperation and established the Dialog on Africa's peace, stability and sustainable development. From the Joint Press Statement showed that Sino-European Strategic Partnership should be not only clear and distinct issues, but also on issues that have a negative impact on the development of mutual relations. For instance, an arms embargo on China, the position of the market economy in China under the anti-dumping investigation, respect for international human rights standards, etc.

Since the Strategic Partnership is not only equivalent and mutually beneficial cooperation between the partners, but also common solutions to the challenges that arise from changing conditions of bilateral, regional and global scale, and sharing responsibility for the solution of the Strategic Partnership between the EU and China witnessed a number joint experiments on mutual

[37] Sixth China-EU Summit (Beijing, 30 October 2003). Joint Press Statement. Brussels, 30 October 2003, 13424/03 (Press 298).

cooperation on global issues, including joint strengthening of the United Nation's role in promoting world peace, security and sustainable development, strengthening of cooperation in human rights, coping with trans-national challenges in the field of justice and home affairs, in working towards progress Chinese reforms, to develop dialogues in key sectors droughts as energy, environment, regulatory and industrial policy, the information society, competition, intellectual property rights, macro-economic questions, health, employment and education. An insight to this whole issue is discussed by for instance Hong Zhou (ed.).[38]

China as a world power and its growing political influence led the EU Commission in 2006 to accepting new *Communication to the Council and the European Parliament*[39], whose main goal was a Closer Strategic Partnership between the EU and China, which will bring greater accountability for both sides and strengthen their cooperation with a view to six main areas: political support China's transition to democracy (dialogue on human rights, protection of minorities and strengthening the rule of law); promote energy efficiency and environmental protection (improve transparency and regulatory environment for the energy sector, exchange of technology and information resource efficiency and renewable energy sources, promotion of investment and closure of government procurement, promoting the use of international standards); balance economic and social development (implementation of balanced monetary and fiscal policies, solving problems – undignified labour standards, health and aging); improving trade and economic relations (support opening Chinese markets, investment and exports, the setting of fair trade rules, resolve trade disputes through dialogue or through WTO mechanisms); strengthening cooperation in key sectors (science and technology, immigration, cultural exchange and education); promote safety and international cooperation (dialogue on peace and security in different parts of the world, particularly in East Asia, transparency in military expenditure, nuclear non-proliferation and the phasing-out of the EU arms embargo). Improving trade and economic relations should help *Policy Paper on Trade and Investment*[40]*,* with its emphasis on competition, market access, openness, support European firms and dialogue.

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[38] Zhou, Hong (ed.). *China-EU Relations: Reassessing the China-EU Comprehensive Strategic Partnership*, cited work.

[39] Communication from the Commission to the Council and the European Parliament *EU – China: Closer Partners, growing responsibilities.* Brussels, 24. 10. 2006. COM(2006) 632 final.

[40] *Global Europe. EU-China Trade and Investment. Competition and Partnership*. European Commission. External Trade. [2016-10-31] Available at: http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc _131234.pdf.

In addition to the 9th EU-China Summit in 2006, the EU and China in 2007 decided to launch negotiations on *Partnership and Co-operation Agreement* (PCA) as a foundation for a Comprehensive Strategic Partnership. PCA supposed to "reflect the full breadth and depth of today's Comprehensive Strategic Partnership between the EU and China … encompass the full scope of their bilateral relationship, including enhanced cooperation and political matter".[41] It thus was supposed to replace the current Trade and Economic Cooperation Agreement, which has long disregards the nature of the mutual relationship. Efforts to develop of the base of the EU-China relationship on a more comprehensive legal framework motivate both sides to reach positive outcomes in the negotiation. After early successful negotiations in 2009, "the negotiation turns out to be less than straightforward and has been deadlocked for years."[42] Answers to the question why these negotiations have frozen, see in 3.3.

During the negotiation of the PCA and even after discontinuation has developed other instruments such as the Macroeconomic dialogue (2006); EU-China Civil Society Round Table (2007); High level economic and trade dialogue (2007); Agreement between the EAEC and the Government of the PRC for R&D Cooperation in the Peaceful Uses of Nuclear Energy (2008); High level people-to-people dialogue (2012); Partnership on Sustainable Urbanization (2012); Join Declaration on the EU-China Innovation Cooperation Dialogue (2012), EU-China Higher Education Platform for Cooperation and Exchanges (2013) and others.

For financing the promotion of China's reforms in areas that are covered by sectoral dialogues, as well as help China to cope with global challenges, including the environment, energy and climate change, and human resources development in China, the EU adopted a *Country Strategy Paper – China*[43] for the years *2007–2013*. For the indicative funding for seven years, EU had earmarked 224 million EUR.[44] The amount of assistance is increasing due to support cross-cutting activities (Democracy and Human Rights, NGOs Co-financing, Gender, Health and Population) and the existence of various thematic and regional budget lines (Asia Pro Eco – environment, Asia Urbs – urban development, Asia Invest – business cooperation).

[41] Council of the European Union. Joint statement of 9th EU-China Summit, 12642/06 (Press 249), Brussels, 11 September 2006.

[42] Shaohua, Yan. The *EU-China Partnership and Cooperation Agreement Negotiation Deadlock*. April 23 2015. [2016-10-31] Available at: http://www.e-ir.info/2015/04/23/the-eu-china-partnership-and-cooperation-agreement.

[43] *Country Strategy Paper – China 2007–2013*. European Commission, 1. 1. 2013. [2016-10-20] Available at: https://ec.europa.eu/europeaid/country-strategy-paper-china-2007-2013_en.

[44] Ibid, p. 2.

3. Deepened and broadened EU-China cooperation

3.1. Period 1975–1994

Initially, relations between the EEC and China developed particularly in the commercial area. EEC export volume to China in 1975 amounted to 1.154 billion ECU, the volume of imports from China, then it was 668 mil ECU[45]. When the third plenum of the Communist Party of China at its 11th session in December 1978 decided to follow reforms in Chinese society and economy, its creator Deng Xiaoping said China on the path of an ambitious reform process that has significantly changed the economic system of the country, as well as its position in the world economy. This process was not the result of directive central plan, but neither was unproblematic and straightforward. Instead, it was the process that led a number of initiatives at different levels (central, local, individual) and implemented on the basis of trial and error. However, the reforms did bring significant economic recovery in China and improved the living standards of its population and booming Chinese trade.

In parallel to the boom in Chinese trade grew and the volume of bilateral trade relations in the EEC (since November 1993 EC[46]) and China. While in 1978 (EEC-9), its volume was only 2.4 billion ECU[47], in 1993 (EC-12), it was already 30.8 billion. This means that since the beginning of China's reforms increased trade between roughly 13 times. Between years 1983–1987 achieved EEC even a positive trade balance, which reached its peak in 1985 (3.2 bn. ECU). Since 1988, the situation has changed; Europe's trade deficit reached 1.2 billion ECU that year and in 1994 already represented 10 billion ECU. The commodities in 1993, EU exports mainly included machinery, transport equipment and nuclear reactors (65%); EU imports consisted mainly of textiles and garments, toys, electrical material, leather goods and footwear (57%). Although during the 80s EEC had recorded, as well as the USA and Japan, the decline in the relative share of total Chinese imports (from 12% in 1980 to 11% in 1990) in

[45] EEC-China Join Committee. European Commission. Press Releases Database. [2016-10-05] Available at: <http://europa.eu/rapid/press-release_MEMO-87-3_en.htm>.

[46] European Community.

[47] ECU (European Currency Unit) was the basket currency unit and the European Communities serving for the settlement of international transactions. It was also used in the European monetary system, where each of the Member States obliged to maintain the exchange rate of its currency within a certain range (+/- 2.5% initially, and later +/- 15%) against the ECU. ECU arose 13. 3. 1979 1st 1, 1999 has been replaced by the euro (EUR). At ECU followed in a symbolic EUR exchange rate of 1 EUR = 1 ECU. Default external value of the euro against the US dollar amounted to EUR 1 = $ 1.1789 and a calculation based on the USD / ECU in the last trading day before the euro (31. 12. 1998).

the early 90s has renewed its relative position (around 15%) more successfully than its competitors.[48]

Positive factors that affected China's exports to the EU include the signing of the first commodity agreement on trade in textile goods (1979) and the extension of the GSP to China (1980). Textile Agreement specified the quotas of textiles, which could be delivered to the European market by 31 December 1988. To guarantee the agreed quotas for the goods market to Chinese authorities forced it to maintain the balance of trade in textiles between the two sides and deliver minimum quantities of certain textile materials for European manufacturers (silk, angora, cashmere), which will be in accordance with the clause on price. It contains a mechanism against the tide of goods and against fraudulent actions. In 90 years, China has become the biggest beneficiary of the EU's GSP. Advantages of China increased from 2.1 bn. ECU in 1988 to 6.6 bn. ECU in 1992, and China's share of total benefits accruing from the EU's GSP increased from 13.7% to 22.2%, hence it was pumping three times larger than the second largest recipient. The range of goods for which China gained duty free access to the European Community market, was constantly expanding.[49]

Since the beginning of the reforms foreign loans grew very quickly as well as foreign direct investment in China mainland. In the period 1979–1992 accounted for foreign loans in China to more than 75 billion USD and foreign companies had established nearly 91 joint ventures (totalling 36 bn. USD). FDI grew even faster in China in the subsequent year 1993, while in 1994 the number of projects and the amount actually invested capital fell. For the entire period 1979–1994 in China more than 221 thousand joint ventures worth more than 95 billion USD were established. These companies employed more than 12 mil Chinese workers and represent about 40% of the total foreign trade of China. The largest investors in China in the years 1979–1993 were Hong Kong and Macao companies with 114 147 projects and 50 billion of invested capital. The next largest investor was Taiwan. Together, these countries represent around 2/3 projects and 3/4 of applied foreign capital. To the rest of the projects and applied foreign capital belonged to the EU, USA and Japan, which had cumulatively invested around 13 billion USD. Furthermore, EU investments lagged behind its main competitors, since it reached 2.5 billion USD. The US and Japan have invested a similar amount of capital (around 5 bn. USD). Also, Taiwanese investments were more than twice higher than EU investments. The largest investors from European countries were France, Great Britain, Germany and Italy.[50]

[48] *A Long Term Policy for China-Europe Relations*, cited work.
[49] Ibid.
[50] Ibid.

Increase trade and investment flows have also allowed a series of reforms introduced by the impact but also the consequences of bilateral and multilateral pressure from Chinese business partners. These improvements included: adoption of the Foreign Trade Law, which was adopted in May 1994 and entered into force in July (although some provisions seem not fully GATT compatible); lowering of certain customs duties; reduction in the number of products subject to import licences or quotas; elimination of the import regulatory tax, direct export subsidies and the import substitution policy; elimination of the official Exchange rate (as of 1 January 1994) and unification of China's exchange rate at the swaps market rate, whose floating is controlled; introduction of VAT, a uniform corporate tax and improved budget accounting rules; conversion of some state owned enterprises to shareholding or limited liability companies, subcontracting of management of some remaining state owned enterprises, creation of a bankruptcy law. According to "A Long Term Policy for China-Europe Relations" "although there measures represent important steps forward, they are clearly insufficient to make the Chinese trade system compatible with internationally accepted rules." Among the problems were mainly: absence of transparency, certainty and uniformity; trade planning (plans are often secret); trade monopolies and other privileges of foreign trade corporations; foreign currency controls; very high customs tariffs; licensing system, quotas, tendering and other import restrictions; tendering restrictions on imports; technical, veterinary and phytosanitary measures used not always in accordance with international rules; export subsidies (mostly indirect); export taxes and restrictions; industrial policies which can have a severe impact on trade and investment conditions (automobile sector). [51]

Further problems were especially for the bilateral trade relations between the EU and China. Their foundation was a growing trade imbalance, which has fluctuated at around 8–10 billion ECU. This imbalance has become a problem not of itself, but especially in the context that reflected the structures and practices that were not compatible with free and fair trade rules. Examples are ferrous metals, which were China exported at abnormally low prices and led to the introduction of a number of anti-dumping procedures, or products of silk, which were sold by Chinese at lower prices than a price of raw material. Moreover, it was also restrictions on financial services, which limited the activities of foreign banks and insurance companies, enforcement of legislation on the protection of intellectual property rights, existing technical barriers that create obstacles, especially for the trade in chemical products, discrimination against foreign companies and the like. In order to eliminate these problems Joint Committee has gradually established

[51] Ibid.

a Trade Expert's Meeting (which met since 1991), Working Group on Economic and Trade Matters (1993) and three sectoral Meetings on Financial Services, Intellectual Property Rights and Agriculture. Their goal was to create the basis for institutionalized dialogue, increase mutual understanding, to find solutions for specific problems and avoid discrimination between entities on both sides.

Along with business and capital collaboration to develop financial and technical assistance, economic cooperation, science and technology cooperation, and other cooperation.

The first development project funded by the EEC originated from the year 1984. Although, the development aid program for China developed after signing of the Trade and Cooperation Agreement. In late 1994, the EC has already funded in China in terms of financial and technical assistance to 25 development projects. Projects focused on professional consultancy on site, training of Chinese workers in EU, support of modernisation of various facilities. Primarily focused on rural provinces (soil improvement, water conservation, processing and storage of foods, improving crop yields). The largest project was the Dairy Development Project, which aim was to improve nutrition standards in China through supporting the dairy sector. Great attention was paid by EC also to support and to strengthen institutions and to develop primary policies. For this purpose, was established in Beijing the China-EC Centre for Agricultural Technology (CECAT). CECAT was set up to encourage the transfer of technology between the EC and China, and to spread the benefits to as wide an audience as possible through seminars, special papers and audio-visual material. EC also supported the minority population in China.

In parallel with the financial and technical assistance an economic cooperation has developed, which combined actions at the local level with institutional strengthening at the centre. The largest project at the micro level was a programme to support the modernisation of Chinese enterprises. To meet these objectives, EC provided in forms such as consultation, expertise, etc. Strengthening institutions of the city was provided mainly in the form of management education. For this purpose since 1985 the China-Europe Management Institute (CEMI) was established. In 1993, the EC with the European Patent Office launched an industrial property training program in China. The institution put an effort to bring Chinese legislation into line with international norms, but also to assist the institutions by implementing the laws. EC also helped in educating of Chinese officials. Relevant programs covered knowledges about the functioning of the EU and the world trading system. In 1994, management training in China has developed into a new phase, when the China-Europe International Business School (CEIBS) was founded in Shanghai. CEIBS is the first business school in China, offering international-level MBA and other courses to Chinese students.

Many activities were also developed in support of business-to-business contact. The idea was to promote cooperation between entrepreneurs from China and Europe within the European Community Investment Partners (ECIP) facility. Already in 1981 and 1985 there were organized the first EEC-China Business Weeks. Moreover, various business meetings and seminars were also organized. ECIP was mainly the support for developing joint ventures. It provided a variety of grants and loans to encourage European firms to establish joint ventures in several Asian countries, including China (more than 100 companies or organizations received benefits).

Scientific cooperation between the two parties began to develop in 1984. After several years it focused on short-term activities including seminars and training. Within a few years, this cooperation has shifted to the implementation of joint research activities with a high added value scientific content and involving research institutes on topics of mutual interest, funded by more than 70 research joint projects in various fields. One of the key areas was the biotechnology; to coordinate research in this field the EC-China Biotechnology Centre (1991) has been established as an information bureau and a catalyst for EU-China interaction. New possibilities have introduced the onset of the Fourth Framework Programme (1994–1998).

Among forms of other cooperation included especially an economic cooperation in various sectors. Developing the industrial cooperation (direct industrial projects, research cooperation in the industrial environment), telecommunications cooperation (information network, mobile communications, digital audio and video) and energy cooperation. But cooperation has not been limited to areas of interest to business. Since 1986 it has also developed contacts between European and Chinese universities (the Chinese Society for EC Studies, creation of European Documentation Centres). In 1994, an initiative was also launched in the context of the EU's worldwide programme to combat AIDS/HIV and sexually transmitted diseases.

3.2. Period 1995–2002

In 1992, the European Communities completed their Single market. Along with this, they realized that additional stimulus for the development of the European economy must be sought to strengthen their trade relations and economic cooperation with other parts of the world. At that time a great economic expansion, as noted in 2.2, spread through Asia. The centre of the EU's New Asia Strategy was located by the European Commission in China.

China has experienced over the past nearly twenty years of significant internal transformation from a centrally planned economy and very closed country

to the world towards an increasingly market-driven and engaged in global commerce one. These reforms accelerated after 1997. It was among other things a response to the Asian crisis (1997), which has also affected China, thus promoting further reform and liberalization. At that time, China's foreign policy has become more assertive and more responsible. The Commission of the European Communities in 1998 stated that "An unprecedented series of summits between China and some of its key world partners over the last year have demonstrated China's wish to be recognised as a world power".[52] EU at that time stood not only at the threshold of a common currency and preparation for eastern enlargement, but also faced the challenge of integrating China into the international community and to maintaining a stable and peaceful international environment. All these facts were a challenge to change EU policy towards China, especially on long-term vision, active engagement and defining priorities for a new, EU-China Comprehensive Partnership.

Since 1995, when the EU adopted its first China Policy Paper "A Long Term Policy for China-Europe Relations", by the end of 2002, when it implemented a Comprehensive Partnership with China and began to create steps for the future and effective policy towards China, it established an institutional basis for the development of EU-China partnerships and develop co-operation on a wide range of issue at both multilateral and bilateral levels. In subsequent communications and policy papers approached the European Commission to evaluate the systemic and substantive EU-China relations from a position of fulfilling the five main objectives of the Comprehensive Partnership, namely[53]:

- engaging China further, through an upgraded political dialogue, in the international community;
- supporting China's transition to an open society based upon the rule of law and the respect for human rights;
- integrating China further in the world economy by bringing it more fully into the world trading system and by supporting the process of economic and social reform underway in the country;
- making Europe's funding go further;
- raising EU'zs profile in China.

First objective – engaging China further in the international community – supposed to be achieved through a renewed and upgraded EU-China bilateral Political dialogue, as well as through the greater involvement of China in both regional and multilateral initiatives of global interest.

[52] *Building a Comprehensive Partnership with China*, cited work, p. 3.
[53] Ibid, p. 4.

The EU has steadily intensified Political dialogue, following an exchange of letters in 1994. In 1998, together with the new status of their relationship it also promoted Political dialogue. Annual Summit meetings at Head of State and Government level, encouraging regular contacts at foreign ministers level, and by holding meetings between ambassadors and senior officials in a similar vein to contacts with other key partners took place. In parallel, regular meetings at expert level on selected issues (i.e. CFSP Troika Working Groups). On the basis of an exchange of letters Political dialogue has been further strengthened in 2002. With all these developments, bilateral relations were noticeably institutionalized, widened and deepened.

Dialogue with China was upgraded in the context of the EU's broader regional strategy towards Asia as embodied in ASEM. EU has contributed to the fact that China has become an active part in the ASEM follow-up process, which focused "on sustainable development in the Asia region, addressing the issue of maritime security in the Asia region, combatting illegal drugs trafficking, coping with the effects of the Asian financial crisis and addressing the issue of arms control and non-proliferation."[54] China is also actively participating in the ASEM Trust Fund, and contributes 500 thousand USD.[55] In order to ensure the stability of the Asian region, China was drawn in a multilateral security dialogue on Asia regional issues, such as the peaceful Resolution of the Korean questions, dialogue on other countries in the region (Cambodia, Vietnam and Burma), where China has strong influence, ensuring stability in the Central Asia countries and improvement in relations across the Taiwan Straits. The EU will continue to take an active interest in the two territories – Hong Kong and Macao. The main platform for the development of this dialogue is the ASEAN Regional Forum (ARF), which was founded in 1994. The EU and China have here (along with other countries) the status of "dialogue partners". a proactive and responsible role of China in global issues is manifested e. g. in dialogue on major UN Development (UN reform), in dialogues during G7-8 and OECD meetings.

Regarding the second objective – supporting China's transition to an open society based upon the rule of law and the respect for human rights, the situation in China has improved during the reporting period. As stated by the Commission of the European Communities, "Economic reform has introduced greater freedom of choice in education, employment, housing, travel and other areas of social activity. China has passed new civil and criminal laws to protect citizen's rights and has signed several key instruments bringing the country closer to

[54] Ibid, p. 6.

[55] *Report from the Commission to the Council and the European Parliament on the Implementation of the Communication "Building a Comprehensive Partnership with China",* cited work, p. 4.

international norms. It has also taken steps to develop the electoral process at local level, allowing villagers to designate their local authorities". It also added that "China is still far from meeting internationally accepted standards on human rights."[56] As a consequence, the EU continues to exploit all possible channels and tools to the promote human rights in China.

One of the ways is the EU-China specific Dialogue on human rights, which was launched in 1995 and interrupted in the spring of 1996. Approximately after a year and a half (November 1997) has been newly established the "regular, serious and he and cooperation programme designed" dialogue with an objective to strengthen the role of law and promote civil, political, economic and social rights. Human rights dialogue is held roughly twice a year and is complemented by special workshops. a series of human rights-related assistance programmes are supported by funding from the EU. The small circle includes initiatives such as Human Rights Small Projects Facility.[57] In 2001, China as a result of this dialogue has ratified the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) and also noted that it has an appreciation for the UN Covenant on Civil and Political Rights.

The second way is cooperation in the framework that relates especially to promoting the role of law and strengthening civil society. For the first area the EU adopts ambitious program of legal and judicial cooperation (The EU-China Legal and Judicial Programme), which has been discussed and implemented by autumn 1998. The second area is focused on support for a training centre in China and officials for that implement of the village governance law. Assistance is provided to different social groups, including ethnic minorities, women and children, consumers and non-governmental organizations.

As far as the third objective is concerned – integrating China further in the world economy by bringing it more fully into the world trading system and by supporting the process of economic and social reform underway in the country, it can be said that China has integrated in the world economy apace. China has become the global economic player due to its ability to cope with common rules based on a combination of trade discussions and targeted cooperation initiatives. The EU used all available channels to create an open Chinese economy and to improve the climate for European investment in China. These channels included: support of China's WTO accession process, strengthening of the bilateral trade agenda, including the promotion of investments, development of bilateral sectoral agreements, concurrent financial liberalization and regulation and support for the euro.

[56] *Building a Comprehensive Partnership with China,* cited work, p. 9.

[57] *Report from the Commission to the Council and the European Parliament on the Implementation of the Communication "Building a Comprehensive Partnership with China",* cited work, p. 7.

China's integration into the global trading system was under considerable support from the EU. At that time, China was the third largest extra-EU's trading partner and an important potential for European investment there. The EU's trade deficit with China reached 20 bn. ECU in 1997[58], reflecting China's growing export capacity as well as the obstructive effect of market barriers in China itself. a bilateral EU-China agreement on China's accession to the WTO entry had been signed on 19. May 2000, paving the way for China's accession to the WTO. The technical assistance programme in support of WTO accession was about to begin. China has become the new (143th) WTO member after fifteen years of negotiations on December 11, 2001. Currently, both sides share an interest in strengthening the rule-based multilateral trading system. China's accession to the WTO "will lead to significant further market opening and it will ensure that China can actively participate as the world trading system prepares for further trade liberalisation in a forthcoming new Round".[59]

The essential legal document for the development of bilateral trade and capital partnership remained EC-China Trade and Cooperation Agreement and the EC-China Joint Committee meetings. Developing bilateral dialogue reflecting the EU's Market Access Strategy, adopted by the EU in 1996, and through it is focused on removing barriers to European exports and investments on a global scale. In 1997, China was the main beneficiary of the EU's GSP, with more than 30% of the value of all beneficiary imports. As some Chinese industries began to compete with domestic EU's sectors, it was necessary to the reduce advantages previously enjoyed by China. The new GSP arrangements will allow beneficiary countries to obtain an additional preferential margin, if it respected the international standards of labour rights and environmental protection. The Commission has proposed to change the EC anti-dumping legislation, concerning China, which takes into account market reforms underway in the country. New legislation proposal removed the existing designation of China as a "non-market economy", and implemented anti-dumping proceedings in the new case-by-case approach. This approach will guarantee market economic treatment only to the Chinese exporters who will be able to operate on the European market under clearly defined conditions of market economy. This means that domestic prices and expenses of such exporters would be the basis to determine the regular value of goods in the market and, therefore, not based on information from the third country market analogue. The proposal also introduced a more systematic approach to individual treatment of individual companies

[58] Ibid, p. 11.

[59] *EU Strategy towards China: Implementation of the 1998 Communication and Future Steps for a more Effective EU Policy,* cited work, p. 12.

with regard to their specific conduct and operating conditions. This approach began also to act as an incentive for Chinese companies to reform themselves. The elementary condition for the effectiveness of the bilateral dialogue has become a regular coordination and exchange of detailed information on updating commercial laws and administrative procedures governing trade in goods and services of the other party. The EU has also sought to improve the investment environment for European companies in China. As an example was an effort to establish a clear and transparent regulatory framework for investment and intellectual property rights. The EU is interested to create the conditions for entry into such sectors as telecommunications, energy, environmental technology and services, transport and financial services, where it has comparative advantages. On the other hand, the EU creates conditions for Chinese investment, particularly through the European Community Investment Partners (ECIP) program, which promotes the creation of joint ventures between European and Chinese companies in China and the Asia-Invest program, which helped European small and medium-sized enterprises to identify potential partners in China.[60] In this context, the Commission and the Chinese Council for the Promotion of International Trade (CCPIT) established an EU-China Business dialogue (1998) in order to fostering links between the European and Chinese business communities. To support European companies in China, the EC Delegation in China founded the EU Chamber of Commerce in Beijing (1999).[61] To deepen bilateral trade and economic cooperation, as a follow-up to the meeting of the EU-China Joint Committee in 2000 a Dialogue on enterprise policy and regulation was introduced.

The result of the EU-China Business dialogue has become conclusions regarding the specific sectoral bilateral agreements in areas of common interest. Especially science and technology, trade and nuclear safety, maritime transport, air transport and customs. Signed in 1998 and in 2000 came into force – the Agreement on Scientific and Technological Cooperation. This specific agreement should be concluded in order to enhance and expand cooperation in fields of drought and energy, environment, life sciences etc. In this context, the Commission proposed in 2000 to transform the existing Telecoms Working Group into an Information Society Working Group. In the year 2000 we were also initiated talks on a potential China-EURATOM Cooperation Agreement on the Peaceful Use of Nuclear Energy safety in the framework of the EURATOM Treaty. In 2002 EU-China Maritime Transport Agreement was signed, which

[60] *Building a Comprehensive Partnership with China,* cited work, p. 16.

[61] *Report from the Commission to the Council and the European Parliament on the Implementation of the Communication "Building a Comprehensive Partnership with China",* cited work, p. 10.

would improve market access conditions for European operators in China. The Memorandum of Understanding between the Commission, China and the European Association of Aeronautical Industry on Industrial Cooperation in the Aeronautical Sector initiated cooperation in the field of air safety, environment and infrastructure; negotiations were launched with regards to China's participation in Galileo Satellite Navigation Program. The Commission was also entrusted to negotiate an Agreement on Customs Cooperation and Mutual Administrative Assistance. This agreement should provide the basis for trade facilitation and the fight against customs fraud.[62]

For businesses and investors is important that China has a well-functioning financial and banking system. China has therefore decided together with the reform of its state-owned enterprises as well as to reform of its financial system. This system should be solid, transparent and open. The EU supports these efforts through cooperation projects, its own expertise in financial regulation and prudential supervision. At the same time putting pressure on China to liberalize access to their financial markets for foreign financial service providers in banking, insurance and securities. For Chinese entities is, in contrary, important to be informed about developments in the European Monetary Union, which effects development in the whole EU and has ties to the international monetary system. China now represents the second largest to the world's reserves of foreign currency. The EU has therefore decided to establish a regular EU-China Macroeconomic dialogue, which should, among other things. Inform China about the potential of the euro as a stable reserve currency.[63]

Since it is necessary for the existing impressive transformation process in China to integrate the concept of sustainable economic growth and social development, the EU was helping China with the successful implementation of a series of reform projects. In 1997, both parties signed the EC-China Memorandum of Understanding on the Programming of EC-China Cooperation Projects. The EU-China Cooperation Programme in the implementation of China's reforms is based on the following priorities. Restructuring of state-owned enterprises, implementation of financial reform, defining common norms, standards and certification procedures in the context of industrial cooperation, develop a business dialogue in order to increase awareness of China's transition process and provide expertise on market reform, modernize legal and administrative framework of its economy, strengthen its own training capacities, use scientific and technological cooperation to strengthen European companies' position on the Chinese market and supporting China's economic development, to help China integrate

[62] *Building a Comprehensive Partnership with China,* cited work, p. 16–17.
[63] Ibid, p. 17–18.

environmental priorities, develop efficient industries, and accelerate the prosperity across the country and improve regional and social cohesion.[64]

Implementation of a Comprehensive Partnership on the part of China requires extraordinary financial resources that are provided by the EU. Until 2001, these resources were provided from the budget lines B7-300, B7-301 and B7-707. Compared to the average annual expenses, which were provided to China in the period 1991–1994, the annual EU budget spending in 1999 more than tripled, up to about 70 mil ECU. For example, some funded programs: EU-China Legal and Judicial Cooperation Programme, Junior Managers Programme, the EU-China Vocational Training Programme, Euro-China Academic Network (ECAN), the EU-China Scholarship 2000 Project, Scientific and Technological Cooperation Programme, Programme on Economic Planning and Environmental Protection etc.[65] To ensure better coordination between projects and between the participating donors, as well as to accelerate the implementation of projects should serve change in the existing project management. It was transported from EU DG Relex to the Europe Aid Cooperation Office and partly on the management of EU Delegations in third countries, including Beijing.

Already in 1996, the European Commission and the Chinese Government agreed to aid flows from the EU to China shifts from infrastructure financing and rural development to finance various aspects of the reform process in the country with an emphasis on human resource development. This policy reflects a shift from traditional China as a developing country to a transition economy. Publication of the Country Strategy Paper (CSP) – China 2002–2006[66] supported this policy. CSP highlighted three priority areas of support for the EU's cooperation with China for a five-year period: economic and social reform (50%); sustainable development (30%) and good governance (20%). The first area focused on building capacity and strengthening institutions so China would be able to cope with WTO obligations; it was also supported by the reform of China's social system. In the second area, it was mainly to establish a better balance between environmental protection, social development and economic growth. In the third area, funds are directed to support's initiatives to promote the rule of law, speeding up democracy and civil society, as well as protection of economic, social, political and civic rights. The total budget was planned in the amount of EUR 250 mil.; 150 mil. EUR for the first National Indicative Programme (NIP) for the years 2002 to 2004 and 100 mil EUR for the second NIP (2005–2006). The EU has become the most important grant donors in China. Compared with the

[64] Ibid, p. 19–21.

[65] *Report from the Commission to the Council and the European Parliament on the Implementation of the Communication "Building a Comprehensive Partnership with China",* cited work, p. 10–11.

[66] *Country Strategy Paper – China 2002–2006*, cited work.

previous period basis for the provision of financial resources have become the aforementioned cooperation and assistance programmes, which should increase the efficiency of the resources.

Since 2000, European Investment Bank (EIB) also won a mandate for intervention in Asia, which largely began to engage in China. For the EIB to be able to provide loans for projects of common interest, the Commission contributes partly from the budget resources to contribute into EIB funds. Other funds are drawn by China from EU regional cooperation projects in Asia.

Both EU and China make efforts to become visible on the territory of the other party, it means that effectively influenced the local public opinion. This requires close cooperation between the two parties. To increase awareness about the partners not only help to annual summits and high-level meetings, as well as mutual information policy and strategy that identifies key target groups in business, government, the academic community, non-governmental organizations, media and other areas that have spread information on EU-China relations.

3.3. Period 2002–2013

Since the main objective of this paper is to notice a shift in the depth, breadth and quality of EU-China relations, and consequently it is prepared to become "China-EU 2020 Strategic Agenda for Cooperation: a new dimension, or the elusive concept of the EU-China Strategic Partnership?", which main purpose is to examine the EU-China cooperation in the stage of Comprehensive Strategic Partnership, especially in its final stage, i.e. in the years 2013–2016 (until the year 2020), this section will be focused rather on just some partial delineation of important attributes partnerships than on a comprehensive evaluation of the results of the Strategic Partnerships. The forthcoming essay will aim on compliance/variance fundamental characteristics of both partners and their shared values; compliance/differentiation of their strategic interests and priorities; and therefore common goals, obligations and procedures, eventually different, conflicting and controversial area. And these moments are in this part are discussed briefly.

The word "Partnership" said the first time the European Commission in its Communication "Building a Comprehensive Partnership with China" in 1998.[67] In 2003 it was said that this partnership was reaching maturity.[68] Promote the Comprehensive Strategic Partnership in the next decade, both parties undertook to 6th EU-China Summit, which was held in late October 2003. The determination

[67] *Building a Comprehensive Partnership with China*, cited work, p. 4.

[68] Commission Policy Paper for Transmission to the Council and the European Parliament *a maturing partnership – shared interests and challenges in EU-China relations* (updating the European Commission's Communications on EU-China relations of 1998 and 2001), cited work, p. 6.

to develop mutual relations into a long-term and stable cooperative relationship, these relationships further institutionalize and strengthen their interdependence in the early years (2003–2004) mainly reflecting the intensification of exchanges not only at the level of top leaders, but also officials.

Mutual relations continue to rely on still valid Agreement on Trade and Economic Cooperation, which was signed in 1985, although the current development of EU-China bilateral relationship requires a comprehensive agreement that would cover "all-dimensional, wide-ranging and multi-layered cooperation". For this reason, the parties to the 9th EU-China Summit decided to launch negotiations on a new contractual basis – Partnership and Cooperation Agreement, which would create the base of EU-China relations for the 21st century. As we mentioned in section 2.3, in the negotiation of this agreement was not successful so far. The answer to the question, why the new agreement has not been negotiated, brings Yan Shaohua[69], that the main reason of this condition identified in factors "that restrain the win-sets of the two parties".

On the EU side, there are several obstacles. In particular, that the PCA should be a mixed agreement, negotiated and ratified by both the EU Institutions (Commission negotiates, Council approves unanimously and the European Parliament by an absolute majority) and EU Member States Institutions, each of which has veto power. This means that the process of adopting the PCA is significantly restricted by the EU of decision rules. Furthermore, the EU has different preferences than China. EU "favours for a single comprehensive agreement that will upgrade the 1985 Trade and Economic Cooperation Agreement (TECA) and encompass both the commercial and political dimensions of the relations." However, its commercial and political interests are different from Chinese. Regarding trade and commerce, "the major interest of the EU is to press China to fulfil the WTO obligations, and protect its trade and investment in China." The EU would like to deal with the "trade deficit, exchange rates, export's restrictions on raw materials, market access, Intellectual Property Rights, service, investment, subsidies, government procurement, norms and standards." As regards the political dimension, there are also some very sensitive issues regarding "democracy, human rights, rule of law, Taiwan, the arms embargo, non-proliferation, disarmament, and the International Criminal Court". EU trade also unites with political matters of human rights and democracy. All these issues are not among the priorities of China, China accesses to these issues moderately and with a different emphasis. All these factors reduce the EU's win-set.[70]

[69] Shaohua, Yan. *The EU-China Partnership and Cooperation Agreement Negotiation Deadlock*, cited work.

[70] Ibid.

Also on the side of China, there are factors that limit negotiations. Rather than making a comprehensive, legally-binding bilateral agreement on China's favourable current structure of the EU-China relationship. They achieved a high degree of institutionalization, among others, in the form of multi-level dialogues, various bilateral agreements and policy documents. The cost of creating a new institutional framework would thus be for China higher than the cost of no-agreement. Due to the sensitivity of many above mentioned issues, China is trying to separate trade and economic issues from the political agreement. It would therefore create two agreements, the PCA and an updated TECA[71] where the nature of TECA would be incorporated into the chapters of PCA. This approach is obviously not in line with the European one, but even if China would managed to convince the EU to negotiate a separate economic and political agreement, there are major obstacles related to agreements in both areas. China is mainly engaged in the "EU's anti-dumping measures, anti-subsidy, safeguards, technical barrier to trade and other restrictions." In particular, China seeks the EU to grant Market Economy Status (MES) and the removal of the arms embargo. "The EU refuses to the grant MES to China due to political considerations and the large trade deficit with China." The EU does not consider either a removal of the arms embargo, which relates to the question of human rights. In the political area, China issues are sensitive especially those associated with the "sovereignty issues" regarding Taiwan and Tibet.[72]

The main obstacle of PCA negotiations are therefore different priorities and preferences relating to the form and content of the agreement. Negotiations itself create obstacles due to complexity of the nature of the agreement, which includes many actors and a broad range of mixed issues. Moreover, some external factors also contributed to frozen negotiations in 2009. Those were: the Tibet disturbance in the spring of 2008, Europe's call of boycott of the 2008 Olympic Games in Beijing and President Sarkozy's meeting with Dalai Lama in, 2008.

Nevertheless, some progress has been made, when at the 16th EU-China Summit held on 21 November 2013 agreed on "the EU and China, EU-China 2020 Strategic Agenda", which is currently the key document underpinning the development of mutual relations. After introduction of this document mutual cooperation became more institutionalized and developed, more and more areas of interest were added. The Strategic Agenda provides a list of key initiatives

[71] In this case, the negotiations included the one hand, trade and economic relations between the EU and China (EU DG Trade – Chinese Ministry of Commerce) as well as political relations, essential for Strategic Partnership (EU DG Relex – Chinese Ministry of Foreign Affairs). See: Men, Jing. *EU-China Relations: From Engagement to Marriage ?*, cited work, p. 18 to 19

[72] Shaohua, Yan. *The EU-China Partnership and Cooperation Agreement Negotiation Deadlock*, cited work.

which should be achieved. It covers every possible aspect of cooperation: human rights, trade, oceans security, agriculture, space and aerospace and many other areas. Strategic Partnership gradually included foreign affairs, security issues and international challenges such as climate change and global economic governance. Generally speaking, the basic elements of a Comprehensive Strategic Partnership are both shared interests in global and regional affairs, partly common and diversified approaches in the context of mutual ties.

In 2003, the launch of negotiations of a comprehensive EU-China Investment Agreement was announced. Actual negotiations on a bilateral Investment Agreement were initiated in January 2014. The agreement will provide for progressive liberalization of investment and the elimination of restrictions for investors to each other's market. It will provide a simpler and more secure legal framework to investors of both sides by securing predictable long-term access to EU and Chinese markets respectively and providing for strong protection to investors and their investments. This agreement is supposed to replace 26 existing bilateral Investment Treaties between the 27 EU Member States and China. [73,74]

The 17th EU-China Summit took place on June 29, 2015, raised bilateral relations between the EU and China to a new level and sent a signal for closer political cooperation, leading to a coordinated strategic approach to solve global challenges and threats. Both sides agreed on priorities for strengthening bilateral cooperation and deepening of the global dimension of their Strategic Partnership. Coordination between the EU and China should be strengthened especially in areas such as the G20, security and defence, the fight against terrorism, illegal migration, transnational crime, nuclear non-proliferation, global and regional security, cyber security, weapons of mass destruction, energy security, global regulation of the financial sector and markets, climate change and urban development, development and assistance programs and sustainable development.

In the case of development programs and assistance programs and sustainable development, at the very beginning of the season it was clear that China has shifted from the status of a traditional recipient of the Official Development Assistance (ODA) to a strategic partner, i.e. a partner, who itself becomes an important source of ODA for other developing countries, which requires coordination and cooperation on a wide range of policy issues. China therefore could be characterized by certain contradictions in its nature. On the one hand, in terms of traditional indicators China was still a developing country, on the other hand,

[73] Overview of FTA and other trade negotiations. Updated October 2016 – For latest updates check highlighted countries or regions. . [2016-10-20] Available at: http://trade.ec.europa.eu/doclib/docs/2006/december/ tradoc_118238.pdf.

[74] 13th round of negotiations is scheduled for December 2016.

it has become a major player worldwide in term of its commercial weight, FDI flows, consumption of natural resources and contribution to global warming.[75]

Chinese President Xi Jinping have started to fulfil the "Chinese Dream" that is presented as a concept and a vision of striving for national revival and building a prosperous society in a wide range of economic, social, cultural and political areas and that China would become a fully developed country by the year 2049. The EU supports the call to shift the Chinese economy on a truly sustainable path of development. Moreover, China's integration into international economic organizations such as the International Monetary Fund could contribute positively to achieving sustainable and balanced economy on both the Chinese and global level, and help reform these organizations. This approach takes into account the launch of the "One Belt, One Road", focused on the construction of large-scale interconnection of energy and communication networks across the central, western and southern Asia to Europe. Considering the geostrategic importance of this initiative, the implementation should be multilateral. The EU and China should use all opportunities provided by close links between the two partners, including cooperation in the field of infrastructure investments in the countries, through which leads the "New Silk Road" and "New Maritime Silk Road".

4. Conclusion: The shift in the depth, breadth and quality of EU-China relations

Due to the large internal changes of the European Community/European Union and China, as well as by developments in external conditions, especially increasing globalization, global competition and changed global situation in the world, change of its nature, forms and tools of relations between the two actors. Until 1974, these relations develop at international level and should mainly take the form of business cooperation based on bilateral agreements between Member States of the EC and China. Business cooperation was complemented by humanitarian assistance. The first major milestone was the establishment of diplomatic relations between the EC and China, which was, among other things, the result of the transfer of competencies in the area of trade policy on Institutions of the EC. Establishment of diplomatic relations and the reforms in China, which led to further economic development in the country, as a result of the nature of the first stage of mutual EC-China relations.

[75] *Country Strategy Paper China 2007–2013*. [2016-10-20] Available at: https://ec.europa.eu/europeaid/country-strategy-paper-china-2007-2013_en, p. 2 a 3.

In the years 1975–1994, basic institutional, political and legal foundation for the development of mutual relations EC and China were created. Besides of establishing of representative offices, an inter-parliamentary dimension of EC-China cooperation is also formed. Adoption of (still in force) Agreement on Trade and Economic Cooperation and the formation of the Trade and Economic Joint Committee created conditions for the approval of other instruments, which led to an increase in trade, economic and other cooperation.

With increasing trade and investment also increased imbalance in bilateral relations, which reflected the structure and practices that were not in compliance with free and fair trade rules. It was not just the classic intimidation by high tariffs and import license requirements. Exporters from third countries also had to cope with an uncertainty about the existing rules of the market, which often was not published, and it was therefore essential for the implementation of ad hoc operations. Secret business plans and import substitution policies of sectoral ministries, as well as control the amount of foreign currency flowing into the economy, lacked transparency and did not provide certainty.[76] The acceptance of TECA conditioned development of financial and technical assistance. Development projects focused especially on specialized guidance and training, development of rural provinces and strengthening of institutions and policy development. The strengthening of institutions at the central as well as local level, was also trying to develop the economic cooperation. But its centre of gravity lay in creating favourable conditions for the business sector and promoting cooperation between entrepreneurs from Europe and China. It also included cooperation in various sectors, especially industries such as telecommunications and energy. Scientific and technical cooperation within a few years has moved from joint seminars and training to joint research activities.

All these areas of cooperation were accompanied by the creation of the first working groups, expert and sectoral dialogues and meetings, as well as public institutions and programs, organizing joint short- and long-term activities. EC cooperation activities which complemented the activities of Member States had gradually accelerated and diversified. They included both traditional methods, such as trade promotion, technical assistance in agriculture and training of entrepreneurs, as well as new activities relating to information technology, energy, science and technology, business management and biotechnology. The way to overcome the crisis, which had been brought by the Chinese event in 1989 into good EC/EU-China relations, was the first formalized Political dialogue at ministerial level in 1994.

[76] *A Long Term Policy for China-Europe Relations*, cited work.

In the years 1995–2002 the individual approach of the EU to China improved – under the influence of great economic rise of Asia and its political emancipation in the world – a multilateral approach to the Asian continent in the framework of ASEM. The emphasis on developing long-term relationships has led the EU to adopt four strategic documents. Already, due to the first, bilateral EU-China relations were given a three-dimensional character – besides trade and economic relations, Political dialogue (including Dialogue on human rights) began to develop. Shift into new areas of cooperation and further development of political and economic dialogues, as well as the emergence of new cooperation instruments, in particular sectoral agreements, moving synergies between the two parties from the initial more or less diversified relations to a Comprehensive Partnership.

The evaluation of systemic and substantive relations, the European Commission approached from a position of fulfilling the five main objectives of the Comprehensive Partnership, namely: to further integrate China into the international community; support China's transition, which should lead to an open society based on the rule of law and respect for human rights; further integration of China into the world economy; strengthening China's development assistance and raise awareness of the EU in China. The first objective should be achieved in particular by strengthening Political dialogue, in which the greatest importance was the establishment of regular annual EU-China Summits, due to which, China has become an active part of ASEM, as part of a multilateral security dialogue on Asia regional issues and multilateral dialogue about the global issues. In the second objective, although the transformation in China to open society is very advanced, EU remains committed to using all the instruments to support especially the human rights of local inhabitants. This tool includes especially financially supported Dialogue on human rights newly introduced by the EU that encouraged China into signing of several international agreements. Furthermore, this includes the implementation of the EU-China Legal and Juridical Programme and support civil society development. The main instrument for the integration of China into the world economy, thus fulfilling the third objective, had become a support for China's entry into WTO, strengthening mutual bilateral trade agenda and the promotion of investments, development of bilateral sectoral agreements, financial liberalization and regulation and support for the euro. The purpose of these instruments is to strengthen the rule-based multilateral trading system, removing barriers to access businesses on the markets of the other parties to create the conditions in sectors such as energy, environment or services, including maritime and air transport, financial and banking services, insurance and securities. During the implementation of the fourth objective of the EU helps China to implement a series of reform projects that aim to integrate the

concept of sustainable economic growth and social development in the transformation process of the country. According to present priorities financial resources are allocated to these projects. Those in 2001 flowed from the relevant budget lines. Since 2002 they are provided on the basis of the indicative programming which makes the EU the largest donor in China. To achieve the fifth goal, i.e. to raise awareness of the EU in China not only contribute to the Political dialogue, but also information policies and strategic plans of both parties.

Stage 2003–2013 was determined by the fact that China has moved from the traditional developing countries to transforming economy and the consolidation of European integration, associated with the preparation of the EU's eastern enlargement in 2004. This consolidation allowed involving China in a still wider circle of mutual relations. But since the opening of the Chinese economy and its access to the international environment was accompanied not only with the "agreements" but also "disagreements" and the political system in China remains different in comparison with countries which the EU is developing partnerships with, the both sides decided to proceed the mutual relations in terms of their long-term plans and develop a Comprehensive Strategic Partnership. This basically meant continue to develop partnerships on an equal, mutually beneficial and mutually respecting the conditions, further extending dimensions, area and level of mutual relations and, moreover, that new long-term and stable relationships, providing and supporting sustainable development, peace and stability, and leading parties to share responsibility in promoting global governance.

Crucial role in defining priorities, areas and instruments of Strategic Partnership were Policy Papers, adopted by both the EU and China, as well as the conclusion of the 6th EU-China Summit, which suggested direction and new instruments for the future development of EU-China relations. It was a new sectoral dialogues (e.g. on the Industrial Policy; Intellectual Property Rights, Innovation, International Development; Sustainable Tourism etc.). Furthermore, a new sectoral agreements (e.g. on Tourism, Custom Cooperation; Peaceful Use of Nuclear Energy, Regional Cooperation, Africa's Peace, Stability and Sustainable Development), joint declarations, memoranda and round tables (e.g. on Non-proliferation and Arm Control; Cooperation in Space Exploitation, Labour, Employment and Social Affairs, Food Safety, Chinese Change Civil Society; Innovation cooperation dialogue) and partial partnerships (e.g. on Sustainable Urbanization). a number of new areas of cooperation is highlighted. a year 2009 brought consolidation of previous agreements, since then cooperation has been gradually transforming to three pillars structure. The first pillar is High level economic and trade dialogue, the second one (High level strategic dialogue) enhanced political dialogue on bilateral and global issues. Last pillar emerged in 2012 with the official name EU-China High level people-to-people dialogue.

One of the most important instruments should be the new Partnership and Cooperation Agreement, which should replace TECA, which its content has long been lagging behind the real state of cooperation. PCA, however, so far has not been negotiated between the EU and China because of their varying preferences and priorities regarding the form and content. Adopted from EU-China 2020 Strategic Agenda for Cooperation, as well as negotiations on a comprehensive EU-China Investment Agreement shows clearly in which strategic areas they should continue to deepen mutual cooperation. These include: liberalizing the business environment (especially in China), political, strategic and security issues, including the fight against terrorism, issues of sustainable development and climate change, strengthening the role of multilateral financial institutions and global governance.

From this summary, it is clear that the development of EU-China relations for more than 40 years has undergone significant qualitative changes which resulted essentially in a shift from the one-dimensional (trade) to the all-dimensional (trade, economic, political and other) cooperation, from the more-limited (covering a few areas) to the wide-ranging (covering an extensive range of areas) cooperation and from the one-level (interstate) to the multi-tiered (local, interstate, supranational) cooperation. Comprehensive Strategic Partnership, as stated H. Zhou, was identified as the beginning of a new stage of acceleration of all-dimensional, wide-ranging and multi-tiered relationship between the EU and China.[77]

[77] Zhou, Hong (ed.). *China-EU Relations: Reassessing the China-EU Comprehensive Strategic Partnership*, cited work.

The EU Founding Values – Constitutional Character and Legal Implications

Werner Schroeder*

Summary: Recent developments in certain Member States of the European Union have revealed that the values of the Union mentioned in Article 2 TEU are jeopardized. This holds true with regard to the respect for rule of law, the principle of democracy and human rights in particular. These tendencies have triggered a discussion as to the meaning and the implications of the values enshrined in Article 2 TEU. The author pursues the thesis that these values can be described as constitutional principles underscoring that the Union is a public authority which relies on a constitution with substantive foundations. Moreover, these values are not of a purely meta-legal character but also permeate the whole legal order of the Union. As binding legal norms they inform the institutional system of the Union and shape the legal relationship between the Union and the Member States on the one hand and between the Member States on the other hand. The values may also serve as a yardstick for judicial review by the ECJ.

Keywords: constitutional order, European Union, Article 2 TEU, values, rule of law, democracy, human rights, constitutional principles, legal principles, homogeneity, judicial review

1. Theoretical basis

1.1. The constitutional order of the Union

The Union is not an intergovernmental organisation like others, but has a particular "basic constitutional charter" as the Court of Justice of the European Union (ECJ) put it.[1]

The conceptual basis of acknowledging the foundational treaties as the European constitution can be found in the early 60ies when Walter Hallstein designated the (then) European Communities as a "Rechtsgemeinschaft" (community

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[1] Case C-294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23.

based on law).[2] By using this term he sought to emphazise that the Community did not dispose of coercive instruments but was based solely on the Member States' respect for the law of the Community in particular and for the rule of law in general.[3] More than twenty years later Hallstein's idea was taken up by the ECJ in an attempt to constitutionalize the European legal order. As the Court of Justice underscored in the Case *Les Verts* v EP, "the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".[4] This choice of terminology implies that the legal order of the Union is founded on certain constitutional principles and structures wich are comparable to domestic constitutional law.[5]

Yet, this "constitution", originally, used to represent a purely economic order as becomes manifest in the *EEA I* Opinion of 1991. Accordingly, the EEC Treaty "aims to achieve economic integration leading to the establishment of an international market and economic and monetary union".[6]

It was only in the 2004 Treaty establishing a Constitution for Europe that the treaty foundations of the Union were systematically approximated to national constitutions, notably by putting in the Treaty a series of foundational provisions concerning the values of the Union, its competences, its institutions, its legal acts, and its procedures. This process was supplemented by relying on explicit constitutional semantics and symbolism such as the flag or the anthem.

As is commonly known, this Constitutional Treaty never entered into force.[7] In terms of content, the Lisbon Treaty embodies much of the Constitutional Treaty, but avoided the constitutional symbolics in order not to endanger the ratification process in the Member States once again.[8] There is consensus that – from a functional perspective – the Union is a public authority[9] that can directly

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2 See W Hallstein, in Th Oppermann (eds.), Walter Hallstein – Europäische Reden, Stuttgart 1979, p. 109; E Fuß, Die Europäischen Gemeinschaften und der Rechtsstaatsgedanke, 1968, p. 16 f.

3 W Hallstein, Der unvollendete Bundesstaat, Düsseldorf 1969, p. 33.

4 Case C-294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23.

5 Already developed by E Fuß, Die Europäischen Gemeinschaften und der Rechtsstaatsgedanke, 1968, p. 16 f; W Hallstein, Der unvollendete Bundesstaat, p. 41 und 48 f; J P Jacqué, Cours général de droit communautaire, Collected Courses of the Academy of European Law 1990-I/1, 237, 277 et seq., G C Rodríguez Iglesias, Zur „Verfassung" der Europäischen Gemeinschaft, EuGRZ 1996, 125, 131.

6 Opinion Avis 1/91 *Avis 1 v 91* [1991] ECR I-6079, para 17.

7 J-C Piris, The Lisbon Treaty- a Legal and Political Analysis, 2010, p. 25.

8 P Bergman, From Laeken to Lisbon: The Origins and Negotiation, in: a Biondi/P Eeckhout/S Ripley (eds.), EU Law after Lisbon, 2012, p. 25, 26.

9 Opinion Avis 1/78 *Avis 1 v 78* [1979] ECR 2871, para 7.

create legal obligations for both the Member States and the Union citizens.[10] It thus exercises public authority that is in need of a constitution so that this authority is controlled. In the end, it is not of particular importance whether this fundamental order is – in a formal perspective – qualified as an international treaty or as a constitution *sui generis*.[11]

1.2. Values according to Article 2 TEU as constitutional basis

In addition to formal provisions on institutions, competences and legislative and judicial procedures, every constitution has its material or substantive foundations.[12] These can be found, for instance, in the qualification of Austria as a "democratic republic" in Article 1 of the Austrian Federal Constitutional Law[13] or in Article 1 of the German Fundamental Law where human dignity and the submission of all statal powers to fundamental rights is defined as the basis and point of departure of the constitution.[14]

1.2.1. Implicit values in the economic constitution of the EEC

In the EU, para. 4 of the preamble of the TEU and Article 2 first sentence of the TEU have precisely this function. In these provisions, the EU and its Member States explicitly profess to certain values, namely human dignity, freedom, democracy, equality, the rule of law and respect for fundamental rights, including the rights of persons belonging to minorities. I shall call these values "constitutional values" in the following.[15]

From the beginning of the 1980s, i.e. even before the creation of this provision, the ECJ has developed specific substantive constitutional principles such as, for instance, unwritten fundamental rights that are binding upon the Union institutions as well as the Member States. In addition, even before the express inclusion in the Treaties, the Court of Justice has addressed the principles of

[10] Case C-6/64 *Costa v E.N.E.L.* [1964] ECR 585, pp 593; Case C-26/*62 Van Gend en Loos v Administratie der Belastingen* [1963] ECR 1, p 12.

[11] F Snyder, General Course on the Constitutional Law, in Academy of European Law (ed), Collected Courses of the Academy of European Law (1995) Vol VI, 41, 53 et seq.; W Schroeder, Das Gemeinschaftsrechtssystem, 2002, p. 341 et seq.

[12] A von Bogdandy, Founding Principles, in: a von Bogdandy/J Bast (eds.), Principles of European Constitutional Law, 2nd. Ed. 2009, p. 11, 16.

[13] M Stelzer, An introduction to Austrian constitutional law, 3rd ed., 2014.

[14] See BVerfGE 7, 198, 205 et seq. – Lüth: the fundamental rights unter the German Basic law are the manifestion of a set of values underpinning the German legal system; cf. U Di Fabio, Grundrechte als Werteordnung, JZ 2004, 1, 5 et seq.

[15] A von Bogdandy, Founding Principles, in : a von Bogdandy/J Bast (eds.), Principles of European Constitutional Law, 2nd. ed. 2009, p. 11, 13 and 22.

rule of law in *Les Verts* in 1986 and of democracy in *Roquette Frères* in 1980 as foundation of the Union.[16]

On the one hand, this was remarkable, given the fact that the EEC was an economic, not a political community. On the other hand, already the Schuman Plan had made clear that European integration was never a purely economic enterprise, but was supposed to bring about political integration by virtue of functionalist dynamics. [17]

This goal was also based on common values of the Member States which are at least alluded to in the preambles of the Treaties. Without a minimum amount of common values of the Member States, such as peace or political freedom, the project of European integration would not have been possible at all.[18]

It appeared consistent, therefore, that the Member States sought to provide these values with an explicit treaty status as the political orientation of European integration became more visible in the early nineties.

Article F para. 1 of the 1992 Treaty of Maastricht laid down that the systems of government of the Member States must be "founded on the principles of democracy".

Subsequently, the principles adopted by the Copenhague European Council of 1993 defined as criteria for accession to the Union the demand for "stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities".[19]

This was emphasised in the 1997 Amsterdam Treaty which in Article 6 para. 1 TEU referred to the "principles" of liberty, democracy, respect for human rights and the rule of law, on which the Union is founded and which are common to the Member States.

In Article 2 of the Treaty establishing a Constitution for Europe, these principles turned into "values" – but with putting human dignity in front! This wording was maintained in Article 2 TEU as enshrined in the Lisbon Treaty of 2007.[20]

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[16] Case C-294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23 ; Case C-138/79 *Roquette v Council* [1980] ECR 3333, para 33.

[17] J Monnet, Mémoires, Paris 1976, p. 353; E Haas, The Uniting of Europe, Stanford 1958, p. 16 et seq.; H P Ipsen, Europäisches Gemeinschaftsrecht, 1972, p. 176 et seq.

[18] Ch Calliess, in: Ch Calliess/M Ruffert (eds.), EUV/AEUV, Commentary, 4th ed. 2011, Art 2 EUV para. 1.

[19] BullEU 6-1993, para. I.13.

[20] Cf. the description of the genesis of Art 2 TEU at F Schorkopf in E Grabitz/M Hilf/N Nettesheim (eds.), Das Recht der Europäischen Union, commentary, looseleaf, Art 2 EUV para. 1 et seq.

1.2.2. Explicit values as indication of the constitutionalisation of the Union

If one refers to the "constitutional nature" of such values, this is to be understood in a descriptive sense inasmuch as the values in Article 2 TEU represent the traditional structural features of the liberal constitutional state.[21] Against this background, they may also be termed constitutional values.

This characterisation testifies to the fact that Union law cannot be understood any more (only) as an internal market law. It is conceived as European constitutional law[22] and the analysis of the values of the Union in Article 2 TEU forms part of a constitutional discourse in Europe.[23] The entrenchment of the constitutional values in the TEU thus symbolises a paradigm shift in terms of legitimation of the Union. The original understanding of EU law as an economic planning regime combined with an overall general political concept which was still present in the EEC Treaty as well as the EC Treaty has obviously lost its power of persuasion from the point of view of the Member States. The constitutional values of Article 2 TEU have therefore replaced the former objectives in Article 2 EEC Treaty, which had a specific focus on economic policy. This change also becomes manifest in the fact that the new provision on the aims of the Union (Article 3 para. 1 TEU) expressly refers to the values of the Union.

The cited provisions indicate the European Union has evolved from an internal market organisation to a "community of values" whose legal norms shape the society and politics in the Member States.

1.2.3. Constitutional basis and homogeneity

The constitutionalisation of a set of legal rules through constitutional values is typically linked to the idea that these values do not only permeate the Constitution itself, but the legal order as a whole. This idea has its basis in *Hegel's* legal philosophy and has particularly become manifest in the "Wertordnungsdenken" of German constitutional law.[24] Thus, the German Constitutional Court has ruled

[21] F Schorkopf in E Grabitz/M Hilf/N Nettesheim, para. 9; a von Bogdandy, Founding Principles, in a von Bogdandy/J Bast (eds.), Principles of European Constitutional Law, 2nd ed. 2009, p. 11, 22.

[22] See E Stein, Lawyers, Judges and the Making of a Transnational Constitution, AJIL 75 (1981) 1; J H H Weiler, The Community System, YEL 1 (1981) 267, 274; T Hartley, Federalism, Courts and Legal Systems: The emerging constitution of the European Communities, AJCL 34 (1986) 229, 231 et seq.; F Mancini, The making of a constitution for Europe, CMLR 26 (1989) 595 et seq.; K Lenaerts, Constitutionalism and the many faces of federalism, AJCL 38 (1990) 205 et seq.; J P Jacqué,Collected Courses of the Academy of European Law 1990-I/1, 265.

[23] Cf. St Mangiameli, in H-J Blanke/St Mangiameli (eds.), The Treaty on European Union (TEU), 2013, Art. 2 TEU para. 11.

[24] A von Bogdandy, Founding Principles, in: a von Bogdandy/J Bast (eds.), Principles of European Constitutional Law, 2nd. ed. 2009, p. 11, 16.

since the 1950s that the fundamental rights enshrined in the Basic Law penetrate the whole legal order.[25]

In my opinion, the characterisation of the values common to the Union and its Member States (as stated in Article 2 TEU) as "homogeneity principles" therefore does not suffice. To be sure, they shall describe, and guarantee, the general homogeneity of the constitutional system, both horizontally among the Member States and vertically in their relationship to the EU.[26] However, they have additional functions. But their constitutional "radiation intensity" reaches far beyond their original scope of application – the control of the accession to and of the behaviour of Member States within the Union according to Articles 7 and 49 TEU.[27] The values have a legitimatory effect for the Union and its identity. Furthermore, they aim at ensuring the functioning of the Union as a whole, since, pursuant to Article 13 para. 1 TEU, they also inform the institutional system of the Union.

1.3. Normative character of the values

The constitutional nature of the values is, without doubt, highly relevant for the "constitutionalisation" of EU legal norms I have just described. From a doctrinal point of view, however, one may challenge the designation of certain provisions as values. The doctrinal analysis must respond to specific questions: How are the constitutional values interpreted and applied? Are they subject to legal review?

1.3.1. Legal norms

First, the question arises whether the values are legal norms at all or only political declarations of intent. The easy way out would be to simply state that the TEU, where they are enshrined is a legal text and that they thus have normative character. In this context, one can also refer to the Court's jurisprudence on the normative character of the Treaty objectives formerly enshrined in Article 2 EC Treaty. The Court of Justice has left no doubt that the aims of the Community in Article 2 EC Treaty and the Preamble to the EC Treaty were certainly couched

[25] BVerfGE 7, 198, 205 et seq. – Lüth, see U Di Fabio, Grundrechte als Werteordnung, JZ 2004, 1, 5 et seq.

[26] F Schorkopf in Grabitz/Hilf/Nettesheim (eds.), Art 2 EUV para. 9 et seq.; St Mangiameli, in: H-J Blanke/St Mangiameli (eds.), The Treaty on European Union (TEU), Art. 2 Rn. 42 f; a von Bogdandy/ M Kottmann/C Antpöhler/J Dickschen/S Hentrel/M Smrkolj, Reverse Solange – Protecting the Essence of Fundamental Rights against Member States, CMLRev 49 (2012) 489, 509 et seq.

[27] Ch Ohler in Grabitz/Hilf/Nettesheim, Art 49 EUV para. 15 f; M Cremona, EU enlargement: solidarity and conditionality, ELRev 30 (2005) 3; see for the relationship between Art. 49 und Art. 7 TEU M Rötting, Das verfassungsrechtliche Beitrittsverfahren zur Europäischen Union, 2009, p. 232 et seq.

in very general terms, but that they, at the same time, did not only contain a political but also a normative programme.[28]

In addition, Article 2 TEU provides the entrenchment in positive law of European principles which were developed by the ECJ since the 1980s as unwritten provisions. This holds true for the fundamental rights, the rule of law or the democracy principle as well as the equality principle.[29] Against this background, Article 2 TEU appears to be rather of declaratory nature. The inclusion of the values in the Treaty works above all, in the light of the requirements of the principle of legal certainty, as a point of reference for the sanction procedure against Member States according to Article 7 TEU.

As the TEU departs from the assumption that these values are "common" to the Member States and that the Union is therefore "founded" on these values (Article 2 TEU), both the Member States and the Union are legally bound by these values.

1.3.2. Values and principles

Since the Constitutional Treaty and the Lisbon Treaty, the concepts referred to in Article 2 TEU are "values". Before that, in the Amsterdam and Nice Treaty the identical reference was to "principles". Most authors are of the opinion that this does not entail any change from the point of view of legal doctrine. They continue to use the concept of principles since this is generally accepted in legal hermeneutics.[30] To that effect, they rely on the jurisprudence of the ECJ which, in the context of the rule of law and fundamental rights, continues to refer to "constitutional principles"[31] and "principles"[32].

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[28] Case C-126/86 *Giménez Zaera v Instituto Nacional de la Seguridad Social and Tesorería General de la Seguridad Social* [1987] ECR 3679, para 14; Case C-339/89 *Alsthom v Sulzer* [1991] ECR I-107, para 8f ; H P Ipsen, Europäisches Gemeinschaftsrecht, 1972, p. 558 et seq.; K Lenaerts, Le juge et la constitution aux États-Unis et dans l'ordre juridique européen, 1988, Brussels, p. 258; J P Jacqué, Collected Courses of the Academy of European Law 1990-I/1, 273 et seq.

[29] Case C-29/69 *Stauder v Stadt Ulm* [1969] ECR 419, para 7: fundamental right; Case C-138/79 Roquette v Council [1980] ECR 3333, para 33: principle of democracy; Case C-294/83 Les Verts v Parliament [1986] ECR 1339, para 23 ff: rule of law; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR 9609, para 34: human dignity.

[30] A von Bogdandy, Founding Principles, in: a von Bogdandy/J Bast, Principles of European Constitutional Law, 2nd. ed. 2009, 11, 22 f; Ch Calliess, in: Ch Challiess/M Ruffert, Art. 2 EUV para. 8 mwN; F Schorkopf, in E Grabitz/Hilf/M Nettesheim, Art 2 EUV para. 21.

[31] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 285; Case C-355/04 *Segi and Others v Council* [2007] ECR I-1657, para 51; Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633, para 45.

[32] Opinion Avis 2/13 *Avis au titre de l'article 218, paragraphe 11, TFUE* ECLI:EU:C:2014:2454, para 167.

Yet, it is problematic from the legal point of view to conceive of legal norms as values as the latter is a meta-juridical and ethically charged concept.[33] Values shall guide the individual – beyond legal norms – to behave in ethically "correct" manner in situations of decision-making. From the legal point of view, value discourses have paternalistic features. In addition, value discourses are problematic inasmuch as the persons participating therein will generally not be able to agree on a fixed set and content of values.[34] That this is also a problem within the Union can be seen in the distinction between the values enshrined in Article 2 first and second sentence TEU which refer to the concept of the human kind represented by the enlightenment and to the European social model based on pluralism and solidarity.[35]

At a more fundamental level, the reliance on the concept of values in Article 2 TEU appears consistent also from the legal point of view. It could be very well that the concept of values as used in the TEU has a dual character:

1) On the one hand, values have an ethical-political dimension that exceed the legal sphere: The values in Article 2 TEU have also the function to articulate a common set of ideals[36] shared by the Member States or even the peoples of Europe and to provide the Union with a specific identity on the international plane[37]. This becomes well manifest when, according to Article 3 para. 1 and 5 TEU, the Union's aim is to promote peace and its values, and to promote them also in its relations with the wider world. The European space, i.e. the neighbourhood policy pursuant to Article 8 TEU, shall be founded on the values of the Union and the institutions shall aim to promote these values, as enshrined in Article 13 para. 1 TEU. The values also play an important role in the framework of the Common Foreign and Security Policy, as indicated in Article 21 para. 2, Article 32 and Article 42 para. 5 TEU.

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33 N Luhmann: Soziale Systeme – Grundriß einer allgemeinen Theorie, Frankfurt a. Main 1984, p. 433.

34 On the relativity of values cf. K R Popper, The open society and its enemies, part 1: The spell of plato, London 1945.

35 St Mangiameli, in: H-J Blanke/St Mangiameli (eds.), The Treaty on European Union (TEU), Art. 2 para. 7; see regarding the dispute on the inclusion of references to christianity and god in the preamble of the EU Constitution, F Schorkopf, in Grabitz/Hilf/Nettesheim, Art 2 EUV para. 14. See also W Schroeder, The European Union and the Rule of Law, in W Schroeder (ed.), Strengthening the Rule of Law in Europe, Oxford 2016, p. 3, 12

36 U Di Fabio, Grundrechte als Werteordnung, JZ 2004,1, 3.

37 Commission, Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based (Communication) COM (2003) 606 final, p 3; Ch Calliess, Europa als Wertegemeinschaft, JZ 2004, 1034; a von Bogdandy, Founding Principles, in: a von Bogdandy/J Bast, Principles of European Constitutional Law, 2nd. ed. 2009, p. 11, 19; F Schorkopf, in Grabitz/Hilf/Nettesheim, Art 2 EUV para. 14.

2) In addition to that, as far as values are laid down in legal texts they often refer to doctrinal principles which shall instruct the decision-makers and which can be operationalised in the legal order by way of further adoption of specific provisions by the legislative, executive and judicial powers. Against this background, one can well understand the core of values in a legal perspective as principles. These are legal provisions in which values, interests and goods are identified as the elements legally relevant for a balancing judgment.

There exist different conceptions of principles.[38] In this context, they are understood as written or unwritten legal norms which do not take a stand on specific rights and duties, but which are of general nature and need to be further specified by the legislative, executive and judicial powers. They eventually serve the goal of structuring the Constitution and the rest of the legal order. For instance, the ECJ has derived the principle of legal certainty from the principle of the rule of law.[39] In such cases, principles can even turn into an independent standard of legal review.

This double nature of the values also becomes manifest in the distinction between the values in the meaning of Article 2 first sentence TEU and their societal foundations in the Member States pursuant to Article 2 para. 2 TEU. In this latter case, further values are enumerated as elements of the European model of society which are obviously of an extra-legal character and are non-binding. This also follows from the reference of the sanction procedure in Article 7 TEU which only includes the "values" in the meaning of Article 2 para. 1 TEU.

The double – ethical-political and normative-legal– understanding of the values has also left terminological traces in the case-law of the ECJ. In the *Omega Spielhallen* case, the Court of Justice refers to human dignity, on the one hand, as a "constitutional principle", but speaks in the same context of "fundamental values prevailing in the public opinion" which are laid down in the national constitutions and eventually qualifies human dignity as a "general principle of law" of the Union legal order.[40]

[38] J Bengoetxea, The Legal Reasoning of the European Court of Justice, 1993, p. 183 et seq; W Schroeder, Das Gemeinschaftsrechtssystem, 2002, p. 262 et seq.

[39] Case C-234/04, *Rosmarie Kapferer v Schlank & Schick GmbH* [2006] I-2585, para 20 ff.

[40] *Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para 23, 32 and 34.

2. Legal consequences

2.1. Regulatory function of the values

As the TEU departs from the idea that the Union is "founded" on the values (Article 2 first sentence TEU), it is legally bound by these values. This is emphasised in Article 13 TEU which defines the values of the Union as a legal point of reference for its "institutional framework".

Article 2 second sentence TEU underscores that "these" values are "common" to the Member States. Due to the systematic link of this sentence with the first one it is obvious that the behaviour of the Member States is to be assessed in the light of the values. This also becomes obvious from the references to the values in the sanction procedure according to Article 7 TEU and in the accession procedure according to Article 49 TEU. These references presuppose that the Members States are legally bound by the values.

This brings up the interesting question whether the Member States – just as with regard to the fundamental rights according to the ECJ's jurisprudence on Article 51 paragraph 1 FRC – are only bound by the values "in the scope of application of the law of the Union".[41] However, Article 2 TEU is not drafted in that manner: It constitutes a general duty to maintain the Member States' legal order in conformity with the values. This is also presupposed by the sanction procedure of Article 7 TEU.[42] It is hardly imaginable that Member States' behaviour that is hostile to the rule of law or democracy could be subject to a distinction as to whether it occurs inside or outside the scope of application of EU law.[43]

2.2. Legal content of the values

It becomes difficult when one seeks to define the content of the constitutional values.[44] The chances are comparably good in regard to the fundamental rights

[41] Case C-617/10 Åklagaren v Hans Åkerberg Fransson, EU:C:2013:105 para 22; Case C-198/*13 Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others* EU:C:2014:2055, para 33ff; C Latzel, Die Anwendungsbereiche des Unionsrechts, EuZW 2015, 658.

[42] Cf. a von Bogdandy/ M Kottmann/C Antpöhler/J Dickschen/S Hentrel/M Smrkolj, Reverse Solange – Protecting the essence of fundamental rights against memberStates, CMLRev 49 (2012), 489, 509; F Schorkopf in E Grabitz/M Hilf/N Nettesheim, Art 2 EUV Rn 18.

[43] Commission, Communication on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based, COM(2003) 606 final para 1.1; M Ruffert, in C Calliess/M Ruffert (eds.), EUV/AEUV, Commentary, 4th ed., 2011, Art 7 EUV para 4.

[44] Cf. Commission, vgl. COM(2014) 158 final, 4. See W Schroeder, The European Union and the Rule of Law, in W Schroeder (ed.), Strengthening the Rule of Law in Europe, Oxford 2016, p. 3, 10 and 19.

or the principle of equality, as these principles are laid down in binding manner in the Fundamental Rights Charter.

However, already when it comes to human dignity such a consensus cannot be identified any more. As the ECJ has stated in regard to the prohibition of killing games and the freedom to provide services in the case *Omega Spielhallen* in 2004 it is compatible with EU law that "the principle of respect for human dignity has a particular status" in certain Member States reflecting the fact that there exists no "common conception" of human dignity among the Member States.[45]

Also regarding the other elements, i.e. democracy and rule of law, even though the preamble of the ECHR speaks of a "common heritage of political traditions, ideals, freedom and the rule of law" in Europe and even though the preamble of the TEU regards the values enshrined in Art 2 TEU as values of "universal" character, a common conception among the Member States cannot be figured out[46], at least with respect to the details so that one cannot actually speak of homogeneity in the proper sense. Already if one compares Austria and Germany it is hard to make clear-cut statements on common democratic and rule of law-constitutional arrangements.

This is understandable bearing in mind that it is one of the main tasks of a constitution to express and to preserve the national political identity of the state in question.[47] For this reason, the Treaty accepts in Article 4 para. 2 TEU that the identity of the Member States which the Union has to respect is based on their constitutional structures, so that in spite of the common values there exist structural constitutional differences which become manifest in a peculiar understanding of the rule of law and democracy. By acknowledging this constitutional pluralism within the Union, Article 4 para. 2 TEU marks a major achievement in the relations between the Union and its Member States.[48]

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[45] *Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para 34 and 37.

[46] P Cruz Villalón, Vergleich, in: a von Bogdandy/P M Huber/P Cruz Villalón (eds.) Handbuch Ius Publicum Europeum, Band I: Grundlagen und Grundzüge staatlichen Verfassungsrechts, 2007, § 13 para. 60.

[47] R Barents, The Fallacy of European Multilevel Constitutionalism, in: M Avbelj/J Komárek (eds.), Constitutional Pluralism in the European Union and Beyond, 2012, p. 153, 161; regarding the identities of national cionstitutions cf. G Jacobsohn, The formation of constitutional identities, in T Ginsburg/R Dixon (eds.), Comparative Constitutional Law, p. 129.

[48] As regards constitutional pluralism in Union law see EU J Baquero Cruz, The Legacy of the Masstricht-Urteil and the Pluralist Movement, ELJ 14 (2008) 389 and the contributions in M Avbelj/J Komárek (eds.), Constitutional Pluralism in the European Union and Beyond, 2012; N MacCormick, The Maastricht-Urteil: Sovereignity Now, European Law Journal 1 (1995), 259; J H H Weiler, Prologue: global and pluralist constitutionalism – some doubts, in G de Búrca/J H H Weiler (eds.), The Worlds of European Constitutionalism, 2012, p. 8, 12 et seq opts for constitutional tolerance instead of constitutional pluralism.

Also vertically, i.e. in the relation between Union and its Member States, it seems difficult to affirm constitutional homogeneity. It was the ECJ itself that made clear in its *CILFIT* Judgment the Union law "uses terminology which is peculiar to it" and that legal concepts in Union law and in national law, even though similar concepts are used, "do not necessarily have the same meaning".[49] Given the different structure of the Union as a community of integration, there exist different requirements as regards democratic participation compared to the Member States, as was accepted by both the ECJ and national constitutional courts.[50] There also exist significant differences as regards the principle of rule of law. The ECJ has interpreted this principle mostly in a procedural manner.[51] It thus varies from the "Rechtsstaatsprinzip" in the German or Austrian tradition which has substantive connotations, too.[52]

In the final analysis, there will be only consensus on a narrow common ground of legally relevant values in the meaning of Article 2 TEU which are common to the Union and the Member States. In relation to the rule of law, this includes subprinciples such as the access to courts, effective legal protection, legal certainty, proportionality, independence of courts and separation of powers.[53] As regards democracy, the task already becomes more difficult. There will be no consensus in Europe beyond the demand of the Charter of Paris for political plurality, free, equal and secret ballot, and the right to establish political parties.[54] This means that Article 2 first sentence TEU enshrines a hard core of criteria which can be conceived of as ordre public of the Union. At the same time, the margins of this core are very much blurred.

It will therefore be the task of the jurisprudence and of the legislator to further concretise the constitutional values and principles.

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[49] Case C-283/81, *CILFIT v Ministero della Sanità* [1982] ECR 3415, para 19.

[50] Case C-138/79 *Roquette v Council* [1980] ECR 3333, cf. BVerfG, NJW 1995, 2216; BVerfGE 89, 115 (182) – Maastricht; 123, 267 (370) – Lisbon.

[51] Case C-294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23; Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 18.

[52] Cf. M Koetter, *Rechtsstaat* and *Rechtsstaatlichkeit* in Germany, in: M Koetter/G F Schupper (eds.), Understandings of the rule of law in various legal orders of the world, Rule of law working paper series No. 1, 2010; M Stelzer, An introduction to Austrian constitutional law, 3rd ed., 2014.

[53] COM(2014) 158 final, 4 and Annex 1. See W Schroeder, The European Union and the Rule of Law, in W Schroeder (ed.), Strengthening the Rule of Law in Europe, Oxford 2016, p. 3, 25.

[54] Cf. P Craig, Integration, democracy and legitimacy, in: P Craig/G de Búrca (eds.), The evolution of EU law, 2nd. ed. 2011, p. 13 et seq.; A. Peters, European Democracy after the 2003 Convention, 41 CMLRev (2004), p. 37.

2.3. Yardstick for judicial review by the CJEU

According to Article 19 paragraph 1, second sentence TEU, the Court of Justice shall ensure that in the interpretation and application of the Treaties the law is observed, and via that provision the ECJ has also access to the values of the Union, as enshrined in Article 2 TEU. Hence, as a matter of principle, the values are also justiciable even though Article 2 TEU constitutes a very open provision which leaves a significant scope of interpretation.

I have already indicated how the ECJ deals with norms consisting of objectives which are couched in very general terms. Their "programmatic character" does not at all entail that they do not have any legal effects.[55] Such general norms include a legal decision-making programme for the institutions of the Union and, via the principle of loyal cooperation, also for the Member States, inasmuch as they define limits which those have to respect when making use of the discretion assigned to them.[56]

In these norms, the "spirit of the Treaty" becomes a manifest on which the ECJ relies to identify the teleological substance of Union law.[57] In that sense, they are relevant for the interpretation of secondary law of the Union and domestic law in the light of primary law.[58] This means that in situations of collision when different provisions of Union law are in conflict with each other, the interpretation is to be preferred that is best compatible with the values. These values can also serve as a standard for legal review.

This jurisprudence regarding the treaty objectives does with even greater force apply for the application of the constitutional values and principles by the ECJ. Article 269 TFEU which expressly limits the competence of the Court of Justice in terms of legal review of the sanction procedure of Article 7 TEU, does not militate against, but *e contrario* in favour of the justiciability of the constitutional values.

This was also made clear by the ECJ in its famous *Kadi* judgment of 2008 when the Court, in view of legal action taken against "smart sanctions" imposed by the Union against persons suspect of terrorism, spoke of "constitutional principles" of the Treaties, the protection of which was entrusted to

[55] Case C-126/86, *Giménez Zaera v Instituto Nacional de la Seguridad Social and Tesorería General de la Seguridad Social* [1987] ECR 3697, para 14; cf. Case C-339/89 *Alsthom v Sulzer* [1991] ECR I-107, para 8 f.

[56] Case C-6/72 *Europemballage Corporation and Continental Can Company v Commission* [1973] ECR 215, para 24; Case C-14/68 *Walt Wilhelm and Others v Bundeskartellamt* [1969] 1, para 6 et seq.

[57] Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 1, 25; Opinion Avis 1/91 *Avis 1 v 91* [1991] ECR I-6079, para 17 et seq.

[58] Case C-283/81, *CILFIT v Ministero della Sanità* [1982] ECR 3415, para 20.

the Court. In this regard, it not only referred to fundamental rights protection, but also to the principle of the Community based on the rule of law and even in explicit terms on the "principles" which then where enshrined in Article 6 paragraph 1 TEU at the same.[59] It thus made values and principles described in my presentation the standard for interpretation and validity of secondary Union law.

This was also the case when the Court recently had to deal with the accession of the Union to the European Convention on the Protection of Fundamental rights (ECHR). It held in its Opinion 2/13 that such "accession must be in conformity with the basic constitutional charter, the Treaties". The Court then went on to state that the "essential characteristics of EU law … have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States … a set of common values on which the EU is founded, as stated in Article 2 TEU." The judges further concluded that EU "fundamental rights must therefore be interpreted and applied within the EU in accordance with (this) constitutional framework", i.e. in accordance with the common values.[60] Interestingly enough, the Court found that the accession treaty does not meet these requirements.

3. Résumé

The values which are enumerated in Article 2 first sentence TEU are meta-norms of Union law. I have undertaken to show that they are structural principles of constitutional nature which have concrete legal effects on the control of the system of the Union, i.e. the behaviour of the institutions and the Member States.

It should not come as a surprise that such meta-norms have only rarely been expressly referred to, notably not in the courts. The rule of law-character of the Union and its Member States and the democratic legitimacy of its activities are not in dispute every day.

[59] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 285; Case C-355/04 *Segi and Others v Council* [2007] ECR I-1657 para 51; Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para 45.

[60] Opinion Avis 2/13 *Avis au titre de l'article 218, paragraphe 11, TFUE* ECLI:EU:C:2014:2454, para 167 and 168.

There are, however, from time to time borderline situations, such as the *Kadi* judgment regarding sanctions imposed against persons suspect of terrorism, where these principles play an important role.[61]

Also in the relation between national law and Union law, these principles are more and more often applied, in particular in areas like the internal market law, where one would not suppose to find them. A remarkable example is the discussion of human dignity in the *Omega Spielhallen* judgment.[62] This makes clear that the constitutionalisation of the Union legal order progresses inexorably. The values enshrined in Article 2 TEU make an important contribution to this ongoing process.

[61] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para. 285.

[62] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 para 285; Case C-355/04 *Segi and Others v Council* [2007] ECR I-1657, para 51; Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633, para 45.

Acquis of European Union and Legal Order of Ukraine

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Summary: The article is devoted to the analysis of the concept and content of EU acquis as well as on its role in the legal regulation of the European integration and of the EU external relations. The content of acquis is characterized by stability and flexibility depending on whether it forms the basis for the legal order of the European Union or fixed in international agreements with the third countries thus transposing the EU law in their internal legal orders. The signing of the Association Agreement by Ukraine with the European Union and its Member States provides for the country a perspective of its integration in the Union with possible membership in it upon the creation of the free trade area between both partners. The effective using of implementation legal tools requires from Ukraine establishing the proper and relevant legal background. Certain prerequisites for the application of the EU acquis into the Ukrainian legal order have been created. The legal basis for the realization of the EU law in Ukraine is formed by the Constitution and national legislation of Ukraine. However, Ukraine is required to make some radical amendments in its legislation to insure the efficient realization of the Association Agreement in the internal legal order. The most important instrument of the realization EU acquis in the internal legal order of Ukraine is harmonization of legislation. In relations between the EU and Ukraine the compatibility of the Ukrainian legislation with EU law can be achieved at the level of international obligations and the level of EU obligations. Harmonization of Ukrainian legislation with that of the EU remains the most powerful legal instrument for the expansion of the acquis into the internal legal order of Ukraine.

Keywords: European Union, EU law, acquis, harmonization of legislation, legal effect, association agreement, implementation, legal mechanism.

It was not until quite recently that the term *"acquis"* has been introduced in legislative acts of Ukraine[1] and in the Ukrainian doctrine of European law.[2] In

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1 The Programme of Integration of Ukraine into the European Union, approved by Ukrainian President's Decree No. 1072 of 14 September 2000.

2 Muraviov V. Legal foundations of the regulation of economic relations of European Union with third countries (theory and practice). – K.: Academ – Press, 2002, 426 p.

Ukraine this notion is primarily used in the context of determining the parameters for the harmonization of Ukrainian legislation with legislation of the European Union (EU). Among foreign and Ukrainian legal publications which are devoted to general issues of the role of the *acquis* in the process of European integration are the works by C. Gialdino,[3] A. Ott,[4] A. Toth,[5] G. Van der Loo,[6] N. Mushak[7], R. Petrov.[8] However, these authors have not given special attention to how the content of the acquis is determined and what is its scope for the third countries that have international agreements with the EU. These issues need to be researched so as to discern special features of the legal character of the EU law, its sources, and means of its impact on the legal orders of third countries that have contractual relations with the Union – all this is on the agenda of the Ukrainian science of European law. This task is of great practical significance to Ukraine, since it is directly connected with the issue of establishing legal frameworks and the limits for the harmonization for Ukrainian legislation with the European Union's legislation in the process of implementing the Association Agreement (AA) between Ukraine, on the one hand, and the European Union (EU) and the Member States, on the other,[9] and other documents relating to the co-operation of the parties in the process of developing the European integration and extending its legal effect into the internal legal order of Ukraine.

It should be noted that an important feature of the EU legal order is that its basis constitutes the so-called *acquis.* A special importance of the *acquis* concept consists in guaranteeing homogeneity of the legal system of the European Union, since it is based on the idea that its elements may not be changed in the process of cooperation with other subjects of international law. As a whole, it ensures the integrity of this system and necessarily a uniform application of EU law in all the Member States.[10]

Homogeneity of law of European Union is maintained, in particular, in the light of the interpretation given by the Court of Justice of European Communities

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3 Gialdino C. Some Reflection on the Acquis Communautaires // Common Market Law Review. – 1995. – V. 32, No. 3. – p. 1089–1121.

4 Handbook on European Enlargement. Commentary on the Enlargement Process / Edited by A. Ott and K. Inglis. The Hague, 2002. 1116 p.

5 Toth A. Oxford Encyclopedia of European Community Law. Oxford, 1990. 985 p.

6 The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: a New Legal Instrument for a EU Integration without Membership. – Leiden/Boston, 2016. – 398 p.

7 Mushak N. Role of Acquis in the EU Legal Order, Evropský politický a právní diskurz, Volume 4, Issue 3, 2016. P. 21-26.

8 Petrov R. Transposition of the European Union acquis into the legal systems of the third countries. – K.: Istina, 2012. – 364 p.

9 OJ L 161/3

10 Case 104/81, Kupferberg [1982] ECR 3641.

(ECJ) to EU law in several of its rulings. The Court sees EU law as a new legal order for the sake of which the States have restricted their sovereign powers and which is distinct both from international law and domestic law.[11]

The term *"acquis"* is of French origin. Although it has its equivalents in other languages of the Member States and third countries, lots of documents and papers on EU law use this French version.[12] References to the *acquis* may be found in the Lisbon Treaties on the European Union and on functioning of the European Union, documents adopted by EU institutions, international agreements of the Union and the ECJ's rulings. In particular, references to the *acquis* may be found in the Article 20 of the Treaty on European Union stating that "Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union". According to Article 87 of the Treaty on functioning of the European Union "The specific procedure provided for in the second and third subparagraphs (of this Article – V.M.) shall not apply to acts which constitute a development of the Schengen *acquis*". Article 7 of the Protocol 19 attached to Lisbon Treaties provides that "For the purpose of the negotiations for the admission of new Member States into the European Union, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission".

References to the *acquis* are also contained in the EU legal acts on matters of foreign relations of the Union. An explicit interpretation for the notion of the *acquis* can be found in the Opinion of the EC Commission of 23 May 1979 concerning the accession of Greece to the European Communities. The EC Commission considered that, in joining the Communities the applicant state accepts without reserve the Treaties and their political objectives, all decisions taken since their entry into force, and the actions that has been agreed in respect of the development and reinforcement of the Communities; it is essential feature of the legal system set up by the Treaties establishing the Communities that certain provisions and certain acts of the Community institutions are directly applicable, that Community law takes precedence over any national provisions conflicting with it, and the that procedures exist for ensuring the uniform interpretation of this law; accession to the Communities entails recognition of the binding force of these rules, observance of which is indispensable to guarantee the effectiveness and unity of Community law; the principles of pluralist democracy and

[11] Case 26/62, Van Gend en Loos [1963] ECR 1.
[12] Gialdino C. Ibid, p. 1090.

respect for human rights form part of the common heritage of the peoples of the States brought together in the European Communities and are therefore essential elements of membership of the Communities.[13]

It should be noted that this Opinion of the EC Commission only relates to the *acquis* of the European Communities. It was specified further in the European Council's conclusions made at its session on 26 and 27 June 1992 in Lisbon already in regard to the *acquis* of the European Union as a structure encompassing the EC, the common foreign and security policy, co-operation in matters of law enforcement and internal affairs. In determining the conditions and criteria for acquiring the membership in the European Union, the European Council has noted that the membership implies the acceptance of the rights and the obligations actual and potential, of the Community system and its institutional framework – the Community *acquis,* as it is known. That means:

– the contents, principles and political objectives of the Treaties, including the Maastricht Treaty;
– the legislation adopted in implementation of the Treaties, and the jurisprudence of the Court;
– the declarations and resolutions adopted in the Community framework;
– the international agreements, and the agreements between Member States connected with the Community's activities.

The assumption of these rights and obligations by a new Member may be subject to such technical adaptations, temporary (not permanent) derogations, and transitional arrangements as are agreed in accession negotiations. The Community will show comprehension for the problems of adjustment which may be posed for new members, and will seek adequate solutions. But the principle must be retained of acceptance of the *acquis* so as to safeguard the achievements of the Community.

Future accessions will take place in conditions different from the past:

The completion of the single market means that the maintenance of frontiers between old and new members, even for a temporary period, could create problems. Such transitional arrangements should be kept to a strict minimum.

The realization of economic and monetary union will imply a real effort of cohesion and solidarity on the part of all members. The passage to the final stage will depend on the number of States including new Members – who fulfil the criteria of economic convergence.

[13] OJ L 291, 19.11.1979, p. 3–3

The *acquis* in the field of foreign policy and security will include the Maastricht Treaty and its political objectives.[14]

In the EC Commission's Communication of 10 May 2004 "The European Neighbourhood Policy, Strategy Paper", the term *acquis* is used in connection with the following two aspects. The first aspect concerns conditions for Libya's entry into the Barcelona process of co-operation between the EU and Mediterranean countries – one of them is Libya's full acceptance of the Barcelona *acquis*.[15] Secondly, the use of this term is associated with the implementation of agreements on partnership and co-operation as well as of association agreements. The document emphasizes that the neighbouring countries' "legislative and regulatory approximation will be pursued on the basis of commonly agreed priorities, focusing on the most relevant elements of the *acquis* for stimulation of trade and economic integration, taking into account the economic structure of the partner country, and the current level of harmonization with EU legislation".[16]

Also, the term *"acquis"* has been used in the sphere of international agreements of the Community. In particular, references to the *acquis* are contained in some stabilization agreements concluded between the EC and Balkan countries. Article 72 of the agreement on stabilization and association between the EC and Serbia, concluded in 2001, provides that the Parties recognize the importance of the approximation of the existing legislation in Serbia to that of the Community and of its effective implementation. Serbia shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*. Serbia shall ensure that existing and future legislation will be properly implemented and enforced.[17]

The ECJ has also made its contribution to developing the notion of *acquis*. In its judgments in cases 80 and 81/77 *(Commissionnaires Reunis et Ramel),* the ECJ referred to the *acquis communautaire* as an update of the Community concerning the unification of the market.[18] However, as the practice has shown, the ECJ has failed to play any noticeable role in the development of the EU's *acquis* doctrine.

According to the European law doctrine, the *acquis* is commonly understood as a body of legal rules, court decisions, doctrinal notions, recommendations, arrangements, etc., which have been established or adopted by the European Communities in their practice and which should be unconditionally accepted

[14] Europe and the challenge of enlargement. Bulletin of the European Communities. Supplement 3/92.

[15] COM (2004) 373 final, p. 12.

[16] Ibidem, p.14.

[17] O.J.2010, L108/3

[18] Cases 80 and 81/77 Commissionnaires Reunis et Ramel [1978] ECR 927.

by the States candidates for EU membership – that is, as something which may not be negotiated.[19] An attempt has also been made to define the types of *acquis* (accession *acquis,* institutional *acquis, acquis* concerning associations with third countries, *acquis* of the European economic space).[20]

The mentioned examples suggest that the term *"acquis"* has various meanings and contents in EU law. Consideration should also be given to the fact that, according to all these documents, court decisions and doctrines, the *acquis* includes, in addition to provisions of agreements and acts by EU institutions, also declarations and resolutions adopted within the framework of the Community – that is, even the acts which are not binding. It also includes the ECJ's case law, though rulings by this authority do not belong to the sources of EU law as laid down in the founding Treaties of the European Union. This suggests that the content of the *acquis* is wider than the term "EU law" and may be equated with the EU legal order. On the other hand, it should be noted that it is possible that, when defining the content of the *acquis,* the EU institutions did not reasonably undertake to clearly outline its scope. The matter is in the following. Although it is believed that *acquis* is essentially an established body of rules to be unconditionally recognized both by the Member States and the States expressing their wish to accede to the European Union – for this reason, this body may not be changed during negotiations on accession, – in reality, the content of the *acquis* has continuously been updated. In particular, it is regularly augmented by new rules as, for instance, in the case with the inclusion into the EU's *acquis* the provisions of Schengen agreements. On the other hand, parts of the *acquis* are regularly excluded from the legal instruments at the expense of those acts which have lost their effect. One should bear in mind that not all the rules making up the body of the *acquis* are relevant for the candidate country. There are also those that do not concern a particular country, although the latter has in some instances to accept that the rules are binding upon it.[21]

In this context, we can distinguish to some extent between the content of the internal and external *acquis*. The first part forms the basis for the legal order of the European Union, whereas the content of the second one depends on the level of relations between the European Union and third countries.

Thus, with the concept of the *acquis* being quite flexible and uncertain, the content of the *acquis* is not something fixed and steady as well – rather, it is permanently being updated. This flexibility is especially noticeable when it

[19] Gialdino C. Ibid, p. 1090; Handbook on European Enlargement. Commentary on the Enlargement Process, p. 14; Toth A. Ibid, p. 9–10.

[20] Gialdino C. Ibid.

[21] European Union: Foundations of politics, institutions and law: Textbook / Scientific editor V. Pjatnitsky. – K.: 1999. – P. 40.

comes to the recognition of the *acquis* by third countries. First of all, this concerns the countries whose relations with the European Union are based on the association and partnership agreements, since only some of such agreements envisage the approximation of laws of such countries to EU law. However, the most important point is that the specific content of the *acquis* for the countries intending to conclude association or partnership agreements with the EC may be determined only when the conclusion of such agreements is being negotiated. Moreover, the specific content of the *acquis* changes depending on the Communities' approaches to determining the level of co-operation between the parties. For instance, the EEA Agreement, which does not aim to prepare the Contracting States for EU membership, was to be concluded upon the condition that the associated countries recognise 1,400 acts of the whole body of EC acts making up the *acquis,* whereas the association frameworks for preparing Central and Eastern European countries for EU membership required that only 1,100 acts – most of which governed issues of the internal market – were be approved by the associated countries so as for them to be eligible for accession to European Union.[22]

The Association agreement (AA) with Ukraine rightly pertains to the new generation of the association agreements of the European Union. In the Agreement the term *"acquis"* is used more often than in any other agreement of this kind. Actually in line with the objectives as set out in Article 1 of the Agreement, Ukraine is obliged to carry out gradual approximation of its legislation to EU *acquis* referred to in Annexes I to XLIV to the Agreement according to the provisions of those Annexes. What is more, apart of the harmonization of its legislation with that of the EU Ukraine is committed itself to transpose the parts of the *acquis* in such areas as standardization (Article 56.8), supply of services (Annex XVII) etc.

But, in all instances, the specific content of the *acquis* of the Community to be recognized by third countries within the scope of the international agreements of the Union should be determined by EU institution.

Among Ukrainian legal documents, the first one to use the term *"acquis"* was the Programme of Integration of Ukraine into the European Union, adopted by Presidential Decree No. 1072/2000 of 14 September 2000. The Programme laid down objectives and priorities for Ukraine on its way towards the integration into the European Union for the period of up to 2007. In this regard, the Programme obliged the Cabinet of Ministers of Ukraine to develop and annually approve a plan of action on implementing the priority tasks set forth in this document. The plan was supposed to include, in particular, the measures

[22] Tatam A. Law of European Union: Manual for high school students / Translation from English. – K.: 1998. – 370 p.

to ensure the harmonization of Ukrainian legislation with Community law. The programmes and plans developed by executive authorities were to be agreed with this Programme.

According to the Programme, the *acquis* also included legal and normative standards of the EU. Almost each of the Programme's economic sections presented a list of the European Union's basic acts making up the *acquis.* The acts were selected on the basis of the candidate countries' experience of accession to the European Union as well as the necessity of meeting the criteria implied by the objectives of monetary, economic, and political union of the Member States and formulated by the European Council in Copenhagen. The Programme's provisions suggested that, for the most part, the *acquis* only included the EU's economic legislation, which was generally based on Articles 50 and 51 of the Partnership and Co-operation Agreement (PCA) between Ukraine, on the one hand, and the European Communities (EC) and the Member States, on the other[23]. In our view, such an approach to defining the content of the *acquis* was wholly in the interests of Ukraine and it was capable of fully satisfying its Eurointegration aspirations. The main focus on measures to harmonize economic legislation laid down the foundation for bringing the relations with the European Union to a new phase which might involves the signature of an agreement on a free trade area.

However, the absence in Ukraine of an effective mechanism for harmonising its legislation with EU law appeared to be a factor which has not facilitated the implementation of the Programme. For this reason, there have been attempts to supplement it with another document – namely, the National Programme for Approximation of Ukrainian Legislation to Legislation of the European Union, which was approved by Law of Ukraine No. 1629 – IV of 18 March 2004.[24]

Section II of the National Programme defines the *acquis* as the legal system of the European Union, including the EU law acts (but, not only such acts) adopted within the framework of the European Community, Common Foreign and Security Policy and Common Policy on Justice and Home Affairs. The National Programme considerably widens the content of the *acquis.* Ukrainian laws and other legislative acts should be brought into line with it. This can also be seen from the Programme's list of *acquis* sources. According to the Programme, among these sources are: the Treaties establishing the European Communities (the EC and the European Atomic Energy Community) and the Treaty on European Union as amended by further Treaties; Merger Treaty of 1965; Acts of Accession; acts adopted by EU institutions; the EC's international agreements;

[23] O.J. 1998, L49.

[24] The National Programme for Approximation of the Legislation of Ukraine to that of the European Union, approved by Ukrainian Law No. 1629 – IV of 18 March 2004.

general principles of EC law; general provisions or principles relating to matters of foreign and security policies; the ECJ's rulings, EU Official publications.

This list, which is rather incomplete, cannot be regarded as absolutely correct. In particular, it does not mirrors the fundamental changes in the sources of the EU law after entering into effect of the Lisbon Treaties on the European Union and on functioning of the European Union, it does not include such sources of the *acquis* as acts adopted by the Member States' representatives in the Council of the European Union; international agreements between the Member States of the European Union, concluded in the process of implementing the provisions of the founding Treaties; the 1970 and 1975 agreements on budget, international traditions established by the European Union over the period of its existence; declarations and resolutions of EU institutions.

However, this does not change essentially the harmonization approach which is mirrored in the National Programme. The Programme reflects an effort to encompass the *acquis* as a whole – that is, not only rules of economic law of European Union. In practice, this suggests that the National Programme aims to ensure that Ukrainian legislation is harmonized with EU law, in the same way as it was done by the countries which having already passed a preparatory association phase, are preparing for their accession to the European Union It should be noted that such an approach to harmonization does not match the practice of the countries candidates for EU membership. It seems from the document that the harmonization is being carried out for its own sake and not for the sake of the objective declared – namely, a step-by-step approximation of Ukrainian legislation to the legislation of the European Union, which is a necessary stage on the way towards creating an area of free trade with the EU. Therefore, such an approach to harmonization raises some questions. The first is whether Ukraine is capable of implementing such wide-scale measures of harmonization by her own. The second is whether there is generally a need, at the current stage of Ukraine-EU relationship, for the harmonization oriented to the entire *acquis* of the Union. The answers to these questions can hardly be positive. In our view, there exists a risk that the National Programme may lead to the same result as the preceding Programme of 2000, which had remained to be nothing but a declaration of good intentions of Ukraine.

In this context, it should be noted that the problem is not in the term *"acquis"* as such – namely, not in whether it can be used in legislative and other normative-legal acts of Ukraine – but rather in how the content of the *acquis* should be interpreted – namely, whether it is necessary to incorporate the entire *acquis* of the Union or only its part fixed in the Association agreement.

This suggests that the content of the *acquis* can be easily identified if there is a real willingness to take into consideration the experience of the

States candidates for EU membership. We believe that the current stage of the Ukraine-European Union relationship should be oriented towards mainly the economic *acquis* whose content is specified in the Association agreement between the EU and Ukraine. Such an approach is optimal in terms of achieving a necessary balance between costs associated with harmonization measures and the anticipated result.

Thus, the *acquis* may be defined as a body of legal rules, court decisions, doctrinal notions, recommendations, arrangements, etc., which have been established or adopted by European Union in its practice and which constitute the foundation for the legal order of the EU which should be unconditionally accepted by its Members and candidates for EU membership. Since the *acquis* applies, first of all, to the Member States and States candidates for EU membership, it is not very necessary for the Ukrainian legislation to use the term *"acquis"* in its broad sense. It should also be taken into account that the content of the *acquis* is not something fixed – rather, it is permanently updated. This, in its turn, can cause difficulties in the process of applying EU law provisions in Ukraine during the period when its legislation is being harmonized with law of European Union. An important factor in this context may become the EU's assistance as provided for by Article 475 of the AA – especially, when it comes to determining the content of EU law provisions with which Ukrainian legislation is to be harmonized. It should also be remembered that all attempts to include into Ukrainian legislation a broad interpretation of the *acquis* would require considerable funds for the realization process. It is agreed that, for the time being, it is optimal for Ukrainian legislative acts to use the term in a narrow interpretation, based on the AA – namely, the part of the *acquis* that comprises virtually all acts of European Union with which Ukrainian laws are to be harmonized in the process of implementing the AA and other agreements or co-operation arrangements between both sides.

Corporate Social Responsibility and the European Union Countries

Dana Bernardová*

Summary: The paper deals with the corporate social responsibility which is a current value and ethical concept in business and public life. The subject of the paper is the very concept of corporate social responsibility (CSR) and its professional approach in science. The aim of the research is to determine to what extent CSR is dealt with within the European Union countries in comparison with other world countries. Science is represented by professional scientific publications devoted to CSR. The basic method is a systematic review based on the quantitative evaluation of selected features of 75 papers published on CSR worldwide. The research concludes that the scientific approach to CSR is described and developed especially in the USA. The transfer of CSR by the European Union into its member states as tracked in documents of the existing initiatives of particularly the OECD and European Commission raises a number of questions.

Keywords: corporate social responsibility, systematic review, scientific paper, European Union countries

1. Introduction – What is the CSR?

In business and in public life, the requirement to link business activities with the perception of the surrounding environment and needs of society appears more and more often. What is the reason? The contemporary civilization faces global problems of this planet. The differences in living standards and the life conditions in general are different for different groups of the population. The process of globalization brings new problems which require the society to learn to deal with them. At the same time, the society is going through a period of civilization crisis, particularly the crisis of its values. a highly competitive environment in countries with developed economy tempts to practice principles favouring self-profit rather than the profit for the whole society. Therefore, a definitely legitimate request – to act socially responsibly – is directed towards

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all organizations in this environment. The so-called corporate social responsibility is developing.

The corporate social responsibility is the subject which will be examined in this paper. Is has an internationally used abbreviation CSR (hereinafter referred to as CSR in the paper).

CSR is interpreted to organizations as a transition in the perception of their own social role from the level *'profit only'* to the level of three Ps – *'profit, people, planet'*. The three Ps represent the request to focus the organization apart from its main economic activity *('profit only')* also on social development *('people')* and the protection of environment *('planet')*. The so called *'Tripple-bottom-line Business'* is similar to the interpretation of the three P's. This is the designation of a triple base of entrepreneurship with a focus on three areas – contribution to economic prosperity, environmental quality and social capital. CSR is closely linked with the issues of business economy, strategy, and management of organizations, ecology, human resources management, legal issues, supplier-purchaser relations, public interests, and the connection with ethics is vital (i.e. on the recognition of the ethical dimension in business).

In information resources, CSR is defined differently by various subjects. The initial idea is that the organization is an integral part of the society in which it creates its own initial profit and realizes its activities. However, its action should be in accordance with the responsibility towards the society which enables it to make profit or operate. The organization is not an isolated unit but a part of a wider system of relations in the society. As a result, its prosperity depends on the health of the surrounding society and the way it perceives surrounding societies. According to A. Caroll, CSR is classically defined as *'the social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time'*[1]. The European Union defines CSR for its participating countries very similarly: *'... describe it as an concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis....* '[2]. a characteristic feature of CSR is the acceptance of commitments that go beyond the legal framework. The responsible organizations voluntarily decide to do even what is not directly legally required. Key organizations dedicated to spreading the CSR in Europe

[1] CARROLL, A. B. a Three-Dimensional Conceptual Model of Corporate Social Performance. *Academy of Management Review*, 4: s. 497–505. 1979.

[2] COMMISSION OF THE EUROPEAN COMMUNITIES. Green Paper. Promoting a European Framework for Corporate Social Responsibility. Brussels, 18.7.2001. COM(2001) 366 final. p. 8.

– BusinessEurope[3], CSR Europe[4], International Business Leaders Forum and its platform Business Leaders Forum of the Czech Republic[5] present the concept that companies that have voluntarily adopted CSR set high ethical standards, try to minimize the negative impacts on the environment, maintain good relationships with their employees and support the region in which they operate. Such firms are the carriers of positive trends and help change the business environment as a whole, they distinguish themselves from the competition, become a desired partner of like-minded companies and organizations and an attractive employer. From the perspective of business ethics, the discipline which is specifically dedicated to this subject, CSR *'...is based on the assumption that the success of any organization depends on ethical attitudes of employees to their employer and vice versa. On their expertise, quality of work and personal responsibility. The staff management, particularly the stimulation to the responsibility and adequate work incentives therefore gained an extraordinary importance'*[6]. Moreover, CSR is a change in thinking and acting of people towards higher levels of ethics in mutual relations.

It is common that CSR is also defined by using the theory of 'stakeholders'. From the stakeholders' perspective, CSR is presented as the aim to *'... verify and show interests in opinions and attitudes of stakeholders not only inside the company, but also external ones'*[7]. Organizations act as an entity responsible for its actions and consequences of them in relation to the stakeholders. Stakeholders are affected by activities of the organization and they also affect this activity themselves. These are groups with different interests against the activities of the organization. In essence, it concerns groups of entities, without support of which the organization could no longer exist. According to this theory, the organization must first correctly identify its stakeholders, find a way to satisfy and harmonize their expectations. From the theory perspective, managers do not have responsibility only towards the shareholders of the company, but also

[3] The leading advocate for growth and competitiveness at European level, standing up for companies across the continent and campaigning on the issues. For more see https://www.businesseurope.eu/history-organisation.

[4] The leading European business network for Corporate Social Responsibility. Since 1995. See more at http://www.csreurope.org/.

[5] A non-profit non-governmental organization bringing together international and national companies that promote the fulfillment of CSR. The parent organization is the international organization The Prince of Wales International Business Leaders Forum (IBLF). It has been active for 23 years. For more see http://www.iblfglobal.org/.

[6] DYTRT, Z. *Dobré jméno firmy*. Praha: Alfa-Publishing, 2006. p 102. ISBN 80-86851-45-1.

[7] TRNKOVÁ, J. *Společenská odpovědnost firem: kompletní průvodce tématem a závěry z průzkumů v ČR* [online]. Praha: Business Leaders Forum, 2004, p. 7-10. [cit. 2009-12-12]. Available from www: <http://www.blf.cz/csr/cz/vyzkum.pdf>.

to the wider community, which means all customers, suppliers, employees, and the local community.

2. Historical evolution of the CSR in the world

The history of the CSR is well described[8]. The topic of CSR is a part of the period of industry development and associated problem of employee motivation to the highest work performance and issues of employing children and women. Especially the period of the industrial revolution gives this topic higher importance. An institutionalized form of CSR came from the US in 1950s. Consistently, H. R. Bowen is considered the first author and 'father' of CSR, he introduced the CSR topic as a more comprehensive request or challenge to entrepreneurs of that time. In 1953, he introduced the first definition of CSR in his publication *'Social Responsibilities of the Businessman': 'It (SR) refers to the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society."*[9] Oliver Sheldon, who responded to the general public demand for social commitment and corporate responsibility by his book *'The Philosophy of Management'* as early as in 1923, is also considered one of the first theorists advocating corporate social responsibility[10].

The idea and concept of CSR was gradually spreading from the USA to other countries, the second world centre (and at the same time the first European centre) is the United Kingdom (hereinafter as the 'UK').

The development of the conceptualized form of CSR remains in the USA. As early as in the period till 1950, it were companies which were involved in the life of the society through their philanthropic and benefactory activities. However, in a subsequent period, Bowen initiates the gradual formalization, precision and definition of these activities as CSR which gradually widens from the staff issues to the issues of discrimination, urban development, or pollution. From 1960 to 1970, the CSR issue was getting to the level of solutions of the company top management in the form of the strategic planning of CSR, organizing and evaluating CSR activities. At the same time, the intense specification of what

[8] This chaper is processed mainly on the basis of the publication by CRANE, A. et al. *The Oxford Handbook of Corporate Sosial Responsibility*. Oxford University Press, 2008. 590 p. ISBN 978-0-19-957394-3.

[9] CRANE, A. et al. *The Oxford Handbook of Corporate Sosial Responsibility*. Oxford University Press, 2008. s. 25. ISBN 978-0-19-957394-3. Taken from BOWEN, H. R. *Social Responsibilities of the Businessman*. New York: Harper & Row, 1953. p. 6.

[10] ibid.

is and what is not the CSR topic also took place. The activity of the Committee for Economic Development (CED) is considered a significant step in making the CSR concept clear, since the Committee members directly linked the state of the society with activities of companies and their business in the book *Social Responsibilities of Business Corporations* in 1971, which encouraged the development of the CSR concept towards the environment, occupational safety, respect to customers and public administration. Personalities of the CSR theory significantly enter expert discussions, e.g. Archibe B. Carrol who defined the four basic pillars of CSR in accordance with the expectations of the society – *'economic, legal, ethical and discretionary'*. In the following decade, the concept of stakeholders[11] formulated by R. Edward Freeman was accepted as an important support in perceiving CSR and also a new science branch called *business ethics* began to develop. More debates on a theoretical level took place. In addition to the term CSR, different names such as Corporate Social Responsiveness or Corporate Social Performance started to be used for the same content. Since 1990's, topics of sustainability, corporate citizenship, the relationship between corporate social performance and financial performance have joined the CSR topics. Other personalities have been entering the internal debate on the theory of CSR – William C. Frederick, Michael E. Porter, and Peter Drucker. Critical discussions are common, the most important of which is Milton Friedman's paper *'The Social Responsibility of Business is to Increase Its Profits'* published in The New York Times Magazine, where the author states his belief that CSR is only another way of increasing the profits of companies.

The developed activities of the CSR reporting, in which companies present overviews of their activities, carry out mutual comparison, communicate with the *parties involved*, and are a component of the CSR concept. The most widely used systems of reports in the world are *AA 1000 Account Ability, GRI Global Reporting Initiative and the principles formulated in the OECD Guidelines for Multinational Enterprises, Triple-bottom-line Reports, Sustainable reports.* Based on the contents of the reports, the overviews and rankings of companies are created and pursuant to them there is the effort to measure the CSR level. In the financial field, the introduction of the so-called *SRI – Socially Responsible Investment* is a significant initiative for companies. Further, initiatives focused on processing the methodology of measuring CSR of companies are emerging. The most widely used include the systems *BSC Balanced Scorecard, IMS Integrated Management System, Responsible Business Standard (RBS), Corporate Governance benchmark*. In the international quality certification, the standards

[11] FREEMAN, R. E. *Strategic Management: a Stakeholder Approach*. Marshfield: Pittman, 1984. ISBN 0-273-01913-9.

are *SA 8000 Social responsibility, ISO 14001 Environmental management system,* and *ISO 26 000 Corporate social responsibility*, the only comprehensive standard on CSR.

CSR is currently so widespread, conceptualized and institualized that it is becoming a global phenomenon. It is not easy to characterize the present prevalence of the CSR topic and the manner of its implementation in different countries. The research part of this paper contributes to understanding the reality of the CSR topic development.

3. CSR in Europe and EU countries

The European approach to the CSR concept came later, in 1990s. It builds on the traditional culture of solidarity and depends rather on the requirements formulated in the form of business ethics. Nevertheless, the CSR concept in Europe is currently organized the same way as the CSR concept in the USA. The differences in approaches to the CSR concept in the USA and Europe can be observed especially in the completion of the theoretical basis in the USA and the trends to build on cultural foundations in Europe[12]. More noticeable differences are traceable also at the level of CSR implementation into practice, as evident from the results of the research conducted in various countries of the world[13].

[12] Cf. Putnová, A.; Seknička, P. *Etické řízení ve firmě: nástroje a metody: etický a sociální audit*. Praha: Grada Publishing, 2007. p. 135. ISBN 978-80-247-1621-3.

[13] as an example there are scientific papers by a research sample of the subsequent research section. According to the paper by SOTORRÍO L. L.; SÁNCHEZ, F. J. L. Corporate social responsibility of the most highly reputed European and north American firms. *Journal of business ethics*. October 2008, vol 82, no. 2, p. 379–390. ISSN 1573-0697 European companies show higher levels of social conduct, especially in the field of forthcoming behaviour towards employees. The risk of losing the company reputation on the basis of misconduct in the field of CSR or zero involvement in CSR activities is higher in Europe. The USA companies are more bound in relation to the customers by presenting financial investments in CSR, the European companies are in their reputation to customers more bound by the level of investments in ecology. European companies give the certainty to employees by presenting higher financial resources. Overall, European companies must make a greater effort than companies in the USA to have earned the trust of their customers as the CSR company. According to the paper by MAIGNAN, I.; RALSTON, D. A. Corporate social responsibility in Europe and the U.S.: insights from businesses' self-presentations. *Journal of international business studies*. 2002, vol 33, no. 3, p. 497–514. ISSN 0047-2506 the differences in the manner of the presentation of companies in the USA, UK, France and Denmark are monitored in the field of CSR on the web pages, the content of which affects the business success of companies differently. The UK companies show significantly more business data on their CSR websites than the USA companies, French and Danish show minimum of such information. The USA and UK companies develop significantly wider discussion with their *stakeholders* than the French and Danish companies. According to the paper by MATTEN, D.;

Currently, the idea of CSR in Europe has been promoted by the UN, OECD and European Union[14], especially the European Commission.

Since 1980, along with the globalization of world economy, the multicultural companies have faced a number of ethical dilemmas. These became the subjects to deal with in the emerging business ethics. This view prefers understanding the different cultural frameworks and differences in moral behaviour of different cultures in business, helps solve different ethical standards and perception of the issue of gender, religion, law, and ethics, the geographic location, type of social consensus, political order, and checking method. The mutual relationship of CSR and business ethics can be described as follows: *'Business ethics requires that an individual or an organization behaves exactly according to the rules of ethics since the social responsibility is a manifestation of how the activities of business entities can affect the interests of other groups in their surroundings. Based on the above-mentioned, the social responsibility has the form of a social contract which the entity commits to respect towards its surroundings. On the other hand, business ethics represents a wider field than the social responsibility which is its inevitable part.'*[15] From the perspective of business ethics, the CSR is closer to European perception. In connection with the processes taking place in terms of the post-war development of Europe and its crisis of values of both men and society, the introduction of ethical rules in business is one of the securities that the society is in need of and looking for, and perhaps even close to finding.

Supranational and international organisations play a key role in the transfer of CSR to Europe. In 1995, after the chairman of the European Commission, Jacques Delors, expressed his incentive, CSR Europe – the leading European business network for CSR was established, the main initiative of which is aimed at promoting and spreading CSR both in theory and practice, especially in the EU partner countries.

MOON, J. 'Implicit' and 'explicit' CSR: a conceptual framework for a comparative understanding of corporate social responsibility. *Academy of management review.* April 2008, vol. 33, no. 2, p. 404–424. ISSN 0363-7425 Compared to Europe, the USA companies use web pages more often to present themselves and provide a variety of details. European companies are more austere in their presentation, include mainly facts and reality. Companies in the USA present also small scale activities which respond to the immediate feedback of stakeholders, European firms ususally present only such actions based on the CSR concept that are of large scale and impact.

[14] For more see JÍLKOVÁ, E. Ekonomická a měnová integrace České republiky v rámci Evropské Unie. In: DUŠEK, J. eds. Ekonomická integrace ČR a SR v podmínkách globalizující se Evropy. České Budějovice: Vysoká škola evropských a regionálních studií, 2016, p. 10–19. ISBN 978-80-7556-006-3.

[15] SOKÁČOVÁ, V. Je spoločensky zodpovedné podnikanie výhodné? In I. OLECKÁ, M. ZIELINA (ed.). *Kdo je aktérem společenské odpovědnosti firem*. Olomouc: Moravská vysoká škola Olomouc, 2009, p. 36–45. Sborník z odborné česko-slovenské konference konané dne 28. května 2009 v Olomouci. ISBN 978-80-87240-07-6. p. 32.

Through documents and activities of the European Commission, the EU promotes the UN initiative *'Global Compact'* which has promoted entrepreneurship with the protection of human rights, recognition of the liberties, protection of the environment and labour standards since 2000, the OECD and its key CSR rules formulated in *'Guidelines for Multinational Enterprises'*. The aim of their activities is to promote the CSR idea, educate and lead consultancy for companies concerning implementing CSR, coordinate the activities of individual countries and create mutual networks, and formulate and enforce the CSR principles. CSR is spread by the institutionalized support, professional organizations focused on counselling in daily corporate practices, implementing managerial standards, consulting and auditing services. In Europe, CSR is quickly emerging at the level of discussions of senior managers, politicians, business companies, customers, and experts. In March 2000, at the European Summit in Lisbon, a call was made to centrally locate CSR in the business strategies of companies. In 2001, the European Commission approved and published the 'Green paper. *Promoting a European Framework for Corporate Social Responsibility*'. This document contains the definition of the CSR concept for Europe. It is a set of recommendations which the EU should use to encourage CSR in its member states, both inside and at the international level, recommendations on how to make use of already collected knowledge and experience from the world in its member states. The document calls for cooperation with the UN in the field of global impact and with the OECD in its key themes – freedom of assembly, abolition of forced labour, non-discrimination, abolition of child labour. The Green Paper asks all types of organizations to use CSR, it calls for the development of the CSR model based on European values, its recommendations are of a voluntary character. It directly calls for achieving the sustainable development.

In 2011, the European Commission published *'A Renewed EU Strategy 2011–14 for Corporate Social Responsibility'*.[16] The intent of this document is to encourage the member states of the EU to create their own CSR strategies. This document sees companies as CSR carriers and once again it stresses the voluntariness, however, it creates the pressure in the form of a proposal to supplement regulatory measures. It proposes a mandatory compliance with the certifications as *ISO 26 000* (the only standard covering the entire CSR), the *Global Compact* standard and OECD guidelines.

The strategy raises the discussion in attempts to a more directive attitude in the CSR implementation than full voluntariness, even though it aims at assisting

[16] EUROPEAN COMMISION. a Renewed EU strategy 2011–14 for Corporate Social Responsibility. Communication from the Commision to the European Parlament, the Council, the European Economic and social committee and the committee of the regions. Brussels, 25.10.2011. COM (2011) 681 final.

in the process of permanent sustainability in the context of globalization (but a similar idea is also expressed in the *'Guidelines for Multinational Enterprises'* where it is also stated that some companies should have selected measures enacted by law). The discussion points out that CSR in Europe has its own form and that the EU should let companies in the EU to seek their own path. At the same time, the strategy called upon EU countries to create national CSR strategies, which happened in the Czech Republic in 2015.[17]

The government policy towards CSR in EU countries is based on the transfer of information and stimuli from the EU and the creation of incentives for the CSR development. The government policies of individual countries towards CSR are very diverse. For European countries, the voluntary basis is primarily maintained for the time being and a state policy is active in spreading and support of this trend. Among European countries, the United Kingdom, for example, has a comprehensive government policy up to the level of the Ministry for CSR[18]. In France, the National Council for sustainable development was established. a more compact concept of the government policy can be found in Italy, the Netherlands, and Hungary[19]. In the Czech Republic, the Ministry of industry and trade specifically dealt with CSR, the Czech society for quality has it in its agenda as well.

The increase in the interest of experts in the CSR topic is observed in the research section of the paper.

4. Research Methodology

The analysis of CSR evolution in the scientific approach[20] is the research subject. The focal point of the research interest is the scientific interest in CSR in EU countries in comparison with other world countries. From the scientific point of view, CSR is in terms of this research identified as a scientific concept. The main objective of the research is to find out where and how is CSR adopted as

[17] The Ministry of industry and trade of the Czech Republic. National Action Plan for Corporate Social Responsibility in the Czech Republic. Praha, MPO, 2015.

[18] In the UK, the CSR history is longer than in other European states, it is rather very close to the concept in the USA. CSR was spread mainly in 1970s and in 1980s it was already well-established.

[19] Cf. *Napříč společenskou odpovědností firem*. Kladno: AISIS, 2005. p. 163. ISBN 80-239-6111-X, p. 15–18.

[20] The full version of the completed research carried out by the author is published in POKORNÁ, D. Koncept společenské odpovědnosti: obsah, podstata, rozsah. Olomouc: Univerzita Palackého v Olomouci, 2012. 327 s. ISBN 978-80-244-3348-6. The entire research contains both quantitative and qualitative sections. This paper draws from the quantitative part of the research. The qualitative part, focused on the content of the CSR concept, is not published here.

a current topic for examining from the scientific point of view. The objective is based on the knowledge described in the introductory section of this paper. The CSR concept originated as a theoretical construct, its development and spread can be monitored in the scientific way.

The research objective designates the main research questions for this paper: What scientific publications concerning the CSR concept can we find? What is the focus of scientific publications in relation to CSR? How does the interest in CSR develop in scientific publications over time? What representation do EU countries have in the interest in CSR in comparison with other world countries? Do the highly recognized authors on the CSR topic come from the EU countries?

The statements and opinions formulated by experts dealing with CSR as a concept or topic can be considered the scientific approach to CSR. Reviewed written scientific texts of the authors are the most accessible form; they are presented in various kinds of scientific publications, i.e. texts the expertise of which can be judged according to characteristics such as originality, text design, credibility of the results presented in the text and elimination of systematic errors when processing the text contents[21].

The most precise designation for the selected way of processing information on the CSR concept is the compilation of a systematic review. In the most general sense, the systematic review is a scientific communication in the form of a summary of the latest developments of the theory or empirical research in the field. More specifically, according to Greenhalgh[22], it is an overview of primary studies selected according to strict criteria, created for a clearly defined purpose. The data from selected studies are ordered in a table, then analyzed (most often statistically) and reinterpreted. a new interpretation of the data can lead to answering the original question by using other methods, or to answer a new question. Quantitative evaluation of data is done by the method of content analysis. Professional and scientific papers (hereinafter 'scientific papers') devoted to the CSR concept are the basic set for the research discovering the current scientific theoretical background of the CSR concept. Scientific papers published all around the world since 1953 belong to the basic set of the research.

A set of scientific papers of a sample set is searched for and retrieved according to the following criteria:

– Publication in multifield databases of peer-reviewed scientific papers (ProQuest, Journal STORage Database, EBSCOhost, Web of Science).

[21] Cf. GREENHALGH, T. *Jak pracovat s vědeckou publikací – Základy medicíny založené na důkazu*. Praha: Grada Publishing, 2003. 208 s. ISBN 80-247-0310-6. p. 69.

[22] Cf. GREENHALGH, T. *Jak pracovat s vědeckou publikací – Základy medicíny založené na důkazu*. Praha: Grada Publishing, 2003. 208 p. ISBN 80-247-0310-6. p. 123.

– The papers generated on the basis of selected key concepts: Social Corporate Responsibility, CSR (the term is mentioned in the title, list of keywords or abstract).
– Scientific papers (which meet the stated requirements of a scientific paper adequate to the paper type).

Based on the conducted search, a sample set for the research was obtained – an overview of all obtained scientific papers published worldwide containing 128 bibliographic records with abstracts, out of which 93 bibliographic records with available *full text*. The obtained sample set of scientific papers was recognized being of such volume that it is sufficient to be used as a sample set that represents the professional papers on CSR published worldwide. The research is carried out with a research sample of 75 scientific papers in the English language, all of which met all the requirements and were not repeated in the set.

To process the research procedure and, consequently, also the results, the comparison to the used procedure and the results of the systematic review by De Bakker, Groenevegen, and Den Hond[23] were used. The research set parameters of their systematic review are specified very similarly to the parameters of the presented research. The comparison of both studies confirms the suitability of the research set selection through online databases as well as all the selected methodology.

5. Role of EU countries in the development of the scientific approach to CSR

5.1. Evaluation of the category the source and place of publication

In the research set, the place of publication can be monitored from identifying information of scientific papers using two criteria. The first criterion is the source of the paper publication (scientific databases, periodicals). According to

[23] The paper was found during the initial study of the contents of papers of the research sample. DE BAKKER, F.G.A.; GROENENWERGEN, P.; DEN HOND, F.A. Bibliometric analysis of 30 Years of Research and Theory of Corporate Social Responsibility and Corporate Social Performance. *Business and Society*. September 2005, vol 44, no. 3, p. 283–317. ISSN 0007-6503. This is a systematic review of the literature on the CSR and CSP topics carried out at the University of Amsterdam. The Oxford University Corporate Social Responsibility also refers to this paper, cf. Crane, A. et al., The Oxford Handbook of Corporate Social Responsibility, p. 6–7. The authors conducted the research using nearly 500 papers.

the sources of publication of scientific papers, specific availability options of scientific papers on CSR can be defined[24].

In the analyzed sample, the main sources of published papers are EBCSO with 39 papers (30.47 %), ProQuest with 29 papers (22.66 %), and Web of Science with 27 papers (21.09 %). Even though this indicator only identifies where scientific papers of the research sample have been published, at the same time, it can be deduced where the scientific papers on CSR are available and in what quantities.

The second criterion, the particular place of publication of the scientific paper, was found out from the bibliographic citation of the scientific paper. The place of publication is the periodical in which the scientific paper was published or other place of publication, such as a monograph to a chapter or conference proceedings. The aim was to find out a list of all places of publication of scientific papers on CSR, and the frequency of the use of all individual places of publication.

The evaluation according to the criteria of the place of publication shows the following from a different perspective: where and how scientific papers on CSR are available, in what places it is effective to search for them, which periodicals are dedicated to CSR. At the same time, on the basis of the scientific focus of the publication source, the criterion can be used as an indicator of what the approach of scientific papers to CSR is. The Journal of Business Ethics with 28 published papers (37.33 % out of the total of the research sample) significantly surpasses other periodicals in the number of published papers. The number of three or four papers (4 % to 5.33 %) can be found in periodicals the Academy of Management Journal, The Academy of Management Review, Systems Research and Behavioral Science, Business and Society, Corporate Governance.

If the list of periodicals containing scientific papers related to CSR is previewed in detail, it is evident that the scientific papers are published in economic journals and databases. The term 'business' refers exactly to the economically oriented periodicals and databases. a total of 37 scientific papers is published in journals that contain the term 'business' in the title (Journal of Business Ethics, Business and Society, Journal of International Business Studies, Review of Business Research, Business Ethics, European Review, The Journal of American Academy of Business, Resource and Energy Economics). Together with the term 'business', the title of periodicals contains another term as well, such as 'ethics',

[24] For the same reasons, the category of source was also the subject of the systematic review by De Bakker et al. a chapter in the publication The Oxford Handbook of Corporate Social Responsibility is also devoted to main sources of publication of papers on CSR. Cf. Crane, A., The Oxford Handbook of Corporate Social Responsibility, p. 7–10.

'society'. This is not just the case of pure economically oriented periodicals. It is necessary to assume that scientific papers published in these journals can also have other vocational focus than purely economic. Scientific papers are also published in journals focused on management. As many as 17 periodicals contain the term 'management' or 'marketing' in the title.[25]

For comparison and complementation of the criteria place of publishing, an overview of scientific periodicals publishing in the CSR field can be given ('The Academic journals in the field of Corporate Social Responsibility') referred to in the publication The Oxford Handbook of Corporate Social Responsibility. Since 1960 (Formation date), Business and Society (Sage) has been issued in the USA (Current editor based in), since 1972 it is Business and Society Review (Blackwell) in the USA, since 1982 Journal of Business Ethics (Springer) in Canada, since 1991 Business Ethics Quarterly (Society for Business Ethics) in the USA. Periodicals issued in the UK follow. Since 1991 it is Business Ethics: a European Review (Blackwell), since 2001 Corporate Governance: the International Journal of Business in Society (Emerald), Journal of Corporate Citizenship (Greenleaf), since 2002 Corporate Social Responsibility and Environmental Management (previously Ecomanagement and Auditing, Wiley) has been issued in China.[26]

Historically, the USA is certainly the key country according to the place of publication of scientific papers on CSR. Since 1991, the UK has joined the USA as equal. The lead periodical for scientific papers on CSR is clearly the Journal of Business Ethics edited in Canada (1st place according to the research, 1st place according to the systematic review by De Bakker et al., 3rd place according to The Oxford Handbook). This periodical could get leadership in publishing papers on CSR by combining its suitable expertise with the time when it enters the professional world – the period since 1980s is a period of boom in publishing about CSR both in the USA and the UK and gradually also in Europe. The location in Canada means it is on the American continent. EU countries create their own environment for publishing scientific papers on CSR in 1990s particularly in the UK. This fact imitates the historical development of CSR in the practical approach.

[25] The systematic review by De Bakker et al. achieved very similar results. By their analysis, periodicals with the highest number of published papers are: Journal of Business Ethics, Business and Society, and Business and Society Review.

[26] Source: CRANE, A. et al. *The Oxford Handbook of Corporate Sosial Responsibility*. Oxford University Press, 2008. p. 8.

5.2. Evaluation of the category the type of the scientific paper

The evaluation of the research set according to the type of scientific papers points at ways of processing the CSR concept, therefore at the practical utility value of the processed papers. In the research sample the following types of the scientific papers were identified: the research report, case study, systematic review (see the methodology description of this paper) theoretical treatise, chapter in a publication.

The evaluation shows that the most common way to process the CSR concept is the form of the research report. The number of 42 research reports represents 56 % of scientific papers of the research sample, 18 theoretical studies represent 24 %, thus more than three quarters of the research sample represented by research reports and theoretical studies confirm that CSR is the focal point of the research interest. Experts are keener to explore internal and external context of the CSR concept in real-world conditions. Other type groups of scientific papers also provide interesting findings. Nine systematic reviews on the CSR concept (12 %) is indicative of the interest of experts to deal with its very essence, the term, its definition, its system and internal structure and its development. Five case studies (6.67 %) suggest that the CSR is being processed for the needs of study, teaching, transfer of proven practices ('best practice' and know-how). Educating managers, and also employees of companies in the field of CSR solutions in specific companies, providing business know-how to other companies or people interested in CSR via processing case studies, this all can be the activities associated with publishing of case studies. In the sample, there was one chapter in a monograph (1.33 %).

5.3. Evaluation of the category the state

The category indicates the place of origin of the scientific paper, from which the main centres of experts' interest in CSR can be inferred. In the category, the state cited in the scientific paper in the description of the author/s as a place of work of the author/s is evaluated (individually for each author). If the scientific paper has more co-authors, the country of origin of each co-author is counted in. This is also why the absolute number of authors differs from a total of 75 papers (12 scientific papers have co-authors from different states). Out of a total of 75 scientific papers, 33 papers are fully by authors from the EU, six papers are co-authored by authors from the EU and outside the EU. 36 papers are by authors outside the EU. The total number of all authors listed in the papers is 144, 70 authors of which are from EU countries and 74 authors are from non-EU countries.

Table 1 State as a place of work of the authors of scientific papers on CSR[27]

State	Number of authors	Percentage (%)	Number of papers	Percentage (%)
USA	47	33.10	28	32.56
UK	21	14.79	17	19.77
Spain	11	7.75	5	5.81
Italy	6	4.23	2	2.33
The Netherlands	5	3.52	4	4.65
Australia	5	3.52	2	2.33
Norway	5	3.52	2	2.33
Switzerland	5	3.52	2	2.33
Canada	4	2.82	4	4.65
Sweden	4	2.82	2	2.33
Finland	4	2.82	1	1.16
Greece	3	2.11	1	1.16
France	3	2.11	1	1.16
Belgium	3	2.11	3	3.49
Israel	3	2.11	2	2.33
Denmark	3	2.11	3	3.49
Chile	2	1.41	1	1.16
Portugal	2	1.41	1	1.16
Slovenia	2	1.41	1	1.16
Turkey	1	0.70	1	1.16
Uganda	1	0.70	1	1.16
Lebanon	1	0.70	1	1.16
Lithuania	1	0.70	1	1.16
Total	142	100.00	86	100.00

Source: adjusted according to Pokorná, D. Koncept společenské odpovědnosti. p. 106

[27] The first column in the table shows a specific number: how many authors from a given country appear in the research sample. The second column in the table shows the approximate number in terms of the monitored descriptive category – the number of scientific papers from the particular country. It is not possible to search for a direct link between the first and second columns. Both columns show the representation of countries in publishing scientific papers on CSR from various perspectives.

From the given overview, it is evident that there are two places, or centres, the authors of scientific papers come from, and where the scientific papers are most often published. Significantly most common place of origin is the USA with 47 authors (33.10 %) and 28 papers (32.56 %). The second centre in order is the UK with 21 authors (14.89 %) and 17 papers (19.77 %). The stated results clearly copy the fact that the place of origin of the CSR concept is the USA and the UK in Europe (EU countries are color-coded). The European concept of CSR as a clearly conceived topic has developed in continental Europe since 1990's, it has a shorter history, which can be the reason why the EU has a smaller representation of experts – authors of scientific papers who deal with CSR. EU countries Spain (11 authors) and Italy (6 authors) have still a great representation of authors in the research sample. With a big difference in the number of representatives, these EU countries follow – the Netherlands, Sweden, Finland, Greece, France, Belgium, and Denmark with the representation of three to four authors. Other world countries, Australia, Norway, Canada and Israel, are more significantly represented by three to five authors. The representation of other countries is minor, rather accidental with one author only.

EU countries are represented by less than a half of both papers and authors in the total sample. Besides the UK as a supporting country, however, EU countries have greater representation in the number of countries of publishing authors than other countries. It suggests that CSR is relatively well dispersed in the EU countries. In the list of authors publishing outside EU countries, a certain randomness of authors from states in different continents (Israel, Lebanon, Chile, Uganda) is apparent, which can also be due to the occasional cooperation of publishing authors with authors from countries of origin of the CSR topic.

5.4. Evaluation of the category the year of publication

The year of publication of the paper is detected from the year referred to in the bibliographic citation of the scientific paper. The year of publication of the scientific paper shows the increase or decrease in interest of experts in CSR on the timeline. It is shown for all states of the research sample, and separately for authors from EU and non-EU countries as well.

Table 2 Year of publication of scientific papers on CSR

Year			
Year	EU	Outside the EU	Total
1979		**1**	1
1984		**1**	1
1985		**1**	1
1986		**2**	2
1988		**1**	1
1995		**1**	1
1999		**1**	1
2000	**½**	**½**	1
2001	**½**	**½**	1
2002	**½**	**1 and ½**	2
2003		**1**	1
2004	**2**	**1**	3
2005	**4 and ½**	**2 and ½**	7
2006	**7**	**4**	11
2007	**4 and ½**	**3 and ½**	8
2008	**14 and ½**	**13 and ½**	28
2009	**2**	**3**	5
Total	**36**	**39**	75

Source: adjusted by Pokorná, D. Koncept společenské odpovědnosti. p. 102

The evaluation result of the category the year of publication is interesting from the perspective of publishing on the CSR topic in EU countries. If we evaluate the developmental series of publication year of the entire sample, one scientific paper is from 1979 and it is the single paper of this period. In the later period, individual scientific papers (1-2) appear from time to time in the first half of 1980s. a significant increase in the number of scientific papers in a contiguous sequence starts at the end of 1990s, particularly since 1999. Since that year, the number of scientific papers on CSR has been growing and it is obvious that it would be only schematic to monitor further the development of the number of publications.[28]

[28] The fall in the number of scientific papers in 2009 is explained by the fact that new papers from earlier that year were not made public in the databases at the time of writing the search.

If we divide the monitored sample into publications published by the EU authors and the publications published by the authors from countries outside the EU, we will find out that no EU author published on CSR until 2000. All publications of the previous period are by authors from the USA, where the concept originated and was developed at the theoretical level.

Since 2000, authors from the EU have begun to publish, but the first three publications in 2000–2002 were in co-authorship with an author from the USA, which suggests the possibility that expert theoretical interest in CSR came to EU countries through international cooperation of experts (first EU authors are from the UK as a second key country in history which has dealt with CSR). Since 2004, the number of publications by EU authors has increased significantly. It is a situation which fully corresponds to incentives for promoting CSR, these come from the UN, OECD and EU through the European Commission (see the introductory chapter). The evaluation of the year of publication category thus demonstrates that the expert interest in CSR reflects the policy of the EU, UN and OECD and their priority topics, on which documents are issued.[29]

5.5. Evaluation of the category the author

Name / names of the author / authors of the scientific paper is a category in which it can be monitored who highly expert authors publishing on CSR are and what role the authors from EU countries play among them, the extent to which the centre of scientific interest in the CSR topic transfers from the USA to EU countries. Respected authors can be determined by their repetitive publications, depending on whether and how many times they are cited by other authors in scientific papers of the research sample.

[29] In their systematic review, De Bakker et al. present a similar development in the number of scientific papers in the time series from 1970 to 2002. They came to the conclusion that the increase in the number of scientific papers can be observed since 1990 within the monitored period since 1970.

Table 3 Authors of scientific papers on CSR

Author of the paper – according to the number of repetitions of papers published by them			
Name	Place of work	State	Number of repetitions
Donald Siegel	The University of Nottingham Business School	UK	3x
Adam Lindgreen	Hull University Business School	UK	3x
Jeremy Moon	Nottingham University Business School	UK	3x
Walerie Swaen	Louvain School of Management	Belgium	3x
Abagail McWilliams	School of Management Arizona	USA	2xx
Dirk Matten	London University	UK	2x

Source: adjusted according to Pokorná, D. Koncept společenské odpovědnosti. p. 105

After evaluating this category, a group of six authors was identified who occurred repeatedly 2-3 times in the research sample as an author or one of the authors of the scientific paper on CSR – Donald Siegel (UK), Adam Lindgreen (UK), Jeremy Moon (UK), Waleria Swaen (Belgium), Abagail McWilliams (USA), Dirk Matten (UK). Out of the total number of 75 papers and the total number of 142 authors, 2–3 authors occur rarely. However, except one author, all the recurring authors are from the EU.

The results of this category can be completed by the survey results concerning repeatedly cited authors in references of scientific papers. It allows a deeper insight into the group of highly respected authors publishing on CSR. From the obtained list of authors, we can identify 11 whose number of records exceeds 25 regardless of the cited publication. These authors are identified as the recognized authors of CSR and their work can be identified as respected pivotal publications – scientific papers with over 10 repetitions in references of 75 scientific papers of the research sample.[30]

[30] For comparison, the numbers of recurrent authors from the systematic review by De Bakker et al., p.303, can be mentioned at least in a reduced form: Jones (119 repetitions), Wood, (117), Auperle, Carrol and Hadgield 107). De Bakker et al. do not state the country of origin of authors; however, the data of the research sample provide facts that these are the authors from the USA in all cases.

Table 4 Highly respected authors publishing on CSR

Repeatedly cited papers			
Author and paper	Country	Repetition	Citation level of the author
Carroll, 1979 a three-dimensional conceptual model of CSP 1999 CSR: Evolution of a definitional construct 1991 The pyramid of CSR	USA	26 16 12	71
Freeman, 1984 Strategic management…	USA	21	42
Wood, 1991 CSP revised	USA	21	38
Friedmann, 1970 The social responsibility of business	USA	19	30
Waddock, Graves, 1997 The CSP – financial performance link	USA	17	33
McWilliams, Siegel, 2001 CSR: a theory of the firm perspective	UK, USA	16	30
Donaldson, Preston, 1995 The stateholder theory…	USA	14	39
Porter, Crammer, 2006 Strategy and society…	USA	14	26
Davis, 1973 The case for and against business	USA	12	30
Bowwen,1953 Social responsibility of the businessman	USA	11	13
Frederick, 1978 From CSR1 to CSR2	USA	5	28

Source: adjusted according to Pokorná, D. Koncept společenské odpovědnosti. p. 126

The list shows A. Carroll as the most frequently cited respected author with as many as three papers, with 26, 16 and 12 repetitions for each of his papers. Other respected authors cited in the list of cited papers clearly belong to leading personalities of the CSR concept, cited in the number of 11 to 21 repetitions per paper. Their most frequently cited papers can be rightfully considered the leading theories giving birth to the definition of the CSR term[31]. The presented overview of the most frequently cited authors and their papers thus clearly

[31] Bowen's publication The Social Responsibility of the Businessman, which is by a number of authors described as the prime beginning of the CSR concept in terms of scientific literature, is among the most frequently cited works.

shows that among the respected authors there are only authors from the USA (apart from one exception in the role of a co-author). The history of the birth of the CSR concept in the USA is thus reflected in the scientific approach to the CSR topic in the long-term, since the key positions were only taken by authors from the USA.

One more view is possible due to which highly respected authors on CSR can be monitored. It uses definitions of CSR which are most frequently cited by the authors of the research sample.

The subjects of evaluation are the repeating names of authors, the definitions of who are cited. In quantitative terms, the authors who occur with their definition of the CSR concept in scientific papers of the research sample at least twice are monitored.

Table 5 Authors whose definitions on the CSR concept are cited

Authors whose definitions are cited[198]		
Name	Country	Number
Carrol	USA	15
McWilliams, Sigel	USA	6
Wood	USA	5
European Commission	EU	4
Moon	UK	3
Sethi	USA	3
Friedman	USA	3
Freeman	USA	2
Lee	USA	2
Davis	USA	2
Others[199]	USA	23

Source: adjusted according to Pokorná, D. Koncept společenské odpovědnosti. p. 123

[32] The important fact is that the authors, in most cases, use multiple definitions at the same time if they use definitions already created by other authors in order to create a CSR definition in their scientific paper. That means that more authors with their definitions of the CSR concept are cited in one paper. For this category, the name of the author is important, not the particular publication of the cited author, from which the cited definition of the CSR term was used.

[33] It represents a group of authors whose definition is cited in scientific papers once.

The presented survey clearly shows authors who are respected by other authors in defining the CSR concept (A.Carroll is cited in 15 papers of this group of scientific papers). All the authors listed in the table are a group of authors which can be described as 'highly respected authors' among experts on CSR, based on the number of citations in scientific papers of the research sample. Unlike the previous monitored criteria, the first traces of transmitting the expertly conceived CSR topic into EU countries have appeared here. The definition in the Green Paper by the European Commission is cited four times. It is also a proof that the Green Paper has become a key document on the approach to CSR for EU countries and its definition has been accepted by experts as one of the respected definitions. At the same time, the UK author Jeremy Moon, originally operating in the UK, now at Copenhagen Business School, appears among the respected authors of the CSR definition.

6. Discussion

The chosen methodology based on processing the systematic review clearly specified the location of the CSR in the scientific context. The methodology specified it in time, located its knowledge epicentres in terms of both territory and personalities. The research set – scientific papers on CSR are a very exhaustive material of predicative skills, they were selected according to exactly defined criteria with respect to the research objective.[34]

The CSR concept is a theoretical concept which has been scientifically grasped and processed for a long time. It is well traceable in scientific papers, has respected experts. CSR as a sophisticated concept reaches Europe from the USA. Europe was not involved in its conceptualisation. It is therefore an imported concept. What does it mean or can mean for EU countries?

EU countries are part of the global world and there is no doubt that in the context of globalization and global policy of sustainability it is correct that they are systematically motivated to implement CSR in the daily activities of organizations of all types and sizes. Organizations have quite a significant support in raising awareness, advisory activities, availability of tools for implementing and measuring CSR. The tools that offer major initiatives of the CSR implementation in Europe, especially EU countries, are sophisticated and ready to use. This is quality know-how.

It must also be noticed that the USA in particular is the country of origin of the whole CSR concept, although there is a significant impact of the UK since

[34] For more see the complete published research by Pokorná, D. Koncept společenské odpovědnosti.

1980. But how does the concept formulated in the USA conditions operate and will operate in countries with European culture? Is the EU procedure of implementing the CSR concept correct?

In documents issued for EU countries (Green Paper, 2001, a Renewed EU Strategy, 2011) the CSR is defined and structured the same way as it has developed in the American environment. Companies in the EU are recommended to adopt the tools that were made, tested and spread in the culture of America, where the CSR already has its stable position. In these documents, however, references to the need for establishing a European approach to CSR on traditional European values can be found. Another noticeable element of the documents is the attempt (expressed by OECD in particular) to make EU countries not only voluntarily accept CSR standards, but mentions occur that certain measures should be defined to certain types of organizations as mandatory (reports, ISO standards). Comments on such references have appeared since the publication of these documents. As a frequent discussion topic of experts and practitioners, these are published in *CSR fórum, časopis o společenské odpovědnosti firem* (translates as 'a magazine on corporate social responsibility'), published in the Czech Republic as a printed matter of the Business for the Society platform which is one of the initiatives working in close cooperation with CSR Europe for the Czech Republic.[35] This means there exist requests such as 'we should be careful, we should not take the CSR as finished, we should be sensitive to historical foundations that are close to European entrepreneurs and the society in general'. What value can mandatory social responsibility have? Is it then social responsibility at all?

Is the EU supposed to follow the prepared path in the globalization process? At first sight, it is certainly a comfortable, simpler way. What about the values of Europe, notably the European historical solidarity? Do we need any precise concept of how to behave politely and considerately? Do we need precise instructions on the implementation of the ethical business approach? Do we need measurement methodologies and criteria working in the American culture?

From one perspective, we need to be integral and integrable. Multinational companies have used CSR tools for a long time. Actually, multinational corporations are one of the key elements which gradually transfer these standards to European countries and distribute them among various countries of the world. This process cannot be prevented. However, in terms of business ethics and its recognition of territorial specificities and values, there is a call for sensitivity in multinational companies which ought to use this sensitivity to rectify the intensity and strictness of the implementation of CSR standards in the countries where they operate.

[35] CSR fórum, časopis o společenské odpovědnosti firem, Publicon, vol. 4/2012, vol. 5/2012.

From second perspective, there is a clear call for the EU and EU countries towards CSR. We should stick to the history and culture which Europe historically professed and which makes sense to build upon. However, the development of historical solidarity and ethical values in Europe was greatly disturbed by events that struck Europe in the recent past, especially World War II and the normalization of Eastern Bloc countries. Many links have been severed, people's confidence in good was disturbed, or even cut off. The continuity of historically developed values was replaced by a crisis of values, demonstrations of the consumer society phenomenon, distrust, fear of competition, uncertainty. These are the feelings that accompany the current business and are natural barriers for the expressions of solidarity with the surrounding environment.

In terms of the third perspective, we should not forget the small and medium-sized organizations as they are typical for European countries. Even these cope with the globalizing economy principles which include the CSR concept. But they cannot compare with CSR demonstrations in large corporations, it is even intimidating to compare with them although they play a key role in creating the social environment, especially at the regional level. At this level of business, problems of the competitive environment, politics, law, economic and social situation are concentrated in the short-term effects. It is unrealistic to rely on historical demonstrations of solidarity and expect that these companies will automatically be socially responsible. From this perspective, the transfer of the CSR concept to EU countries and Europe can be seen as a positive step. This way organizations acquire certain know-how, get clear stimuli to figure out what path to take. At the same time, thanks to full voluntariness of the CSR concept at present, they can approach the concept 'in their own way', they can enrich the concept with what they believe in, what works for them. This is how Europe can gradually move towards the above-mentioned own European approach to the CSR concept. If we look at the above-described links and transfers of the CSR concept in its complexity, it is possible to accept the idea that the original Europeans, who became the basis for settlements in America and, consequently, were the creators of local ethical foundations, end up affecting European culture and business ethics by being involved in the CSR conceptualisation and thus creation of the new European approach to CSR.

CSR can be seen as a social economic and ethical issue which is necessary to respond to mainly in education. Since it is already well described in the manifest form, it is a prepared curriculum for education, particularly at the higher education level. In its latent form, the CSR concept is a formulated moral value for learning in a broader sense, an approach designated to be intensively influenced and modified, and can also be considered a prompt from the surrounding environment at the level of the company itself or individuals. If the CSR concept is

labelled as a form a social institution, CSR can then be also the subject for adult education in terms of the attribution of social status[36], and the suport of social integration especially in company environment, but also within the scope of democratization in the most general terms, the contribution to the civic qualities. In this context, however, another challenge appears – preparing expert educators in the field of CSR[37] with the ability to correctly identify the CSR field for educating the target group and subsequently finding effective methods of education which will influence the values and attitudes of the educated students, managers, company employees or citizens.

[36] An attained type and field of education or post – 'CSR Manager' is nowadays a generally established and respected position in large corporations.

[37] As long as the CSR concept is a new concept in business and relations of companies to the surrounding environment, it can be seen as a current social problem which becomes the task for experts in adult education – i.e. in andragogy. Comprehensively, the relationship between andragogy and the CSR concept can be described as a way of mediating the understanding of the relationship between business and society. Therefore, it is useful to focus on involving the CSR in education in the EU.

Complex Relations between EU Competition and Public Procurement Law

Michal Petr*

Summary: Both competition and public procurement law constitute complex and independent, but to a large extent "closed" areas of law, with limited interdisciplinary discussions. An exemption is represented by a specific form of cartel agreements, taking place in the tendering procedure and manipulating with its outcome; these agreement are known as bid rigging. The relationship between competition and public procurement law is nonetheless more complex. We will argue in this article that certain principles, characteristic and indisputably beneficial in one of these disciplines, may be counterproductive in the other unless a right balance in their implementation is struck.

Keywords: bid rigging; competition law; public procurement; transparency

1. Introduction

The principle aim of competition law is to maintain the markets effective. This means in particular that undertakings in the market shall exert competitive pressure upon one another, "forcing" each other to offer goods and services of highest quality for lowest prices in order to win a customer, who significantly benefits from this process. Thus – if effective – competition secures consumer welfare.

Such an effective competition may nonetheless be distorted, on the one hand, by legislation that prevents or limits it, e.g. by creating a legal monopoly, erecting administrative barriers to enter the market, etc. On the other hand, undertakings themselves may wish to limit the level of competition in order to increase their profits or reduce their business risks; a typical example would be any form of collusion – cartelization, allowing the undertakings – instead of competing with one another – to coordinate their future conduct, e.g. in order to increase prices or partition markets.

Even though the aims of public procurement rules are more varied, including anticorruption, public oversight over public resources, good public

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governance etc., efficiency ranks very high among them; an effective tender, able to attract significant number of bidders, secures optimal outcomes for contracting authorities, because the bidders need to compete in order to win the tender, which brings the abovementioned benefits. Thus, the rules on competition and on public procurement are mutually reinforcing. Effective competition among bidders provides efficiencies to contracting authorities, who in turn need to design the tendering procedure in order to enable bidders to compete; conversely, if the bidders collude, the contracting authority cannot reap the benefits brought about by competition.

Competition law and public procurement law may be difficult to reconcile. In particular, the principle of transparency, requiring among others publication of – potentially commercially sensitive – information concerning the tendering procedure and its results, is essential for public oversight over contracting authorities and thus crucial in order to secure good governance, but it may at the same time facilitate cartelization. This is concisely summarised by the Organization for Economic Cooperation and Development (OECD), according to which:

> *"Strategies to address collusion and corruption in public procurement must address a fundamental tension: while transparency of the process is considered to be indispensable to corruption prevention, excessive and unnecessary transparency in fact facilitates the formation and successful implementation of bid rigging cartels. The extent to which transparency is a desirable aspect of a procurement process therefore depends on the circumstances, and may require trade-offs between best practice approaches to avoidance of collusion and corruption".*[1]

This paradox will be discussed in this article. We will first recall the basic principles of EU cartel law, in particular bid rigging and information sharing agreements. We will then proceed to explore the principle of transparency, as stemming from the EU public procurement rules. Finally, taking Czech Republic as an example of implementation of these rules, we will consider to what extent may these transparency rules facilitate cartelization, and to what extent they might be modified to in order to fulfil the aims of both competition and public procurement law.

[1] *Competition and Procurement: Key Findings*. OECD, 2011, p. 19. This material is accessible at: http://www.oecd.org/regreform/sectors/48315205.pdf (1 December 2016).

2. EU Cartel Law

Anticompetitive agreements are defined in Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU), according to which *all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market* are prohibited.

We will not discuss the concept of agreements in detail;[2] it suffices to note that the term agreement comprises any form of cooperation, whether explicit or implicit, among independent undertakings, which is capable of distorting competition. As a matter of principle, the negative consequences of an agreement on competition need to be established by competition authorities; conversely, there is a narrow category of agreements that have the distortion of competition as their object. As the Court of Justice of the European Union (CJ EU) observed,

> *"certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects […].*
>
> *That […] arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition […]".*[3]

Such agreements, e.g. price fixing or market sharing, constitute the most serious infringements of competition law. From the point of view of a competition authority, it is only necessary to establish that such an agreement was concluded, without substantiating its actual effects. Bid rigging, an agreement of (potential) bidders on outcomes of a tendering procedure, belongs to this category as well, as will be described below.

With regard to other forms of agreements, known as "by effect" infringements, the actual or potential distortion of competition caused by them needs to be substantiated; this will typically be the case with information exchange agreements, as described below.

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[2] See e.g. WISH, J., BAILEY, D. *Competition Law. Eighth Edition.* Oxford University Press, 2015, p. 84 *et seq.*

[3] CJ EU judgement of 11 September 2014 C-67/13 *Groupement des cartes bancaires (CB)*, par. 49 and 50.

2.1. Bid Rigging

It is universally accepted that bid rigging belongs to the most serious infringements of competition law, because it not only harms the competition as such, but also has a negative effect on public budgets and more broadly, on the quality of public administration. This is fittingly summarised in the OECD recommendation concerning bid rigging, adopted in 2012, according to which

> *"public procurement is a key economic activity of governments that has a wider impact on competition in the market, […] as it can affect the degree of innovation and the level of investment in a specific industry sector and the overall level of competitiveness of markets, with potential benefits for the whole economy.*
>
> *[I]n public procurement, competition promotes efficiency, helping to ensure that goods and services offered to public entities more closely match their preferences, producing benefits such as lower prices, improved quality, increased innovation, higher productivity and, more generally, "value for money" to the benefit of end consumers, users of public services and taxpayers.*
>
> *[C]ollusion in public tenders, or bid rigging, is among the most egregious violations of competition law that injures the public purchaser by raising prices and restricting supply, thus making goods and services unavailable to some purchasers and unnecessarily expensive for others, to the detriment of final users of public goods and services and taxpayers".*[4]

OECD, as well as other international organisations,[5] thus dedicates a significant proportion of their activities to help prevent and uncover bid rigging, not only in their member countries but in other states as well. Specifically, OECD adopted its Guidelines for Fighting Bid Rigging in Public Procurement already in 2009,[6] and since then, these guidelines have been translated into 26 languages. Many national competition authorities have since identified bid rigging as their priority, including the Czech Competition Authority (CCA).[7]

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4 Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement, as approved by Council on 17 July 2012 [C(2012)115 – C(2012)115/CORR1 – C/M(2012)9].

5 See e.g. United Nations Conference on Trade and Development (UNCTAD) and its materials on bid rigging, accessible at: http://unctad.org/meetings/en/Contribution/ccpb_SCF_Bid-rigging%20Guidelines_en.pdf (1 December 2016).

6 The material is accessible at: http://www.oecd.org/daf/competition/cartels/42851044.pdf (1 December 2016).

7 The CCA's guidelines on bid rigging are accessible (in Czech only) at: http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html (1 December 2016).

Bid rigging may take many forms. The simplest (and most frequent) is called "cover bidding". Under this scheme, undertakings agree to submit bids that are higher than the bid of the designated "winner", to submit bids that are known to be too high to be accepted or bids that contain special terms that are known to be unacceptable to the purchaser, or even bids that do not fulfil requirements of the contracting authority. Cover bidding is thus designed to give the appearance of genuine competition, whereas in fact, the results of the competition were fixed in advance by a cartel agreement.

A similar scheme is known as "bid suppression". It involves agreements among undertakings in which one or more of them agree to refrain from bidding or to withdraw a previously submitted bid so that the designated "winner" will be accepted. In essence, bid suppression means that an undertaking does not submit a bid for final consideration.

Systematic bid suppression may amount to "market allocation", by which the undertakings carve up the market and agree not to compete for certain customers or in certain geographic areas. Undertakings may, for example, allocate specific customers or types of customers to different firms, so that they will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to another undertaking. In return, that undertaking will not competitively bid to a designated group of customers allocated to other cartelists.

More sophisticated, but especially relevant for the topic of this article, is a strategy known as "bid rotation". In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the "winner". The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each of them or to allocate volumes that correspond to their respective sizes. The "losing" undertakings may also be "rewarded" in other forms, e.g. through subcontracts.

It is clearly in the interest of contract authorities to prevent bid rigging. The different guidelines on preventing bid rigging indicate many good practices, e. g. designing the tender procedure, defining the requirements and evaluation criteria and raising awareness about bid rigging among relevant staff, including a concrete checklist for detecting bid rigging in public procurement.[8]

Even if these recommendations are fulfilled, it is still the case that an elementary precondition for any collusion is communication, some exchange of information among the cartelist. In the next chapter, we will therefore explore the approach of EU competition law to information exchange agreements.

[8] See e.g. OECD Guidelines for Fighting Bid Rigging in Public Procurement, quoted above.

2.2. Information Exchange Agreements

The theory of competition law dedicates significant amount of attention to information exchange agreements, it will nonetheless not be discussed in detail in this article.[9]

Two forms information exchange agreements may be distinguished. Under the first scenario, the exchange of information is not the actual aim of the collusion, but only a means to achieve it. For example, the mechanism of regular exchange of information concerning volume of sales and prices may facilitate functioning of a price fixing cartel. Such agreements are not perceived as self-standing agreements, but only as a tool employed for the purposes of executing the "main" one. Thus, such information exchange mechanisms will be judged illegal, should the agreement itself be anticompetitive, but legal, if pursued through an agreement in line with competition law.[10]

The other form stands for "pure" or "self-standing" information exchange agreements. As the CJ EU ruled in the *T-Mobile Netherlands* case:

> *"the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted".* [11]

A subset of such agreements may be considered as "by object" infringements, prohibited without the need to substantiate their precise anticompetitive effects (see above); in particular, this will be the case with exchange of future pricing information.[12] Because with regard to public information, only "historic" information is being published, this situation will not be discussed any further.

Exchange of information may nonetheless be classified as "by effect" infringement as well. Under such scenario, a thorough analysis of concrete effects of the collusion in question needs to be undertaken, considering the specific characteristics of the affected market, the information exchanged as well as the exchange mechanism.[13] Arguably, the sharing of information, as mandated by the public procurement rules, may produce such anticompetitive effects.

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[9] See e.g. WISH, J., BAILEY, D., *op. cit.*, p. 575–583.

[10] This may be the case with research and development agreements, see WISH, J., BAILEY, D., *op. cit*., p. 576.

[11] CJ EU judgement of 4 June 2009 C-8/08 *T Mobile Netherlands and others*, par. 35.

[12] Communication from the Commission *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011/C 11/01), par. 72–74.

[13] *Ibid*, par. 76–94.

This conclusion is supported by the abovementioned OECD study, according to which:

> *"Transparency requirements can result in unnecessary dissemination of commercially sensitive information, allowing firms to align their bidding strategies and thereby facilitating the formation and monitoring of bid rigging cartels. Transparency may also make a procurement procedure predictable, which can further assist collusion".*[14]

Taking into account these observations, we will further concentrate on two ways in which anticompetitive effects may be produced by dissemination of commercially sensitive information. Firstly, such sharing of information may facilitate functioning of a cartel already in place. And secondly, it may enable a new cartel to be concluded.

2.2.1. Publication of information as a means of monitoring existing cartels

As a matter of principle, it needs to be observed that information exchange agreements typically concern secret information, i.e. information not available to public. At the same time, market transparency, i.e. availability of relevant information to undertakings as well as consumers, is generally perceived as pro-competitive, stimulating a more intensive competition and hence benefiting consumers.[15]

At the same, exchange of information may under specific conditions produce anticompetitive effects. As observed by the Commission,

> *"[...] information exchange can lead to restrictive effects on competition [...] by increasing the internal stability of a collusive outcome on the market. [...] Namely, information exchange can make the market sufficiently transparent to allow the colluding companies to monitor to a sufficient degree whether other companies are deviating from the collusive outcome, and thus to know when to retaliate. Both exchanges of present and past data can constitute such a monitoring mechanism. This [...] can increase the stability of a collusive outcome already present on the market".*[16]

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[14] *Competition and Procurement: Key Findings*, str. 19.

[15] See e.g. FAULL, J., NIKPAY, A. *The EC Law of Competition. Second Edition.* Oxford University Press, 2007, p. 732.

[16] *Guidelines on the applicability of Article 101*, *op. cit.*, par. 67.

As discussed above, information exchange as a means of monitoring existing cartels would not be perceived as a self-standing agreement, but "only" as a monitoring mechanism for the "main" cartel. Such arrangements are relatively common in bid rigging schemes,[17] it nonetheless needs to be admitted that the exchanged information identified in the relevant case-law were secret, commercially sensitive and not publicly available. As the Commission summarizes in its Guidelines, *"exchanges of genuinely public information are unlikely to constitute an infringement of Article 101 [TFEU]"*,[18] even though *"the possibility cannot be entirely excluded that even genuinely public exchanges of information may facilitate a collusive outcome in the market"*.[19]

With relation to public procurement, certain information is made public (or readily available) *ex lege*, as will be described in the next chapter. It therefore needs to be discussed whether even such "genuinely public" information may produce anticompetitive effects. We put forward that it may. The information is not public because of inherent characteristics of the market (as would be the case e.g. with regard to stock-exchanges, where the price information is public by definition) or because of specific activity or certain market players (e. g. certain price-comparison websites, produced in order to provide consumers with additional information to enable them to make a more informed choice). Arguably, the information published under the public procurement rules is only publicly available because the legislation requires so; otherwise, it would rather be kept undisclosed as a business secret.

We therefore believe that such *ex lege* publication of the information concerned does not relieve it of its ability to distort competition and produce anticompetitive effects.[20]

2.2.2. Publication of information as a means of cartelization

The other risk connected with publication of the public procurement information is that it may facilitate cartelization, in particular conclusion of price fixing or bid rigging agreements, in markets where no such cartelization prevailed before.[21]

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[17] See e.g. the Commission's Decision of 24 January 2007, COMP/F/38.899 (*Gas Insulated Switchgear*).

[18] *Guidelines on the applicability of Article 101*, *op. cit.*, par. 92.

[19] *Ibid*, par. 94.

[20] To the same conclusion, see e.g. BENNETT, M., COLLINS, P. *The Law and Economics of Information Sharing: the Good, the Bad and the Ugly*. European Competition Journal, 2010 (8), p. 311.

[21] SKRZYPACZ, A., HOPENHAYN, H. *Tacit Collusion in Repeated Auctions*. Journal of Economic Theory, 2004 (1), p. 153. Similarly, according to the Commission's *Guidelines on the applicability of Article 101*, *op. cit.*, par. 67, "*information exchange can make the market*

According to economic science – especially with regard to frequent and repeated tendering – the availability of information on winners of the previous tender and the essential elements of their bids, in particular the price, may produce a focal point for creation of a price equilibrium, serving as a starting point for future collusion.[22]

We will not go into further details concerning the economics of competition law.[23] It would go beyond the scope of this article, as the concrete characteristics of a specific bidding market and nature of the information exchanged would need to be taken into account. We nonetheless argue that publication of information, as mandated by the public procurement rules, is in principle capable of facilitating cartelization.

With this information in mind, we may proceed to analyse the specific publication requirements of public procurement legislation.

3. EU Public Procurement Law

Public procurement belongs to the largest government spending activities and a means through which public services are delivered to citizens; important policy goals – such as job creation, support to small and medium enterprises, environmental sustainability or innovation – are pursued through public procurement, which represents approximately 13% of gross domestic product in OECD Members and 29 % of general government expenditure. On average, 63% of total general government procurement spending across OECD Members occurs at sub-national levels.[24]

Public procurement is thus crucial from the point of view of budgetary policy of individual countries. At the same time – in the EU context – due to the extent of public expenditure, public procurement is also capable of affecting functioning of the Single Market. Specific rules on public procurement, harmonizing the legislation of member states and ensuring effective functioning of the Single Market, where thus designed. Currently, the EU public procurement

sufficiently transparent […][in order to] enable companies to achieve a collusive outcome on markets where they would otherwise not have been able to do so *[…]*".

[22] See e.g. SÁNCHEZ-GRAELLS, A. *Public Procurement and the EU Competition Rules. Second Edition.* Hart Publishing, 2015, p. 73, and the literature cited there.

[23] See e.g. GUNNAR, N., JENKINS, H., KAVANAGH, J. *Economics for Competition Lawyers. Second Edition.* Oxford University Press, 2016.

[24] *Fighting Bid Rigging in Public Procurement. Report on Implementing the OECD Recommendation 2016*. Accessible at: http://www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf (1 December 2016), p. 9.

rules are enshrined in a number of directives;[25] for the purposes of this article, we will only comment on the general Directive on public procurement (Directive).[26] According to its first recital:

> *"The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty […], and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition".*

The Directive thus establishes rules on the procedures for procurement by contracting authorities with respect to public contracts, whose value is estimated to be not less than the financial thresholds set therein.[27] Only procurements above these thresholds are thus covered by the Directive; Member States, while implementing it, nonetheless apply similar requirements to below-the-threshold procurement as well; for example, this is the case of the Czech Republic, as will be described below.

The procurement process itself will not be discussed in this article;[28] we will further focus only on the Directive's requirements on publication and disclosure of certain information.

3.1. Publication of Information under the Public Procurement Rules

The Directive prescribes the transparency rules with their anticorruption potential in mind:

[25] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in water, energy, transport and postal services and repealing Directive 2004/17/EC.

[26] Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

[27] Directive, Art. 1 (1).

[28] See e.g. BOVIS, C. *The Law of EU Public Procurement*. Oxford University Press, 2015.

> *"The traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud. Contracting authorities should therefore keep copies of concluded high-value contracts, in order to be able to provide access to those documents to interested parties in accordance with applicable rules on access to documents. Furthermore, the essential elements and decisions of individual procurement procedures should be documented in a procurement report".*[29]

This general presumption is implemented by an obligation to publish contract award notices;[30] for the purposes of this article it is sufficient to note the contract award notice needs to contain, among other information, description of the procurement, including nature and extent or value of works, supplies or services demanded, number of tenders received, identification of the successful tenderer, value of the successful tender and value and the proportion of contracts likely to be subcontracted to third parties.[31] At the same time, the contracting authority is obliged to inform – upon written request – any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.[32]

It ought to be stressed that the abovementioned information may be withheld if their disclosure *might prejudice fair competition between economic operators*.[33] It is nonetheless not clear what precisely is to be understood by this exemption. The Directive itself does not elaborate on it, nor does the CJ EU's jurisprudence; conversely, most of the relevant case law mandates publication of the abovementioned information.[34]

For the purposes of comparison, let us consider how were the EU public procurement rules on information disclosure transposed into the Czech law. A new Public Procurement Act (PPA), implementing the Directive as well as other relevant EU legislation, entered into force in October 2016.[35] Increased transparency was one of the guiding principles behind the PPA, perceived as

[29] Directive, recital 126.
[30] Directive, Art. 50.
[31] Directive, Annex V, Part D.
[32] Directive, Art. 55.
[33] Directive, Articles 50 (4) and 55 (3).
[34] In detail, see SANCHEZ-GRAELLS, A. *The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives*. University of Leicester School of Law Research Paper 13-11, 2013, accessible at: ssrn.com/abstract=2353005 (1 December 2016).
[35] Act. No. 134/2016 Coll., on public procurement.

a crucial tool to combat corruption.[36] Pursuing the same goal, a specific law on mandatory publication of certain contracts concluded by public authorities entered into force in July 2016.[37]

The information identified by the Directive, as described above, are published using specific forms in the Public Procurement Journal, an information system run by the Ministry of Regional Development, which is generally responsible for public procurement. This obligation falls on both below-the-threshold and above-the-threshold procurement; information on above-the-threshold procurement, to which the EU rules apply, is also published in the Official Journal.[38]

In addition to that, contracting authorities are also obliged to prepare a written report, which includes more mandatory information than prescribed by the Directive,[39] in particular the identity of all the tenderers and subcontractors; this report is to be published at the contracting authority's profile, an electronically accessible place where contracting authorities need to publish all the information concerning their procurement.[40]

Similarly to the EU legislation, there is a general provision that the contracting authority is not obliged to make public certain information, if their publication *would be able to influence economic competition*;[41] to our knowledge, there is no practical experience with this provision.

In addition to this, public authorities are obliged to store all their contracts, including the public procurement contracts, in a single electronic register.[42]

3.2. Impact of the Published Information on Effective Competition

The doctrine on anticompetitive effects of information exchange agreements, as described above, is concerned with *agreements*, i. e. illegal coordination among

[36] *Governmental Anticorruption Action Plan 2015*, accessible at: http://www.korupce.cz/assets/protikorupcni-strategie-vlady/na-leta-2015-2017/Akcni-plan-boje-s-korupci-na-rok-2015.pdf (1 December 2016).

[37] Act No. 340/2015 Coll., on specific conditions for validity of certain contracts, publication of such contracts and the register of contracts (Act on the Register of Contracts).

[38] PPA, Sec. 126 and 212. Concerning the forms, see Commission Implementing regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011, and Decree of the Ministry of Regional Development No. 168/2016 Coll., on publication of certain forms for the purposes of public procurement act and on the requirements on the profile of the contracting authority.

[39] Directive, Art. 84.

[40] PPA, Sec. 217.

[41] PPA, Sec. 218 (3).

[42] Act on the Register of Contracts, Sec. 2 (1).

independent undertakings. With regard to public procurement, it is however not necessary to adopt any such agreements as the relevant information is disclosed *ex lege*. Hence, the disclosure itself may produce the same effects as an agreement might have had, and the analysis of these effects should therefore take into consideration the same criteria. We argue that the system mandating disclosure of commercially sensitive information produces the same effects as an information exchange agreement would have.

As is evident from the discussion above, sharing of *historic* information concerning past tenders may facilitate collusion concerning future ones, either by reinforcing existing cartels by providing an effective monitoring mechanism or by establishing conditions under which collusion is easier.

Concerning specifically the EU public procurement rules, we put forward that taking into account the extent of information disclosed or made publicly available, it may produce anticompetitive effects. This conclusion is supported by findings of economic science:

> *A greater than necessary amount of information is divulged […]. Relevant information regarding the selected bid, the name of the winning bidder and the reason for the rejection must be provided upon request by the tendering authority. While this is, of course, desirable from and administrative law perspective, the degree of transparency exceeds the level desirable from a law and economics perspective.*[43]

Under the Czech public procurement rules, the extent of disclosure is even more far reaching. In our opinion, this regulation may produce anticompetitive effects as well.

4. Published Information as a Means of Cartel Detection

We have so far concluded that the obligation to make public certain information concerning past tenders, both according to the EU public procurement law and the Czech one, may pose a significant risk to efficient competition, as it may facilitate bid rigging. As a remedy, it is sometimes suggested that the level of

[43] WEISHAAR, S. E. *Cartels, Competition and Public Procurement*. *Law and Economic Approaches to bid rigging.* Edward Elgar Publishing, 2013, p. 103. See also SKRZYPACZ, A., HOPENHAYN, H. *Tacit Collusion and Repeated Auctions*. Journal of Economic Theory, 2004 (1), p. 153.

transparency should be limited, i.e. that some information should not be so easily accessible and some information should not be disclosed to public at all, only to supervisory authorities or courts.[44, 45]

We respectfully argue that this is not a feasible strategy. As a non-legal argument, any limitation of transparency would in our opinion be perceived as pro-corruption, and hence be impossible to adopt. On the other hand, even though historic information concerning public procurement may be "misused" by bid riggers, it may also be "used" by competition authorities. We therefore suggest that the extent of transparency should be increased and the accessibility of relevant information enhanced, making detection of bid rigging easier for competition authorities.

Information on bidders in a tender, its winners, the price they won with, the bidders who withdrew their bids etc., available over a long period of time, may be used to identify patterns in bidding strategies, and thus to reveal that bid rigging might have been taking place. In this regard, software used by the Korean Competition Authority (KFTC – Korean Fair Trade Commission) called BRIAS (standing for *Bid Rigging Detection System*) has been frequently presented.[46] We believe that similar software is being developed (or is already employed) by other competition authorities as well.

Sufficient source-data are indispensable for effective operation of such software. The amount of information published under the EU rules, though excessive form the point of view of competition law itself, may not be sufficiently detailed and readily available for the purposes of such software. Other information, including at least the price expected by the contracting authority, the price actually offered by the winning tenderer, the identity of other bidders and the identity of the bidders who withdrew their offers or were disqualified should be made public as well, in a single database enabling machine search.

As has already been observed, the publication requirements in the Czech Republic correspond with this desired amount of information, the problem is that the information is not contained in a single database, but on individual contracting authorities' profiles, what complicates automated search. Making

[44] SÁNCHEZ-GRAELLS, A. *Public Procurement and the EU Competition Rules. Second Edition.* Hart Publishing, 2015, p. 74.

[45] The same effect might be achieved by employing the exemption from mandatory publication of certain information because *it might prejudice fair competition between economic operators*; it would nonetheless limit the public oversight over the procurement process and we do not argue in favour of it either.

[46] The presentations are accessible at numerous international fora on competition policy, e.g. UNCTAD (in 2012) at: http://unctad.org/meetings/en/Presentation/ciclp2012_RT_PP_JaehoMoon_en.pdf, or ICN Cartel Workshop (2013), at: www.icncartel2013.co.za/assets/10h00-12h00-dae-young-kim.pptx (1December 2016).

publication of this information mandatory in a single database, for example the Public Procurement Journal where other information concerning procurement are already published, would not further increase the level of transparency in the market, but would be able to significantly increase the capability of the CCA to search for patterns in past tenders.

In this regard, it is surprising that even though a single authority – the CCA – is responsible for both the competition and public procurement policy, such a request has not been successfully raised.

5. Conclusions

In this article, we put forward that the current public procurement requirements on transparency, in particular the extent of published or readily disclosable information, may increase the risk of bid rigging, thus potentially depriving the tendering procedure of its procompetitive effects.

We also argue that to remedy this risk, it would not be appropriate to limit the extent of transparency, as such a move would undermine the anticorruption efforts enshrined in the principle of transparency. Conversely, we suggest that the level of transparency should be increased. Information corresponding in its extent at least to the level prescribed by Czech public procurement law should be listed in a single database allowing machine search. Thus, the potential risk of bid rigging might be offset by an actual increase in competition authorities' capability to detect bid rigging.

Walking a Tightrope – Looking Back on Risky Position of German Federal Constitutional Court in OMT Preliminary Question*

Ondrej Hamuľák, David Kopal & Tanel Kerikmäe**

Summary: The paper analyzes the relevant parts of the OMT ruling 2014 of the German Federal Constitutional Court (FCC) with regard to the question whether FCC acted in conflict with its prior case law, respectively with its powers. Emphasis is placed first on issues relating to the concept of a constitutional complaint, which was accepted in the decision. The paper also analyzes the extent to which the previously defined criteria for *ultra vires* review were met in the decision. This is related to the issue of a preliminary reference and to the question of manifest exceeding of the competences by the EU. The article also deals with the issue of possible ordering of the constitutional organs by the Constitutional Court and with the concept of constitutional identity from the perspective of FCC.

Keywords: Federal Constitutional Court, European law, constitutional law, European Union, Outright Monetary Transactions, financial crisis, Court of Justice of the European Union

1. Introduction

Financial and economic crisis, which broke out in 2008, had a significant impact on European Union and its currency and cause significant economic troubles for some of the Member States and EU itself. In reaction to these events, many different measures were adopted, both on the supranational as well as on the intergovernmental level in order to stabilize the whole situation. Germany became the most active

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country as far as the creation of new measures was concerned. The reason why Germany played the most important role in this process was not only the position of the country within the EU, but also the fact that the whole crisis did not have such a massive impact upon this member state compared to the other states within the Union. Thanks to the power and volume of its economy Germany became one of the most generous contributors to the common European rescue package.

For these reasons, decisions of the Federal Government and of the Bundestag as well as the decisions of the German Federal Constitutional Court (further recalled as 'FCC'), were crucial for a successful battle against the crisis. While the Parliament and the Government were participating in the process of negotiations, passing and approving of specific crisis austerity measures, the FCC reviewed some of these measures in its rulings. This was also the reason why the attention of the all EU Member States focused on the FCC whe e.g. it was making a decision upon the compatibility of tne European Stabilization Mechanism (ESM) and Basic Law (further recalled as 'BL'). Even though the crisis measures were subject to judicial reviews in many other Member States[1], it was specifically the rulings of the FCC whose impact on EU as a whole could well be defined as the most significant generally.

In all its upt to date rullings on the crisis and austerity measures, FCC, notwithstanding of its critical and euro-sceprical rhetoric, did not find any dirrect contradiction between these measures and requirements of Basic Law. Thus, these rulings did not have any negative impact on the situation in the EU so far. However, the possibility of such negative impacts in reality occurred when FCC within its rulling on the legality of Outright Monetary Transactions programme of the European Central Bank[2], decided to ask the Court of Justice of the European Union (CJEU) a preliminary question. In the argumentation attached to the preliminary question, FCC (apart from other things) raised the suggestion that the European Central Bank (ECB) could have to certain extent acted ultra vires by launching the OMT programme.

Even though the CJEU had already answered this question[3] and it came to the conclusion that OMT programme is in fact in harmony with the law of the EU, it did not comment on most of the issues analyzed in this paper. Thus the subject of this paper is to find the answer to the question whether it was the FCC which in its OMT ruling 2014 acted ultra vires, i.e. in other words whether or not it acted contrary to its powers and its settled approach to EU law.

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1 See e.g.. FASONE, Christina. Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective. *EUI Working Paper,* 2014, vol. 25, pp. 1–51.

2 Decision of FCC from 14th January 2014, 2 BvR 2728/13, OMT (further recalled as "OMT ruling 2014").

3 Decision of CJEU form 16th June 2015, C-62/14 – Gauweiler and Others, ECLI:EU:C:2015:400.

In the following paragraphs the OMT programme itself will be described, i.e. the ECB measures which were reviewed by the FCC in the ruling analyzed in this paper. Consequently we will focus on the relations between the FCC and the law of the EU, CJEU respectively. In this respect there are mainly two types of reviews, which had been defined by the FCC before: ultra vires test and the constitutional identity test. Next, the contemporary judicial decisions of the FCC and other courts covering the austerity crisis measures will be analyzed as well. Thus the critical assessment of the historically first preliminary question asked by the FCC will be gradually carried out. We will also deal with the conception of the constitutional complaint received by the FCC in this ruling. It will also be very important to deal with the question how the FCC set tasks to other constitutional bodies. Next, the issues connected to the protection of constitutional identity will also be touched upon.

2. Outright Monetary Transactions programme or how to save euro currency

The financial and economic crisis which broke out in the USA in 2008 and gradually spread across a globe sped up the whole process of European integration especially as far as economic integration is concerned. This crisis pointed out to the structural inefficiencies in the economic, financial, fiscal, macroeconomic, political and constitutional area of the European Union. The Union had not been prepared for such a crisis and it was specifically the Eurozone which had to cope with the consequences of this crisis. While the Eurozone was established the authors of the Treaties failed to create machanisms[4], which would have enabled the EU institutions to react to the crisis more flexibly and promptly, or even prevent the crisis and thus to substantially eliminate the consequences of the crisis itself, i.e. those consequences which caused significant problems in many Member States. In this way it can be said that it is the EU which shares part of the responsibility for the expansion of the financial crisis in Europe[5]. There are visible serious consequences of the crisis in everyday lifes of Europeans. One could mention those such as e.g. the increase in unemployment numbers, small or almost no economic growth, respectively, problems of many financial

[4] On development of EMU see further: LASTRA, M. Rosa, LOUIS, Jean-Victor. European Economic and Monetary Union: History, Trend, and prospects. *Yearbook of European Law*, 2013, pp. 1–150.

[5] MENÉNDEZ, José Augustín. The Existential Crisis of the European Union. *German Law Journal*, 2013, vol. 14, no. 5, p. 466.

institutions and especially the growth of the public debt endangering the solvency of the individual Member States.

As a reaction to this financial situation many Member States adopted a whole number of austerity measures[6] with the aim to eliminate the negative impact of the crisis both on the Eurozone as well as on the Eropean Union as a whole. It was specifically in Europe where the crisis manifested itself through the so-called debt crisis. This specific sort of crisis severely hit the economies of some EU Member States. To cover the crisis first a specific temporary tool was launched in the form of European financial stability facility (EFSF). And consequently a permanent European stabilization mechanism was introduced in order to secure the financial stability within the Eurozone. It was thanks to this specific mechanism that those Member States which were experiencing finacial difficulties were allowed to receive the financial assistence, i.e. those which participated in the mechanism decsribed above under condition that they agreed to fulfill the settings and requirements entailing strict economic measures and reforms.

However, these mechanisms proved to be inefficient as the risk premiums of the governmental bonds sharply increased their value in several Member States of the EU during the year 2012. Thus in reaction to these events the president of the ECB Mario Draghi in his speech of July 26, 2012 conveyed the message containing the words which can now be considered as legendary when he said that he will do everything possile in order to save the euro currency[7].

A few weeks later the Governing Council of the ECB passed an internal decision containing the Fundamental rules and conditions of the so-called outright monetary transactions programme, i.e. the programme of buying the governmental dluhopis through secondary markets. Thus the ECB intended to provide help for some Member States which found themselves in the state of economic trouble. However, the states intending to receive such help would have to meet certain conditions and requirements contained in assistence programmes, i.e. EFSF, or ESM respectively.

The aim of the OMT programme is, in fact, identical with the aim of the ESM programme, i.e. the keeping of the liquidity of the states which find themselves in economic trouble. However, there is a considerable difference in the way of on one side buying of government bonds through the ESM where the budget is limited by the volume of finances contained in the mechanism and buying through OMT programme where the budget is practically unlimited, on the other

[6] See DEGRYSE, Christophe. The New European Economic Governance. *European Trade Union Institute Working Paper*, 2012, no. 14, pp. 19–66

[7] *Speech of Mario Draghi, ECB president at the Global Investment Conference in London*. 26th June 2012. [online]. Available at < https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

side. The fact that the finances for the ESM must always be approved by the national parliaments of the Member States can be considered as another difference of considerable importance. Thus the only way to express disagreement on the part of the Member States in the case of OMT programme is to absent in voting for the programme in the Governing Council during the process of approval of the programme itself. This was what the president of Bundesbank tried to do, however, he was overruled by the other members.

On the 6th of September the ECB subsequently published a report[8] which contained the fundamental characteristic features of the OMT programme[9]. Even though this was merely a press report, this document is of a great significance in the context of the OMT programme because it served as the basis for the plaintiffs in their complaints to the FCC as well as for the the considerations and opinion of the FCC in its OMT ruling 2014.. This is so as the press report is the only official document which was in connection with the OMT programme published as the programme itself has not been put into practice yet. Moreover, it is not very likely that the programme will be set in motion in the future at all. The mere delivery of the public declaration proved to be a sufficient impulse for calming down of the situation in financial markets. Many professionals believe that it was specifically the Draghi's declaration along with the announcement of the launching of the OMT programme which actually prevented the break up of the Euro currency.[10]

3. The Federal Costitutional Court and Court of Justice of the EU: Friends or Foes?

The hierarchy of legal orders is a typical sign of the federal states where the federal law has priority over the law of the individual members of the federation. However, this matrix demonstrates significant cavities when it comes to

[8] ECB Press Release *Technical features of Outright Monetary Transactions*. 6 September 2012 [online]. Available at <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html>

[9] According to this report, the programme shall ensure the proper transmission and consistency of monetary policy. a necessary condition for its realization is strict conditionality in relation to the EFSF and ESM respectively. All other potential transactions will focus on government bonds with maturities between one and three years. There are no ex ante quantitative limits provided for these transactions. The Eurosystem shall not have a privileged position among the other creditors, but their position shall be *pari passu*. According to press release the value of bonds will be publised on regualar basis.

[10] KENNEDY, Simon, BLACK, Jeff. *Draghi's 'Whatever It Takes' Still Works as Euro Revives*.10. January 2014. [online]. Available at <http://www.bloomberg.com/news/articles/2014-01-10/draghi-s-whatever-it-takes-still-works-as-euro-revives>

the relation between the law of EU and the the law of Member States. The developments of the legal system accompanning the European integration (which consists of the legal order of the EU and the legal orders of the Member States[11]) proved that the atmosphere of mutual conflicts among the individual legal orders prevails over the overall effort to cooperate. In this sense some constitutional courts and supreme courts of the Member States even reserve the right of the last word for themselves with respect to the interpretation and resolutions of the potential conflicts between EU law and their national law. The most priviliged position within these courts is undoubtedly held by the FCC.

The relationship between the FCC and CJEU or the EU law respectively had been of an ambivalent nature since the very beginning of the European integration[12]. This fact was based on the contradicting views on the relations between national legal orders and the law of the EU with both parties employing the opposte view. According to the CJEU the law of the EU forms an autonomous legal order[13] and thus it has a priority over the constitutional law[14] of the Member States[15]. In order to keep the autonomy as well as the uniformity of the law of the EU the article 267 of the TFEU stipulates that all the national courts should have the possibility or even an obligation[16] to file a preliminary question to CJEU in case it is the primary law that needs to be interpreted or even when the secondary law needs to be analyzed as to the validity and interpretation as well. Thus the national courts themselves do not have the right to declare the Union acts as null and void[17].

According to the law of the EU and the judicial decisions of the CJEU it is the EU court which has the last word in the issues relating to the EU Law.

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[11] MADURO, Miguel P. Three Claims of Constitutional Pluralism. In: AVBELJ, Matej, KOMÁREK, Jan (ed). Constitutional Pluralism in the EU and Beyond. Oxford: Hart Publishing, 2012, p. 70.

[12] DAVIES, Bill. *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979*. New York: Cambridge University Press, 2012, 248 p.

[13] ECJ judgement from 3rd June 1964 Costa vs. ENEL, 6/64, ECLI:EU:C:1964:66, ECJ judgemt from 9th March 1978 Simmenthal, 106/77, ECLI:EU:C:1978:49.

[14] ECJ judgement from 17th December 1970 Internationale Handelsgesellschaft, 11/70, ECLI:EU:C:1970:114.

[15] The discussed limit to the principle of primacy is inclued in art. 4/2 TEU, according to which the EU shall respect the national identity of Member States. But it is worth to mention here that CJEU never accepted or expressly acknowledged this provision as legal exception from this principle. See further ZBÍRAL, Robert. Koncept národní identity jako nový prvek ve vztahu vnitrostátního a unijního práva: Poznatky z teorie a praxe. *Právník*, 2014, vol. 153, no. 2, pp. 125, 126.

[16] In situation when case is pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law.

[17] ECJ judgement from 22th October 1987, Foto-Frost, 314/85, ECLI:EU:C:1987:452, p. 15.

This is expressly stated even in the article 344 of the TFEU[18]. Thus the EU has a centralised system of the judicial review mechanism in order to deal with the matters involving the execution of the powers of the EU itself[19]..

However, the FCC never totally identified itself with this conception of the EU Law.[20] According to the FCC the principle of the transfer of the powers can be explained as the expression of the fact that the Union powers have their foundation in the Constitutional law of the Member States[21]. Thus in comparison with CJEU the FCC does not put down the priority of the law of the EU to its autonomous nature but to the authorization which is provided by the BL[22] along with the other constitutions of the Member States.

In the case of Germany this authorization was carried out through the ratification law, i.e. through the consent of the Bundestag with the transfer of powers to the EU the contents of which is made up of the integration programme. Thus FCC remains as the protector of the German sovereign rights and of the constitutional identity in order to thwart the interventions of the EU law and the European authorities in cases of overusing their mandate defined in the integration programme. However, as far as this approach is concerned the FCC is not the only one[23] as there are many other national constitutional courts which never accepted absolute priority of the EU law[24].

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[18] This provision oblige Member States not to resorve their mutual disputes concerning the interpretation or application of the Treaties by submission to any external body of institution.

[19] BAST, Jürgen. Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's *Ultra Vires* Review. *German Law Journal,* 2014, vol. 15, no. 2, p. 171.

[20] Evidently, FCC speaks about the European constitution in material, functional sense only. See FCC decision from 30th June 2009, 2 BvE 2/08 Lissabon-Urteil, p. 231 (further recalled as "Lisbon ruling").

[21] Lisbon ruling, p. 234.

[22] For evolution of relation between European and German law see KOKOTT, Juliane. The Basic Law at 60 – From 1949 to 2009: The Basic Law and Supranational Integration. *German Law Journal*. 2010, vol. 11, no. 1, pp. 99–114.

[23] This attitude towards the primacy of EU law may not be surprising given the fact that many of Member States, including Germany, became a fully sovereign only in the early nineties in connection with the fall of the Iron Curtain in Central and Eastern Europe (see further HAMUĽÁK, Ondrej. *National Sovereignty in the European Union. View from the Czech Perspective.* Cham: Springer, International Publishing AG, 2016, 89 p). In the case of Germany it's connected with the unificatio of the eastern and western parts. These states have a strong desire to preserve a unique element of their statehood (eg. the constitutional identity). See further MAYER, C. Franz. Rashomon in Karlsruhe: a Reflection on Democracy and Identity in the European Union. *International Journal of Constitutional Law*, 2011, vol. 9, no. 3–4, p. 783.

[24] For example decision of the Czech Constitutional Court Treaty of Lisbon I, Pl. ÚS 19/08, ECLI:CZ:US:2008:Pl.US.19.08.1, decision of Italian Constitutional Court 183/73 Frontini v. Ministero delle Finanze, decision of Irish Supreme Court from 19th December 1989 Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan.

FCC carries out its protective function through two types of judicial review[25] of the European Law: *ultra vires* and so called *Identitätskontrolle*, i.e. through the judicial control of the constitutional identity[26]. These two mechanisms define the mutual relation between the legal system and the law of Germany and the the law of the EU[27]. While the second review and its purpose consists in finding out of the answer to the question of the protection of the imperishable core of the BL defined in the article 79/3 of the BL against the intervention through the transfer of powers to the EU, the review of *ultra vires* is focused on the European Acts violating the principle of transfer of powers or the fact whether or not the EU intervenes into the areas which fall within the scope of the Member States' mandate.

While the process of the execution of the judicial review is, in both cases, practically the same, the real impact on the relation between the legal orders varies. The intervention into the constitutional identity does not necessary imply, that the EU law is generally wrong or unvalid. However, the declaration of the act of *ultra vires* always indicates that the act is wrongfull in general terms. Moreover, this wrongfullness goes beyond the twofold relation between Germany and the EU as the EU act which was declared *ultra vires* is not suitable even for other Member States. The intervention into the constitutional identity, on the other hand, only involves the constitutional identity of the specific state. Moreover, the constitutional identity and its determination cannot be established merely by the state itself, but it has to be the result of common and mutual efforts of the CJEU and the national courts.[28]

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[25] There is also third type of review – the oldest one interconnected with the famous 'Solange saga'. Because it is not relevant in connection to OMT ruling we won't deal with in further on in the main text of this paper. In 'Solange saga' FCC primarily rejected the possibilityof unlimited application of Community law within the national legal practice by the argument that supranational law showed serious deficiencies in the field of protection of individuals. It stated that as long as Community system will show the deficiencies (in comparison with German level) it will not accept its general internal effects (case Solange I). Once the Community system improved and the doctrine of fundamental rights was introduced FCC changed its opinion and accepted the application of Community rules (case Solange II) but once more with the objection that It will serve as the ultima ratio guardian of the structural quality of this reached level. In case when serious structural discrepancies will appear within the supranational system the German court reserves itself the right not to accept the internal applicability of the certain rules of EU law within the German system. See cases Solange I–Internationale Handelsgesellschaft von Einfuhr–und Vorratsstelle für Getreide und Futtermittel, decision of 29 May 1974, FCCE 37, 271 and Solange II–Wünsche Handelsgesellschaft decision of 22 October 1986, FCCE 73, 339.

[26] For review of constitutional identity in the context of OMT ruling see chapter 5.5.

[27] Similar mechanisms were introduced also by Czech Constitutional Court, see further KOPAL, David. Ústavní soud ČR a kontrapunktní principy: Jaké je naladění ústavního ochránce vůči evropskému právu? *Právník*, 2014, vol. 153, no. 7, p. 581.

[28] MAYER, C. Franz. Rebel Without a Cause? a Critical Analysis of the German Constitutional Court's OMT Reference. *German Law Journal*, 2014, vol. 15, no. 2, pp. 130, 131.

Neither the first nor the second way of judicial review of the EU acts is explicitly prescribed by the German legal order and thus both of them are merely the result of the judicial decisions of FCC. Thus FCC through its interpretation of the BL defined the limits of the European integration and obliged itself to review these limits.

3.1. The conditions for application of the ultra vires review

This type of review was first defined by the FCC in the ruling concerning the constitutional review of the Maastricht Treaty[29]. The review *ultra vires* consists in the capacity of the FCC to review whether or not the EU in the specific case analyzed went beyond the limits of its powers which were delegated to the Union by the individual states. The justification of this judicial review consists in the fact that the intergration programme contained in the ratification law cannot be, according to the FCC, subsequently amended one sidedly and significantly through the European Acts which go beyond the powers of the Union. The integration programme amended in this way would not be covered by the consent of the Bundestag through which this authority expressed its consent with the ratification law. This is the reason why the amendments and changes would not be accepted and binding for Germany as they would be contradicting with the Ratification Law. And the national authorities would not be bound to apply these changes and amendments in practice[30] in case the EU institutions developed the EU law in a way which is contrary to the Treaties.

The content of the integration programme is primarily determined by the law of the EU. FCC thus reviews the law of the EU through the criteria of the ratification law which in material sense represents the "German version" of the law of the EU which, however, does not always have to be identical with the interpretation of the CJEU. Thus, the FCC finally reviews the harmony between the act of the EU and the BL, but also the harmony between the act of the EU and the primary law of the EU[31]. In fact FCC thus established the power to independently interpret the law of the EU.

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[29] FCC decision of 12th October 1993, FCCE 89, 155 Maastricht-Urteil (further recalled as Maastricht ruling). For the critic of this decision see e.g. WEILER, Joseph Halevi Horowitz. Does Europe Need a Constitution? Demos, Telos and German Maastricht Decision. *European Law Journal*, 1995, vol. 1, no. 3, pp. 219–258. For positive analysis of the decision see e.g. MACCORMICK, Neil. The Maastricht-Urteil: Sovereignty Now. *European Law Journal*, 1995, vol. 1, no. 3, pp. 259–266.

[30] Maastricht ruling.

[31] MAYER*: Rebel Without a Cause*…, s. 117.

FCC further developed this kind of review in the Lisbon ruling[32], where, inter alia, it stated that the review of *ultra vires* can be performed in the framework of the German judiciary only by the FCC itself[33]. Thus it decreased the likelihood of the application of this review. Subsequently, this issue was dealt with in the ruling in Honeywell case[34], where the rhetoric was defind even more strictly and stringent conditions were set for the review[35], and therefore it was highly unlikely that the FCC would ever actually declare an act of the EU *ultra vires*.

The conditions formulated in the decision of the Honeywell were referred to by the FCC in its OMT ruling 2014[36]. These conditions include the fact that the review of *ultra vires* must be coordinated with the powers of CJEU arising out of Treaties in order to preserve the unity and coherence of EU law. This approach is an expression of the friendly relationship to EU law (so-called Europarechtsfreundlichkeit). CJEU must have the possibility, in preliminary ruling proceedings, to interpret the Treaties and to comment on the validity and interpretation of EU legal acts, before the FCC can rule on their inapplicability. In order to declare the act *ultra vires* it is further necessary that an EU act should clearly violate delegated powers and at the same time have a singificant structural impact on the division of powers between the Member States and the EU. The purpose of this review is according to the FCC to prevent the misuse of the powers of the EU which could lead to changes in Treaties or to the expansion of EU powers. However, the FCC further mentions that such conflicting cases will only be exceptional due to the existence of institutional and procedural mechanisms in EU law.[37]

The aboventioned conditions for the application of the review of *ultra vires* had arised from the case law of the FCC predating the preliminary question in OMT ruling 2014. But after filling the preliminary question, many of these conditions and their future applicability remained uncertain.[38]

[32] For *ultra vires* review see further BECK, Gunnar. The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Kompetenz-Kompetenz: a Conflict between Right and Right in Which Law and the Problem of There is No Praetor. *European Law Journal,* 2011, vol. 17, no. 4, pp. 470–494.

[33] Lisbon ruling, pp. 353, 354.

[34] FCC decision of 6th July 2010, 2 BvR 2661/06, Honeywell (further recalled as Honeywell ruling).

[35] OMT ruling, p. 24.

[36] This fact was discussed also by dissenting judge Landau in Honeywell ruling, p. 102.

[37] Honeywell ruling, pp. 56–61.

[38] See further chapters 5.1 a 5.3.

4. European crisis measures before FCC and CJEU

The OMT ruling 2014 is not the first case in which the FCC reviewed the rescue measures of the EU. FCC has already previously expressed its view on the constitutionality of the consent of Germany, with bilateral financial assistance for Greece and EFSF.[39] In other rulings, it also expressed its view on the issues of parliamentary involvement[40] and issues relating to the right of parliament to the access to information[41] in the context of European assistance programmes.[42]

The question of the legality of the OMT programme was originally part of a broader management, which covered even the review of the amendment to the article 136 of SEFU and the legality of the ESM and the Treaty on stability, coordination and governance in the economic and monetary union (fiscal compact). FCC expressed itself on the following three key issues on September 12, 2012, i.e. at a time when the attention of the whole of Europe was focused on the FCC, because the feasibility and effectiveness of the major crisis measures of the EU depended on its decision. FCC in its, so far only preliminary ruling[43], refused to file a preliminary measure, which would prevent the participation of Germany in the ESM and the fiscal compact, and, conversely, allowed Germany to ratify the amendments to the article 136 TFEU, the ESM Treaty and the fiscal compact. However, in the case of the ESM FCC set conditions that had to be met, so that the participation of Germany in it was in accordance with the BL. The most essential condition was the fact that the German parliament must have the operation of the ESM de facto always under control. These requirements were subsequently satisfied in the interpretative declaration of the ESM.[44]

Although the FCC in that interim decision dealt with many important issues, several other questions remained still unanswered. FCC, for example, did not deal with the legal analysis of the crisis measures of the ECB and several constitutional issues relating to, for example, parliament's participation in the rescue mechanisms. While issues related to the ECB, which FCC separated from the

[39] FCC decision of 7th September 2011, 2 BvR 987/10, Greece & EFSF (further recalled as Greece & EFSF ruling).

[40] FCC decision of 28th January 2012, 2 BvE 8/11, Special Parliamentary Committee.

[41] FCC decision of 19th July 2012, 2 BvE 4/11, Right to Information (ESM & Euro Plus Pact).

[42] Further to decision predecesing the OMT ruling see FABBRINI, Frederico. The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective. *Berkeley Journal of International Law*, 2014, vol. 32, no. 1, pp. 86–95.

[43] FCC decision of 12th September 2012, 2 BvR 1390/12, ESM & TSCG, preliminary decision.

[44] Declaration on the European Stability Mechanism, 27th September 2012. [online]. Dostupná na <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/132615.pdf>

main proceedings[45], resulted in filing of preliminary question, the remaining issues are touched upon in the main ruling of March 18, 2014[46]. Here, FCC dealt with the matters mentioned above, often in a greater detail than in a preliminary ruling. In the final analysis here, however, nothing unexpected was expressed.

Similar issues were touched upon by the CJEU in the decision of Pringle case[47]. Here the CJEU stated that both, the amendment to the article 136 TFEU, adopted on the basis of a simplified legislative procedure, as well as the conclusion and ratification of the ESM Treaty by the Member States of the Eurozone are in accordance with the EU law[48]. The reasoning used in this ruling, was subsequently used by the FCC in the review of the OMT programme, paradoxically, to call into question its legality.

It was the General Court (GC) which has dealt with the crisis measures of the ECB several times before. In December 2011, the GC refused an individual lawsuit requesting the cancellation of the ECB's measures regarding the Securities Markets Programme[49], which was the predecessor to the OMT programme. In December 2013, the GC also refused the individual action[50] directly on the cancellation of the OMT programme filed by more than 5000 complainants.[51] Most of them attacked the OMT programme at the same time, even before the FCC. According to the GC, however, these individuals failed to prove that they were affected by the OMT programme directly and thus their rights were not violated as the programme itself had not been implemented by the ECB at that time. The GC moreover pointed out in its ruling to the posibility of individuals to challenge the future implementation acts at national courts and also to the fact that they can in such a procedure seek to file a preliminary question to the CJEU.[52]

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[45] FCC decision of 17th December 2013, 2 BvR 1390/12, ESM & TSCG – exclusion from OMT programme.

[46] FCC decision of 18th March 2014, 2 BvR 1390/12, ESM & TSCG – main proceedings.

[47] Judgment of CJEU of 27th November 2012, C-370/12 Pringle, ECLI:EU:C:2012:756.

[48] See further LHONEUX, Etienne, VASSILOPOULOS, A. Christos. *The European Stability Mechanism Before the Court of Justice of the European Union Comments on the Pringle Case*. Springer, 2014, 74 p.

[49] Judgement of General Court of 16th December 2011, T-532/11 Städter v ECB, not published; further confirmed by CJEU judgement of 15th November 2012, C-102/12 P Städter v ECB, ECLI:EU:C:2012:723.

[50] Judgement of General Court of 10th December 2013, T-492/12 von Storch and Others v ECB, ECLI:EU:T:2013:702. (further recalled as von Storch and Others).

[51] WENDEL, Mattias. Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference. *European Constitutional Law Review,* vol. 10, no. 2, p. 269.

[52] von Storch and Others, p. 47.

5. OMT ruling 2014 of the Federal Constitutional Court

The legality of the OMT programme (or buying government bonds by the ECB on the secondary markets without a predetermined amount) was called into question from two directions. From one side it was attacked by a group of individuals through constitutional complaints, through which the claimants sought protection of their fundamental rights in connection with the fact that the German federal government did not file an action at the CJEU, the purpose of which would be the cancellation of the OMT programme, and also fought against the OMT programme itself. From the other side the programme was attacked at the same time by the parliamentary party DIE LINKE in proceedings concerning a dispute between constitutional bodies (the so-called Organstreit) and sought that the FCC ordered the Bundestag to seek cancellation of the OMT programme.

The main question of the proceedings before the FCC therefore was whether the OMT programme is compatible with the BL and with the EU law, or whether the ECB did not exceed its powers when it declared that it is ready, under certain conditions, to buy without any limits the government bonds of certain Eurozone Member States. The complainants in this sense, argued that the OMT programme does not fall within the mandate of the ECB, as the EU law gives the ECB the powers relating especially to the monetary policy. The OMT programme however, according to them, in fact, represents a general measure of economic policy that belongs exclusively to Member States, and the ECB acted *ultra vires*. The federal government and the *Bundestag* have, therefore, according to the complainants, the obligation to seek a cancellation of the OMT programme, or at least prevent its implementation. This second obligation applies according to them, even for the *Bundesbank*.[53]

5.1. Preliminary question and the condition of 'apparentness'

By the majority ruling of January 14, 2014 the second senate of FCC filed historically the first preliminary question on the basis of the article 267 TFEU, to the CJEU concerning the interpration of primary law. FCC, through this question, not only inquired about the interpretation of the relevant provisions of EU law, but at the same time it outlined its own answer, which, however, due to strict interpretation of EU law[54] would transform the OMT programme into such an

[53] OMT ruling, p. 5.
[54] Ibid, p. 100.

inefficient means that it would lose its original purpose. Two of the judges, who did not agree with the majority decision, wrote dissenting opinions in which they stated that the court should refrain from deciding in the matter, because according to them, inter alia, this was a sensitive political issue, which should not be solved by the courts.[55]

By the decision to refer the preliminary question to the CJEU, FCC accepted to a certain extent it's position as the national court having a duty (as the court which decisions cannot be challenged by any further remedies) to start the preliminary question proceedings under article 267 TFEU. Strictly speaking FCC just accepted it's Honeywell[56] condition, which requires that FCC shall turn on the CJEU and offer it a space for comment on the issue concerned always before it could possibly declare an EU act *ultra vires*.[57] Hovever, the simple reffering of the preliminary question cannot be seen as acceptance of the hierarchical nature of the European judicial system. In fact, the mere nature of the original national proceedings (*ultra vires* review) undermined the authority of the decision of the CJEU. Additionaly one must consider the wording and FCC suggestions included in its decision on preliminary request. FCC in fact asked CJEU only to confirm its own interpretation of EU law. Although the FCC had full right to express its view on the issues dealt with, the question was whether in a wake of cooperative relationship between the two courts it could not rather refrain from stating, that the OMT programme was de facto *ultra vires*[58] and that there was a risk of encroachment to the German constitutional identity in the case if the CJEU would not have confirmed the interpretation of the FCC. The question could be so easily understood at the same time as a threat: 'Accept my interpretation, or you will face a constitutional conflict'.[59] Although the FCC therefore offered the CJEU the opportunity to express its view, through its

[55] OMT ruling, dissenting opinions of judges Lübbe-Wolff and Gerhardt.

[56] Previously mentioned by the FCC in its decision of 2nd March 2010, 1 BvR 256/08, Data Retention, pp. 185, 186. It's worth to mention here that in cases related to the revisions of primary law there is no duty to sent preliminary question cause intrepretatio of the treaties chamging primary law, which are not valid, is out of the CJEU competence; see further KUMM, Mattias. Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About It. *German Law Journal*, 2014, vol. 15, no. 2, p. 205.

[57] Honeywell ruling, p. 60.

[58] According to FCC the violation (*ultra vires* act) would have been structurally significant in case if OMT programme would breach the explicit prohibition of monetary financing of the budget (art. 123/1 TFEU) or allow ECB to exceed its monetary competence, see OMT ruling, pp. 39, 43.

[59] KUMM: *Rebel Without a Good Cause*…, p. 206. For opposite (rather untanable) opinion see MURSWIEK, Dietrich. ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014. *German Law Journal*, 2014, vol. 15, no. 2, p. 153.

strict argumentation it already suggested its intent to have the last word in the interpretation of EU law.

From the interpretation of the OMT programme made by the FCC it arises that the OMT programme should not undermine the conditionality of the assistance programmes of the EFSF or the ESM. Furthermore, it must have only a supporting role in the field of economic policy. This means that the possibility of a debt write-off must be excluded, the purchase of government bonds can not be unlimited and the distortion of market pricing must be as low as possible.[60] The consequence of this interpration is, however, irreversible "cutting" of the OMT programme, which goes against its meaning and idea, which, at the time of the debt crisis, gave birth to the programme itself.

What would happen, then, if the CJEU in its ruling would not have complied with the interpretation of the FCC and this court would in turn declare the OMT programme *ultra vires*? According to the case law of the CJEU, the ruling, in which the European court responded to the question about the interpration or the validity of EU law, is binding for the national court in the original proceedings.[61] The states are also bound by the principle of loyalty cooperation, as provided for in art. 4 TFEU, according to which Member States must take all appropriate measures to ensure fulfilment of the obligations arising from the Treaties or from acts of the institutions of the EU. States have also an obligation to refrain from any measure which could jeopardise the attainment of the objectives of the Union. Article 131 of the TFEU further provides that each member state shall ensure that its national legislation was compatible not only with the Treaties, but also with the Statute of the European system of central banks and of the ECB.[62] Disregarding of the decision of CJEU would therefore be a clear violation of the EU law and Germany could have ultimately faced proceedings for breach of Treaty.

The question remains, why FCC at all drawed attention to the *ultra vires* nature of the reviewed act, if in another paragraph of the decision it accepted the possible interpretation of the OMT programme in a manner compatible with EU law?[63] Could thus an act, which could be interpreted in accordance with EU law, be at the same time the apparent exceeding of competences by the EU? The answer is negative; as such an act could not clearly violate the principle of transfer of powers, which is the main condition for declaring the act *ultra vires*.

The question of apparentness was commented on even by the disenting judge Gerhardt, who pointed out that it must be an infringement of powers, which is

[60] OMT ruling, p. 100.
[61] ECJ decision of 4th March 1986, 69/85 Wünsche v Germany, ECLI:EU:C:1986:104, p. 12.
[62] MAYER: *Rebel Without a Cause*…, p. 123, 124.
[63] OMT ruling, p. 99.

apparent immediately, and which can be recognized without further legal analysis.[64] Such apparentness, therefore, means that it should be a clear consensus among all the judges and there should be no need for a deeper analysis. However, this is not the case of OMT ruling 2014, in which two senior judges argued convincingly the other way than the majority and the FCC moreover came to its conclusion only after a long and detailed legal analysis.

The condition of apparentness and the institute of preliminary question plays in the review of *ultra vires* an important role not only because of the preservation of the unity of the EU law, but also because it reduces the likelihood of potential conflicts between the FCC and the CJEU. In the OMT ruling 2014 FCC, however,did not respect the purpose of these mechanisms.

5.2. What si the scope of subjective individual right?

In this chapter we look at the legitimacy of the complainants to submit a constitutional complaint, or whether procedural criteria were complied with or not. Answering this question is important in particular with regard to the fact that the contested act of the EU has not yet been implemented, and cannot have, therefore, any impacts on the rights of the individual.

According to the article 93/1/4a BL FCC rules on the constitutional complaints of individuals who claim a breach of any of their fundamental rights by public authorities. Among these protected rights are included a general right of the citizens to elect their representatives to the Bundestag based on the article 38/1 BL. This right is a procedural instrument, which implements the constitutional principles defined in article 20 BL, and in particular the principle that all public power comes from the people.[65] Citizens using their rights in the general elections legitimise the Bundestag as the representative body, which passes laws and establishes a government that is in turn responsible to it. Thus the guarantee of the subjective rights of voters to participate in elections and thereby contribute to the legitimization of state power and influencing its performance is the democratic content of the voters' right.[66]

In this respect, article 38 BL according to the FCC, prohibits, within the field of application of article 23 BL[67], the exhaustion of the electoral rights of

[64] OMT ruling, dissenting opinion of judge Gerhardt, p. 16.

[65] GÄRDITZ, Klaus Ferdinand. Beyond Symbolism: Towards a Constitutional *Actio Popularis* in EU Affairs? a Commentary on the *OMT* Decision of the Federal Constitutional Court. *German Law Journal*, 2014, vol. 15, no. 2, p. 186.

[66] OMT ruling, p. 17.

[67] Art. 23 of Basic Law which includes so called 'Integrationshebel' regulating the position of Germany vis-á-vis European integration processes.

the individual through the transmission of powers of the Bundestag to the EU to the extent that there would be a violation of the democratic principle, which is, according to the article 79/3 BL in connection with the article 20 BL unbreakable.[68] Violation of the electoral right will always occur, if it should happen in the field, which it is necessary for political self-determination of citizens, i.e. that there will be limits on the powers of the Bundestag to the extent where significant political decisions could not be made independently.[69] Individuals thus can by means of a constitutional complaint fight against the transfer of powers to the EU, if they can prove that this transfer can significantly affect the functioning of the democratic process.

Article 38 BL is, therefore, a means, which helps to implement the basic democratic principles of the article 79/3 through constitutional complaints. It is an expression of the right of every citizen to participate on the democratic functioning of the state. The right to vote, as well as any fundamental right can therefore be put even against the decision of the parliamentary democratic majority, which is legitimated by all the citizens. This presumption results from the equal status of all citizens in a democratic state.

From what was said above it results that the violation of the electoral rights is, therefore, possible in the context of the transfer of competences to the EU, which is typically represented by a change of the Treaties. This is confirmed by the FCC in the OMT ruling 2014.[70] a consequence of such a transfer can be a substantial disruption of the democratic process of legitimization, because as soon as the amendment of the Treaties becomes effective, the competencies are transferred to EU and their re-transfer at the state level is rather complicated.[71] The transfer of powers to the EU may have an impact on every German citizen, as it may lead to a violation of his/her right to participate in democratic governance.

The OMT rulling 2014 however had a different nature than other previous FCC decisions considering the primary law changes and reviewing the limits of transfer of competences to the EU. Here the transfer of competence in connection with the establishment of the independent ECB had occurred long ago and it had never been directly the subject of constitutional complaints. The OMT programme however, cannot be considered as an act of secondary law either, where the review of *ultra vires* cannot be excluded. Although the OMT programme is meant to represent a secondary law, as it is a measure taken by the ECB as

[68] Maastricht ruling.

[69] OMT ruling, pp. 19, 52.

[70] Ibid, p. 53.

[71] See further ZBÍRAL, Robert. *Přenos pravomocí členských států na Evropskou unii: cesta bez zpátečního lístku?* Praha: Leges, 2013, 224 p.

a European institution according to the valid EU law[72], its absence of form as well as no legal effects make it an act *sui generis* currently.

Due to the specific characteristics of the OMT programme it seems unlikely that this act could interfere within the electoral rights of the complainants, as such a conclusion could lead to a quite broad interpretation of this law, when the protection of an individual at the FCC could be sought in cases of any activity or inaction on the part of the EU. FCC, however, came to a different conclusion.

5.3. Was Constitutional Complaint *ultra vires*?

FCC in the OMT ruling 2014 links the right of the individual to vote with the violation of powers by an EU institution, as it stated that the obligation to ensure compliance with the integration programme and that, in the case of manifest and structurally significant abuse of power by the institutions of the EU the German authorities must avoid not only the implementation of such acts, but try to achieve the accordance of these acts with the integration programme[73]. This statement by the FCC admitted each citizen an individual right consisting in the fact that democratically elected authorities actively protect the political self-determination of citizens against the harmful acts of the EU.[74] If the German authorities do not fulfill this obligation, then the citizen can object to the interference into the right to vote at the FCC.

FCC actually argues that the *ultra vires* act is a violation of the democratic process, in which individuals have the right to participate in, and that's just legitimizes the submission of the constitutional complaint, without real prejudice to their individual rights.[75] FCC, justifies this approach by the fact that the citizens with the right to vote have the right to make sure that the transfer of sovereign powers to the EU is always in accordance with the integration clause, therefore, with article 23 BL, and also they have to right to make sure that this transfer is approved by a 2/3 majority of the Bundestag. This right of the individual is, according to the FCC, violated in the case of a unilateral usurpation of powers from the EU and its institutions.[76]

By this argument, FCC created a new type of constitutional complaint. The complaint here is sufficiently admissible even if it's based on the mere assertion that EU acted *ultra vires*. But according to the article 93 of BL a real intervention

[72] GÄRDITZ: *Beyond Symbolism*…, pp. 190, 191.
[73] OMT ruling, p. 49.
[74] GÄRDITZ: *Beyond Symbolism*…, p. 193.
[75] This fact was confirmed by the General court in its von Storch decision.
[76] OMT ruling, p. 53.

into fundamental rights stands as a condition for admisibility of constitutional complaints. The *ultra wires* question on the other hand is only the form of review methodology. Individuals may post the *ultra vires* argument within the review of their constitutional complaint but the simple *ultra vires* assertion is not a legal reason for filing the constitutional complaint. The fact that the act of the EU can potentially be *ultra vires* does not replace this rule. The FCC itself furthermore, in its Lisbon ruling stated that for the review of *ultra vires* there are no statutory procedural rules.[77] The fact that these rules have not been adopted so far by the legislator, does not allow the FCC to establish the rules by itself.

This new concept of constitutional complaints contrasts sharply with an earlier decision of the FCC in which it dismissed as inadmissible the complaint directed against the already completed purchase of government bonds by the ECB under its Securities Markets Programme.[78] The question then arises, why FCC found the complaint admissible in the case, when the complaint was directed against a mere notice of intention to buy government bonds by the ECB?

One of the reasons for the change in attitude is probably the fact that FCC interpreted the constitutional complaint so that it is not directed only against the participation of the Bundesbank in the potential implementation of the OMT programme, but also against the unconstitutional inactivity of the parliament and the government.[79] FCC stated that an individual can seek that the Bundestag and the federal government should actively deal with the issue of division of powers, and also to decide how they should achieve this goal.[80]

Even if we however accept that the complaint is actually directed against the aforementioned passivity of the German authorities, then, the reasoning of FCC is once again at odds with its recent statement. FCC previously stated that a constitutional complaint requesting that the German state authorities are active in a certain way, is inadmissible.[81] In the OMT ruling 2014, however, FCC set new conditions for the admissibility of constitutional complaints, ignored its previous case-law and came to the fact that the citizens may demand the court to make the Bundestag and the federal government behave actively in a certain way[82], without any previous infringement of the individual rights of the complainants.[83]

The importance of this change consisting in the extension of the admissibility of the constitutional complaints is confirmed by the views of some authors, who

[77] Lisabon ruling, p. 241.
[78] Greece & EFSF ruling, p. 116.
[79] WENDEL: *Exceeding Judicial Competence*…, p. 280.
[80] OMT ruling, p. 53.
[81] Greece & EFSF ruling, pp. 114–116.
[82] OMT ruling, p. 53.
[83] Criticised by judge Lübbe-Wolff, OMT ruling, dissenting opinion, p. 22.

have called this fact the change of paradigm.[84] On the basis of the right to vote every citizen will be able to rely on compliance with the procedural terms of the provisions of the BL relating to the EU by sole argument that EU had acted *ultra vires*.[85] Thus it would no longer be necessary to prove by the complainants, the connection between *ultra vires* act and the intervention into individual rights, but it would be enough to simply claim that the EU has exceeded its competence through the act in question. Such a concept of constitutional complaint, moreover, does not require full compliance with the strict conditions for the review of *ultra vires* set out in the Honeywell ruling.[86]

Thus the intervention into the right to vote became too abstract, as the individual could seek the right practically in every particular case, when the Union is active or inactive in some way. Consequently, the defining element disappears from the concept of constitutional complaint. Such an approach could lead, as it was noted by the dissenting judge Gerhardt, to a situation where everyone can claim his rights through constitutional complaints, without being affected as far as his rights are concerned in any way.[87]

Although it may thus seem that FCC protects the individual, or his right to vote, this is a rather paternalistic approach, whose goal is the preservation of the BL. This position ultimately undermines the autonomy of the Bundestag and the principle of separation of powers by unduly empowering the individual.[88] Paradoxically, the FCC itself refused the existence of an actio popularis in its recent ruling, when it stated that if there is no interference with the fundamental rights of the individual through an act or omission, then such a person is not entitled to legal protection.[89]

Based on what was said above it results, that FCC in the OMT ruling 2014 created a new broad procedural rules of the constitutional complaints, which have no constitutional backing and are also in conflict with the terms of the application of the review of *ultra vires*, used and applied by the court itself in the past.[90]

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84 WENDEL: *Exceeding Judicial Competence*…, p. 278.

85 Ibid.

86 OMT ruling, dissenting opinion of judge Gerhardt, p. 7.

87 OMT ruling, dissenting opinion of judge Gerhardt, p. 6.

88 WILKINSON, Michael. Economic and Constitutional Power in a 'German Europe': All Courts are Equal, but Some Courts are More Equal than Others. *LSE Law, Society and Economy Working Papers*, 2014, no. 26, p. 16.

89 FCC decision of 12th September 2012, 2 BvR 1390/12, ESM & TSCG, preliminary decision, p. 199.

90 OMT ruling, pp. 24–26.

5.4. Could FCC order the tasks to other political powers?

As it has already been mentioned above, the complainants in the constitutional complaint argued that the OMT programme is an act *ultra vires*, and, therefore, the federal government and the Bundestag have a obligation to commit to its repeal, or at least prevent its implementation. It also claimed that the Bundesbank must refrain from its participation in that programme in case of its implementation. FCC confirmed this possibility of citizens to "instruct" the German authorities and stated that in the case when acts of the EU institutions of the EU are *ultra vires*, the authorities mentioned above (including the courts and the Bundesbank) cannot take part in the decision-making process or the process of implementation of this act. The German Bundestag and the federal government are also obliged to disallow the EU to usurpate the sovereign powers in structurally significant manner. If this has already occurred, then these authorities must actively try to achieve the accordance of these acts with the integration programme. This is according to FCC possible either by changing the primary law in respect of the article 79/3 BL, or by changing the incoherent act of the EU through legal or political steps and by ensuring that the potential national impacts should be minimized.[91]

The German central bank has in this respect an important position, because it is the institution, which would, in practice, buy government bonds on the secondary market, because the OMT programme is implemented mainly through the national central banks that form part of the Eurosystem. The Bundesbank is an independent central bank outside the division of powers. The executive, the legislature and even the judiciary power therefore cannot impose any instructions on it. At European level, in addition, there are standards that further confirm its independence.[92] Article 130 of the TFEU says that the ECB or any national central bank shall not take instructions from anyone when exercising the powers and performing the tasks and duties conferred upon it by the Treaties and the Statute of the ESCB and of the ECB. Each member state has in addition, according to the article 131 of the TFEU, the obligation to ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB.

From this point of view therefore the arguments of the FCC, according to which the Bundesbank can participate in the decision-making process or the implementation of the act *ultra vires*[93], is being problematic with regard not only to the independence of the central bank, but also on the precedence of EU law

[91] OMT ruling, pp. 47–49.
[92] MAYER: *Rebel Without a Cause*…, pp. 127, 128.
[93] OMT ruling, p. 45.

over national law. FCC is, moreover, in this case, unique in the world, because there are not many courts that would deal with the practices of central banks with regard to their competence.[94]

However, even if the Bundesbank wanted to comply with the decision of FCC, which would declare the OMT programme *ultra vires*, it would have limited options, because its role in the purchase of government bonds could be replaced by other central banks.[95] If in addition, the central bank decided not to participate in its implementation, then the ECB could turn to the CJEU according to the article 35 paragraph 6 of the Statute of the ESCB and of the ECB. The Bundesbank has no statutory means through which it could oppose the OMT programme. The only possibility of defiance was the vote of the president of the Bundesbank on the ECB Governing Council when approving the OMT programme, where he was, however, outvoted.

It is also not clear what the Bundestag or the German government would have to do in practice, to meet the expectations of FCC. Exit the EMU is more than unlikely with regard to unimaginable consequences both for Germany itself and for the whole of the EU. None of these authorities can, at the same time, impose any instructions on the independent Bundesbank as stated above. This is true even in the case of the ECB, as it is a European institution, which is bound exclusively by the EU law, and thus cannot in any case proceed on the basis of the request of one member state. Its independence is, moreover, enshrined not only in EU law (art. 130 TFEU) and in the BL (art. 88/2 BL), but also the FCC in its case law emphasizes the independence of the central bank of the parliament.[96]

It is apparent that the FCC does not have any effective means which could be used in the case of declaring the OMT programme *ultra vires*. "Tasking" the independent Bundesbank seems very problematic. And at the same time, the parliament, the federal government or the central bank have no means in their discretion, which could oppose the OMT programme, or force the ECB not to implement the programme. The absence of such a means is also evident from the vague reasoning of FCC, which proposes, for example, the retroactive modification of Treaties, or the use of unspecified legal and political instruments.[97]

Strange is the fact that these vague procedures could be claimed by every citizen on the basis of a constitutional complaint, or a political party in the proceedings Organstreit, with a statement challenging the inaction of the

[94] KUMM: *Rebel Without a Good Cause*…, p. 214.
[95] WENDEL: *Exceeding Judicial Competence*…, p. 281.
[96] Maastricht ruling.
[97] WENDEL: *Exceeding Judicial Competence*…, p. 282.

German constitutional authorities. Both of these cases are in contradiction with the settled case-law of the BVrfG, as it is recalled by the dissenting judge Lübbe-Wolff.[98]

In a recent decision, which also concerned the measures related to the crisis, FCC stated that the omission of the legislature may be the subject of a constitutional complaint only if it follows from the express provisions of the Basic law, which defines the content of this obligation.[99] In the present situation, however, the choice of possible governmental and parliamentary procedures falls within the discretionary powers of the German authorities which are not explicity expressed in the German constitution.[100] Thus, neither the citizens nor the political parties according to the existing case law can "assign tasks" to the authorities through the FCC in this particular case.

Judge Gerhardt in addition, noted that if a citizen had the right to seek through the FCC particular procedure at the Bundestag in matters where he has a wide discretion, it would be in contradiction with the principle of representative democracy according to the BL. The German constitution gives people other options to influence the political process, e.g. the right of petition or membership in political parties.[101]

5.5. OMT programme and the question of constitutional identity

Ultra vires review is not the only mean of scutinizing the EU law acts by the FCC. In its Lisbon ruling FCC added also new instrument in the form of protection of German constitutional identity vis-á-vis EU law acts.[102] Here it was stated that the court will review whether the inviolable core of constitutional identity of the Basic law according to article 79/3 BL was preserved. This power of review is derived from the EU law and is related to the principle of openness of the BL to the EU law, and is therefore not in contradiction with the principle of loyal cooperation enshrined in article 4/3 of the TFEU. According to FCC, it is not possible with the advancing integration to protect the political and constitutional structure of sovereign Member States, recognized by article 4/2 TFEU, in other

98 OMT ruling, dissenting opinion of judge Lübbe-Wolff, p. 18.

99 Greece & EFSF ruling, p. 118. FCC reached the same findings also in decision *Organstreit*, decision of 17th September 2013, 2 BvE 6/08.

100 WENDEL: *Exceeding Judicial Competence*…, p. 282.

101 OMT ruling, dissenting opinion of judge Gerhardt, p. 21.

102 The protection of constitutional identity was indirectly mentioned by FCC already in Solange I ruling, where FCC pointed out that core of the Basis Law forms the part of German constitutional identity.

ways.[103] In the ruling described above FCC further stated that the protection of national constitutional identity in constitutional and european law goes hand in hand.[104] In the case that the act of the EU really collides with the constitutional identity, it is not applicable in Germany. Such an act cannot be based on primary law, as the legislature according to the BL cannot pass on to the EU those powers, which would concern constitutional identity.[105]

In its OMT ruling 2014 FCC significantly developed its up-to-date case law on the question of protection of constitutional identity at European and national level. As mentioned above, the FCC previously stated that the protection of constitutional identity at both levels goes hand in hand. But in OMT ruling 2014, however, FCC makes a difference between these concepts stating that constitutional (national) review of identity is fundamentally different from review under Article 4/2 TEU performed by CJEU. The constitutional core of the Basic Law contained in Art. 79/3 according to view of FCC can not be balanced by the other legal interests, because this nucleus is absolute in nature, and thus falls under the exclusive jurisdiction of the FCC. Respect of the national identity of the Member States provided for in EU law is contrary to that a relative concept, and could be therefore counterbalanced against other interest in line with the proportionality test requirements.[106]

This approach of FCC is, however, in conflict with uniformity and effectiveness of the EU law. The obligation to respect the national identities cannot mean that the identity will always take precedence over the EU law. It would mean the existence of the 28 potential exceptions to uniformity of the EU law, which would be in conflict with this basic principle. The concept of national identity, in fact, only allows certain national constitutional principles to penetrate into the EU law, thus creating a certain connection between constitutional law and the EU law. This is probably the way how the national identity is viewed by other European courts.[107]

The idea of the protection of constitutional identity is the preservation of a particular element of diversity within the largely uniform rights of the EU, which in itself gives the national courts certain autonomy in defining the constitutional identity of the state. National courts can play a crucial role in its

[103] Even art. 4/2 TEU states explicitly only national indentity, there is a general accord that this concept includes also constitutional identity as its key feature. See further ZBÍRAL: *Koncept národní identity…,* p. 127.

[104] Lisabonské ruling, p. 240.

[105] OMT ruling, p. 27.

[106] OMT ruling, p. 29.

[107] E.g. decision of French Constitutional Council of 27th July 2006, 2006-540 DC, Copyright and related rights in the information Society; or decision of Polish Constitutional Tribunal of 16th November 2011, SK 45/09.

protection. Thus, while these courts define the content of the constitutional identity it is the CJEU which decides to what extent these national principles take precedence over the EU law, or it applies a test of proportionality.[108] The CJEU in several rulings proved that national identity can take precedence over the interests arising from the EU law.[109] Thus the CJEU has managed to prove to certain extent that it respects the constitutional identity of the Member States and that the article 4/2 TFEU is not a mere rhetoric.[110]

From the reasoning of FCC in both these points it results that the FCC does not consider the protection provided to the constitutional identity within the EU system as sufficient. Here one may compare its position with its approach to the protection of fundamental rights at the EU level as it was formulated in the ruling Solange I. The problem with this comparison is, however, the fact that while in Solange decision the position of the FCC was from certain point of view justifiable, since the protection of fundamental rights at the European level actually showed the structural weaknesses and sufficient attention was not paid to it by the CJEU[111], in the case of the constitutional identity the protection of the EU is clearer and more efficient, as evidenced by the several decisions of the CJEU.

Of course, it is possible to discuss the issues of how sufficient this protection at the EU level is, however its possible deficiencies do not justify the approach of FCC, which might have seriously jeopardised the functioning the the EU legal order.

6. Conclusion

At the beginning of the this paper we expressed some doubts, whether it was not just the FCC which acted *ultra vires* in the OMT ruling 2014, that is, whether it acted contrary to its powers and its existing case-law.

It should be noted that the FCC ignored its earlier case-law, or its constitutional mandate, in several places in the OMT ruling 2014. The ruling pervades

[108] WENDEL: *Exceeding Judicial Competence*…, pp. 286, 287.

[109] For example ECJ decision of 14th October 2004 Omega Spielhalen, C-36/02, ECLI:EU:C:2004:614; CJEU decision of 22nd December 2010 Ilonka Sayn-Wittgenstein, C-208/09, ECLI:EU:C:2010:806; CJEU decision of 12th May 2011 Runevič-Vardyn, C-391/09, ECLI:EU:C:2011:291; CJEU decision of 12th June 2014, C-156/13 Digibet a Albers, ECLI:EU:C:2014:1756.

[110] It's case-law in this respect is quite fragmented, see ZBÍRAL: *Koncept národní identity…,* pp. 125, 126.

[111] KOKOTT, Juliane. Report on Germany. In: SLAUGHTER, Anne-Marie, STONE SWEET, Alec, WEILER, Joseph Halevi Horowitz (eds). *The European Courts and National Courts: Doctrine and Jurisprudence*. Oxford: Hart Publishing, 1998, p. 118.

the undisguised desire of FCC to prove that the OMT programme is potentially an act of *ultra vires*.

It was obvious from the fact that the FCC found the constitutional complaint challenging the OMT programme permissible. FCC in this regard made great efforts to justify the fact that the fundamental rights of individuals might have been actually affected through the examined act. FCC thus effectively created a new kind of constitutional complaint, when it is only sufficient to argue that the EU has acted beyond its scope of powers, regardless of the direct violation of individual rights. a considerable weakening of the strict conditions for the application of the review of *ultra vires* itself, which were previously defined by the FCC itself, is the consequence of the approach.

Thus, FCC set aside its past case-law in cases where there is a risk of destabilisation of relationship between national and EU law. Additionally, the individuals were given a powerful tool that enables them (in 'cooperation' with Eurosceptic national court) to influence the democratic processes with the distinct impact on the shaping of European policy. Originally it was the limited admissibility of a constitutional complaint what prevented individuals to interfere disproportionately within the competence of the executive and legislative powers. The understanding of a constitutional complaint offerd by the FCC in OMT decision somehow touched this limited concept and therefore infringed the principle of separation of powers.[112]

FCC acted problematically at the moment when it stated that in the case of declaration of the OMT programme *ultra vires* it can order the government, the parliament or the central bank certain procedures. The paradox is that FCC in fact does not possess any effective means, which could have been used in the case of the declaring of the OMT programme *ultra vires*. Under the current case law of FCC, moreover, neither citizens nor political parties could "instruct" the German authorities through the FCC.

Through the line of its reasoning FCC thus created a special situation. If hypothetically in the final ruling it would have stated that the OMT programme is *ultra vires*, and the German authorities would have failed to comply with this decision then the German authorities would have, through their activity or inaction, intervened into the German constitutional identity. Hovever these authorities could have argued, that it was the FCC itself which had acted *ultra vires* arguing that it was the court itself which had gone beyond the scope of its powers. This whole unfortunate situation would have been the consequence of the legal structure created by the FCC in relation to the EU law.[113]

[112] GÄRDITZ: *Beyond Symbolism*…, p. 195.
[113] KUMM: *Rebel Without a Good Cause*…, p. 208, 209.

Some problems might be seen also in the Courts' approach to the review of constitutional identity that the OMT ruling 2014 developed substantially. FCC newly made a distinction between the protection of constitutional identity by the Basic Law and under the Treaties, when first concept has, unlike the latter, absolute character and must in any case take precedence. The problem is that if this approach is adopted by all European constitutional and supreme courts, then EU law would not work properly, because there would be 28 absolute exemptions from the requirement of uniform application of EU law. In this regard we may agree with the opinion of Franz Mayer, who several years ago pointed out that the national identity can become a Pandora's box once it will attain the significant legal effects. This could lead to the situation when Member States will try to include many of their own interests under this concept, to protect them from the effects of EU law.[114] It seems that it had happened, because the FCC had appropriated not only the decision-making about the content of constitutional identity, but also deciding about when the content of the constitutional identity had been violated.[115]

FCC also overturned its approach towards *ultra vires* review. In fact and surprisingly it failed to meet the conditions of *ultra vires* test previously formulated by itself. One of them was a condition of express violation of the principle of the transfer of powers by the EU action. Although FCC alleged that this condition was fulfilled, yet in another part of its decision it stated that the OMT programme could have been interpreted in a manner consistent with EU law. And here the contradiction occurred. It is disputable to claim the *ultra vires* act and simultaneously state, that act could have been interpreted in line with the Tretaies.

The purpose of defining the conditions for the review of *ultra vires* was (among other things) to avoid frequent interventions into the unity of EU law and to diminish possible conflict with the CJEU. The failure to comply with the requirements of *ultra vires* test by the FCC significantly reduced its functionality.

By all of these points, FCC (contrary to its previous case-law and exceeding its constitutional mandate) could have brought ultimately serious consequences for the judicial dialogue in the whole EU, and could have also served as a dangerous precedent for other national courts that could have been inspired by the jurisprudence of FCC.[116]

[114] MAYER: *Rashomon in Karlsruhe*…, p. 784.

[115] *MAYER: Rebel Without a Cause*…, p. 123, 124.

[116] E.g. decision of Polish Constitutional Tribunal of 16th November 2011, SK 45/09; or decision of Czech Constitutional Court of 31st January 2012, sp. zn. PL. ÚS 5/12 Slovak pensions XVII.

Support for Photovoltaic Power Plants – Czech Legislator's Dilemma from the perspective of both the EU and International law

David Sehnálek*

Summary: Czech subsidies on production of electricity from renewable energy sources represent a sensitive and highly discussed topic in the Czech Republic, in particular where photovoltaic power plants are concerned. The legal viewpoint is not necessarily limited to only the constitutional and criminal-law implications. The issue is also of great interest from the systemic and theoretical viewpoints, especially where assessed comprehensively in the context of the EU law and, simultaneously, in conjunction with the public international law. The protection of investments into photovoltaic power plants is often protected under international law by bilateral treaties. However, the subsidies itself may not be under certain occasions in accordance with the EU law which put the two in conflict that must be solved by the Czech legislator. This article tries to find a solution to this conflict. On the other hand, the validity of the Czech legislation or its substantive analysis are not in the centre of the interest of the article. Accordingly, the article does not deal with the question whether or not the Czech law complies with the EU law. The article rather focuses on the relation between the Czech, EU law and international and the implications for the EU law and, in particular, for public international law.

Keywords: Agreements on the protection of investments; state aid; relation between the EU and international law; photovoltaic power plants.

1. Introduction

The support for the production of electricity from renewable energy sources is a sensitive and highly discussed topic in the Czech Republic, in particular where photovoltaic power plants are concerned, with political, economic and legal

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implications. The legal viewpoint is not necessarily limited to only the constitutional and criminal-law implications. The issue is also of great interest from the systemic and theoretical viewpoints, especially where assessed comprehensively in the context of the EU law and, simultaneously, in conjunction with the public international law. The adoption of the Czech regulation on support for renewable sources of electricity has indeed created otherwise unprecedented legislative pattern. The reason is that the state of affairs caused by the Czech legislator has no truly correct legal solution. Any solution to be adopted now will necessarily involve more or less substantial violation of the law – either the EU law or the international law, depending on circumstances. What's more, even the legislator's inaction would have the same consequences. Having regard to the rather sensitive nature of the issue, where legal opinions are easily affected by personal interests, the author wishes to point out that he has never had any stake whatsoever in the issue of support for photovoltaic power plants. The author of this article is interested only and solely in the conflict of laws arising from three different legal systems.[1] The analysis presented in this article focuses on the possible solutions to the aforementioned conflict. Consequently, the article will in no way review the validity of the Czech legislation or offer its substantive analysis. Accordingly, the article will not offer any conclusions as to whether or not the provision of this kind of support complies with the EU law. The article rather focuses on the implications for the EU law and, in particular, for public international law. Indeed, the later makes the topic even more interesting. The reason is its twofold parallel effect, as it affects both the external obligations of the Czech Republic and the obligations of the European Union. This twofold effect of the public international law substantially influences the possible solutions to the issue at hand.

2. Description of the issue

Having regard to the relevance for the following analysis itself, this part first explains, or rather summarises, the facts and state of affairs in the Czech Republic that gave rise to the legal issues at hand. In simple terms, by the

[1] The author is aware that the concept of EU law and international law as two separate legal systems is problematic, to say the least. Nonetheless, the simplification may hopefully be tolerated for the purposes of this article. For the mutual relation between the two legal systems and the issue of independence and autonomy of the EU law, see Malenovský., J. Důvěřuj, ale prověřuj: prověrka principu přednosti unijního práva před vnitrostátními měřítky pramenů mezinárodního práva *(Trust, but verify: Review of the principle of priority of the EU law over the national rules concerning sources of international law)*, in Právník 8/2010, p. 778.

adoption of the Act on Support for the Use of Renewable Energy Sources[2], the Czech Republic granted support to individuals for their business under clear and concrete pre-defined conditions, specifically under Section 6 (1)(b) of the Act, which guarantees a 15-year period of return of investments; and under para. (4) of the cited provision, which stipulates the statutory mechanism of gradual price decrease for the same purpose. The legislation implied a unilateral obligation of the State that influenced the conduct of a number of individuals. In fact, the adopted legislation had such a great incentive effect that the entrepreneurs actually made use of the arrangements stipulated by the Act to an extent the legislator had neither considered nor anticipated. One could sarcastically describe what followed the adoption of the Act could as an extraordinary success; however, it was not as much the success of the legislation as the associated costs what truly astonished the legislator. Finding a solution to the resulting situation proved to be extremely complicated.[3] Indeed, once the legislator realised what has happened, it had to face a problem as difficult as sailing between Scylla and Charybdis. In this case, the legislator had to reconcile the requirements of the Czech constitutional law, on the one hand,[4] and the limits stipulated by the public international law, on the other hand. Indeed, rights once vested in individuals are subject to protection, which is guaranteed by the Constitution of the Czech Republic as well as by several international agreements.[5]

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[2] Act No. 180/2005 Coll., on the support for production of electricity from renewable energy sources (Act on Support for Use of Renewable Sources).

[3] Instead of directly amending the already implemented support arrangements, a new tax was imposed on the production of electricity. For more on this issue, see Kouba, S. Zdanění výroby elektřiny ze solárních elektráren *(Taxation of Production of Electricity from Photovoltaic Power Plants)* in Dávid, R. Sehnálek, D., Valdhans, J. Dny práva – 2010 – Days of Law [online]. Brno: Masaryk University, 2010, [retrieved on: 25. 2. 2016]. ISBN 978-80-210-5305-2 Available at: https://www.law.muni.cz/sborniky/dny_prava_2010/files/prispevky/03_ekonomicke_aspekty/Kouba_Stanislav_(4375).pdf

[4] The national aspect of the issue was reviewed by the Constitutional Court, which expressed its opinion on the matter in its judgement of 15 May 2012, Pl.ÚS 17/11 ECLI:CZ:US:2012:Pl.US.17.11.2, concerning the introduction of levies and taxation of electricity generated by photovoltaic (solar) power plants. However, by definition, the judgement does not adequately deal with the aspects of international and EU laws.

[5] This includes in particular agreements aimed to ensure protection of foreign investments under international law. The Czech Republic has concluded dozens of such agreements. See the list of applicable agreements concerning the reciprocal promotion and protection of investments prepared by the Ministry of Finance of the Czech Republic and available at http://www.mfcr.cz/cs/legislativa/dohody-o-podpore-a-ochrane-investic/prehled-platnych-dohod-o-podpore-a-ochra

2.1. Consequences of the Czech legislation for the public international law and EU law

As noted above, this article focuses exclusively on systemic issues, rather than on substantive solution of the issue within the scope of the Czech laws. Accordingly, regarding further analysis it suffices to say that any further measures the Czech legislator may adopt are substantially limited by the Czech Republic's international obligations. For this reason, an ill-advised amendment to the Czech legislation could have impact not only in terms of the Czech constitutional law, but also in terms of responsibility under public international law. Moreover, the agreements on the protection of investments, which are most likely to be affected, contain provisions allowing even certain affected individuals to invoke responsibility of the State for breach of its obligations where the persons concerned fall under the definition of an investor.[6] Therefore, the most appropriate solution seems to lie in retaining the *status quo* or amending its certain parameters within the limits respecting the rights of the investors guaranteed by the concluded agreements. [7]

However, the outlined solution is complicated by factors that could be described as external to the Czech law. The reason is that the support for the production of electricity from renewable sources provided by the Czech Republic could be qualified as unauthorised State aid.[8] While we admit that such interpretation of the concept of State aid is rather extensive, it nonetheless cannot be excluded.[9]

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[6] The investors from Cyprus and the Netherlands are of particular importance for the Czech Republic, considering the amount of their investments. The Czech Republic has concluded agreements on the protection of investments with both countries. The entitlement to sue the State is vested in the individuals (investors) under Article 8 (2) of the Agreement for the Promotion and Mutual Protection of Investments between the Czech Republic and the Kingdom of the Netherlands. The agreement with Cyprus, too, stipulates the right to sue the Czech Republic in court or arbitration proceedings in Article 8 (2) of the Agreement on the Promotion and Mutual Protection of Investments between the Czech Republic and the Republic of Cyprus. a summary of all such concluded agreements is available at the website of the Ministry of Finance of the Czech Republic at http://www.mfcr.cz/cs/legislativa/dohody-o-podpore-a-ochrane-investic/prehled-platnych-dohod-o-podpore-a-ochra.

[7] Having regard to the fact that this article is not intended to provide a legal analysis of the given situation, but merely strives to clarify and classify the individual relationships within the system of the international, EU and national laws, we refer to expert literature for a more detailed analysis of the mechanism of protection of the rights of individuals through agreements on the protection of investments. In the Czech literature, the topic is addressed *inter alia* by Bělohlávek, A. J. *Ochrana přímých zahraničních investic v energetice* (Protection of Direct Foreign Investments in the Energy Sector). 1st edition. Prague: C H. Beck, 2011, p. 199 *et seq*.

[8] See Article 107 (1) of the Treaty on the Functioning of the European Union.

[9] As noted above, this article does not focus on substantive issues and, consequently, the question of whether or not the support qualifies as State aid is not addressed either. Nonetheless,

Indeed, if this were the case, this would mean the whole issue would also have implications in the area of the EU law. However, under such circumstances, the requirements of the EU law would be in direct conflict with the Czech legislation, as well as the agreements binding on the Czech Republic; such a situation could hardly be acceptable, especially in the latter case.[10]

As mentioned above, in the relevant area the Czech Republic is bound both by the public international law as well as the EU law. The EU law takes precedence over the Czech law, as follows from the established case law of the Court of Justice of the EU.[11] Assuming that an international agreement binding on the Czech Republic has been concluded under the Czech laws and its effects are thus conveyed through the Czech legislation, the international agreement must, too, be subordinated to the EU law. Such an approach, however, is somewhat simplistic and, as will be demonstrated below, inaccurate because it fails to reflect the mutual systemic links among the individual legal systems. Moreover, while such solution might be applicable purely in the relation between the Czech Republic and the European Union, it cannot apply to any non-Member State, given its unilateral nature. However, non-Member States cannot be omitted as they are indeed counter-parties to the agreements on the protection of investments concluded with the Czech Republic. The external obligations of the Czech Republic therefore must be taken into account even in its otherwise internal relations with the European Union.

For the sake of clarity, we can thus change the perspective. From the viewpoint of a non-Member State, there is an obligation provided for by the public international law and stipulated in an international agreement on the protection of investments. The obligation consists in the rights and duties that both the Czech Republic and the non-Member State must comply with. However, the non-Member State has no direct relation towards the European Union. The requirements of the EU law can therefore be perceived as third-party requirements,

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the features of State aid might be indicative, as sufficiently explained in literature; see, e.g., Plender, R. Definition of Aid in Biondi, A., Eeckhout, P., Flynn, J. (eds.) The Law of State Aid in the European Union. Oxford University Press, 2004. ISBN 9780199265329. p. 5 *et al.;* in Czech literature, see e.g. Běhan, P. Státní podpory slučitelné se společným trhem*(Forms of State aid Compatible with the Common Market)* (Part I) . Právní fórum (Law Forum) 2005, No. 8, p. 297–301.

[10] The European Union is obliged to respect the public international law and this duty is also emphasised in the EU law in Article 3 (5) TEU. The author believes that this duty needs to be interpreted broadly in that it also includes respect for the obligations of the Member States following from international law.

[11] See e.g. the Judgment of the Court of Justice of 15 June 1964 in Flaminio Costa v E.N.E.L. Case 6-64. ECLI:EU:C:1964:66; or in SVOBODA, Pavel: K povaze práva Evropské unie. *(On the Nature of the European Union Law).* 1994, No. 11, p. 940 *et seq*.

which the relevant non-Member State does not have to respect, on account of there being no grounds under the public international law obliging non-Member States to comply with the EU law.[12]

Any consideration to the contrary would mean that the non-Member State would be bound, without its consent and perhaps even against it will, by a treaty to which it is not a party[13] and which was concluded by other subjects of the public international law. However, the public international law does not, in principle, allow such a situation, as is indeed confirmed by the two Vienna Conventions on the Law of Treaties. Pursuant to the Vienna Convention on the Law of Treaties (1969), a third State may be bound by a treaty concluded by other countries only where the third State assents thereto.[14] Similar solution was adopted by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1987).[15,16] The EU regulation and prohibition of State aid therefore cannot serve as adequate argument to support non-application or even violation of international agreements on the protection of investments concluded by the Czech Republic. Indeed, an obligation of the Czech Republic following from such agreements may in no way be affected by the EU law in relations with non-Member States and therefore remains unchanged. This fact is also reflected to a certain degree by the EU law, which stipulates that the rights and obligations arising from

[12] Naturally, the conclusion above only applies provided that we consider the Czech Republic and the European Union to be two separate entities under the public international law. So far, there are no indications that this would not be the case. Other arrangements of mutual relationships and their effects under the public international law thus need not be reviewed.

[13] Reference is naturally made to the Treaty on the Functioning of the EU.

[14] The conditions are stipulated in Article 36 of the Vienna Convention on the Law of Treaties and are based on fulfilment of two conditions. The Signatory states must intend the treaty to establish an obligation and the third State concerned must expressly assent thereto in writing.

[15] The Convention has not yet come into force. Nonetheless, it is referenced even in the case law of the Court of Justice of the EU. See e.g. the judgment of the Court of Justice of 9 June 1994 in The French Republic v. the Commission of the European Communities. Case C-327/91. ECLI:EU:C:1994:305. In the cited judgement, the Court of Justice refers to the definition of an international treaty as provided in the Vienna Convention II, without mentioning that the Convention has not yet come into force.

[16] The argument based on the 1987 Vienna Convention would not apply only if the original wording of the draft treaty containing Article 36 bis were approved; the cited provision permitted the establishment of a consent to be bound towards a third party in case of an international organization. However, the wording of the aforementioned provision was considered controversial, did not reflect the then-current practice in the public international law and, simultaneously, was perceived as too progressive to be generally applied to all international organizations with the exception of the European Union. See Fitzmaurice, M. Third parties and the Law of Treaties. Max Planck Yearbook of United Nations Law Online, Volume 6, str. 65 [online], [cit. 25. 2. 2016], available athttp://www.mpil.de/files/pdf1/mpunyb_fitzmaurice_6.pdf.

agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more non-Member States on the other, shall not be affected by the provisions of the EU law.[17]

Focusing again on the Czech legal environment, the Czech Republic is currently in a situation where if it complies with its obligations under the international law and actually provides the promised support, it will comply with the relevant binding international agreement but in doing so, it will violate the EU law prohibiting the provision of State aid, save for certain exemptions.

The situation would get even more interesting if the Czech Republic did not provide the support promised by the Act. The Czech Republic would thus comply with the EU law, but at the cost of breaching its obligations under the international law towards a non-Member State. Naturally, this could have legal consequences since, as a rule, agreements on the protection of investments envisage the possibility of protection of the individuals concerned through arbitration proceedings against the State.[18] If the State loses the arbitration, it could entail the obligation to pay to the affected investors a financial compensation for frustrated investment. However, where applying an extensive interpretation of the term "State aid"[19], such financial compensation, if provided, could also be hypothetically construed as a form of State aid.[20] Should this hypothesis be

[17] See Article 351 TFEU. However, this provision does not address the problem of a conflict between the EU legislation and an agreement concluded by a Member State with a non-Member State during the former's membership in the European Union, where this problem is caused by an amendment to the primary law and the transfer of competences from the Member State to the European Union. It is therefore necessary to anticipate and provide for this situation, where possible, for example in a protocol or at least a memorandum to the amending treaty, where the Member State concerned shall specify its international obligations that must not be affected by the transfer of competences resulting from the amendment to the primary law. However, the problem is that the possible consequences of a transfer of competences are often difficult to predict.

[18] By way of example, we can cite the provisions of Article 8 (2) of the Agreement for the Promotion and Mutual Protection of Investments between the Czech Republic and the Kingdom of the Netherlands; such a provision is indeed typical for BITs, as mentioned by Bělohlávek in his publication focused on the issue of investments . See Bělohlávek, A. J. Ochrana přímých zahraničních investic v energetice (Protection of Direct Foreign Investments in the Energy Sector). 1st edition. Prague: C H. Beck, 2011, p. 30 *et seq*.

[19] State aid is defined in very general terms as any public funds made available by the State, i.e. irrespective of the underlying legal title. From this point of view, a broader interpretation under which also funds paid following an unsuccessful arbitration would constitute State aid cannot be excluded.

[20] This would in fact involve funds selectively provided by the State or from public resources, the provision of which could potentially affect or distort competition and affect trade between the Member States. Although the aid would not be provided voluntarily by the State, from the viewpoint of the EU the fact alone that the State assumed such obligation could be interpreted

correct, the payment of the financial consideration would again violate the EU law.[21] The provision of such aid would therefore be impermissible, or any aid provided would have to be claimed back, on the grounds of non-compliance with the EU law. However, this results in a dilemma for the State that lacks any reasonable solutions since no matter what steps the State takes, it will violate the law – either the EU law, or international law. Any violation in this respect will have substantial financial consequences for the public budget of the Czech Republic. In the end, it is essentially irrelevant whether the State will be forced to compensate the investors, provided naturally that they succeed in the dispute, or to pay fines to the European Union.

2.2. (Non-) permitted solutions to the issue

This apparently no-win situation can only be resolved in co-operation with the European Union. In fact, the EU is involved in the matter more that could be apparent *prima facie* and more than the EU probably wished to be. The internal relations of the European Union and its Member States can also have consequences towards non-Member States in terms of public international law if these relations have effects outside the EU. This is exactly the case in the assessed situation. If the European Union requires the Czech Republic to comply with the EU regulations concerning State aid, this would have effects towards non-Member States, manifested already through the breach of the bilateral agreements on the protection of investments. The responsibility for such a breach would be borne not only by the Czech Republic, where the responsibility is apparent, but, under certain circumstances, also by the European Union.[22] For agreements concluded

as expression of the will of the State. In terms of international law, the payment would constitute compensation for frustrated investments; however, such qualification is irrelevant from the perspective of the EU regulations on State aid.

[21] Nonetheless, the author believes that such interpretation is supported neither by the current case law nor expert literature. Any thus-provided funds would indeed be provided by the State from public resources, but not on the basis of the State's own decision. The relevant decision would be issued by an arbitration tribunal, over which the Czech Republic exerts no control whatsoever. This at least follows, in our opinion, from the conclusions derived by the Court of Justice of the European Union in para. 35 of judgement Pearle BV. See judgment of the Court of Justice (Fifth Chamber) of 15 July 2004 in Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV v. Hoofdbedrijfschap Ambachten. Case C-345/02 Court Reports 2004 I-07139. ECLI:EU:C:2004:448. Possible ambiguities are pointed out on p. 71 in Hancher, L., Ottervanger, T., Slot, P., J., EU State Aids. 4th edition Sweet & Maxwell, 2012. ISBN 9780414046566

[22] For the responsibility of international organizations, see e.g. Scheu, H. Ch. Pojem odpovědnosti v mezinárodním právu *(The concept of responsibility in international law)* [online], [cit. 25. 2. 2016], available at http://www.pravnickeforum.cz/archiv/dokument/doc-d33488v42932-pojem-odpovednosti-v-mezinarodnim-pravu/.

before the accession to the European Union, the solution can be found in Article 351 TFEU, indicating that such agreements shall not be affected by the EU legislation. As concerns other agreements, the situation is more complicated and may have consequences in terms of responsibility.

The problem is that the issue of responsibility of international organizations has not yet been adequately addressed and codified in the public international law. Nonetheless, the Draft articles on the responsibility of international organizations prepared by the International Law Commission may provide guidelines for solution of possible problems. In this context, it is apparent that the European Union will be responsible in cases where it has itself, through the acts of its own bodies or employees, violated the public international law. However, the situation at hand is of a different nature. The Czech Republic would violate the international law, but only having been forced to do so based on the requirement of the European Union to comply with the EU law. Under the theory of the public international law, it is irrelevant in such a case who exercises effective control over the relevant act, whether the EU or the State.[23]

In this respect, the interpretation of the term "effective control" as such represents a rather complex legal issue, which is moreover usually addressed in relation to military or police missions, rather than situations such as the one analysed herein.[24] Nonetheless, the current state of affairs is probably best reflected in the approach placing responsibility on the person who in reality had direct influence on the violation of international law and who could effectively prevent the violation. In practice, this means that each situation has to be assessed separately and on the basis of different decisive aspects, which will under any circumstances include the consideration as to whether or not the State could have exerted its own discretion and acted in some other way. Nonetheless, having regard to the supranational law of the European Union and the control and sanction mechanisms available to the European Union against its Member States, all

[23] See Article 7 of the Draft articles on the responsibility of international organizations, which stipulates as follows: "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."

[24] Based on an analysis of the current case law, Šturma, but also the commentaries on the Draft articles, come to the conclusion that the courts have not adopted a uniform approach towards interpretation of the term "effective control". They distinguish between the ultimate control and the operational control. See Šturma, P. Drawing a Line between the Responsibility of International Organization and its Member States under International Law in Czech Yearbook of Public & Private International Law (Vol.2) [online], p. 13 *et seq*. [cit. 25. 2. 2016], available at http://www.cyil.eu/contents-cyil-2011/ a Draft articles on the responsibility of international organizations, with commentaries – 2011 str. 23 [online], [cit. 25. 2. 2016], available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf

circumstances support the assumption that the European Union exercises, rather than not, effective control over its Member States.[25]

It follows from the above that if the European Union enforced its regulations on State aid against the Czech Republic in a manner leading to breach of a bilateral agreement, the European Union itself could be responsible for the breach of the agreement,[26]despite not being a party thereto. Its responsibility would follow from the international law and, accordingly, could be invoked only by the affected non-Member State and not by an individual, i.e. specifically the investor who actually incurred damage due to non-compliance with the original Czech legislation.

As a matter of fact, the potential arbitration proceedings and their outcome represent another variable. It is certainly questionable whether the arbitrators would even decide that the EU law must be taken into account in the case at hand.[27] If the EU law were taken into account, all the problems the Czech Republic faces would be satisfactorily resolved. However, as mentioned above, the relevant agreements on the protection of investments are not binding on the European Union and no direct obligations arise between the EU and the affected non-Member State. From the viewpoint of the latter, the EU law thus can be viewed merely as a special provision of the public international law with no implications for the non-Member State in question other than the ones mentioned earlier in this article. The arbitrators might interpret the circumstances similarly. Moreover, even from the substantive viewpoint, there is no reason for the application of the EU law in the arbitral proceedings unless the prohibition of the provision of State aid stipulated by the EU law could be subsumed under the EU public policy, which may in fact be possible.[28]

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[25] The overall situation is indeed complex in legal terms. The reason is that irrespective of their internal relations, the European Union and its Member States continue to act as separate entities towards non-Member States, both in the area concerning the State aid and in the area of direct foreign investments, despite the transfer of competences implemented through the Lisbon Treaty. The European Union thus has not implicitly entered into the obligations of its Member States, which would mean that the European Union would be solely responsible for any breaches and violations. See Šturma, P. Drawing a Line between the Responsibility of International Organization and its Member States under International Law in Czech Yearbook of Public & Private International Law (Vol.2) [online], p. 18 *et seq*. [cit. 26. 2. 2016], available at http://www.cyil.eu/contents-cyil-2011/

[26] This is not a responsibility under Article 340 TFEU, which is internal and governed by the EU law.

[27] The EU law naturally does not prevent this. It even appears that its approach might be benevolent, including the willingness to respond to a preliminary reference if submitted to the arbitrator. See Basedow, J. EU Law in International Arbitration: Referrals to the European Court of Justice. Max Planck Private Law Research Paper No. 15/16. pp. 72 and 73. [cit. 25. 2. 2016], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642805.

[28] According to Drličková, public policy includes the rules essential and fundamental for the functioning of the internal market; she mentions *inter alia* the rule for the protection of competition

3. Conclusion

This leads us to the final conclusion. The preceding text implies an unequivocal and absolute necessity to primarily respect the obligations of the Czech Republic under the international law, even on the part of the European Union. The State aid law must reflect this situation. This does not mean that no other solutions are possible. Nevertheless, it is apparent that the Czech Republic cannot rely on any simple and direct solution based on the EU law and the prohibition of State aid contained therein. In simple terms, the European Union cannot solve the current problem for the Czech Republic.

Nonetheless, the situation is not without solution. The easiest way seems to be to prefer the narrower interpretation of the concept of State aid in the EU law, which, however, the Czech Republic itself can hardly influence. Under any circumstances, the rights already vested in individuals must be respected both by the Czech law and the EU law. Consequently, the State may consider amending certain parameters of the current system to achieve the declared purpose of the Czech legislation while complying with its obligations under the EU and international law. However, should any of the outlined options be assessed to constitute unlawful State aid, the Czech Republic will be held responsible for a violation of the EU law, including potential penalties. The EU law as such does not provide any easy solutions to the problem and indeed makes the situation even more complex in legal terms.

under Article 101 TFEU. Following this logic, public policy would necessarily also include the provisions governing State aid. Cf. Drličková, K. Vliv legis arbitri na uznání a výkon cizího rozhodčího nálezu *(Effects of* legis arbitri *on recognition and enforcement of foreign arbitral awards)*. 1st ed. Brno: Masaryk University, 2013. 204 s. Edition S, Theoretical Series of the Faulty of Law of MU, No. 443. ISBN 978-80-210-6419-5. p. 66; or Kyselovská, T. Interakce rozhodčího řízení a evropského práva *(Interaction between arbitration proceedings and the EU law)*. In Dny Práva – 2009 – Days of Law: The Conference Proceedings. 1st ed. Brno: Brno: Masaryk University, 2009. ISBN 978-80-210-4990-1.

Legal Framework for Renewable Energy in the European Union and in Slovakia

Miroslav Bilišňanský*

Summary: One of the common topics of the Member States of the European Union is also the energy policy, which has become a subject of significant legislative and institutional changes in recent years. The aim of this paper is to analyze the legislative framework of a legal regulation promoting renewable energy in the European Union, as well as in the Slovak Republic, together with the assessment of a degree of implementation of European law into the legal system of the Slovak Republic in the field of renewable energy. Regarding legislation promotiong renewable energy sources in Slovakia special attention is paid to the sector of electricity.

Keywords: renewable energy sources, promotion system, implementation of European commitments.

1. Introduction

One of the common topics of the Member States of the European Union is also the energy policy, which has become a subject of significant legislative and institutional changes in recent years. Furthermore, the latest political events and economic developments in the European region clearly indicate that this trend shall henceforth continue. Issues related to energy policy are now one of the most sensitive and therefore, an adequate attention in the national and pan-European field is given to them.

Union, as well as individual Member States, are well aware that a regulatory and legislative framework governing the energy sector, regardless of how they are set, will directly affect the economic growth of countries and the quality of life of their citizens. The question is only whether the effect will be positive or, vice versa, negative.

Energy security, efforts to achieve the objectives in the environmental area, increasing dependence on the import of fossil fuels, and price volatility in the energy market today are among the most essential determinants affecting the

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development of the energy sector in the European Union. Promotion of renewable sources appears to be a key to the solution of these unprecedented challenges. The European Union has declared that the promotion of renewable energy sources, together with energy savings and improvements in energy efficiency, will be a high priority in the future direction of its energy policy. Union presumes that the promotion of renewable energy will contribute to a greater security and diversification of energy supply while ensuring a high level of environmental protection. Last but not least, the promotion of renewable sources is seen as an opportunity to promote social and economic cohesion in the various regions of the Member States of the European Union.

It would be naive to delude ourselves that those findings or assumptions are not motivated by a strong political background. On the other hand, it cannot be denied that the search for a safe and sustainable energy source is one of the greatest challenges of our time.

Promotion of renewable energy sources is therefore nowadays considered as one of the key areas of the economy, in which it is essential that all Member States take the measures necessary to introduce a minimum standard of common rules in this sector and to introduce a uniform policy in relation to third States that supply energy to the European Union.

2. Legal Regulation of Renewable Sources in EU

Fundamental principles relating to the field of legal regulation of renewable energy sources (and energy industry in general) can already be found in primary EU law. In this case, it the area of so-called shared competence.[1] The stated means that the powers in the field of renewable energy are divided among the competent authorities of the EU and individual Member States, i.e. on the basis of the principle of subsidiarity. The fact that the inclusion of objectives for the promotion of renewable energy sources into the establishing document of the EU has become real as late as the arrival of the Lisbon Treaty in December 2009 appears to be slightly surprising. Until then, the energy was contained only in a few marginal and overly vague provisions in the primary EU law.[2]

Despite the fact that EU energy policy is one of the key areas essential to the functioning of the EU, it is surprising that the primary EU law directly addresses the energy only in a single article, namely Article 194 of the Treaty on the Functioning

[1] Article 4 sec. 2 limb. i) of the Treaty on the functioning of the European Union.

[2] Only The Treaty of Rome contained a provision, which proclaimed that the activities of the EC towards the fulfilment of its objectives also include measures in the field of the energy industry.

of the European Union (TFEU). The article stipulates that in *"In the context of the establishment and functiononing of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (i) ensure the functionong of the energy market, (ii) ensure security of energy supply in the Union, (iii) promote energy efficiency and energy saving and the development of new and renewable forms of energy, and (iv) promote the interconnection of energy networks."*[3]

Article 194 TFEU implies that the setting of objectives in the area of the promotion of renewable energy sources falls within the competence of EU to its bodies. The choice of instruments for achieving the objectives set by the European Commission is, however, still in the hands of individual Member States. Member States should decide on the conditions for utilization of their energy resources, promoting the construction and operation of renewable energy sources, as well as the procedures on regulatory issues and financial support for producers of energy from renewable sources in order to achieve the objectives set by EU bodies.

Despite the aforesaid, however, it is not possible to assert quite clearly that only a single article was devoted to the promotion of renewable energy in the EU primary law. Promotion of renewable energy is clearly one of the interdepartmental issues and the interest of progressive development of this area can be observed also in other areas of social life of the EU. Based on the aforesaid, it can therefore be established that the conditions for the promotion of renewable energy sources, albeit indirectly, are yet contained in other provisions of the TFEU. It is, for example, Articles 101 to 106 TFEU, dealing with the rules of competition. Furthermore, Articles 191 to 193 TFEU that are dealing with the environment in which a special consideration is given to the fight against a climate change, are indirectly referring to the promotion of renewable energy sources. Finally, Article 173 of the TFEU, which is devoted to industry because the energy is a fundamental and inseparable part as such, cannot be excluded from this area.[4]

Legislation for the promotion of renewable sources is regulated in more detail in the secondary EU legislation, while a dominant form is vested in directives. Secondary legislation has been developing in the historical context in phases, aiming at different stages in the gradual creation of a functional and sustainable energy market, where the renewable energy sources shall have an inherent status.

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[3] Syllová, Jindřiška. *Lisabonská smlouva*. 1. ed. Praha: C. H. Beck, 2010. p. 700.

[4] JAKAB, Radomír. BILIŠŇANSKÝ, Miroslav. *Implementácia práva EÚ do právneho poriadku SR v oblasti elektroenergetiky.* In *Implementacja prawa unijnego do systemów prawa krajowego w Polsce i na Slowacji po dziesieciu latach czlonkostwa w Unii Europjskiej.* Rzewzów: Wydawnictwo Uniwersitetu Rzeszowskiego, 2015. p. 76-89.

The first comprehensive analytical document focusing on the area of renewable energy sources was so-called White Paper – Energy for the future: Renewable energy sources from the end of 1997. The white paper identified fundamental energy problems, to which Member States are or shortly will be exposed and drew attention to the conclusions of the Kyoto conference of 1997. White Paper identified for such issues mainly (i) the increasing dependence of Member States on imported energy sources from third countries (ii) inadequate and inconsistent use of renewable energy sources (iii) and, finally, climate change and its impact on the economy and Member States energy requirements. The White Paper set forth a gradual increase in the share of renewable energy in gross energy consumption within the Community while recommended to achieve at least 12% of this share by 2010 for the solution of the above raised issues.

A real step towards the promotion of renewable energy sources by the European Parliament and the Council can be referred to as Directive 2001/77EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market from January 2001. First of all Directive defined the term "renewable energy sources", meaning that renewable non-fossil energy sources such s wind, solar, geothermal, wave, tidal, hypopower, biomass, ladfill, gas sewage treatment plant gas and biogas. Directive required achieving the objective of a 21% share of green electricity in total electricity consumption in the EU by 2010, while also requiring the fulfilment of national indicative objectives for individual Member States. Which specific mechanisms shall be used at the national level remained in the hands of individual Member States. Directive emphasized the need for the removal of factual, legal and other barriers of the increase of the electricity production from renewable energy sources and the need for streamlining and expediting procedures at the appropriate administrative level.

In accordance with the uncertain situation in the field oil supplies security (i.e. the transport sector), the EU adopted in 2003 *Directive 2003/30/EC on the promotion of the use of biofuels of other renewable fuels for transport* with the objective to promote the production and consumption of biofuels in the EU. Biofuels are in fact (or at that time were) seen as the only available large scale substitute for petrol and diesel in transportation. As in the electricity sector, also the directive on biofuels was determining a benchmark value of a biofuel share in petrol and diesel consumption.[5]

First directives on the promotion of renewable sources of energy have shown which direction the development should take in this field, on the other hand, we

[5] In 2005 in the amount of 2% and in 2010 in the amount of 5.75%.

have to state that they were far from a solid and ambitious legislation underlying the increase in the contribution of renewable sources of energy to the overall EU energy consumption. They have been set to the Member States only indicatively, i.e. not legally binding objectives in the field of renewable energy sources. This phase of the promotion of renewable energy sources is therefore characterized by more formal measures that failed to respond to the complexity and novelty of the introduced technology. Progress that has been made (primarily in electricity) has been largely invoked due to efforts made by a relatively small number of Member States. Furthermore, the EU has not adopted any legislation to promote heating and cooling from renewable sources, while this sector contributes to the overall final energy consumption in the EU with around 50%.

Insufficient progress in meeting previously set objectives in 2009 led to the adoption of comprehensive legislative framework that has brought much broader and more radical changes in the support of renewable energy. Such an approach can be regarded as quite pragmatic and therefore the level of harmonization of laws in the field of energy in the Member States and the related liberalization tendencies in the market with electricity and gas just peaked in 2009 by the adoption of so-called third liberalization package of measures which should contribute to the creation of a single energy market in the EU.[6]

Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources was adopted on April 23, 2009 and has been valid until now. Significant change, which the Directive 2009/28/EC brought, consisted mainly in setting the binding national objectives for the overall share of energy from renewable sources in gross final energy consumption of individual nation states. This is to achieve the overall objective of the Community, which has been set at 20%. Current positions and capabilities of Member States, including the existing share of energy from renewable sources and energy mix was taken into consideration in determining the binding objectives for individual Member States. Binding national objectives for the Slovak Republic has been fixed at 14%, while, Sweden, for example, has an objective at 49%, which is by far the most from all Member States.[7]

It is essential to note that the objectives set forth in the Directive cover not only the share of electricity consumption, but energy itself, involving heating, cooling and transport. Binding objectives for the transport sector were set for all states equally at 10% share of the total final energy consumption in transport,

[6] JAKAB, Radomír. BILIŠŇANSKÝ, Miroslav. *Implementácia práva EÚ do právneho poriadku SR v oblasti elektroenergetiky*. *In Implementacja prawa unijnego do systemów prawa krajowego w Polsce i na Slowacji po dziesieciu latach czlonkostwa w Unii Europjskiej*. Rzewzów: Wydawnictwo Uniwersitetu Rzeszowskiego, 2015. p. 76-89.

[7] Annex no. 1 of the Act on Promotion of RSoE.

which shall be recovered from renewable sources (and not just from biofuels alone, as it was previously). These are significant differences compared to Directive 2001 or 2003 and that of 2009.

Objectives set forth in the Directive were consequently transferred into so-called National Action Plans, which Member States were required to draw up and communicate to the Commission by 30 June 2010. The action plan should set national objectives for the share of energy from renewable sources consumed in transport, electricity production and in the sector of heating and cooling in 2020, the trajectory of the expected growth in the use of renewable sources in each sector, measures to achieve the objectives, promotion systems as well as the total contribution expected of each technology to produce energy from renewable sources.

The Directive also proposed a variety of mechanisms that can be used by Member States to achieve their objectives (promotion schemes, guarantees of origin, joint projects, cooperation between Member States and third countries), the selection and method of application of particular measures is left to the discretion of Member States.

Given the fact that the production of energy from renewable sources often involves new and expensive technologies that require high financial inputs, creating a system of promotion and providing promotion (in various forms) is a prerequisite for the growth of this sector. Two dominant systems for the promotion of investments in this field have crystallized in the area of renewable energy in the EU – a system of a guaranteed purchase price (so called feed-in-Tariff) and the system of quotas or green certificates.

Guaranteed purchase price is largely a price determined by the legislative or official decision for the amount of electricity produced from renewable sources. This price is set for a certain fixed period which is within the range of 10-30 years. During this time, the State (through its bodies or a regulatory body) guarantees the amount of the minimum price for the producer of renewable energy, as well as guarantees the producer such consumption – the purchase of such produced energy at a guaranteed price (main representatives of this promotional scheme is Germany and France).

The system of quotas requires from energy suppliers a mandatory purchase of energy from renewable energy sources. Every unit (typically 1 Megawatthour of electricity) generated by certified producer represents a certain amount of so-called green certificates and the State or the Regulatory Authority determines the amount of green certificates that suppliers of energy need to achieve for a given period (this system can be found in various modified forms in countries such as Great Britain, Denmark and Italy).

The selection of a specific promotional system and its application is at the discretion of the Member States, taking into account their national interests and

potential of renewable energy sources (geographical and geological aspects), energy infrastructure and the question of the additional costs for the promotion of the implementation of a system. These differences are the main reason why a number of Member States prevent closer harmonization of legislation on the issue of systems for the promotion of renewable energy sources.

With regard to the persisting differences among States in promoting renewable sources, the cooperation mechanism that the Directive 2009/28/EC established is also worth attention. Member States may (and under conditions prescribed in the Directive also with countries outside the EU) consolidate their efforts in the development of renewable energy sources, by the following approaches: (1) statistical transfers– under which a single Member State with a "surplus" amount of energy from renewable sources may statistically sell the surplus to another Member State, which renewable energy sources may be more expensive. Accordingly, one country gains revenues that may at least partially cover the cost of developing the energy, while another gives a contribution to the achievement of its objective at a relatively low cost, (2) joint projects – under which a new project in the field of renewable energy sources in one Member State may co-finance other states and outputs are statistically shared by both countries. Joint projects may be implemented also between Member States and third countries in the event the electric energy is being imported into the EU and meets further conditions prescribed in the Directive (in particular, it must be a newly built facility with the operation as of 25.06.2009), and, finally, (3) joint promotional schemes – under which two or more countries may agree to harmonize all or part of their promotional systems, to integrate this energy into the internal market and the joint utilization of production in accordance with the rule that takes account of the origins of financial support.

Cooperation among Member States is certainly an interesting approach in achieving the ambitious objectives set by the Community. However, the only previously issued cross-border mechanism remained the Swedish – Norwegian joint promotional system, particularly through recognition of green certificates, which operates since January 2012. The actual disinterest in common mechanisms might be, however, overcome as approaching 2020. Moreover, in 2016, the Nordic countries (the Netherlands, Norway, Sweden, Germany, Luxembourg, Ireland, Germany, France, Denmark and Belgium) signed a declaration on closer cooperation in ensuring sustainable, secure energy supplies available in the North Sea.[8]

A part of the Directive 2009/28 / EC is also the reinforcement of measures aimed to develop the energy infrastructure in order to adapt it to the further development

[8] The text of the political declaration is available at: https://ec.europa.eu/energy/en/news/north-seas-countries-agree-closer-energy-cooperation.

of a production of renewable energy. This measure applies mainly to the electricity sector. Member States shall provide a prioritized or guaranteed access to the electricity systems for producers of energy from renewable sources and to ensure that transmission and distribution system operators guarantee the transmission and distribution of electricity produced from renewable energy sources in their territory.

The openness of systems for electricity producers constitute a major element in the integration of renewable energy sources at the national and international electricity market and contributes significantly to the creation of the single energy market that the EU is trying to create. On the other hand, technical possibilities and requirements for the security and stability of individual power systems cannot be undervalued. This is confirmed in the case of Germany, for example, that with the increasing promotion of renewable sources (mainly wind parks in the North) is not able to provide continuous transmission of produced electricity from the north to the south of the country. Huge tidal volumes of wind power are overloading systems in Poland, the Czech Republic and Slovakia and significantly limit cross-border capacity to other market participants and the international trade with electricity. Slovakia has also a problem with capacity for connecting new sources, but we focus on this more closely in the following sections of this paper.

The results achieved by the Directive 2009/28 / EC are perceived mostly positively in the European spheres. The Commission itself has identified the Directive as *"the key driver for European led global investment in renewable Technologies and supportive renewable energy policies far beyond Europes' frontiers helping renewables emerge as cost-competitive energy source in the last decade in Europe and on global scale."*

Less than 5 years remain by the end of 2020 and it seems that most Member States are on the track to meet objective for renewable energy set forth in the Directive 2009/28 / EC. Prospects for the EU as a whole, relating to the objectives for 2020, remain favourable. According to the Commission report of 2015 in meeting objectives for 2020, we succeeded in meeting the expected share of 15.3% in gross energy consumption in 2014. However, some Member States shall need to significantly increase their efforts and, if necessary, to use some mechanisms for cooperation with other Member States for the sake of progress. In a report from 2016, the Commission expressed the greatest concern about Belgium, France, Luxembourg, Malta, the Netherlands and Spain, so these countries will have to strengthen their policies and instruments to ensure compliance with the objectives for 2020.[9]

[9] Renewable energy progress report [2016/2041(INI)] from 31.5.2016. [online]. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0196+0+DOC+XML+V0//EN

3. Legislation on the Promotion of Renewable Sources in Slovakia

In recent years, the promotion of renewable energy sources in Slovakia has undergone significant changes. These changes were mainly determined by the requirements of the European Union. The Slovak Republic as a full member of the Union is therefore not following only the national, but also European legislation. The fact that the implementation of European commitments will not be an easy task is evidenced by the fact that Slovakia has, in accordance with Directive 2009/208 / EC, an obligation to increase the use of renewable energy sources in proportion to the gross final energy consumption to 14% in 2020, while still in in 2005, this figure stood at 6.7%. The strategic document regarding the objective of 14% is the National Action Plan for renewable energy, approved by the Government on 06.10.2016 by Government Resolution no. 677/2010 (**NAP**).

Slovak Republic, despite the later accession to the European Union, compared to the old members, proceeded to the issue of renewable energy sources rather ambitious, as evidenced by the very objective stated in the NAP, that stipulate the level of 15.3% of renewable sources in proportion to the gross final energy consumption in 2020. The fulfilment of this objective inevitably led to the amendment of several statutes and other legal acts in the field of energy, which should stabilize energy market a make business environment more attractive for new investments. Renewable energy sources for the production of heating and electricity has become a priority.[10]

Energy legislation represents a relatively wide mass branched into a number of statutes and other legislation. Basic substantive issues relating to running a business in the energy, construction and operation of energy facilities and the conduct of state administration are regulated mainly by the Act. no. 251/2012 Coll. on Energy and on amending and supplementing certain laws (**Energy Act**) and Act no. 657/2004 Coll., on Thermal Energy (**Act on Thermal Energy**). These Acts and their follow-up secondary legislation constitute the key legislative framework for the status of individual participants in the energy market and determine their mutual relations. These Acts created conditions for the functioning of the open energy market, as well as the conditions for third party access to energy transmission system in Slovakia. For instance, the provision of § 27 sec.

[10] According to the document entitled *"Draft of Energy Policy of the Slovak Republic"* of October 2014, the share of electricity produced from renewable energy sources in the long term, in the period from 2010 to 2040, shall have increased from 19% to 29%, while the use of renewable energy to generate heat in the same period is predicted to increase from less than 10% to over 30%.

1 of the Energy Act stipulates that the electricity producer shall have the right to connect an electricity generation facility to the network provided that it meets the technical requirements and business terms for connection to the system. Moreover the electricity producer shall have the right to enter into a contract on Access to system provided the electricity producer meets the technical requirements and business terms for Access to the system. The technical requirements for access and connection to the network are specified by the network operator and these must be set on the non-discriminatory, transparent and secure basis.[11]

Efficient and stable promotion for the production of renewable energy is so significant that it was reflected in the form of a state regulation in almost all countries of the European Union. Production of energy from renewable sources is a regulated activity in accordance with Act. no. 250/2012 Coll., on Regulation in Network Industries (Regulatory Act). The actual subject matter of regulation of electricity and combined production of heat and electricity are primarily prices of produced energy, including the conditions for their application. Results of a price regulation in relation to producers are price decisions rendered by the Regulatory Office for Network Industries as a regulatory authority in the field of energy.

Regulatory Act contains, except the price regulation, also so-called substantive regulation, which is, for example, the issuance of an authorisation for doing business in the energy sector. Procedure for the substantive regulation involving a claimant – the producer – commences by the submission of the application. In the event of fulfilling the statutory requirements, the outcome of the substantive regulation is the issuance of an authorisation for the performance of regulated activities. Such a decision is of a legislative nature, i.e. it establishes the rights and obligations of the applicant *pro futuro*, i.e. as of entering into the force to the future.

Simultaneously, however, it shall be added that for the performance of certain activities in the field of electricity production from renewable sources, it is sufficient to meet the notification obligation towards the Regulatory Office for Network Industries. Confirmation of compliance with the notification requirement, however, has no longer the nature of an administrative decision, since such a certificate is not issued in the administrative proceedings. The nature of an administrative decision issued in an administrative procedure has neither certificate of origin of electricity produced from renewable energy sources, certificate of origin of electricity produced by high-efficiency cogeneration. Although the given confirmations fall within the substantive regulation, they have no decisive nature but rather the nature of certificates, to which the legislation does not

[11] § 19 sec. 1 Energy Act.

acknowledge the administrative nature. According to provision of § 41 sec. 2 Regulatory Act, general law on administrative procedure shall not apply to issue of these certificates.

4. Promotion of Renewable Energy Sources in the Act No. 309/2009 Coll.

A more detailed regulation governing the area of promotion the utilisation of renewable energy source is finally the Act no. 309/2009 Coll., on the promotion of renewable energy sources and high efficiency cogeneration (Act on the Promotion of RSoE). This law regulates the relatively wide scope, including a field of conditions and methods of application for the promotion of electricity generation and cogeneration of electricity and heat from renewable energy sources, the conditions for the promotion of a biomethane production, the application of the rights and obligations of producers from renewable energy resources, rights and responsibilities of regional distribution systems and other participants in the energy market, the state administration in the promotion of renewable energy sources, defines certificate of origin and guarantee of origin of electricity produced from renewable energy sources and by high-efficiency cogeneration, while implemented new terms into the legislative framework, as it was required by the implementation of European directives.

Act on the Promotion of RSoE has undergone a number of amendments since 2009, which gradually reflected not only the proposed measures of the European Commission in the field of energy, but also the content of the national strategy documents. One of the most essential of them, except the already mentioned NAP, is the Energy Policy of the Slovak Republic (EP SR) adopted by the Ministry of Economy of the Slovak Republic, which defines objectives and priorities of the energy sector in the long term, i.e. a minimum period of 20 years. EP SR's objective is to ensure the sustainable growth and competitiveness of the national economy by ensuring the sustainable Slovak energy industry. From this perspective, it is a priority for EP SR to ensure the reliability and stability of the energy transmission by the usage of low-carbon technologies, such as renewable energy sources and nuclear energy.

In the promotion of the renewable sources of energy and for the purposes of the Act on the promotion of RSoE, the renewable source of energy is deemed as a non-fossil source of energy, the energy potential of which is constantly restored by natural processes or human activity, and includes the following sources: hydro energy, solar energy, wind energy, geothermal energy, biomass including all

products of its processing, biogas, landfill gas, waste water treatment plant gas, biomethane, earothermal energy and hydrothermal energy. General basic terms including the definition of individual renewable energy sources stem from the Directive 2009/28/EC.

Act on RSOE represents a number of forms of promotion for producers of renewable energy and high efficiency cogeneration with an emphasis on resources with less performance, which is in line with the principle of promoting decentralized sources. In other words, a form of promotion for producers varies depending on the type of renewable energy source and the total installed capacity of the production facility. According to provision of § 3 sec. 1 limb a), an electricity producer is entitled to (i) priority connection to the distribution network, (ii) priority access to the network, (iii) priority electricity transmission, (iv) priority electricity distribution, and (v) priority electricity supply. The given form of promotion represents a basic form of promotion that is provided to producers, regardless of the performance and nature of the production facility. In this respect, however, it should be noted that, the stated is currently not applied in practice to the source with the installed capacity of 10 kW. The three regional distribution companies declared so-called "stop status" for connecting new sources for the production of electricity with the mentioned output of 10 kW at the end of 2013. Technical limitations in the system are given a reason to do so. The number of connected production sources in fact caused that the amount of electricity produced from renewable sources is not consumed directly in the production area, which then causes energy flows in the system that may endanger the safety and reliability of operating the electricity systems.

Since 2009, when the Act on the promotion of RSoE was passed in Slovakia, a large number of new facilities for the production of electricity from renewable sources of energy and high efficiency cogeneration of energy have been introduced into the operation. The reason for such increase of facilities is mainly the guarantee of promotion through feed-in tariffs for a period of 15 years.

As was already mentioned in the introduction, the promotion of electricity production from renewable energy sources through feed-in tariffs is the most widespread form of promotion in the EU. This promotional system is considered useful for investors because of the guarantee of the return on investment. Promotion in the form of feed-in tariffs is regulated in the Act on Promotion in § 3 sec. 1 limb b) and c), i.e. in the form of electricity offtake for the price of electricity covering the losses and in the form of so-called additional payment. Both forms are provided through the regional distribution system and the producer may (contrary to the legislation in the Czech Republic) implement both forms of promotion at the same time.

The fact is that all facilities generating electricity from renewable sources, which are connected to the regional distribution system and comply with the current legislation, have a guaranteed repurchase of electricity, based on the promotion under § 3 sec. 1 limb b) of the Act on Promotion of RSoE. Regional distribution system operator is required to repurchase such electricity to cover losses that arise from the physical distribution of the required amount of electricity to the final customer at the various voltage levels. The regional distribution system operator thus pays only for the actual amount of electricity serving to cover losses, which had been supplied by the producer. The price of electricity for losses is a pricing decision of the Regulatory Office for Network Industries set forth as a fixed price generally valid for one calendar year.

In accordance with the provision of § 5 sec. 7 of the Act on Promotion of RSoE, in the event, if the instantaneous power of the electricity offtake exceeds the quantity necessary for covering the losses, the regional distribution network operator is entitled to sell this electricity at a price not less than the price of electricity for losses.

Philosophy of purchasing the electricity to cover losses is not standard in the EU Member States. The imposition of obligations for a market participant, which is a regulated entity and which may not deal in electricity, in addition to the above exemptions for the required offtake of electricity. Such an approach was set by the Act on the Promotion of renewable energy sources because of the experience of previous years, however, nowadays, it is necessary to modify such approach, not only as result of the volume of electricity offtaken to cover losses. Some operators of regional distribution systems have already delegated another person (supplier of electricity) for the provision of support in the form of repurchasing electricity to cover losses, as the provision § 4 sec. 1 of the Act on Promotion of RSoE allows them.

Unlike previous form of promotion, in the event of additional payment in accordance with § 3 sec. 1 limb c), the fact is that the regional distribution system operator pays the price for all volumes of electricity (lessen by autocomsumption of technology) produced by a producer connected to the network regardless of whether the manufacturer supplies the electricity to a provider of the regional distribution system (or the person authorized by him).[12] The amount of additional payment is determined by the Office for Regulation of Network Industries individually for each single producer. Additional payment is set forth as a fixed price, while the Regulatory Office for Network Industries takes into consideration the type of renewable energy source, rate of return on investment,

[12] Electricity generation facilities to which applies additional payment are listed at § 3 sec. 4 of the Act on Promotion of RSoE.

production technology, the term of initiation the facility into operation, and the term and scope of reconstruction or modernisation of technological facilities or the total installed capacity. Amount of the additional payment de facto does not change and remains the same as in the year when the facility was initiated into operation.[13]

Market principles are currently preferred in the promotion of renewable energy sources and high efficiency cogeneration. Generously set prices for some types of renewable energy cause undesirable financial and technical effect. Given the experience with the promotion of renewable energy sources, it can be stated that in Slovakia, this risk was underestimated and prices were set very favourable towards investors. This is particularly related to the resources that are relatively unstable depending on the weather, such as photovoltaic power plant.

The Regulatory Office for Network Industries determined the generously set feed-in tariff for photovoltaics further the adoption of the Act on Promotion of RSoE in 2010 and that invoked a large interest of investors for this area of business. Investors who have had ready funds for projects for different types of renewable energy sources mostly focused on the area of photovoltaics. Towards the end of 2013 the installed capacity of these sources amounted to 537 MW. Purchase price of electricity from solar energy, which was several times higher than the market prices of electricity, has reflected to the final price of electricity to the so-called tariffs for the system operation (**TFO**).

Further construction was regulated by the legislative modification of promotion to avoid problems in the management of the power system and escalating electricity prices. Under the current legal status for facility of an electricity producer that uses solar energy as source, the additional payment applies only to a facility with the installed capacity of up to 30 kW that is located on a roof structure or perimeter wall of one building connected with the earth by a fixed fondation, registred in the cadastre of immovables[14].

The promotion of those renewable sources that do not show fluctuations in production and which feed-in tariffs will be closer to those of the market can be expected in the new regulatory period to support. The new setting of the promotional system for renewable energy sources should thus ensure the achievement of its objectives in a cost effective manner and should prevent impact on electricity prices.

[13] The Act on Promotion allows an exception from this principle, where pursuant to § 6. sec. 4 the Office shall alter the price of electricity under sec. 3 per calendar year by additional payment that reflects the significant increase or decrease in raw material prices in the preceding calendar year that were used to generate electricity.

[14] § 3 sec. 10 Act on Promotion of RSoE.

5. Cost for Promotion Energy from Renewable Energy Sources

As mentioned above, as regional distribution system operator is obliged to offtake electricity for which they are paying the price of electricity for losses. The electricity producer is also entitled to an additional payment to the regional distribution system operator to the actual amount of electricity produced for a calendar month from renewable sources (reduced the own technological autoconsumption of electricity). Regional distribution systems operators have the cost of this promotion compensated in the procedure of price regulation under Act no. 250/2012 Coll.[15]

The funds designated for the promotion of production of renewable electricity for the regional distribution system operators are allocated annually by the Regulatory Office for Network Industries through TFO, based on forecast production from renewable sources for individual calendar years. Given the fact that in the past, there was an inconsistency among the data on estimated production, what caused increased costs for electricity supply and thus the impact on the price of electricity, the notification obligation for electricity producers was introduced under provisions § 4 sec. 2 limb c) of the Act on RSoE. According to that provision: *"electricity producer entitled to support is obliged to notify the Regulatory Office for Network Industries and the regional distribution system operator of claiming the support pursuant to § 3 sec. 1 limb b) and c), including of the expected quantity of supplied electricity always by 15 August for the following calendar year."* Failure to meet this obligation causes the impossibility to apply for the support in the form of additional payment and as well as in the form of electricity offtake for the price of electricity covering the losses.[16]. There is no doubt that the loss of entitlement in producers to the promotion for a full calendar year may denote a significant limitation of their business and can also significantly negatively affect their economic situation, in particular where such promotion constitutes a significant or even sole incomes from business activities of such producer of electricity. For this reason, therefore, the fact that one third of all of the overall number of 3000 producers of electricity from renewable sources has not fulfilled their statutory obligations in 2015 is strikingly shocking.[17]

[15] § 5 sec. 1 Act on Promotion of RSoE.

[16] § 4 sec. 3 Act on Promotion of RSoE.

[17] A list of producers who lost a claim to exercise the promotion in 2015 because of the application of the provision § 4 sec. 3 of the Act on Promotion of RSoE is available on the website of the Regulatory Office for Network Industries; for an actual list of producers see: http://www.urso.gov.sk.

The current system of promotion with the philosophy of purchasing the electricity to cover losses in the distribution system is unsustainable; especially due to the fact that the electricity that is compulsorily being purchased exceeds the losses in distribution systems. Moreover, the calculation of system costs in every operator of the regional distribution system is also quite complicated.

There is an ongoing discussion in connection with the promotion of electricity produced from renewable sources that a single central purchaser of all electricity produced in this way shall be determined. Regardless of which that entity would be at the end, all such mandatorily reversely purchased electricity would be placed on the market, thus contributing to the increase of its liquidity. Such a system would undoubtedly contribute to the optimization of costs compared with the system of three regional distribution companies. Regulatory Office for Network Industries would then be able to set fees for the promotion of "green electricity" far more effectively because the costs would check and compare with the facts only in one subject. At the same time, this would eliminate an obligation for the regional distribution system operators to make, which is not related to distribution as such. Additionally, a similar model has already been operating in Austria and Italy.

6. Conclusion

Promotion of renewable energy sources is nowadays considered as one of the key areas of the economy, in which it is essential that all Member States take the measures necessary to introduce a minimum standard of common rules in this sector and to introduce a uniform policy in relation to third States that supply energy to the European Union.

The Directive 2009 with legally binding Union and national targets and 10% target for renewable energy use in transport became the key driver for European led global investment in renewable technologies and supportive renewable energy policies far beyond Europe's frontiers. This momentum needs to continue.

With four years to go to the end of 2020, majority of the Member States are well on track to meeting the renewable energy targets laid down in the Directive 2009. On the other hand the concerns regarding the progress in some Member States still exists and causes lesser optimistic assumptions related to their future development, namely: deviations from their own national renewable energy action plans; failure to address certain administrative and grid-related barriers to the uptake of renewable energy; recent disruptive changes to national support schemes for renewable energy; and, finally, the slow transportation of the Directive into national law.

The Slovak Republic as a full member of the Union is not following only the national, but also European legislation. Basic substantive issues relating to promotion of electricity from renewable energy sources are regulated mainly by the Act no. 309/2009 Coll., on the promotion of renewable energy sources and high efficiency cogeneration. It can be stated that via this act the measures contained in the European energy directives has been thoroughly implemented.

Reservations, however, may have in relation to support scheme provided through three regional distribution system operators. On the other hand, with the financial subsidies for electricity produced from renewable energy sources, the share of "green electricity" generated in the years 2010–2014 increased to stable level of around 20 %. In 2015, however, production of electricity from renewable energy sources accounted only for 17 %. The share o fit total gross consumption was reduced even to 15,6 %. The decline was undoubtedly caused by the loss of support for more than 1.000 producers due to the failure of their legal obligations in reporting data.

Finally, it can be concluded that the Slovak republic has implemented the European Union rules regulating the area of promotion energy from renewable sources, taking into account acceptable departures. The way forward in the area of promotion the energy from renewable energy sources should, step by step, lead to the ceasing the system based on financial subsidies and implementing market oriented tools.

European Protection Order in Criminal Matters versus European Protection Order in Civil Matters*

Libor Klimek**

Summary: The European Union called for the adoption of specific post-Lisbon instruments to ensure the protection of victims, namely the European protection order. The contribution deals with the European protection order in criminal matters and its comparison to the European protection order in civil matters. It is divided into three sections. While the first section is focused on general overview and legal basis of the European protection order in criminal matters, the second section analyses its definition and scope of application. In the third section the author compares the European protection order in criminal matters and the European protection order in civil matters.

Keywords: European protection order in criminal matters, European protection order in civil matters, the Directive 2011/99/EU on the European protection order, the Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters, mutual recognition

1. Introduction

One of the victim's most important rights is the right to be protected against further attacks by the offender. Victims have the right to avoid being a victim once again. Victim protection is a priority objective of any advanced criminal policy. Victim protection means activating appropriate mechanisms to prevent a repeat offence or a different, perhaps more serious offence, by the same offender against the same victim. Such repeat offences against the same victims are particularly frequent in case of gender-based violence, although they also occur in other forms of crime such as human trafficking or sexual exploitation of minors and they can obviously arise in all forms of crime.

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All Member States of the European Union apply measures to protect victims' lives, their physical, mental and sexual integrity and their freedom. However, such measures are effective only on the territory of the State which adopted them and thus they leave victims unprotected when they cross borders. The protection which a Member State affords to crime victims should therefore not be confined to its territory, but it should apply to victims wherever they go.[1]

No cross-border problem arises as long as the victim and the offender remain within the State in which the protection measure has been adopted and the issue is thus confined to that State. If the offender moves to a different State there have been already introduced legal instruments that cover this cross-border element.

Two crucial measures have been introduced in the European Union – the 'European protection order in criminal matters' and the 'European protection order in civil matters'. The contribution deals with the European protection order in criminal matters and its comparison to the European protection order in civil matters. It is divided into three sections. While the first section is focused on general overview and legal basis of the European protection order in criminal matters, the second section analyses its definition and scope of application. In the third section the author compares the European protection order in criminal matters and the European protection order in civil matters.

2. European Protection Order in Criminal Matters: General Overview and Legal Basis

The Treaty on the Functioning of the European Union[2] provides that '[t]o the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial co-operation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives […] establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern […] the rights of victims of crime'[3].

[1] Council of the European Union (2010): 'Initiative [...] for a Directive of the European Parliament and of the Council on the European Protection Order – Explanatory memorandum', 17513/09, ADD 1, REV 1, p. 3.

[2] Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon. Official Journal of the European Union, C 83/47 of 30th March 2010.

[3] Article 82(2)(c) of the Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon.

Further, the Stockholm Programme[4] of 2009 also devotes particular attention to the rights of victims and their protection. Referring specifically to criminal law it states that 'victims of crime or witnesses who are at risk can be offered special protection measures which should be effective within the Union'[5]. Indeed, besides the Treaty on the Functioning of the European Union the European Parliament also called to examine how to improve legislation and practical support measures for the protection of victims.

The European Union legislator opted for the adoption of a specific post-Lisbon legislative instrument to ensure the protection of victims when they exercise free movement rights in the European Union[6], namely the European protection order (in criminal matters).

The legal basis of the European protection order addressed for the Member States of the European Union is the *Directive 2011/99/EU on the European protection order*[7]. However, Ireland and Denmark are not taking part in the adoption of the Directive and are not bound by it or subject to its application. The objective of the Directive 2011/99/EU on the European protection order is to ensure the trans-border protection to victims of crimes in other Member States when they move within the European Union. It is defined in its core text as well as in its Preamble.

First, the core text of the Directive 2011/99/EU on the European protection order stipulates that it sets out rules allowing a judicial or equivalent authority in a Member State, in which a protection measure has been adopted with a view to protecting a person against a criminal act by another person which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity, *to issue a European protection order* enabling a competent authority in another Member State *to continue the protection of the person* in the territory of that other Member State, following criminal conduct, or alleged criminal conduct, in accordance with the national law of the issuing State (emphasis added).[8]

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4 European Council (2009): 'Stockholm Programme – An open and secure Europe serving and protecting citizens'. Official Journal of the European Union, C 115/1 of 4th May 2010; see also: European Commission (2010): 'Delivering an area of freedom, security and justice for Europe's citizens : Action Plan Implementing the Stockholm Programme', communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 171 final.

5 Point 3.1.1. of the Stockholm Programme.

6 MITSILEGAS, Valsamis. The Place of the Victim in Europe's Area of Criminal Justice. In IPPOLITO, Francesca, IGLESIAS SÁNCHEZ, Sara (eds). *Protecting Vulnerable Groups: The European Human Rights Framework*. Oxford – Portland: Hart Publishing, 2015, p. 317.

7 Directive 2011/99/EU of the European Parliament and of the Council of 13th December 2011 on the European protection order. Official Journal of the European Union, L 338/2 of 21st December 2011.

8 Article 1 of the Directive 2011/99/EU on the European protection order; see also: RYCKMAN, Charlotte, VERMEULEN, Gert, De BONDT, Wendy. Considerations For a Future EU Policy

Second, the Preamble of the Directive 2011/99/EU on the European protection order highlights that its objective is 'to protect persons who are in danger'[9] and adds that 'this Directive should set out rules whereby the protection stemming from certain protection measures adopted according to the law of one Member State […] can be extended to another Member State in which the protected person decides to reside or stay'[10].

The Directive 2011/99/EU on the European protection order takes account of the different legal traditions of the Member States as well as the fact that effective protection can be provided by means of protection orders issued by an authority other than a criminal court. The Directive does not create obligations to modify national systems for adopting protection measures nor does it create obligations to introduce or amend a criminal law system for executing a European protection order.[11]

The measures included in the Directive 2011/99/EU on the European protection order, offering the victim a guarantee of safety, are not a novelty for the Member States of the European Union. They had been recognised, first, in the Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions[12] (hereinafter 'Framework Decision 2008/947/JHA on mutual recognition of probation measures and alternative sanctions', and second, in the Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention[13] (hereinafter 'Framework Decision 2009/829/JHA on mutual recognition of supervision measures as an alternative to provisional detention').

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on Disqualifications. In COOLS, Marc et al (eds). *Readings on Criminal Justice, Criminal Law & Policing*. Antwerpen – Apeldoorn: Maklu, 2009, p. 121; MITSILEGAS, Valsamis. The Place of the Victim in Europe's Area of Criminal Justice. In IPPOLITO, Francesca, IGLESIAS SÁNCHEZ, Sara (eds). *Protecting Vulnerable Groups: The European Human Rights Framework*. Oxford – Portland: Hart Publishing, 2015, p. 317; VERMEULEN, Gert, De BONDT, Wendy. Justice, Home Affairs and Security: European and International Institutional and Policy Development. Antwerpen – Apeldoorn: Maklu, 2015, p. 117.

9 Recital 39 of the Directive 2011/99/EU on the European protection order.

10 Recital 7 of the Directive 2011/99/EU on the European protection order.

11 Recital 8 of the Directive 2011/99/EU on the European protection order.

12 Council Framework Decision 2008/947/JHA of 27th November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions as amended by the Framework Decision 2009/299/JHA. Official Journal of the European Union, L 337/102 of 16th December 2008.

13 Council Framework Decision 2009/829/JHA of 23rd October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. Official Journal of the European Union, L 294/20 of 11th November 2009.

The Directive emphasises that it 'should contribute to the protection of persons who are in danger, thereby complementing, but not affecting, the instruments already in place in this field'[14], namely mentioned framework decisions.

The Framework Decision 2008/947/JHA on mutual recognition of probation measures and alternative sanctions aims at facilitating the social rehabilitation of sentenced persons, improving the protection of victims and of the general public and facilitating the application of suitable probation measures and alternative sanctions, in case of offenders who do not live in the State of conviction. With a view to achieving these objectives, the Framework Decision lays down rules under which a Member State of the European Union other than the Member State in which the person concerned has been sentenced, recognises judgments and probation decisions and supervises probation measures imposed on the basis of a judgment, or alternative sanctions contained in such a judgment, and takes all other decisions relating to that judgment.[15] It applies to many alternatives to custody and to measures facilitating early release, for example, an obligation not to enter certain localities, to carry out community service or instructions relating to residence or training or professional activities. However, the Directive 2011/99/EU on the European protection order the Framework Decision partly overlap. For example, if both the protected person (victim) and the person causing danger (offender) would move to the same Member State and the protection measure entails an obligation not to enter certain localities, places or defined areas in the issuing or executing State and/or an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed, there is overlap between the European protection order and the Framework Decision in cases of post-trial measures.[16]

The Framework Decision 2009/829/JHA on mutual recognition of supervision measures as an alternative to provisional detention lays down rules according to which one Member State of the European Union recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention, monitors the supervision measures imposed on a natural person and surrenders the person concerned to the issuing State in case of breach of these measures[17]. However, the Directive 2011/99/EU on the European protection order the Framework Decision partly cover the same types of supervision

[14] Recital 33 of the Directive 2011/99/EU on the European protection order.

[15] Article 1(1) of the Framework Decision 2008/947/JHA on mutual recognition of probation measures and alternative sanctions.

[16] Van der AA, Suzan, OUWERKERK, Jannemieke. The European Protection Order: No Time to Waste or a Waste of Time? *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, Vol. 19, No. 4, p. 276.

[17] Article 1 of the Framework Decision 2009/829/JHA on mutual recognition of supervision measures as an alternative to provisional detention.

measures. The most obvious difference between the scope of the Directive and that of the Framework Decision is that the latter only refers to pre-trial orders as an alternative to provisional detention, whereas the Directive also handles post-trial orders.[18]

The Directive 2011/99/EU on the European protection order shall not affect the application of:[19]

– the Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[20],
– the Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[21],
– the Hague Convention on the Civil Aspects of International Child Abduction[22] of 1980, and
– the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children[23] of 1996.

As far as the relationship of the Directive 2011/99/EU on the European protection order with other agreements and arrangements is concerned, Member States of the European Union may continue to apply bilateral or multilateral agreements

[18] Van der AA, Suzan, OUWERKERK, Jannemieke. The European Protection Order: No Time to Waste or a Waste of Time? *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, Vol. 19, No. 4, p. 274.

[19] Article 20(1) of the Directive 2011/99/EU on the European protection order.

[20] Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters as amended by the Regulation (EU) No 156/2012. Official Journal of the European Communities, L 12/1 of 16th January 2001.

[21] Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 as amended by the Regulation (EC) No 2116/2004. Official Journal of the European Union, L 338/1 of 23rd December 2003.

[22] Hague Convention on the Civil Aspects of International Child Abduction of 25th October 1980.

[23] Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children of 19th October 1996. Official Journal of the European Union, L 151/39 of 11th June 2008; see the Council Decision 2008/431/EC of 5th June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law – Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children. Official Journal of the European Union, L 151/36 of 11th June 2008.

or arrangements which are in force upon the entry into force of the Directive, in so far as they allow the objectives of the Directive to be extended or enlarged and help to simplify or facilitate further the procedures for taking protection measures. In addition to that, Member States may conclude bilateral or multilateral agreements or arrangements after the entry into force of the Directive, in so far as they allow the objectives of the Directive to be extended or enlarged and help to simplify or facilitate the procedures for taking protection measures.[24]

3. Definition and Scope of Application

A principal question which begs consideration is the definition of the term *European protection order*. In the national legal systems of the Member States of the European Union the concept of the *protection order* is defined and interpreted differently.[25] Although it is less or more often similar, the harmonisation or even the unification of this concept has never been an objective of the European Union. Moreover, the Directive 2011/99/EU on the European protection order does not focus on it. Rather, it introduces special approach.

The Directive 2011/99/EU on the European protection order defines the European protection order as 'a decision, taken by a judicial or equivalent authority of a Member State in relation to a protection measure, on the basis of which a judicial or equivalent authority of another Member State takes any appropriate measure or measures under its own national law with a view to continuing the protection of the protected person'[26]. The precedent is the *protection order* in the English-speaking world which takes the form of a court order protecting one person from another, is valid for the entire national territory and contains a number of obligations or prohibitions which the person to whom it is directed must observe, for example, prohibition on possessing weapons, approaching or contacting one or more persons, etc. The European protection order is based on the following assumptions:[27]

[24] Article 19(1)(2) of the Directive 2011/99/EU on the European protection order.

[25] Various synonyms of the term *protection order* exist. For example, in national laws of the Member States of the EU can be observed equivalents or closely related terms such as *protective order*, *restraining order*, *stay-away order*, or even *no-contact order*; details see: Van der AA, Suzan. Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here? *European Journal on Criminal Policy and Research*, 2012, Vol. 18, No. 2, pp. 183–204.

[26] Article 2(1) of the Directive 2011/99/EU on the European protection order; see also: MITSILEGAS, Valsamis. The Place of the Victim in Europe's Area of Criminal Justice. In IPPOLITO, Francesca, IGLESIAS SÁNCHEZ, Sara (eds). *Protecting Vulnerable Groups: The European Human Rights Framework*. Oxford – Portland: Hart Publishing, 2015, p. 317.

[27] Council of the European Union (2010): 'Initiative [...] for a Directive of the European Parliament and of the Council on the European Protection Order – Explanatory memorandum', 17513/09,

– there is a person in danger,
– the danger is such that the Member State of the European Union in which the person resides has to adopt a protection measure in the context of criminal proceedings,
– the person decides to move to another Member State of the European Union, and
– the person continues to be in danger on the territory of the Member State to which (s)he wishes to move.

The European protection order is designed to continue to protect persons finding themselves in such circumstances, ensuring that in the Member State of the European Union to which they move they will receive a level of protection identical or equivalent to the protection they enjoyed in the Member State which adopted the protection measure.

The Directive 2011/99/EU on the European protection order applies to protection measures which aim specifically to protect a person against a criminal act of another person which may, in any way, endanger that person's life or physical, psychological and sexual integrity, for example, by preventing any form of harassment as well as that person's dignity or personal liberty, for example, by preventing abductions, stalking and other forms of indirect coercion, and which aim to prevent new criminal acts or to reduce the consequences of previous criminal acts. These personal rights of the protected person (victim) correspond to fundamental values recognised and upheld in Member States. However, a Member State of the European Union is not obliged to issue the European protection order on the basis of a criminal measure which does not serve specifically to protect a person, but primarily serves other aims, for example, the social rehabilitation of the offender. It is important to underline that the Directive applies to protection measures which aim to protect all victims and not only the victims of gender violence, taking into account the specificities of each type of crime concerned.[28] Indeed, the Directive relates to protection measures in criminal matters. The application of protection measures in civil matters is not included.

The Directive 2011/99/EU on the European protection order clearly seeks to restrict its scope of application to criminal matters.[29] For purposes of the Directive the term *protection measure* shall mean '*a decision in criminal matters* adopted in the issuing State in accordance with its national law and procedures by which one or more of the prohibitions or restrictions […] are imposed on

ADD 1, REV 1, p. 11.

[28] Recital 9 of the Directive 2011/99/EU on the European protection order.

[29] BRADLEY, Kieran. Legislating in the European Union. In BARNARD, Catherine, PEERS, Steve (eds). *European Union Law*. Oxford: Oxford University Press, 2014, p. 121.

a person causing danger in order to protect a protected person against a criminal act which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity'[30] (emphasis added).

Indeed, the European protection order involves a mechanism based on mutual recognition and, as such, it is not a harmonisation measure. Its objective is not to ensure uniformity as regards the protection measures which each national legislature can adopt, but to eliminate existing borders from the point of view of victim protection. Its objective is therefore threefold:[31]

– to prevent a further offence by the offender or presumed offender in the State to which the victim moves, the executing State,
– providing the victim with a guarantee of protection in the Member State to which (s)he moves which is similar to that provided in the Member State which adopted the protection measure, and
– preventing any discrimination between the victim moving to the executing State compared with victims enjoying protection measures initiated by that State.

The European protection order is therefore intended to provide protection for victims in whichever Member State they move to, by preventing the commission of a new offence against them by the offender or the person causing the danger and providing victims with a level of protection similar to that provided by the Member State of the European Union whose judicial authority adopted the initial measure and equivalent to that provided to other victims in the executing State. As the European Data Protection Supervisor *Hustings* pointed out, the protection measure imposed on the person causing danger aim to protect life, physical and psychological integrity, freedom, or sexual integrity of the protected person within the European Union regardless of national boundaries. It attempts to prevent new crimes against the same victim.[32]

For the application of the Directive 2011/99/EU on the European protection order the protection measure may have been imposed following a judgment within the meaning of the Framework Decision 2008/947/JHA on mutual recognition of probation measures and alternative sanctions, or following a decision

[30] Article 2(2) of the Directive 2011/99/EU on the European protection order.

[31] Council of the European Union (2010): 'Initiative [...] for a Directive of the European Parliament and of the Council on the European Protection Order – Explanatory memorandum', 17513/09, ADD 1, REV 1, p. 12.

[32] European Data Protection Supervisor (2010): 'Opinion of the European Data Protection Supervisor on the Initiative […] for a Directive of the European Parliament and of the Council on the European Protection Order, and on the Initiative […] regarding the European Investigation Order in criminal matters', Official Journal of the European Union, C 355/1 of 29th December 2010.

on supervision measures within the meaning of the Framework Decision 2009/829/JHA on mutual recognition of supervision measures as an alternative to provisional detention. If a decision was adopted in the issuing State on the basis of one of those Framework Decisions, the recognition procedure should be followed accordingly in the executing State.[33]

As far as the Framework Decision 2008/947/JHA on mutual recognition of probation measures and alternative sanctions is concerned, for its purposes *judgment* shall mean a final decision or order of a court of the issuing State, establishing that a natural person has committed a criminal offence and imposing:[34]

- a custodial sentence or measure involving deprivation of liberty, if a conditional release has been granted on the basis of that judgment or by a subsequent probation decision;
- a suspended sentence; it shall mean a custodial sentence or measure involving deprivation of liberty, the execution of which is conditionally suspended, wholly or in part, when the sentence is passed by imposing one or more probation measures; such probation measures may be included in the judgment itself or determined in a separate probation decision taken by a competent authority;
- a conditional sentence; it shall mean a judgment in which the imposition of a sentence has been conditionally deferred by imposing one or more probation measures or in which one or more probation measures are imposed instead of a custodial sentence or measure involving deprivation of liberty; such probation measures may be included in the judgment itself or determined in a separate probation decision taken by a competent authority;
- an alternative sanction; it shall mean a sanction, other than a custodial sentence, a measure involving deprivation of liberty or a financial penalty, imposing an obligation or instruction.

As far as the Framework Decision 2009/829/JHA on mutual recognition of supervision measures as an alternative to provisional detention is concerned, *decision on supervision measures* shall mean an enforceable decision taken in the course of criminal proceedings by a competent authority of the issuing State in accordance with its national law and procedures and imposing on a natural person, as an alternative to provisional detention, one or more supervision measures. Supervision measures shall mean obligations and instructions imposed

[33] This, however, should not exclude the possibility to transfer the European protection order to a Member State of the EU other than the State executing decisions based on mentioned framework decisions.

[34] Article 2(1)(2)(3)(4) of the Framework Decision 2008/947/JHA on mutual recognition of probation measures and alternative sanctions.

on a natural person, in accordance with the national law and procedures of the issuing State.[35]

4. 'European Protection Order in Criminal Matters' versus 'European Protection Order in Civil Matters'

During the negotiations on the Draft Directive on the European protection order it appeared that its mechanism, based on mutual recognition in criminal matters, is not compatible with the ambitious standard of mutual recognition already reached for civil matters.

The Directive 2011/99/EU on the European protection order explicitly states that the European protection order does not cover protection measures adopted in civil matters[36]. Originally, the European protection order was meant to be an instrument for the recognition of protection measures adopted both in criminal and in civil matters in order to respond to the existing diversity in the legislation of the Member States and to the different legal systems providing for criminal, civil or mixed measures. Even so, in spite of the fact that on many occasions a combination of different measures are used, it was decided to base the Directive on criminal co-operation because the legal interests to be protected, such as life, physical or mental integrity, or sexual freedom, have traditionally been safeguarded under criminal law. The main objection was that, according to some States, these measures go beyond the legal basis used for the Directive, the Treaty on the Functioning of the European Union, which regulates the judicial co-operation in criminal matters. For this reason during the negotiations on Directive in order to overcome the frontal opposition by the European Commission and the doubts of certain Member States regarding the procedure followed, the scope of the European protection order was limited to criminal matters.[37]

While the European protection order is focused on protection orders of criminal nature, in case of mutual recognition of protection orders of non-criminal nature applies its complementary measure – the European protection order in civil matters.

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[35] Article 4(a)(b) of the Framework Decision 2009/829/JHA on mutual recognition of supervision measures as an alternative to provisional detention.

[36] Recital 10 of the Directive 2011/99/EU on the European protection order.

[37] ATANASOV, Atanas et al. *The European Protection Order: Its Application to the Victims of Gender Violence*. Madrid: Tecnos, 2015, pp. 35–36.

The legal basis of the European protection order in civil matters at the European Union level is the *Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters*[38]. It is part of a legislative package which aims at strengthening the rights of victims in the European Union. The Regulation establishes rules for a mechanism for the recognition of protection measures ordered in a Member State of the European Union in civil matters.[39] It shall apply to protection measures in civil matters ordered by an issuing authority.[40]

The Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters aims at completing a legal instrument on the mutual recognition of protection measures taken in criminal matters to ensure that all protection measures taken in a Member State of the European Union benefit from an efficient mechanism to ensure their free circulation throughout the European Union.[41] The need for the measure applying exclusively to protection orders taken in civil proceedings appeared during the negotiations on the Draft Directive on the European protection order. To consult more specifically on the need for and the modalities of the Draft, the European Commission launched additional consultations with Member States, other institutions and experts from different backgrounds.

The distinction between both protection orders does not exclude the possibility of confusion. The Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters, however, establishes a different recognition system. This duplicity might be a source of confusion for legal actors that may intervene in the process of issuing and/or executing European protection orders, and also tor the victims, who will have to be properly informed about the protection measures and recognition processes in other Member States which make them available, and specifically, about the procedures and guarantees in each or them.[42] As argue

[38] Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12th June 2013 on mutual recognition of protection measures in civil matters. Official Journal of the European Union, L 181/4 of 29th June 2013; see also: Commission Implementing Regulation (EU) No 939/2014 of 2nd September 2014 establishing the certificates referred to in Articles 5 and 14 of Regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters. Official Journal of the European Union, L 263/10 of 3rd September 2014.

[39] Article 1 of the Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters.

[40] Article 2(1) of the Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters.

[41] European Commission (2011): 'Proposal for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters', COM(2011) 276 final, p. 3.

[42] FREIXES, Teresa, ROMÁN, Laura. *Protection of the Gender-Based Violence Victims in the European Union*. Tarragona: Publicacions Universitat Rovira i Virgili, 2014, pp. 15 and 16.

Vermeulen, *De Bondt*, *Rackman* and *Peršak,* there is a very thin demarcation line between both instruments.[43]

The relation of both protection orders is not defined either in the Directive 2011/99/EU on the European protection order or in the Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters. It is natural that the first act does not define their relationship. However, the second act should define it and make clear distinction between the 'European protection order in criminal matters' and the 'European protection order in civil matters'. While the Preamble to the Directive states that it 'applies to protection measures adopted in criminal matters'[44], the Preamble to the Regulation states that it 'complements the Directive 2012/29/EU'[45] (i.e. the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crim[46]) and that its scope 'is within the field of judicial co-operation in civil matters'[47].

The comparison of the term *protection measure* is clear answer of the question what is the distinction between both protection orders.[48] In case of the 'European protection order in criminal matters' it shall mean '*a decision in criminal matters* adopted in the issuing State in accordance with its national law and procedures by which one or more of the prohibitions or restrictions […] are imposed on a person causing danger in order to protect a protected person *against a criminal act* which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity'[49] (emphasis added). In case of the 'European protection order in civil matters' it shall mean '*any decision*,

[43] VERMEULEN, Gert, De BONDT, Wendy, RYCKMAN, Charlotte, PERŠAK, Nina. The disqualification triad: Approximating legislation: Executing requests: Ensuring equivalence. Antwerpen – Apeldoorn – Portland: Maklu, 2012, p. 45.

[44] Recital 10 of the Directive 2011/99/EU on the European protection order.

[45] Recital 8 of the Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters.

[46] Directive 2012/29/EU of the European Parliament and of the Council of 25th October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Official Journal of the European Union, L 315/57 of 14th November 2012. The purpose of the Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.

[47] Recital 9 of the Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters.

[48] KLIMEK, Libor. Európsky ochranný príkaz: nový trestnoprocesný nástroj Európskej únie a úvahy k právnemu poriadku Slovenskej republiky [transl.: European Protection Order: a New Criminal Law Instrument of the European Union and Considerations towards Law of the Slovak Republic]. *Justičná revue*, 2014, Vol. 66: No. 4, p. 568.

[49] Article 2(2) of the Directive 2011/99/EU on the European protection order.

whatever it may be called, ordered by the issuing authority of the Member State of origin in accordance with its national law and imposing one or more of the following obligations on the person causing the risk with a view to protecting another person, when the latter person's physical or psychological integrity may be at risk' (emphasis added):[50]

– a prohibition or regulation on entering the place where the protected person resides, works, or regularly visits or stays,
– a prohibition or regulation of contact, in any form, with the protected person, including by telephone, electronic or ordinary mail, fax or any other means, and
– a prohibition or regulation on approaching the protected person closer than a prescribed distance.

Indeed, while the 'European protection order in criminal matters' covers protection measures issued through decisions in criminal matters, protection measures covered by the 'European protection order in civil matters' covers any other decisions.

The term 11th January 2015 is important for both protection orders. The Member States of the European Union shall take the necessary measures to comply with the provisions of the Directive 2011/99/EU on the European protection order by that date. The Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters shall apply from that date (to protection measures ordered on or after that date, irrespective of when proceedings have been instituted).

[50] Article 3(1)(a)(b)(c) of the Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters.

Private Enforcement Comparison in Selected EU Member States*

Eva Zorková**

Summary: Untill the end of December 2016, the Damage Directive 2014/104/EU shall be implemented into Czech law, as well as into national laws of all EU Member States. The new Directive should facilitate private claims based on infringement of competition law, known as "private enforcement". Although private enforcement is already available in all Member States, its implementation in practice is limited and uneven, due to numerous factual as well as legal barriers for potential claimants. The principle aim of this article is to evaluate the actual experience with private enforcement in selected EU Member States, namely in the Czech Republic, France and Hungary, on the basis of a thorough comparative analysis of several issues known to cause problems for private enforcment in practice.

Keywords: private enforcement, competition law, Damage Diretive 2014/104/EU, comparison of EU Member States, the Czech Republic, Hungary, France.

1. Introduction

Private competition enforcement is nowadays in most EU Member States negligible and it can hardly be compared to the number of private enforcement cases and actions brought to courts in the United States, where this type of competition enforcement represents more than 90% of all competition enforcement cases. As such, the width of American competition jurisdiction is unique world-wide.

In recent years, the European Commission has been trying to greater the application of private competition enforcement by national courts of all Member States, although not very successfully. Focusing on the role of the private competition enforcement was also one of the fundamental aims of the modernization of competition law in 2004, but as it seems, Europe still tends to the public competition enforcement, or even to the criminal competition enforcement in

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particular EU Member States. In accordance with statistics that are regularly published by the European Commission, there was only a slight upward trend in the number of judgments issued by national courts in the frame of private competition law actions. For example, in 2004 the European Commission was informed of 29 judgments, in 2005 of 43 judgments, in 2006 there were totally 30 cases and in 2007, the European Commission was informed about 50 issued private competition enforcement judgments.

Private enforcement on the internal market of the European Union is not only underdeveloped, but also very uneven. Between 2006 and 2012, two thirds of all EU Member States reported no private competition enforcement action, which would be followed by the Commission decision. As statistics show, national courts apply private competition enforcement mainly in the United Kingdom and in Germany. The reason why there is a greater number of private competition enforcement actions brought to courts in the United Kingdom and in Germany lies mainly in legislation.

Some legal systems of EU Member States are favorable for the damaged party of legal proceedings, for example due to easier access to evidence, specialized courts, collective enforcement or thanks to a substantive legislation (higher compensation, longer limitation periods, etc.). For this reason, in Europe there is still so-called "forum shopping" place, since the choice of "favorable" jurisdictions with more favorable legislation is common.

Another reason may be specifics of legal culture. In some countries, people are used to defend their rights themselves, while in other countries people are rather used to state protection, and therefore they delegate the competition enforcement to national competition authorities.

In the Czech Republic, as it is evident from a recently issued research,[1] the situation regarding private competition enforcement is more or less disconcerting – the annual number of new actions is steady, but relatively small, since 2001 varying between 0 and 2 since 2001.

The main aim of this paper is to compare some of our existing experiences with the private competition enforcement in selected EU Member States and to describe and evaluate certain practical or problematical aspects of private competition enforcement in selected EU Member States, namely in the Czech Republic, in Hungary and in France.

Hungary, which has approximately the same population as the Czech Republic, was chosen for this comparison, because it has very similar recent historical development, including the transition to a market economy and accession to the

[1] Michal Petr, Eva Zorková: Soukromé prosazování v České republice, Antitrust, Issue 2, year 2016, p. I – VIII.

European Union in 2004, while France, by population much more larger than Hungary and the Czech Republic, represents a traditional European democracy and is a founding member of the European Union's competition authority. Besides, French experiences with competition law are among the world's best rated.

2. Comparison Report

2.1. Current State of Knowledge

At the beginning, it must be admitted that the role of private competition enforcement has been quite unnoticeable on the development of competition law as such. Current development (or rather underdevelopment) of private competition enforcement in most of the European countries is linked to the lack of quantitative and/or qualitative research in this field, mainly due to difficult access to information, since obtaining the relevant data in this area is not an easy task.

For instance in the Czech Republic, only one (academic) research has been made in2016. This research strives to be the first qualitative as well as quantitative analysis of private competition enforcement (both on national and on EU level) in the Czech Republic. It is bases on an academic project, during which Czech courts were addressed with dozens of requests of information concerning specific private enforcement decisions. If thou the authors claim to have completed the wideset database of private competition enforcement decisions in the Czech Republic – more than 70 judgements issued in more than 20 cases. Despite, authors are aware of the fact that the research is still necessarily incomplete.[2] Likewise in Hungary, where the current state of research seems to be sightly better than in the Czech Republic, since there have been three major surveys in the field of private competition enforcement. Firstly, "The Hungarian country report" prepared for the Euroepan Commission on the condition on claim for damages in 2004, reported about the lack of competition law based actions for damages in Hungary.[3] Six years later, in 2010, the Hungarian reporter, Csongor Nagy described the litigation friendly legislation and also a couple of ongoing follow-on damage actions.[4] Third survey summarized the practice

[2] Michal Petr, Eva Zorková: Soukromé prosazování v České republice, Antitrust, Issue 2, year 2016, p. I – VIII.

[3] Tamás Éless, Ágnes Németh: Hungarian country report, [2004], available at: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/hungary_en.pdf, [19-11-2016].

[4] Csongor István Nagy: The Judicial Application of Competition Law in Hungary, in G. C. R. Iglesias and L. O. Blanco (eds.) Proceedings of the FIDE XXIV Congress Madrid Vol. 2, 2010.

of Hungarian courts, involving both Hungarian and EU competition rules published in two papers, in 2013 and in 2014. After studying 16 cases between 2007 and 2012, the author noted that there was not a single private competition action which had stood the chance of succeeding and stated that private competition enforcement is highly underdeveloped in Hungary, although underdeveloped Hungarian practice stays in sharp contrast with the legislative background in Hungary.[5]

In France, according to the best author's knowledge, a complex qualitative and/or quantitative analysis of private competition enforcement, both on national and on EU level, is missing. It is possible to find analysis and/or brief description of relevant case law, as well as certain explanations of relevant French legislation, but a complete and complex survey in this field is missing.

2.2. Legislative Framework and Types of Claims

Hungary, just like the Czech Republic, introduced its first modern competition act in early 90s. In Hungary, until an amendment of the Hungarian Competition act in 2005, the only avaible remedy was the nullity of the anticompetitive act. Nowadays, plaintiffs can seek much more remedies, for example recovery of loss suffered (compensatory damages), in integrum restitutio, interim measures, seize and desist, declaration and/or modifications of contractual relations by the court.[6] The Czech Civil Code, which came into effect in January 2014, claims that anybody affected by breaches of competition law may raise against the infringer. It also stipulates that under certain circumstances, breach of law (not only the competition law) may cause invalidity of a contract. On the basis of the Czech Civil Code, anybody whose rights were violated or jeopardised by competition law infringements may ask the court to issue restraining (cease-and-desist) order, restitution order; decision on (reasonable) satisfaction; decision on damages and/or decision on disgorgement of unjustified enrichment.[7]

Both legislations therefore provide enough types of remedies, althought, in Hungarian practice there are three mainly used types of private competition law claims based on competition law provisions, that is claims on the nullity of a contract, requesting the provision of services (injunctive relief) and demanding compensation. Other remedies available in private competition

[5] Pál Szilágyi: Private Enforcement of Competition Law and Stand-alone Actions in Hungary, [2013] G. C. L. R., Issue 3, p 136.; Pál Szilágyi: The Hungarian Experience on Private Enforcement and Class Actions, [2014] G. C. L. R., Issue 3 © 2014, p. 168.

[6] Pál Szilágyi: Private Enforcement of Competition Law and Stand-alone Actions in Hungary, [2013] G. C. L. R., Issue 3, p 136.

[7] Czech Law No. 89/2012 Coll. Civil Code, § 2990 and § 2988.

litigations are available, but rarely used in cases based on competition law infringements.[8]

In Czech existing practice, most of the claims are for damages, followed by injunctions and nullity of contracts, in almost 25 % of cases the claimant also asks for preliminary relief. While the claims for preliminary relief are relatively successful (more than 50 %), the success rate of the claims themselves (on the merits) is strikingly low, only one (partially) successful action was identified; out of the other actions, a slight majority is settled out of the court, while the rest is dismissed. Breach of competition law is only rarely employed as the only legal ground for action. Typically, it is associated with unfair competition or contractual law claims; astonishingly, in none of the cases a breach of EU competition law was dealt with by the courts.[9]

In France, private competition enforcement is based on the general tort law provisions of Article 1382 of the Civil Code in combination with the specific competition law provisions, Articles L420-1 and L420-2 of the Commercial Code and Articles 101 and 102 of the TFEU.

The infringement of any legal provision – whether administrative, civil or criminal – constitutes a fault for the purposes of Article 1382 of the French Civil Code. Damages actions may also be based on contractual claims. The statutory basis for such actions is Article 1147 of the Civil Code, in combination with the relevant competition law provisions. Under the French law, the plaintiff may bring an action for nullity under Article L. 420-3 of the Commercial Code or Article 1304 of the Civil Code an action for damages under Article 1382 and following of the Civil Code. Damages actions may also be based on contractual claims. The statutory basis for such actions is Article 1147 of the Civil Code, in combination with the relevant competition provisions. [10]

2.3. The Need of Specialised Courts and Educated Judges

Both in the Czech Republic and in Hungary, there are no courts designated to deal specifically with antitrust law. In Accordance with the Czech Civil Procedure Code, all Czech regional courts are empowered to hear private competition enforcement cases in the first instances, these courts act generally as courts of appeal and they have a first-instance-jurisdiction only in more complex cases,

[8] Tihamér Tóth: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 410.

[9] Michal Petr, Eva Zorková: Soukromé prosazování v České republice, Antitrust, Issue 2, year 2016, p. I – VIII.

[10] Mélanie Thill – Tayara, Marta Giner Asins: The Private Competition Enforcement Review, Chapter 11 – France, [2014], The Private Competition Enforcement Review, Edition 7, p. 170.

including (among others) antitrust, unfair competition or intellectual property rights. a single judge is in charge with handling and deciding the case. Judgements of Czech regional courts may be appealed to a superior court in Prague or in Olomouc, within which the case is firstly decided by a panel of three judges. Under specific circumstances, judgements of appellate courts may further be challenged using an extraordinary appeal mechanism before the Supreme Court of the Czech Republic.

Concerning specialization within the courts, courts have mostly established specialised panels of judges (or single judges in case of regional courts) dealing with antitrust cases. However, the case-load of these specialised panels comprises mostly of unfair competition cases. Due to a very low number of cases, full specialization in antitrust cannot be realised in Czech practice, although it would be very needed. While antitrust cases are extremely rare for most Czech judges, the only exception is the Municipal Court in Prague, dealing with a new competition case biannually. Most of these cases are reviewed by the Superior Court in Prague, which is the only one likely to have constitutes any sort of "institutional memory" due to the number of processed antitrust cases.[11]

The qualification of Czech judges in antitrust law is (unfortunately) limited, in particular due to the fact that private competition enforcement is still very rare. Occasionally, a seminar concerning antitrust law is organised by the principal educational institution for judges. The lack of qualification may be demonstrated by the fact that in some (fortunately exceptional) cases, the judges still doubt they even have a jurisdiction.[12]

In Hungary, in accordance with Hungarian procedural legislation, general courts are empowered to hear private enforcement cases of competition law, since all appeals from the Hungarian Competition Authority are to be made to the Metropolitan Court. In case of private competition enforcement, regional courts act as the first instance courts if the value of the claim is higher than 30 million HUF. Tribunals, as the second instance courts in Hungary, have an exclusive competence to deal with cases involving unfair contractual terms, or various intellectual property related disputes.

In Hungarian practice, there is a call for educational training in competition law, at least at the level of the Curia (Hungarian Supreme Court). One of the proposed solutions is to involve experienced administrative law judges in civil law case concerning competition law issues.

[11] Michal Petr, Eva Zorková: Soukromé prosazování v České republice, Antitrust, Issue 2, year 2016, p. I – VIII.

[12] Czech Judgement of the Supreme Court of 27 May 2015, Ref. No. 23 Cdo 2555/2014.

Just like in the Czech Republic, some of the Hungarian judgments prove that some Hungarian judges are not aware of the exact meaning of competition law provisions. On the other hand, most of the Hungarian judicial conclusions are very well founded, although the reasoning is far from the usual public competition enforcement standard, given by the Hungarian Competition Authority decisions. a non-application of EU competition norms may be the result of the lack of Hungarian judge's knowledge, although all judges are frequently trained by the Hungarian Judicial Academy. Unfortunately, competition law is not part of the practical legal exam which has to be passed to become an attorney, public prosecutor or a judge and so involving an economist as part of a three-member first instance court panel could improve the poor economic reasoning of Hungarians private competition enforcement judgments.[13]

The situation is quite different in France, where (untill the end of 2005) the competent courts were the general civil or commercial courts. In 2006 there were created sixteen specialised courts. Eight of these courts are commercial courts, competent over litigation between professionals (commercial courts of Marseilles, Bordeaux, Lille, Lyons, Nancy, Paris, Rennes and Fortde-France), the other eight courts are civil courts with jurisdiction over cases between private litigants (courts of first instance situated in the same cities as the commercial courts).[14]

According to most of available resources, it seems that the knowledge of competition law in case of French judges is sufficient. The reason might be the specialization of courts in competition law which reflects the desire of French legislature to provided certain jurisdictions which would deal with this special type of procedure. However, in some surveys, the need of better judge's training in (private) competition disputes is explained by the new allocation of the selected courts which was cheated to achieve greater efficiency for this type of litigation.[15]

2.4. Quantitative Level

In general, it is extremely difficult to quantify the frequency of claims based on private competition law infringements. For example in the Czech Republic, the

[13] Tihamér Tóth: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 416.

[14] Mélanie Thill – Tayara, Marta Giner Asins: The Private Competition Enforcement Review, Chapter 11 – France, [2014], The Private Competition Enforcement Review, Edition 7, p. 172.

[15] Florence Ninane, Guillaume Teissonnière, Mélanie Paron and Romain Maulin: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 333.

courts register private enfrocement cases together with unfair competition cases. It is therefore impossible to correctly report all the private enforcement cases. In July 2015, the Czech Competition Authority asked all the competent civil courts to report their private enforcement cases over the last 10 years but just less than 10 cases have been reported, based mainly on individual memories of the judges involved. The Czech Competition Authority undertook similar survey again in 2009, unfortunately with similarly unsatisfying results, as the Czech system of judicial evidence was not able to successfully identify these cases. Research in this field is further complicated by the fact, that only the Supreme Court's judgements are systematically accessible through an online database.

As mentioned above, an academic research has been made in 2016. This research, although published only in Czech language, strives to be the first qualitative as well as quantitative analysis of private enforcement of competition law (both on national and EU level), in the Czech Republic. It is bases on an academic project, during which Czech courts were addressed with dozens of requests of information concerning specific private enforcement decisions. The authors claim to have completed the wideset database of private enforcement decisions in the Czech Republic – more than 70 judgements issued in more than 20 cases. Even thought authors are aware of the fact that it is necessarily incomplete and ask their readers to provide them with more additional information, it is the most comprehensive research made in the Czech Republic so far. Overall, such a small number of cases cannot be adequately used for statistical purposes. The annual number of new actions taken within the practice in Czech private enforcement is very steady but still low, varying between 0 and 2 since 2001.[16]

In Hungary, there are publicly available judgments of the Curia (Hungarian Supreme Court) and the five regional Courts of Appeals since 2010, although only in Hungarian language, which greatly complicates any research. It can be assumed, that in case of serious antitrust issues, they would reach at least the court of appeals. In a period from 2007 to 2012 there have been 16 private enforcement cases in Hungary. Except for two cases, all the cases invoked the national equivalents of arts 101 and/or 102 TFEU.[17]

The Curia handled four antitrust cases, three of them relating to follow-on damage claims and a fourth one stand-alone case involving arbitration court judgment and Article 101 TFEU. As to the regional courts of appeals, it can be found seven cases, two of those involving domestic abuse of dominance

[16] Michal Petr, Eva Zorková: Soukromé prosazování v České republice, Antitrust, Issue 2, year 2016, p. I – VIII.

[17] Tihamér Tóth: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 410–411.

provision. None of the cases involving anti-competitive agreements referred to the application of EU law though. The case decided by the Metropolitan Court of Appeal involved a follow-on action for damages. One of the two cases decided by the Court of Appeal of Győr was a kind of follow-on damage action, based on a commitment decision of the Hungarian Competition Authority. The other based claims involved the nullity of a property lease agreement, a non-compete clause and a non-compete relating to the sale of a local grocery store. The plaintiffs in the abuse of dominance cases sued for damages based on exploitative contractual clauses and predatory pricing. Although the number of cases is slowly growing in Hungary, there are still only a few of them. Most Hungarian courts, within the reasoning of the judgment, dealt with the competition law issues in only a few sentences. The arguments far from those arguments that are usually seen in competition judgments of the United Kingdom Competition Appeal Tribunal or the US courts. However, private actions in Hungary are practically non-existent and for example in 2013, only four pending actions for damages were recorded, all involve bid-rigging in public tenders in the construction industry.[18]

In accordance with available data, just a few years ago private competition enforcement was not so common in France. But this is rapidly changing in recent years. Although the number of actions for damages is increasing in France, actions for contractual invalidity based on an infringement of private competition law remain the most frequent. To autor's best knowledge, complex quantitative analysis does not exist,but it is still possible to find specifically described (or commented) case law. Most French professionals and practising experts state, that private competition enforcement in France still remains limited and remains difficult in practice, mainly because of the limitation period as well as because of the number of defenses that are publicly available.[19] Lastly, the limitation might be caused by the duration of procedures which is often too long. Long delays in public competition enforcement may discourage private competition enforcement in follow-on actions. In any case, it is certain that these imperfections will have to be corrected in the future.[20]

[18] Pál Szilágyi: Private Enforcement of Competition Law and Stand-alone Actions in Hungary, [2013] G. C. L. R., Issue 3, p 136.

[19] Florence Ninane, Guillaume Teissonnière, Mélanie Paron and Romain Maulin: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 331.

[20] Josepf Vogel, Louis Vogel: France: An Important Legislative and Case-law Activity, [25-11-2016], avaible at: https://www.expertguides.com/articles/france-an-important-legislative-and-case-law-activity/ARSULQWY

2.5. Interactions between National Courts and National Competition Authorities

Basicly, the enforcement of competition law stands on three pillars. In Europe dominates the public competition enforcement, in some European countries the criminal competition enforcement is still avaible and the third pillar is currently in the biggest development, as it is the private competition enforcement. It is therefore quite obvious that public and private competition law can never be applied and interpreted independently, since they complementary and mutually react to each other with regards to the unity and the harmony of a whole legal system as such. Also the preamble of Regulation 1/2003 state the complementary role of national courts in relation to the national competition authorities of all EU Member States. And so, in practice a cooperation between national courts and national competition authorities can be found on several levels – national civil courts might ask their competition authorities for relevant opinions, mutual exchange of information is possible and even a temporary interruption of the proceedings can be an option.

In the Czech Republic, civil courts only rarely ask for opinion. On one occasion, the Superior Court in Olomouc even ordered to open proceedings and to adopt a formal decision, the Czech Competiton Authority refused to do so and the case was ultimately settled as the parties to the proceedings merged. [21] Similarly rare are the cases in which the competition authority would submit its opinion to the court. There is no legal basis for the *amicus curiae* procedure in Czech legal order, there is only a specific provision for proceedings in which EU competition law is applied. The Czech Competition Authority has nonetheless addressed the courts with several opinions, for example, concerning application of the term undertaking on a specific association. Finally, if there are parallel proceedings by civil courts and by the Czech Competition Authority concerning the same putative infringement, the courts usually periodically ask about the progress of public enforcement proceedings (and sometimes even tend to suspend the civil proceedings). Czech courts are not obliged to stay proceedings if the Czech Competition Authority has initiated proceedings on the same matter, they are however generally allowed to do so, on the other hand civil courts are to assess the question of competition law infringements themselves, without 'waiting' for the public enforcement decision. According to Regulation 1/2003, the competition authority is allowed to submit its observations concerning private enforcement proceedings only in cases where EU competition law is applied. In the Czech Republic, the main problem concerning the cooperation between

[21] Czech Judgement of the Superior Court in Olomouc Ref. No. 7 Cmo 348/2002.

courts and the competition authority is the lack of knowledge about court proceedings on the authority's side. Since 1 July 2004, the courts are obliged to send the competition authority copies of judgements in force where Art. 101 or 102 SFEU was applied and since January 2008, they shall also inform the competition authority about initiation of such proceedings. In practice, the competition authority has however not received any such information so far, even though some court cases have been initiated after that date that should have been reported.[22]

For example in Hungary, there are a handful of cases each year where the Hungarian Competition Authority is called upon to help interpret EU or even Hungarian competition rules. Besides, the competition authority should be informed about the violation of Hungarian antitrust law (and Articles 101 or 102 TFEU) and may decide to act as *amicus curiae.* Failure in obeying this procedural rule may lead to the annulment of a civil judgment. There is also an obligation for the judge to send its decision to the Hungarian Minister of Justice so the European Commission can be informed as well. Interestingly, there is no similar rule as regards the infringement of domestic competition rules. According to the latest Hungarian Competition Authority report to Hungarian Parliament about its activity, there are mentioned nine cases of intervention, while in 2012 there were only six cases of intervention. Each of this *amicus curiae* case involved the interpretation of domestic competition rules. [23]

Mutual obligation to provide relevant information and/or to be informed about issued competition decisions, particularly with regards to the European primary law, also applies in French practice. Generally speaking, civil courts usually tend to follow the opinion of the French Competition Authority. In France, as well as in the Czech Republic and in Hungary, there is no obligation to stay the proceedings. However, in the interests of the proper administration of justice, such a stay (especially if is requested by the defendant), is generally pronounced by the judge.[24]

[22] Jiří Kindl, Michal Petr: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapes, p. 275–277.

[23] Tihamér Tóth: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 423–424.

[24] Florence Ninane, Guillaume Teissonnière, Mélanie Paron and Romain Maulin: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 342.

2.6. Price Avaibility of Private Competition Enforcement Proceeding

In general, private competition enforcement proceeding is quite expensive and therefore it is recommended only to a limited number of specific cases. Since (nowadays) there is no system of financing or reductions for consumers or small businesses, usually only large businesses can afford to sue within the private competition enforcement.

The level of legal fees in the Czech Republic may not deter potential claimants from bringing meritorious private enforcement claims in competition law, since the court fees are relatively low in the Czech Republic (ranging approximately from 2–5% of the claimed amount and 4.1 million CZK at maximum). Legal costs in the Czech Republic are considerably lower than in more advanced jurisdictions. It is generally up to a party to the proceedings to fund its own costs and the costs of its representatives. However, on a party's request (and in accordance with the Czech Civil Procedure Code) a judge can relieve in full or in part of its duty to pay court fees if such relief is justified by the position of the party and, at the same time, the claim is not entirely arbitrary or obviously futile. As regards to reimbursement of costs, Czech civil procedure is based on the 'loser pays' principle. There are, however, certain exceptions to that principle, primarily in cases when certain costs were caused by fault of one party. The reimbursement of costs is not based on a full indemnity basis. Firstly, only those costs that are considered expedient shall be reimbursed. Secondly, in appropriate cases the court may at its discretion decrease the amount of reimbursement if it finds it justifiable in the case.[25]

In Hungary, there might be cases, especially those relating to consumer goods, where the cost of litigation exceeds the potential benefits (in disputes involving corporations, these costs are less detergent). In essence, legal costs would deter consumers from suing companies producing or selling consumer goods, since their estimated individual harm is outweighed by the litigation costs they would face. In accordance with Hungarian legislation, there is a fee (duty) to be paid by the plaintiff. The amount of the duty is 6% of the value of the claim and is to be paid at the time of commencing the procedure. Althought 6% of the value seems to be a lot, this duty cannot be more than 900,000 HUF. The same amount applies for appeals against the first level judgment. As well as in the Czech Republic, there are also rules granting exemption from paying the fee in Hungary, but these exemptions are not relevant for antitrust law related

[25] Jiří Kindl, Michal Petr: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapes, p. 264–265.

claims. The losing party is ordered to pay the costs of legal representation of the other party as well (the size of this legal fee is usually determined in line with a Decree issued by the Hungarian Minister of Justice).[26]

In France, civil procedure is, just like in the Czech Republic, based on the 'loser pays' principle and there is a possibility to fully and/or partly relieve of its duty to pay court fees if such a relief is justified and reasonable. However, according to French practising experts, it is quite possible that the amount of the costs of proceedings and/or fees in France prevents potential plaintiff, in particular private individuals or small businesses, to sue their compensation claims in the field of private competition enforcement. Group actions might be an ideal option (not only) for French consumers.[27]

2.7. Average Duration Of Court Proceeding

According to statistics published by the Czech Ministry of Justice, court proceedings in the field of private competition enforcement (including appeal, if applicable) took on average 666 days. It ought to be mentioned that this figure includes not only antitrust, but also unfair competition cases (standing for vast majority of all the cases reported), which significantly decreases the relevance of this statistics. The fact is, that most of the antitrust court proceedings are on average significantly longer – according to the Czech recent research already mentioned above, the average duration takes about six years, but it is always important to distinguish between preliminary and permanent injunctions. According to Czech civil procedural rules, in case of preliminary injunctions, delivered before the case is decided on the merits, they shall be issued without undue delay; only in case the matter is not urgent may the decision be taken within 7 days from receiving the petition. There are no time limits concerning proceedings on the merits, including decisions on permanent injunctions.[28]

The situation in Hungary does not differ, the average length of civil court procedures can be considered reasonable. The average length of a two stage civil procedure is between 1,5–2,5 years. If the claim is high enough and important legal issues are raised, parties can turn to the Curia as well, which may add 10-12 months more. In complex cases a litigation lasting 5 years is not exceptional

[26] Tihamér Tóth: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 414–415.

[27] Florence Ninane, Guillaume Teissonnière, Mélanie Paron and Romain Maulin: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 331–332.

[28] Jiří Kindl, Michal Petr: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapes, p. 266–267.

either. Cases beyond five years are not common, since judges are aware of the practice of the European Court of Human Rights which sanction states for such lengthy procedures (of course with the consideration of all specifics in each particular case).

If the plaintiff intends to rely on the outcome of a public enforcement procedure, the gap between the occurrence of the anti-competitive event and the final award of damages can be considerable and it is not exceptional that some of the cases were closed after 8–10 years after the potential anti-competitive actions had taken place.[29]

Unfortunately, neither in France the average duration of private competition enforcement proceedings is not shorter, since the duration of this type of litigation remains reasonable and falls more in line with the time limits for dealing with commercial litigation. The main difficulty is that the contentious claims is (in the majority of cases) initiated after the proceedings before the French Competition Authority, which cause unreasonable delays for individuals and undertakings affected by this type of infringement This inappropriate situation resulted in the fact that compensation for the prejudice of anti-competitive acts occurred several years later. The occurrence and recognition of the antocompetitive evidence make its provement much more difficult. [30]

3. Conclusion

Due to the fact that in December 2016 the legislation transposing the Damage Directive will enter into the force in all EU Member States, the question of existing European experiences, made by this comparison of selected EU Member States, is very atual issue, since any legal comparison in this area in fact hasn't existed.

The Damages Directive will enter into force very soon in all EU Member States and hopefully the implementation period was sufficient enought, because I believe that only effective private competition enforcement is able to adequately protect the rights of those harmed by any anticompetitive conduct. Unfortunately the current legislative and practical state of private competition enforcement is not very satisfying. As indicated by the comparison report above, the need of more sufficient legislation in this field is obvious and so even the

[29] Tihamér Tóth: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 417.

[30] Florence Ninane, Guillaume Teissonnière, Mélanie Paron and Romain Maulin: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p 333.

European Commission's efforts to improve the private enforcement situation are not surprising at all.

I have to admit, that my personal estimates before beginning this comparison were much more positive than the private competition reality actually is. Althought it can be expected that the situation in the Czech Republic and in Hungary will be more or less similar and unsatisfactory (which was also confirmed by this comparison), it is still surrising that even in France, which is known for its experiences with competition law much more that the Czech Republic or Hungary, most of the available surveys prove rather unsatisfactory situation and underdevelopment.

Firstly, it is extremly difficult to quantify the real number of private actions in all three states. It is not only about language difficulties, but competition case law is never recorded separately, which could be understood, since private competition enforcement cases are very rare in all selected Member States. On the other hand, it is logical that the chances of a successful application of competition law within private enforcement is reduced, because there is a great risk that the judge who has to decide the case meets with competition law (and with private competition enforcement) for the first time and can not easily find previous case law or use already formulated conclusions. Unfortunately, due to this substantial problem a chance for a plaintiff to succeed is rapidly decreasing as well. For the beginning, the solution is clear – all competition case law need to be clearly recorded, both on European and on national level.

Simultaneously in all selected Member States, a need of a better education in the field of private competition enforcement can be found. All legal experts pefroming in this field should be specifically trained to achieve their greater specialization. To solve the lack of trained experts, sixteen specialised courts were created in France (eight of these courts are commercial courts, competent over litigation between professionals and the other eight courts are civil courts with jurisdiction over cases between private litigants). While in the Czech Republic and in Hungary, there are no courts designated to deal specifically with antitrust law. This fact, as well as the long duration of court proceedings, may reduce the willingness of potential plaintiffs to sue, for example in the Czech Republic, there are many private enforcement cases settled out of court, although the court fee is not among the highest.

Legislation also allows various forms of cooperation between national civil courts and national competition authorities but as the comparison revealed, not very often used in practice. Czech civil courts only rarely ask competition authority for opinion, althought in all EU Member States, competition authorities are called upon to help interpret EU or in some cases even national competition rules. Possibly due to the aspects described bellow, national civil courts usually tend to follow the opinion of their national competition authorities.

In France, as well as in the Czech Republic and in Hungary, there is no obligation to stay the proceedings, however civil judges often do so to wait for the administrative decision and to based their decision in civil proceedings in accordance with the decision taken within the administrative procedure.

As it is obvious, whatever the Damage Directive brings after its implementation may be beneficial to the plaintiff as private competition enforcement still remains (in most EU Member States) underdeveloped field of the competition law and only a long-term development may bring improvements, since the need of better regulation has been sufficiently demonstrated and justified.

Maritime Safety and Environment Protection in the EU; Port State Control Inspections

Hamed Alavi*

Summary: Europe is the green continent surrounded by water. Sea has always played an important role in connecting Europe to the rest of the world. After the dawn of 21th Century and further globalization of trade dependency of Europeans to inland waterways and international ports is growing more than ever. High level of seaborne economic activities at the EU is a good indicator for wealth and number of lives floating at any given moment and raises concerns regarding safety measures taken by Member States and the Union in order to minimise perils of sea for involved stakeholders. The EU enjoys establishment of strong regulatory framework in the area of maritime industry. However, no regularity system would be implemented effectively without existence of monitoring and compliance systems. Importance of access to monitoring and compliance system is much more evident in maritime industry due to its international nature, multiplicity of jurisdiction, dealing with long distance trips and difficulties on the way of inspections in international waters. There is no doubt that monitoring compliance at level of the EU ports is a huge challenge. However, use of effective monitoring and enforcement systems can be among the choices of authorities for the purpose of ensuring compliance of maritime industry with safety regulations. Therefore, paper tries to answer the question of what is the legal basis for monitoring and enforcement of compliance of ships during port state controls at the EU level and what are the tools used for this purpose? Towards achieving its gaol, paper continues with providing a short overview on EMSA in second chapter. Third part will discuss Port State Control System and it Legal framework in the EU. Forth part explains the Paris Memorandum of Understanding on Port State Control while fifth part describes THETIS system as the operational arm used for enforcement of maritime regulations by EU authorities. At the end, final part will provide concluding remarks on the subject matter

Keywords: The European Union, Maritime Safety, Environmental Protection, Port State Control , Inspection tools

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1. Introduction

The fact that Europe is surrounded by water has always been a key factor in the history of this continent. From Vikings time to Empirical era and now in modern times, sea plays a significant role in relations between Europe and other parts of the globe. This can be seen in evaluation of gross added value of maritime sector in the EU equal to 500 billion Euros with capability to employ 5 million people[1]. According to official statistics, more than 90% of external and 40% of internal trade at the EU level are done via maritime transport.[2] This provides a perfect picture from level of wealth and number European Lives which float at any given moment of time and raises critical importance of safety, efficiency and security in management of maritime transport and trade.

Development of international maritime safety and security regulations are well reflected in the European legal acquis with due transposition of relevant laws to the national legal system of member states. Therefore, the EU enjoys establishment of strong regulatory framework in the area of maritime industry. However, no regularity system would be implemented effectively without existence of monitoring and compliance systems[3]. Importance of access to monitoring and compliance system is much more evident in maritime industry due to its international nature, multiplicity of jurisdiction, dealing with long distance trips and difficulties on the way of inspections in international waters. There is no doubt the monitoring compliance at level of the EU ports is a huge challenge, however, use of effective monitoring and enforcement systems can be among the choices of authorities for the purpose of ensuring compliance of maritime industry with safety regulations.

As a result, the European Maritime Safety Agency (EMSA) is formed to monitor compliance and enforces maritime regulations regulation within the framework of the EU legal system. Current assignment will focus on monitoring and enforcement aspects of EMSA mandate by discussing the subject matter in next sections.

Therefore, paper tries to answer the question of what is the legal basis for monitoring and enforcement of compliance of ships during port state controls at the EU level and what are the tools used for this purpose?

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1 European commission & HR of the EU ,*For an open and secure global maritime domain: elements for a European Union maritime security strategy, 6 March 2014*, p. 2.

2 Ibid

3 Đorđeska, Marija. "The Process of International Law-Making: The Relationship between the International Court of Justice and the International Law Commission." *International and Comparative Law Review (ICLR),* 2014, pp. 7–58.

Towards achieving its gaol, paper continues with providing a short overview on EMSA in second chapter. Third part will discuss Port State Control System and it Legal framework in the EU. Forth part explains the Paris Memorandum of Understanding on Port State Control while fifth part describes THETIS system as the operational arm used for enforcement of maritime regulations by EU authorities. At the end, final part will provide concluding remarks on the subject matter.

2. European Maritime Safety Agency

Based in Lisbon, EMSA was established in 2002 on the basis of regulation (EC) No 1406/2002 as one of decentralized EU agencies. The main tasks of EMSA can be summarized in providing assistance to the European Commission and EU Member States towards further development and implementation of maritime safety and security, taking preventive action as well as responding to pollution caused by ships and hydrocarbon extracting installations.[4] EMSA is also responsible for pollution response as well as vessel monitoring and tracking[5]. In order to performs respective duties, EMSA has established different information systems which provide support to port state control activities (PSC) including:

- CleanSeaNet : Europe wide satellite vessel and oil spill detection service;
- Safe Sea Net , Europe wide information system used for the purpose of vessel trafficking and monitoring activities;
- THETIS , data base supporting the Port State Control system;
- EU LRIT CDC, the EU Long Range Identification and Tracking Cooperative Data Centre.

Obtained information form above mentioned systems can be used by authorities to ensure compliance of maritime activities with EU and international regulations. Synchronization of data collected from these sources with other systems would add substantial value to users by providing them with a comprehensive view of maritime activities.

[4] Markku Mylly, EMMA's role in making the maritime regulatory system work, in Maritime Safety and Environment Protection, 2015, pp 194–206.

[5] Ibid

3. Port State Control and its Legal Framework in the EU

Control and jurisdiction in Maritime industry has a multi-level structure which evidences the efforts of different actors in imposing different regulations and compliance regimes[6]. As a general rule, in maritime industry, safety and security issues are under the auspicious of flag states and port states through flag state and port state controls regulated by national and international law . Active international originations in this field are different UN agencies like International Labour organization and International Maritime Organization. Additionally, regional inspections schemes in the format of non-binding MoUs (like Paris MOU of European Union) contribute to this regulatory system.

According to United Nations Law of the Sea, controlling measures for merchant ships should be implemented by flag states and costal states accordingly.[7] Also, the United Nations General Assembly Resolution 58/240 recognizes significance of port state control in improving the level of maritime compliance with international standards of safety, Pollution security and labour. [8] Before 1980s, on the basis of fundamental rule that only flag states has jurisdiction of vessel in high seas, control was more the responsibility of flag states. However, during last 40 years, with changing the scope of maritime activities and increasing accidents, pollution incidents and increasing the use of flags of convenience the role of port state control became more evident. The legal basis of port state control is right of costal states conferred to them by UNCLOS via exercising power in their national waters. Therefore, as national waters are under jurisdiction of costal state, a visiting ship should comply with regulations of costal states[9].

Article 218 of the UNCLOS is considered as the intentional basis of the Port State Control it provides:

"1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside

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6 Roe, Michae. Multi-level and polycentric governance: effective policymaking for shipping. *Maritime Policy & Management*, *36*(1), 2009, 39–56.

7 UNCLOS, United Nations, (UN), (1982)

8 UN Doc. a /Res/58/240. Oceans and law of the Sea, Mar. 5, 2004, p. 33.

9 Anderson, D. Roles of Flag States, Port States, Coastal States and International Organisations in the Enforcement of International Rules and Standards Governing the Safety of Navigation and the Prevention of Pollution from Ships under the UN Convention on the Law of the Sea and Other International Agreements, The. *Sing. J. Int'l & Comp. L 1998, 2*, 557.

the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference."

The right for PSC has been confirmed in all other international maritime conventions including SOLAS[10], MAERPOL 73/78[11], STCW[12] and MLC[13]. Chapter 1 regulation 19(a) of SOLAS provides that : "Every ship when in a port of another Contracting Government is subject to control by officers dully authorized by such Government…"

At the same time invitation of the General Assembly to conjunct port state control functions of IMO together with International Labour Organization and Food and Agriculture Organization of the UN resulted in negotiations to harmonize port state controls at regional level. Regional PSC actions might be conducted through regional agreements recognized as Memorandum of Understanding (MoU). Such MoUs do not have legal binding effect, but respected by authorities of participating states as a political commitment. At present, nine MoUs provide coverage to all seas and oceans around the world[14]. Namely, Paris MoU (Europe and Canada), Tokyo MoU (Pacific Ocean), Acuerdo Latino or Acuerdo de Viña del Mar (South and Central America), the Caribbean MoU, the Mediterranean MoU, the Indian Ocean MoU, the Abuja MoU (West and Central Atlantic Africa), the Black Sea MoU and the Riyadh MoU (Persian Gulf). PSC measures are applied in the USA, Europe and Canada in more effective manner than other parts of the world. In the EU, MOU in place regarding PSC is known as Paris Memorandum of Understanding on Port State Control (PMoU) and legal basis of its application is Directive 2009/16/ EC on Port State Control. According to the directive, provisions of PSC inspections apply to any vessel and its crew which calls at a port or anchorage of Member State. Such inspections follow the goal of enforcing compliance with international standards of safety, pollution prevention and working – living conditions on-board.

[10] International Convention of Safety of Life at Sea of 1 November 1974

[11] The International Convention for the Prevention of Pollution from Ships (MARPOL)

[12] International Convention on Standards of Training , Certification and Watch-Keeping for Seafarers of 1 December 1978 (1361 UNTS 190 , as Amended)

[13] Maritime Labour Convention of 23 February 2006 (45 ILM 792)

[14] Kraska, James , & Pedrozo, Raul . *International maritime security law*. Martinus Nijhoff Publishers.2013, 420

4. Paris Memorandum of Understanding on Port State Control

Principle basis for PSC legislation at the EU level was provided by articles 75-84 of the Treaty of Rome in 1957. Further developments included the agreement of Member States on a memorandum on controlling the labour condition on board of vessels to be in accordance with ILO rules in the Hague in 1978. However, beginning of the PSC was conclusion of Paris Memorandum of Understanding (Paris MoU) and covering larger scopes of conventions and regulation. In fact, the Paris MoU was the outcome of Amoco Kadiz disaster which resulted in meeting of IMO , ILO and European States in Paris in 1980 for the purpose of discontinuing sail of substandard vessels in European waters . Since existing North Sea Agreement of 1978(which was also known as Hague MoU) did not seem to be effective for this purpose, meetings resulted in adoption of Paris MoU during the second ministerial conference in 1982[15]. Originally, it had 14 European States including Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Ireland, Italy, The Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom which later increases to 27 after joining Bulgaria, Canada, Croatia, Cyprus, Estonia, Finland, Iceland, Latvia, Lithuania, Malta, Poland, Romania, The Russian Federation, and Slovenia.[16] Its target inspection rate was set on the basis of ship risk profile [17]. In fact, Paris MoU was the first major agreement in harmonization of post state control measures at national level. [18]At present, legal basis of PSC in the Paris MoU is upon Directive 2009/16/EC of the European Council and European Parliament on 23 April 2009. PMoU consists of 27 authorities[19] including EU coastal Member States, Canada, Iceland, Norway and the Russian Federation.

PMoU provides that with no discrimination, all authorities will maintain effective system for PSC in order to ensure that merchant ships anchoring off its ports or calling for a port would comply with standards available in relevant instruments. [20] In case of detecting deficiency during the inspection(which has

[15] Özçayir, Z. Oya. The Use of Port State Control in Maritime Industry and Application of the Paris MoU'(2009). *OCLJ*, *14*, 208.

[16] Kraska, James, & Pedrozo, Raul. (2013). 424

[17] Kiehne, Gerhard, Investigation, detention and release of ships under the Paris Memorandum of Understanding on Port State Control: a view from practice. *The International Journal of Marine and Coastal Law*, *11*(2), 1996, 217-224.

[18] Lowe, A. V. a move against substandard shipping. *Marine Policy*, *6*(4),1982, 326-330.

[19] Amendmet 37th of the PMoU in effect from 1 July 2014 is using the term authority , maritime authority and Member State

[20] Paris Memorandum of Understanding (2014)

negative effect on safety, health or maritime environment), port state authorities would make sure about removal of the deficiency before allowing the vessel for get back to the sea. In order to ensure removal of deficiency, PS authorities may even detain the vessel[21].

Directive 2009/16/EC has introduced the New Inspection Regime (NIR) in the PMoU which came into force as of January 2011.[22] In the frame work of the NIR, initiatives which could help overcoming problems with previous PSC regime have been introduced. Among others, freedom of authorities in selecting the ship , enhanced mechanisms in defining sub-standard vessels and implementation of the new information system named TETIS (The Hybrid European Targeting and Inspection System) can be mentioned. Periodicity of the inspection would be determined by Ship Risk Profile (SRP). As a result of violating relevant regulations to safety which is noted by a member authority in THETIS, the interval between inspections might be reduced. Another new aspect of PSC is possibility to include Concentrated Inspection Campaign (CIC) related to one topic in a relevant instrument. CIC has a periodical nature and will be haled once a year for a period of three months and follows the objective of, preventing marine pollution, increasing the safety at sea, and enhancing condition for maritime labour.[23] Therefore, CIC aims at increasing awareness among ship owners , crew and operators on issues discussed during the particular campaign for the purpose of building safety attitude and improving the environment of marine industry.

5. The Hybrid European Targeting and Inspection System (THETIS)

In order to facilitate implementation of NIR, European Maritime Safety Agency has developed an information system called The Hybrid European Targeting and Inspection System. THETIS which is hosted and operated by the Agency provides access to all requirements of the PMoU and Directive 2009 /16/EC.

In short, its functions can be listed as following:

Firstly, it processed ship information to be used for PSC operation. Secondly, it defines the Ship Risk Profile and ship priorities available in the data base. Thirdly, it organizes the information from different steps of call, inspection ,

[21] Ibid

[22] The NIR is covered by Directive 2009/16/EC amended by Directive 2013 /38 and applies to all Member States of the EU as well as Norway and Iceland . The NIR is used by Russia and Canada with minor changes in cooperation with what is applied by the EU Directive .

[23] Markku Mylly (2015)

report as well as follow up action by using one single source and finally, it publishes inspection reports and information on behalf of the European Commission.

THETIS is capable of calculating risk profile for each ship in the data base and update it on the daily basis. Ship Risk Profiles divide ships into Law Risk Ships (LRS), Standard Risk Ships (SRS) and High Risk Ships (HRS). Criteria for risk calculations include: Ship type, flag, recognized organization, age, management company and inspection history. On the bases of above mentioned criteria , SRP will define periods in which ship inspection should be conducted.[24] In case of facing with "overriding" or "unexpected factors" which depend on severity of deficiency additional inspection might be necessary besides periodic inspection.[25]

THETIS is also synchronized with SafeSeaNet system which provides it with capability to process ship call information. This information will be used in defining ships which are due for inspection.[26] Since Directive 2009 /16/EC and Directive 2002/59/EC on Vessel Traffic Monitoring require all EU Member States to establish system for estimation of arrival and departure time of ships in addition to register their actual time of their arrival and departure, such capability of THETIS would help in timely recognition of hazardous vessels.

While considering THETIS for enforcement purposes, indication of "overriding factor" (only authorities are capable of entering such data) will make the inspection mandatory with no regard to time and date of previous inspection. Indication of facts on safety or environmental problems will make the inspection in next port located within the PMoU territory mandatory.

Violations recorded during the inspection, would be shared with authorities for the purpose of criminal prosecution which will be subject to the national law of the port state, flag state of the ship and costal state reporting the violation.

6. Conclusion

Current paper focused on THETIS as the information system used by European Maritime Safety Agency for the purpose of improving surveillance, monitoring and systematic inspection in the process of Port State Control within the framework of Paris Memorandum of Understanding. Study of information systems used by EMSA clearly show that how authorities may have access to information

[24] Markku Mylly (2015)

[25] Ibid

[26] It worth to mention the linkage with SafeSeaNet of Russia and Canada provides THETIS with position of central system among whole PMoU countries.

data which require in order to monitor compliance of maritime actors with existing international regulations. As a result of access to reliable data, it is possible to detect violations more than before in more efficient manner. However, it should not be forgotten that Compliance with maritime regulations is not only monitoring and enforcement. It is important to update regulations in the same pace with technology change and increase knowledge of maritime stockholders about requirements and its effect of their own safety and security.

Can be EU Competition-law Concept of Undertaking Lesson for Bankruptcy Law?

Ondrej Blažo*

Summary: The article deals with the relevant feature of the concept of undertaking in European competition law, particularly its definition as economic unit and possible transplantation of this concept into bankruptcy law. The main features of this concept that are related to parent liability and economic continuity. Furthermore the concept of parental liability is compared to concept of beneficial owner in European anti-money-laundering legislation and the concept of related party in Slovak insolvency law.

Keywords: competition law, bankruptcy law, joint and several liability, single economic unit, beneficial owner, related party

1. Introduction

Indeed, bankruptcy law shall be tool for "healing" entrepreneurial environment that provides as high recovery of creditors' claims as possible. Bankruptcy law, and civil and commercial law in Slovakia as a whole as well, is based on identification of bankrupting debtor and its assets that fall into estate subject to bankruptcy procedure. Similarly, judicial enforcement of civil and commercial claims is restricted to debtor's assets, only. This approach could deprive creditors from full or higher recovery of their claims in cases when debtor is a part of greater corporate structure and this structure holds enough assets to both, compensate debtor's liabilities and continue in economic activity. Normally, all legal persons that are part of corporate structure operating with single corporate identity are perceived as single entrepreneurial unit. It is not rare if difference between legal person's department or branches and its subsidiaries is merely legal without any economic, managerial or factual consequences. However, satisfaction of claims arising from economic activity of branch and subsidiary in the case of its insolvency is dramatically different. Therefore there is a question if it could be possible to introduce some kind of joint liability of the whole corporate structure in commercial, judicial enforcement and bankruptcy law. Furthermore, such

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enlargement of group of persons liable of debts and assets that may be subject to judicial enforcement can also can lead to incentives not to commit crimes connected with bankruptcy because the main motives for such crimes (escape from liability from debts, damage to creditors) can became ineffective.

One of the easiest was for evolving new legal instrument in the legal environment is its "transplantation". This "transplantation" can be directed form other legal environment, from other country, or from other sphere of law (or combination of them).

If we are trying to find workable concept of liability of corporate structure for its non-compliance with law, concept of undertaking developed in European competition law can serve as an example. This concept can rely on decades of years of application and substantial amount of case-law. Therefore this article will particularly focus on possibility of "transplantation" of competition-law--like liability of undertaking into commercial, judicial enforcement and bankruptcy law.

2. Concept of undertaking in European competition law

The concept of undertaking for the purposes of competition law (agreement restricting competition and abuse of dominant position) is not explained in the TFEU itself (Art. 101[1] and 102[2]). However non-existence of legal explanation of this notion in the primary law is not absolute. Articles 54 and 55 of the Agreement of European Economic Area (EEA Agreement) contain corresponding provisions to Articles 101 and 102 TFEU. For the purposes of their application Protocol 22 Concerning the Definition of 'Undertaking' and 'Turnover' (Article 56) was attached to the EEA Agreement. Article 1 of Protocol 22 provides legal definition of the notion "undertaking" for the purposes of EEA competition law: "an 'undertaking' shall be any entity carrying out activities of a commercial or economic nature". Although this definition explains notion "undertaking" for procedural and competence purposes only, it is not prevented to use it for subject-matter purposes, too. It must be noted that such definition is in line with

[1] The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (…).

[2] Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. (...)

well-established case-law of the CJ EU in this issue (and which is applicable in the EEA as well).

The starting point for definition of undertaking in European competition law under the settled case-law is the concept of an undertaking that covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.[3] The concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal.[4] The concept of undertaking may be de-personalized since undertaking corresponds to the unitary organisation of personal, tangible and intangible elements.[5]

The description of "undertaking" constituted by several natural or legal persons is necessary for finding persons who are liable (jointly and severally) for debts arising from fines imposed for competition infringement. Liability of persons responsible for actions of the undertaking does not stem for their personal involvement in illicit behaviour but from they responsibility of the actions of undertaking as a whole. In *Elf Aquitaine* the General Court explained that "it is not a relationship between the parent company and its subsidiary in which the parent company instigates the infringement or, a fortiori, the parent company's involvement in the infringement, but the fact that they constitute a single undertaking for the purposes of Article 81 EC that enables the Commission to address the decision imposing fines to the parent company of a group of companies".[6] Therefore parent company was "personally condemned for an infringement which it is deemed to have committed itself because of its economic and legal links with [its subsidiary], which enabled it to determine the latter's conduct on the market."[7] Such concept thus does not not breach the principle that penalties should be applied only to the offender, because companies responsible for acts of the undertaking are offenders themselves without being directly active in wrongdoing.[8]

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3 Eg. Judgment of 28 June 2005 02 P Dansk Rørindustri and Others/Commission, C189/02 P, C202/02 P, C205/02 P to C208/02 P and C213/02 P, EU:C:2005:408, (hereinafter "Dansk Rørindustri") par. 112.

4 E.g. Judgment of 10 September 2009 Akzo Nobel and Others/Commission, C97/08 P, EU:C:2009:536 , par. 54 and 55, Judgment of 14 December 2006 Confederación Española de Empresarios de Estaciones de Servicio, C217/05, EU:C:2006:784, par. 40, and Judgment of 15 September 2005, DaimlerChrysler v Commission, T325/01, EU:T:2005:322 , par.85.

5 E.g Judgment of 3 March 2011, Areva and Others/ Commission, T-117/07, ECLI:EU:T:2011:69 (hereinafter "Areva"), par. 71

6 Judgment of 17 May 2011 Elf Aquitaine/European Commission, T-299/08, EU:T:2011:217, (hereinafter "Elf Aquitaine"), par. 180.

7 Elf Aquitaine, par. 180.

8 Elf Aquitaine, par. 181.

The general principle for building up set of natural and legal persons liable for infringement committed by particular undertaking is that parent companies are responsible for actions of their subsidiaries. The conduct of the subsidiary may be attributed to the parent company in particular where that subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company[9] , due to the economic, organisational and legal links between those two legal entities[10]. In order to attribute liability to parent company for behaviour of the subsidiary the Commission cannot merely find that the parent company is in a position to exercise decisive influence over the conduct of its subsidiary, but must also check whether that influence was actually exercised[11]. It must be noted, that such influence does not need to be proven regarding to certain act of the subsidiary but in general.[12] If a parent company has a 100% shareholding in a subsidiary which has infringed the competition rules, the parent company is able to exercise decisive influence over the conduct of the subsidiary[13] and there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary[14]. In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to avail itself of the presumption that the parent exercises decisive influence over the commercial policy of the subsidiary.[15] Hence in such cases the Commission is empowered the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary, unless the parent company produces sufficient evidence to show that its subsidiary acted independently on the market[16]. This presumption is not subject to further confirmation by other indicia, such as the fact that it was not disputed that the parent company exercised influence

[9] Eg. Judgment of 14 July 1972, Imperial Chemical Industries/Commission, 48-69, EU:C:1972:70, (hereinafter "ICI") par. 132 and 133.

[10] Cf Dansk Rørindustri par.117., Judgment of 11 December 2007, ETI and Others, C-280/06, ECLI:EU:C:2007:775, (hereinafter "ETI and Others") par. 49.

[11] ICI, par. 137.

[12] Cf. Judgment of 27 October 2010, Alliance One International and Others/European Commission, T-24/05, :EU:T:2010:453 (hereinafter "Alliance One International"), par .: "It is also necessary to reject the applicants' argument that the decisive influence that a parent company must exercise in order to have liability attributed to it for the infringement committed by its subsidiary must relate to activities which form part of the subsidiary's commercial policy stricto sensu and which, furthermore, are directly linked to that infringement, in this instance the purchase of raw tobacco (…)."

[13] ICI, par. 136 and 137.

[14] Cf. Judgment of 25 October 1983 AEG-Telefunken/Commission, 107/82, EU:C:1983:293, par. 50.

[15] Alliance One International, par. 130.

[16] Cf. Judgment of 16 November 2000, Stora Kopparbergs Bergslags/Commission, C-286/98 P, EU:C:2000:630, (hereinafter "Stora Kopparbergs Bergslags"), par. 29.

over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure[17] and therefore such indicia themselves do not rebut the presumption. The presumption arising from 100% ownership of the capital can apply not only in cases where there is a direct relationship between the parent company and its subsidiary, but also in cases such as the present one, where that relationship is indirect, through an intermediary subsidiary.[18]

On the other hand, the fact that the subsidiary is not wholly owned by a parent company does not exclude the possible existence of an economic unit, in the competition law sense[19]. The existence of an economic unit may thus be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such a unit.[20] In order to decide whether a company determines its conduct on the market independently, account must be taken of all the relevant factors relating to the economic, organisational and legal links which exist between it and the company in the same group which is considered to be responsible for the actions of that group, and which may vary from case to case and the CJ EU noted that it is not possible set out in an exhaustive list[21].

In the majority of cases there is one parent company found to be liable for behaviour of their subsidiaries. In this context, assessment of the structure of Knauf Group in *Knauf* case became interesting because companies forming Knauf Group do not have single parent comp/any or have single shareholder but have 22 shareholders, the same members of Knauf family in every of companies, even though none of them held majority. However event in such case it was confirmed that Knauf Group companies form single economic unit – undertaking. The CJ EU argued that "the legal structure particular to a group of companies, which is characterised by the absence of a single legal person at the apex of that group, is not decisive where that structure does not reflect the effective functioning and actual organisation of the group"[22] and company can be found liable for behaviour of other company even without any subordinating legal links between them if it is established that, in reality, the latter does not determine its conduct on particular market independently.[23]

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17 Cf. Alliance One International, par. 131.

18 Alliance One International, par. 132.

19 Judgment of 1 July 2010, Knauf Gips/Commission, C-407/08 P, EU:C:2010:389 (hereinafter "Knauf Gips"), par. 82.

20 Knauf Gips, par. 65.

21 Knauf Gips, 100.

22 Knauf Gips, par. 108.

23 Knauf Gips, par. 109.

If there is not such situation when the company is owned by family-linked group of persons but by several other companies, it is not possible to employ presumption of decisive influence. Where such undertaking is under the joint control of two or more other undertakings or persons, those undertakings or persons are by definition able to exercise decisive influence over it. However, only one part of criteria are there fulfilled since that is not enough to enable them to be held liable for the infringement of the competition rules committed by the undertaking which they control jointly, because such liability also requires fulfilment of the condition concerning the actual exercise of decisive influence.[24] On the other hand, if those conditions are fulfilled, it would be possible to hold the various undertakings or persons which exercise joint control liable for the unlawful conduct of their subsidiary.[25] Hence two companies, each with a 50% shareholding in a subsidiary and having joint management power in the commercial management of the subsidiary, can be found liability for the unlawful conduct of that subsidiary. However if it transpires that, in reality, only one of the undertakings or persons holding joint control in fact exercises decisive influence over the conduct of their subsidiary, or if other specific circumstances were to justify it, only that undertaking or person jointly and severally liable, with its subsidiary, for the infringement committed by the subsidiary.[26]

Description of undertaking by the group of natural and legal persons constitute static description of undertaking. However economic reality is much more complex and persons responsible for behaviour of undertaking can vary in the time. Hence "dynamic" description of the "undertaking" must be involved and this kind of description is mainly represented by the concept of "economic continuity".

Even in the case of dynamic principle, it is crucial to refer to the principle of personal liability[27], under which a person can be held liable only for his own acts[28], the person managing the undertaking in the time of commitment of the infringement shall answer for that infringement, even if, at the date of the decision finding the infringement, that undertaking is the responsibility or under the management of a different person[29].

So-called "economic continuity" criterion is considered derogation from the principle of personal liability that is accepted by the CJ EU.[30] Under this

[24] Alliance One International, par. 165.

[25] Alliance One International, par. 165.

[26] Alliance One International, par. 165.

[27] ICI par. 131 to 141; Judgment of 8 July 1999, Commission/Anic Partecipazioni , C-49/92 P, EU:C:1999:356 (hereinafter "Anic Partecipazioni"), par. 78; ETI and Others, par.39.

[28] Areva, par. 65.

[29] Cf. Judgment of the Court (Fifth Chamber) of 16 November 2000, SCA Holding v Commission, C297/98 P, EU:C:2000:633, par. 27, and Stora Kopparbergs Bergslags, par. 37.

[30] Areva, par. 66

approach competition infringement may be attributed to the economic successor of the legal person which committed it, even where the latter has not ceased to exist on the date of adoption of the decision finding the infringement. The rationale of the swift of the liability is not to compromise the effectiveness of the completion rules due to the changes to, inter alia, the legal form of the undertakings concerned[31].

Comparing to the *Anic Partecipazioni* case, in *Aalborg Portland*[32] in the context of an intra-group transfer of an undertaking, the transferee company was held liable for the infringement committed by the undertaking, before its transfer, even where the transferor company continued to exist as a legal entity. In *Anic Partecipazioni* was established that there can be "economic continuity" only where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed. The reason for this different approach in *Aalborg Portland* was that the transferor company had transferred all of its economic activities to the transferee company while maintaining a structural link with the latter, in which it had a 50% shareholding.

Further, in *Jungbunzlauer v Commission*[33] the General Court held, that the fact that a company continues to exist as a legal entity does not exclude the possibility that there may be a transfer of part of the activities of that company to another company which becomes responsible for the acts of that undertaking, provided that such transferred part of the activities of the company constitute an undertaking for the purposes of competition law. The liability for the infringement can be attributed to the to the transferee company, even though the transferor company continued to exist as a legal entity, while the transferor company had retained the production activities of the relevant undertaking, it had inter alia transferred the management and governance of that undertaking to the transferee company, which could, to that extent, be regarded as the economic successor of the transferor company.

The justification of penalising "economic successor" was provided by the CJ EU in *ETI and Others* case[34]. The Court confirmed, that applying penalties in this way is permissible and does not breach the principle of personal responsibility, even if the entity that committed the infringement still exists on the date on which the entity to which it transferred its economic activities is penalised, where those two entities have been under the control of the same person and,

[31] Cf. Judgment of 20 March 2002, HFB and Others/Commission, T9/99, EU:T:2002:70, par. 105 and 106.

[32] Judgment of7 January 2004, Aalborg Portland and Others/Commission, C-204/00 P, EU:C:2004:6.

[33] Judgment of 27 September 2006, Jungbunzlauer /Commission, T-43/02, EU:T:2006:270.

[34] ETI and Others, par. 48 to 51.

given the close economic and organisational links between them, have carried out, in all material respects, the same commercial instructions. In the case of entities answering to the same public authority, where conduct amounting to one and the same infringement of the competition rules was adopted by one entity and subsequently continued until its cessation by another entity which succeeded the first, which has not ceased to exist, that second entity may be penalised for that infringement in its entirety if it is established that those two entities were subject to the control of the said authority.

Contrary to intra-group transfers, legal entities which have participated in their own right in an infringement and which have subsequently been acquired by another company continue to bear responsibility themselves for their unlawful conduct prior to their acquisition, where they have not been purely and simply absorbed by the acquiring undertaking, but continued their activities as subsidiaries[35] The acquiring undertaking may be held responsible only for the conduct of its subsidiary with effect from its acquisition if the subsidiary continues the infringement and if the liability of the new parent company can be established[36].

Finally, identification of natural and legal persons liable for actions of the undertaking is necessary for attribution of joint and several liability for that infringement. Thus, the decision by which the Commission imposes on several companies the payment of a fine jointly and severally necessarily produces all the effects which are inherent, by force of law, in the legal rules governing the payment of competition law fines, both in relations between creditors and joint and several debtors and in those between joint and several debtors.[37]

3. Parent company as a beneficial owner?

Concept of parent liability in competition law stems from the idea that on the one hand parent company has duty to manage its subsidiary properly and on the other hand it can benefit from illicit gains of its subsidiary. The "reverse" approach is defined in anti-money-laundering laws. Particularly, "beneficial owner" is defined in "anti-money-laundering" directive[38] (Art. 3 par. 6 thereof) as any natural

[35] Cf. Judgment of 16 November 2000, Cascades /Commission, C279/98 P, EU:C:2000:626 , par. 78 to 80.

[36] Cf. eg. Stora Kopparbergs Bergslags, par. 37 to 39.

[37] Judgment of 3 March 2011, Siemens AG Österreich and Others/Commission, T-122/07 to T-124/07, T:2011:70, par.156.

[38] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist

person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least persons described in said provision.[39] Indeed, purpose of definition of beneficial owner is completely different to the definitions of competition law and focuses more on potential benefits that responsibility for actions (it is obvious that the directive is aimed to illicit actions of beneficent than behaviour of market actors). However, it is evident from the definition of the beneficial owner that the principle – who controls – benefits – is similar to rationale of definition of undertaking in competition law. On the other hand it must be noted that thresholds for definition of beneficial owner are much more lower comparing to attribution of liability for competition infringement. The notion of undertaking in competition

financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, p. 73–117.

[39] (a) in the case of corporate entities:

(i) the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity, including through bearer shareholdings, or through control via other means, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information.

A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a natural person shall be an indication of direct ownership. a shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of indirect ownership. This applies without prejudice to the right of Member States to decide that a lower percentage may be an indication of ownership or control. Control through other means may be determined, inter alia, in accordance with the criteria in Article 22(1) to (5) of Directive 2013/34/EU of the European Parliament and of the Council (29);

(ii) if, after having exhausted all possible means and provided there are no grounds for suspicion, no person under point (i) is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s), the natural person(s) who hold the position of senior managing official(s), the obliged entities shall keep records of the actions taken in order to identify the beneficial ownership under point (i) and this point;

(b) in the case of trusts:

(i) the settlor; (ii) the trustee(s); (iii) the protector, if any; (iv) the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; (v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means;

(c) in the case of legal entities such as foundations, and legal arrangements similar to trusts, the natural person(s) holding equivalent or similar positions to those referred to in point (b)

law serves to attribution of liability for infringement that is quasi-criminal due to human-right standards, but identification of beneficial owners serves to risk assessment and suspicions for further investigation, only. Therefore, it seems that stricter concept can serve better for subject assets to judicial enforcement or bankruptcy schemes, however definition of beneficiary owner can be starting point for suspicion on fraudulent transaction aiming to harm creditors.

4. Related parties in Slovak Insolvency Act

Act No. 7/2005 Coll., on Bankruptcy and Restructuring as amended (hereinafter "Insolvency Act") defines in § 9 so-called "related party":

(1) following persons are related party of legal persons:

a) statutory representative or member of statutory body, director, statutory proxy, or member of supervisory body,
b) natural person or other legal person that holds qualified share in the debtor legal person,
c) statutory representative or member of statutory body, director, statutory proxy, or member of supervisory body of the legal person named in b),
d) close person of the natural person named in a) to c),
e) other legal person in which legal person or one of the persons under a) to d) holds qualified share.

(2) the act consider related party of natural person close person of such natural person and legal person in which holds the natural persons or his or her close persons qualified share.

Qualified share (interest) is defined as at least merely direct or indirect 5 % share of the capital, voting rights or influence of managing of the debtor.

The major consequences for the related parties are that their claims are subordinated.[40] Furthermore, claims that belong to related party in the past are also subordinated and such subordinated claim is not only every claim of the person that is related party but also was in the past related party. Since subordinated claims are subject to satisfaction in the last tier, the probability of their compensation is very low. This subordination has two intertwined consequences: it marginalizes claims of the related parties to the theoretical sphere and raises probability of satisfaction of claims of others creditors. However, existence of related parties generally does not influence amount of assets subject to bankruptcy procedure.

[40] Insolvency Act, § 95(3).

5. Assets of bankrupted debtor

Under the Insolvency Act following assets are subject to bankruptcy scheme:
a) assets of the debtor in the time of declaration of bankruptcy,
b) assets acquired by the creditor during bankruptcy procedure,
c) assets securing debtors debts,
d) other assets stipulated by the law.[41]

Such other assets of third parties can occur from void and null agreements or acts.[42] Nevertheless, it is evident that assets subject to bankruptcy scheme is generally restricted to the assets of the debtor notwithstanding economic links within possible corporate rules.

6. Introducing concept of "undertaking" into bankruptcy law

First of all it is necessary to find out in which stage the assets of persons belonging to "single economic unit" will be subject to satisfaction of claims of debtor's creditors.

The first option is to establish statutory guaranties of such persons for paying debts of the debtor vis-a-vis such creditors. The advantage of this approach is that probability of satisfaction of claims via judicial enforcement could be higher. Furthermore such satisfaction of claims, e.g. by the parent company could avoid bankruptcy of the debtor. On the other hand, this system can be hindered by numerous objections by "statutory" guarantors by which they can challenge existence of links with debtor that give basis for their liability.

The similar situation can occur in the second option, if under the bankruptcy law assets of whole "undertaking" will be subject to bankruptcy scheme[43].

Second question is what and why this concept is "transplantable".

First of all, concept of undertaking in EU competition law follows more economic and factual context that formal legal construction. Second, the concept of undertaking is aimed to effectiveness of sanctions and their full recovery. Third, it was confirmed that parent company is liable for actions of its subsidiary even though it was not directly involved in particular transaction due its responsibility for management as well as benefits from illegal behaviour. All these principles

[41] Insolvency Act, § 67(1).
[42] Insolvency Act, § 80.
[43] This approach sets aside bankrupt private persons.

are feasible with the principles of judicial enforcement as well as bankruptcy goals.

Such approach inevitably erodes concept of limited liability and separation of assets of shareholders from assets of legal persons. On the other hand can lead to higher responsibility of shareholders for economic actions of its subsidiaries and proper diligence.

Indeed, concept of undertaking in competition laws is complex and facet. Furthermore it was never codified in its whole complexity and it is dynamically evolved by jurisprudence. Ephemeral character of borders of the concept can be the major obstacle to its "transplantation". The most simple and economically and legally clearly understandable form of the EU competition law concept of the undertaking can be restricted to parental liability with rebuttable presumption of liability for debts of subsidiaries and concept of economic continuity.

7. Conclusions

Insolvency of the debtor is almost always situation damaging its creditors who are rarely substantially satisfied. Bearing in mind such possibility how to escape from debts is certainly incentive also for criminal activities containing action deceasing possibility of creditors to be satisfied. If probability that debtor can escape from debts could be decreased by increasing amount and content of the assets subject to the bankruptcy scheme, incentives for fraudulent behaviour can be limited.

The article focused on the concept of the undertaking due to European competition law and its possible transplantation into bankruptcy law. This concept is based on idea that the whole group of companies forming usually one corporate structure are jointly and severally liable for their behaviour. The concept of undertaking is thus based on economic and factual relations that cannot be fogged by existence or non-existence of formal legal links. It is evident that Slovak insolvency law does not reflect wholly economic and factual relations when construing definition of assets subject to bankruptcy scheme.

Although it might be too difficult to directly incorporate or "transplant" competition-like concept of undertaking into bankruptcy law due to its complexity and non-codified character it can substantially contribute to better enforcement of creditors' claims and deter creation formal structures within corporate structures aimed to decrease amount of debts due to real satisfaction. Moreover, this idea creates another field of discussion on corporate and intra-corporate liability.

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YOUNG RESEARCHERS PAPERS

Common European Union Army Under the Constitutional Law of European Union

Radim Doležal*

Summary: Essay explores the legal possibility of creation of unified armed forces of the European Union. Essay analysis the possibility from the point of view of EU constitutional law. Primary focus of essay is the competence of EU. First, a question of division of powers between the EU and Member States is addressed. Second, a question of concrete legal basis for exercise of the determined power is addressed. As a secondary problem, essay explores the question of sovereignty of Member States and whether it would be infringed. Essay gives arguments why creation of unified European Union armed forces is legal and why it does not infringe the Member States' sovereignty.

Keywords: Armed Forces, Army, Common Foreign and Security Policy, Constitutional Law, Division of Powers, EU, European Armed Forces, European Army, European Security and Defence Policy, European Union, European Union Law, Law of European Union, Legal Basis, Proportionality Principle, Sovereignty, Subsidiarity Principle, Unification

1. Introduction

The main hypothesis of this essay is: It is possible to establish Common European Union Army under the constitutional law of European Union. I expect this hypothesis to be confirmed. In order to do so, I need to explore:

1) What sort of power under the division of powers by TFEU would creation of Common EU Army fall into?
2) What conditions need to be met for EU to exercise this sort of power?
3) What arguments would support compliance of these conditions?
4) Is there any concrete legal basis for creation of Common EU Army?

In the process of proving the main hypothesis I will address also a minor legal issue: the impact of establishing Common EU Army on Member States sovereignty. This I consider to be a great issue, not only legal one. Still, for the purposes

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of this essay it remains minor for the purpose is not to deal with the sovereignty of the Member States, but the legal possibility of creating such an army. Minor issue will be addressed by answering following questions:

1) How is state's sovereignty defined?
2) Would a creation of Common EU Army breach such sovereignty?

The topic of Common EU Army has been recently mentioned in relation to the events of last months – situation in Ukraine, Turkey, Middle East, or so called immigrant crisis.[1] On 22nd of November 2016 the European Parliament adopted resolution on the European Defence Union.[2] Resolution requests the European Council to begin with harmonisation of European armed forces under the European Defence Union.[3]

Common EU Army is not a new topic though. When Winston Churchill was talking to the Assembly of the Council of Europe he expressed the importance of *"unified European Army"* that would have *"unified command"*.[4] In 1952 the European Defence Community Treaty was drafted. Its objective: to merge national armies into one (European Defence Forces) with independent supranational administration under the scrutiny of European Assembly and Court of Justice.[5]

More recent history goes to the 1992 when Common Foreign and Security Policy (hereinafter CFSP) was formed by Maastricht Treaty. Later in 2000 Common Security and Defence Policy (hereinafter CSDP) was formed as a part of CFSP by the Treaty of Nice. The objectives of CSDP were set out by Petersberg Tasks and later by the Treaty of Lisbon.[6] The objectives are now part of art. 42 and following articles of TEU. According to them the military units can be deployed for (1) peacekeeping, (2) conflict prevention, (3) strengthening

1 This question was raised also by Czech Prime Minister Bohuslav Sobotka in his speech towards Czech diplomatic staff. KOPECKÝ, Josef. *Bez společné evropské armády se neobejdeme, řekl velvyslancům Sobotka*. [online]. Available at: <http://zpravy.idnes.cz/bez-spolecne-evropske-armady-se-neobejdeme-rekl-velvyslancum-sobotka-1kl-/domaci.aspx?c=A160822_092756_domaci_kop>

2 European Parliament resolution 2016/2052 (INI) of 22 November 2016 on the European Defence Union

3 *"invites the European Council to take concrete steps towards the harmonisation and standardisation of the European armed forces, in order to facilitate the cooperation of armed forces personnel under the umbrella of a new European Defence Union"* Ibid., para. 12

4 TRYBUS, Martin. *The Legal Foundations of a European Army.* [online]. Available at: <http://ssrn.com/abstract=2675017>, p. 2

5 So called Plan Pléven that later failed because it was not ratified by all the members of the Treaty. European Defence Community Treaty 1952

6 TRYBUS: *The Legal Foundations…*, p. 3–4

international security, (4) help in self-defence conducted under art. 51 of United Nations Charter.[7]

In 1998 J. Chirac and T. Blaire agreed on the Joint Declaration on European Defence that later continued with conferences in Cologne and Helsinki.[8] Blaire and Chirac were able to find a consent because they realized that even if Member States spend as much money on armed forces as USA they will not reach the same level of advancement at the end.[9] These conferences came up with further development: General Affairs Council, the Political and Security Committee, EU Military Committee, EU Military Staff,[10] European Rapid Reaction Force (never actually formed), and later also Battel Groups and EUFOR.[11]

From history of the common defence, we can draft a following conclusion. (1) In historical and current EU the common defence was and is realized through policy depending on political consent of (at least some) Member States. (2) Under such policy EU armed forces were formed.[12] (3) The existing EU armed forces consisted of voluntary contributions of Member States. (3) The existing EU armed forces were established for a certain goal and temporarily (*ad hoc*). (4) The existing EU forces were never to substitute national armed forces.[13]

This essay is concerned with EU armed forces that do not fall under the conditions of previous conclusion. This essay considers true unified army[14] for which I will use the term Common EU Army. Common EU Army would be the only all-military force in the EU made out of national armed forces; these would not be all-military and would be considered a part of the Common EU

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7 Art. 42 TEU

8 TRYBUS: *The Legal Foundations…*, p. 5–6

9 *"…although the EU Member States spend about two-thirds of what the USA spend on defence, they can only deploy about 10 per cent of what the USA can deploy."* TRYBUS: *The Legal Foundations…,* p. 5

10 European External Action Service. *Shaping of a Common Security and Defence Policy*. [online]. Available at: <http://eeas.europa.eu/topics/common-security-and-defence-policy-csdp/5388/shaping-of-a-common-security-and-defence-policy-_en>

11 TRYBUS: *The Legal Foundations…*, p. 6

12 Some – European Rapid Reaction Force – only on paper.

13 Such voluntary *ad hoc* cooperation seems to be the best option because it widely preserves the member states' autonomy (and therefore sovereignty). But from strategic point of view the opposite is the truth. As it is discussed in the Report of a CESP Task Force voluntary *ad hoc* cooperation is way too loose. As a result, it undermines the CSDP and weakens EU as a whole. The Report gives an example of Netherlands that gave up its heavy armour. For Netherlands it was unwise to keep it, but from EU strategic point of view it was important contribution. Another example is situation in NATO where EU member states are unwilling to take an action. BLOCKMANS, Steven, FALEG, Giovanni. *More Union in European Defence*. [online]. Available at: <https://www.ceps.eu/publications/more-union-european-defence>, p. 7

14 I would say the unified European Army Churchill had in mind.

Army.[15] This is where the development points to; where the history never really went yet; what is more controversial; what is maybe even called for by some and against by others.

2. Common EU Army as a Shared Competence

The EU is an entity made out of and by its members – states.[16] Being such an entity EU has a structure, makes its own law, and respects the rule of law and the fundamental rights. These are notoriously known facts. Important is that these facts are considered to be the arguments supporting the requirement that the EU had a constitution.[17]

One of the attributes of constitution as a basic law of any entity is a division of powers.[18] The powers within EU are divided horizontally between the bodies of EU itself and vertically between EU and Member States.[19] The power between EU and Member States is divided into three categories: (1) Exclusive Competences, (2) Shared Competences, (3) Supportive Competences.[20]

Exclusive Competences in art. 3 TFEU and Supportive Competences in art. 6 TFEU are defined by taxative list of areas where EU exercises its competence. Shared Competences in art. 4 TFEU are defined by demonstrative list of such areas.[21] Common army is not listed among the Exclusive or Supportive Competences of EU; neither common defence is; neither common security is; neither anything at least remotely pointing towards unified armed forces. Therefore, the security and defence area including armed forces is part of Shared Competences. This is supported by art. 4 TFEU explicitly listing area of security in para.2, subpara. j).

Within the category of Shared Competences both EU and Member States can be legislatively active and exercise their powers.[22] Member States are given two conditions to meet in order to do so. (1) EU has not exercised its competence.

[15] I. e. with national armed forces harmonised in such a level that they seize to be all-military and attain narrow but high specialisation forming one autonomous and coherent Common EU Army. This seems not so far from the idea suggested in European Parliament resolution 2016/2052 (INI).

[16] HAMUĽÁK, Ondrej, STEHLÍK, Václav. *European Union Constitutional Law.* Olomouc: Palacký University, 2013, p. 15.

[17] HAMUĽÁK, STEHLÍK: *European Union Constitutional Law…,* p. 13.

[18] *"The doctrine of the separation of powers was for centuries the main [10] constitutional theory which claimed to be able to distinguish the institutional structures of free societies from those of non-free societies."* VILE, Maurice John Crawley. *Constitutionalism and the Separation of Powers.* [online]. Available at: <http://oll.libertyfund.org/titles/677#Vile_0024_34>

[19] HAMUĽÁK, STEHLÍK: *European Union Constitutional Law…,* p. 15.

[20] Ibid., p. 2.1

[21] HAMUĽÁK, STEHLÍK: *European Union Constitutional Law…,* p. 21.

[22] Art. 2 TFEU.

(2) EU decided not to exercise its competence.[23] EU is also given two conditions to meet in order to exercise its powers within the Shared Competences areas. It is (1) subsidiarity, and (2) proportionality.[24] Therefore, EU can legally establish Common EU Army by its legislature if it meets the conditions of Subsidiarity and Proportionality principles.

3. Subsidiarity and Proportionality principles

Subsidiarity and Proportionality principles are to balance two interests: (1) EU's interest in achieving its objectives effectively on its own, (2) Member State's interest to keep as much sovereignty as possible.[25] Principle of subsidiarity means that EU shall act only if *"the proposed action cannot be sufficiently achieved by Member States ... but can rather ... be better achieved at Union level."*[26] Principle of Proportionality means that EU's action (form and content) *"shall not exceed what is necessary"*.[27] Subsidiarity and Proportionality as set out in TEU suffer from one problem that has been pointed out by many scholars. It is *"textual failure"*[28] because it is too *"vague and general"*.[29]

Subsidiarity and Proportionality are closely dealt with in Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality (hereinafter Protocol No. 2). In the preamble of Protocol No. 2, we find the main lead for interpreting Subsidiarity and Proportionality – the aspiration to keep the decision process as close to citizens as possible. Protocol No. 2 sets out procedure that must be followed by EU institutions so their actions comply with the Subsidiarity and Proportionality. National Parliaments are involved into this procedure – they have a say in legislative process since the draft legislative act was drawn.[30] The scrutiny of Court of Justice[31] and other EU bodies[32] is emphasized.

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[23] Art. 2, para. 2 TFEU – It is basically one condition considering omission either wilful or not.

[24] Art. 5, para. 1 TEU.

[25] BARTON, Olivia. An Analysis of the Principle of Subsidiarity in European Union Law. In *North East Law Review*, 2014, vol. 2, iss. 1, p.84; The second interest is in my opinion also EU's interest since EU is its Member States.

[26] Art. 5, para. 3 TEU.

[27] Art. 5, para. 4 TEU.

[28] SCHÜTZE, Robert. *European Constitutional Law*. Cambridge: Cambridge University Press, 2012, p. 178.

[29] ESTELLA, Antonio. *The EU Principle of Subsidiarity and its Critique.* Oxford: Oxford University Press, 2002, p. 95.

[30] Art. 4 Protocol No. 2.

[31] Art. 8 Protocol No. 2.

[32] Art. 9 Protocol No. 2.

Subsidiarity is defined by (1) the sufficiency standard and (2) the efficiency test. The sufficiency standard means that Member State has to carry out an objective sufficiently; if not, EU institution can act. The efficiency test means that EU institution can act if its action will be more efficient that action of the Member State.[33] Here a question arises. Who is going to decide whether certain action (objective) undertook by a Member State was sufficient, and whether an EU institution can carry out such action (objective) more efficiently? The answer seems to be: EU institution. Such answer is disturbing and also wrong.

The Member States are part of the decision process held over the question of sufficiency and efficiency. This is given in the Protocol No. 2. If only EU institution would decide what is sufficient and efficient, it would be dangerous because the objective of the whole principle is to keep it as close to citizens as possible.[34] Without citizen's (Member State's) control of whether the principle is met it is a mere declaration; EU institution can easily get around, claim it has been fulfilled and usurp the control.

Another problem with Subsidiarity lies in the objective that is to be achieved sufficiently and efficiently. This objective is given by EU; it is EU's interest.[35] From this point of view Subsidiarity looks like a smart move; result: EU will reach its interest no matter what. Either the Member States will fulfil EU objectives and interests, or if not EU institution will take over and fulfil it. Some would say *"masking principle"*,[36] others might point even to bullying and power usurpation. They would be right if we would rip it out of the context. Truth is that it is the Member States who decide what EU objectives will be. They do so for example through nationally elected European Parliament members and nationally elected national governments members who form the Council and other EU institutions. The Member States exercise the control of Subsidiarity also in this aspect.

The problems arising from Subsidiarity and Proportionality as set out in TEU could be addressed further but it is not the purpose of this essay. From problems outlined above a conclusion can be made. Where is a problem, there is also a solution, if there is a will. Subsidiarity and Proportionality remain valid lawful principles that need to be met when exercising shared power.

Before moving on with the topic of Common EU Army we need to say how Subsidiarity and Proportionality can be met in practice. Meeting the Subsidiarity and Proportionality in practice is mostly a question of political consent between

[33] BARTON: *Analysis of the Principle of Subsidiarity…*, p. 84.

[34] Preamble of Protocol No. 2

[35] BARTON: *Analysis of the Principle of Subsidiarity…*, p. 85

[36] DASHWOOD, Alan. The Relationship Between the Member States and the European Union/ European Community. *Common Market Law Review*, 2004, vol. 41, iss. 2, p. 36

EU institutions and Member States. That is why TEU and Protocol No. 2 give only procedural norms without a detailed substantive definition of Subsidiarity and Proportionality. That is why the Court of Justice is sometimes reluctant towards cases concerning the principles of Subsidiarity and Proportionality.[37]

4. Arguments supporting compliance with the Subsidiarity and Proportionality principles

The most common arguments in favour of Common EU Army are concerned with economic issues and power attainment issues.[38] These two are closely connected. It is economically effective to unify for military defence purposes. It is economically effective to hold higher importance within the world community; this can be achieved by attaining power through Common EU Army.

Günter Verheugen, former Commissioner for Industry and Entrepreneurship, stated that EU can never be a global player without having a Common Army.[39] Franco Franttini, former Italian Minister of Foreign Affairs, stated that Common Army would strengthen the position of EU in the world.[40] Radek Sikorski, former Polish Minister of Foreign Affairs, stated that if EU wants to become a superpower it has to have the means to assert its interests outside the territory of EU.[41]

Current trend is that each Member State in general spends less money on its army than Russia or some Asian states.[42] a lot of Member States have small economy resulting in a small army; if they would want to reach a level of a bigger economy they would have to spend higher percent of GDP in comparison.[43] History showed that even after that, disunited Member States might still fall behind the bigger states like USA or Russia.[44] History also shows that states which

[37] BARTON: *Analysis of the Principle of Subsidiarity…*, p. 86–88

[38] In its Executive Summary the CESP report calls for stronger CSDP because otherwise EU will not be able to promote its values and interests. BLOCKMANS, Steven, FALEG, Giovanni. *More Union in European Defence.* [online]. Available at: <https://www.ceps.eu/publications/more-union-european-defence>

[39] KUBEŠA, Milan. Evropská armáda – utopie nebo reálná budoucnost? ... aneb společné ozbrojené síly EU „jinak". In *Vojenské rozhledy*, 2013, roč. 22 (54), č. 2.

[40] KUBEŠA, Milan. Evropská armáda – utopie nebo reálná budoucnost? ... aneb společné ozbrojené síly EU „jinak". In *Vojenské rozhledy*, 2013, roč. 22 (54), č. 2.

[41] Ibid.

[42] UHER, Michal. *NÁZOR: Federální armáda Evropské Unie*. [online]. Available at: <http://www.armadninoviny.cz/nazor-federalni-armada-evropske-unie.html>

[43] UHER: *Federální armáda Evropské Unie…*

[44] TRYBUS: *The Legal Foundations…,* p. 5.

used to be unified were able to have more advanced army for lesser percent of GDP than they have today after they have split up.[45]

United States Armed Forces are composed of (1) United States Army, (2) United States Army Reserve, (3) Army National Guard.[46] The US Army is an all-military federal army; the USAR is simply reserve force; the ARNG is a militia force of each state under governor's command.[47] This unified structure enables to focus the economic means on the US Army as the only all-military armed force acting outwards. Whereas in EU each Member State focuses its economic means on its own all-military armed force.[48] That constitutes diversification of economic means and duplicity in expenditures resulting in ineffectiveness.[49]

Common EU Army free of this diversification and duplicity would be economically more effective. British economist Keith Hartley estimated that savings for armaments would be 17% if the Common EU Army is established. The number would grow substantially because states could save not only on armaments but also on wages and running a whole administrative body.[50]

Common EU Army would be more effective from the military point of view. Member States' armed forces are *"ill-equipped and ... [do] not allow the member states to autonomously manage crises..."*.[51] The situation is not any better when it comes to EU armed and defence programs. Nowadays, EU armed force is created *ad hoc* for each operation. Such *ad hoc* created military force is less effective because it is consisted of soldiers who are coming from different background – *"they are not one force but a combination of forces"*.[52] Moreover, the Member States are reluctant to provide the troops and technical support for the EU military operations.[53]

Common EU Army would be more effective also from the political point of view. Foreign policy backed by a strong army is more successful and easier. EU has no army therefore in the most intensive situations its voice might be ignored.[54] Militarily stronger EU would strengthen NATO.[55]

Militarily stronger EU would also strengthen itself internally because stronger external military force would calm internal radicalisation. The EU is

[45] E.g. Czechoslovakia. UHER: *Federální armáda Evropské Unie…*
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] BLOCKMANS, FALEG: *More Union in European Defence, Report…,* p. 2.
[50] TRYBUS: *The Legal Foundations…*, p. 9.
[51] BLOCKMANS, FALEG: *More Union in European Defence, Report…,* p. 11.
[52] Ibid., p. 10.
[53] Ibid., p. 3.
[54] TRYBUS: *The Legal Foundations…*, p. 11.
[55] BLOCKMANS, FALEG: *More Union in European Defence, Report…,* p. 4.

experiencing internal radicalisation because (1) Europe is surrounded by instable and hostile states, (2) EU itself is unable to react adequately if necessary in extreme situation due to (a) lack of military strength, and (b) political denial of such a lack.[56]

The biggest military power in terms of spending is USA.[57] USA spends ca. 600 million GBP annually.[58] Second biggest is China, spending five times less[59] (i. e. ca. 120 million GBP annually). EU Member States spend together on their armies ca. 400 million GBP annually.[60] This simply means that EU could be the second biggest military superpower without spending more than it is spending now or even with spending at least one time less. Common EU Army would mean (1) saving financial means, (2) better functioning, better trained, and better equipped military forces, (3) more inner stability (getting rid of inner radical elements), and (4) better external promotion of the EU's values and interests.

As it is set out above, one of EU objectives is security and defence, meaning also military defence and military maintained security.[61] This objective falls into the category of Shared Competences. EU can exercise its power within the category of Shared Competences if and in so far as the Member States cannot reach the objective sufficiently and efficiently enough on their own. The EU institutions and Member States decide whether an objective was met sufficiently and efficiently.

This means that if EU institutions and Member States come to a consent that national armies do not fulfil the objectives of EU security and defence sufficiently and efficiently enough, EU itself can start acting. Such action would under these circumstances mean creation of Common EU Army if EU and Member States come to a consent that it is proportional. The arguments given above could[62] comply with the principles of Subsidiarity and Proportionality. As a result, EU could[63] exercise its Shared Competence by creating Common EU Army. Such action would comply with the legal requirements given by constitutional law of EU.

As we can see, the legal validity of such argumentation lies and falls with wide political consent. That applies to any other argument given in favour of complying with the Subsidiarity and Proportionality of EU exercise of Shared Competence – the creation of Common EU Army.

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[56] Ibid., p. 1.
[57] Ibid. p. 3.
[58] TRYBUS: *The Legal Foundations…*, p. 9.
[59] BLOCKMANS, FALEG: *More Union in European Defence, Report…,* p. 3.
[60] TRYBUS: *The Legal Foundations…*, p. 9.
[61] Articles 42 and 43 TEU.
[62] In my opinion not only could but actually do.
[63] In my opinion should.

5. Concrete legal basis for creation of Common EU Army

Once EU has the competence, the concrete legal basis has to be determined.[64] Concrete legal basis sets the borders for the competence of the EU institution and its exercise – extent, content, character.[65] In some cases the concrete legal basis is given by the Treaties; in some the so called flexible clause of art. 352 TFEU can be used.[66] The use of art. 352 TFEU cannot be by its own definition a legal basis for creation of Common EU Army.[67]

Without concrete legal basis properly determined an action of EU institution can be annulled.[68] Proper determination of legal basis is such that is consistent with the aim and content of the legal basis in question.[69] This means that certain act of an EU institution cannot be founded in a legal basis which aim and content is merely similar to the act in question.[70]

The problem outlined in previous paragraph is the reason why arts. 24 to 41 TEU cannot be legal basis for the creation of Common EU Army. In relation to this issue the rules in arts. 24 to 41 TEU on CFSP are general and therefore derogated by the rules in arts. 42 to 46 TEU on CSDP.[71] The rules on CFSP as general rules will apply only subsidiary. Moreover, it gives space for doubt because it is too vague.[72]

The arts. 42 to 46 TEU seem more promising since their aim is directly the CSDP. EU may use the CSDP to provide itself with an operational capacity using capabilities provided by Member States.[73] European Council can unanimously decide to create common defence by its CSDP.[74] Member States are obliged to make their capabilities available to EU for implementation of CSDP including

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64 *"Every single activity (an adoption of the act or conclusion of an international treaty) shall have its legal foundation in the provisions of the Treaties."* HAMUĽÁK, STEHLÍK: *European Union Constitutional Law…,* p. 23.

65 Ibid.

66 Ibid.

67 Art. 352 para. 4 TFEU.

68 Judgment of the Court (Grand Chamber) of 20 May 2008 C-91/05, paras. 106–110.

69 Ibid., para. 106.

70 Judgment of the Court (Grand Chamber) of 20 May 2008 C-91/05, para. 106.

71 According to the rule *lex specialis derrogat legi generali* since CSDP is according to art. 42 TEU an integral part of the CFSP.

72 *"The Union's competence … shall cover … the progressive framing of a common defence policy that might lead to a common defence."* Art. 24 TEU

73 Art. 42 para. 1 TEU.

74 Art. 42 para. 2 TEU.

creation of common defence.[75] Art. 43 TEU sets legal basis for various military actions[76] and how to define them in detail.[77]

This could be the legal basis for creation of Common EU Army. First, a CSDP setting appropriate defence objectives and goals would be formed. Second, European Council would unanimously decide that this policy can lead to common defence. Third, the Member States would be called to implement this policy and make their capabilities available for EU. EU would form a Common EU Army from provided means. Fourth, the Common EU Army would be deployed in actions according to art. 43 TEU.[78]

Problem arises with art. 44 para. 1 TEU. Its wording might point towards the fact that implementation of CSDP, or at least action taken under art. 43 TEU, is voluntary by using the phrase *"Council may entrust ... Member States which are willing"*. On the other hand, its wording does not necessarily exclude the possibility that Council will not entrust the implementation of a task to a group of Member States and instead Council implements the task on its own using the capacities provided by Member States in compliance with art. 42 para. 3 TEU.

Another problem arises with art. 42 para. 6 TEU and following art. 46 TEU. These give legal basis for permanent structured military cooperation within the EU framework. Such cooperation is clearly voluntary. If all permanent structured military cooperation within the EU framework should be voluntary, also Common EU Army would have to be voluntary. Otherwise there would be no legal basis for it.

But from the wording of art. 42 para. 6 can be concluded that these arts. are concerning strictly cooperation of Member States who made binding commitments to one another. Legal basis of such cooperation is further developed by Protocol No. 10.[79] Such cooperation seems to be different from binding commitment made by EU and Member State(s) which Common EU Army would be. Nevertheless, *"the relationship between the various elements of the CSDP"* such as between the voluntary cooperation under art. 42 para. 6 TEU and art. 42 para. 2 TEU still needs to be defined.[80]

Last issue needs to be addressed in this regard. The adoption of legislative acts in the area of the CSDP and the whole CFSP is excluded.[81] CSDP is defined and implemented by European Council and Council; put into effect by the High

[75] Art. 42 para. 3 TEU.

[76] Art. 43 para. 1 TEU.

[77] Art. 43 para. 2 TEU.

[78] This whole process could be described much deeper but that would be for a whole other essay.

[79] Protocol No. 10 on Permanent Structured Cooperation Established by Article 42 of the Treaty on European Union

[80] LEGRAND, Jérôme, KRUIJS, Rick. *Common Security and Defence Policy.* [online]. Available at: <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_6.1.2.html>

[81] Art. 24 para. 1 part 2 TEU.

Representative of the Union for Foreign Affairs and Security Policy and by Member States.[82] a specific role is played also by European Parliament, Commission, and the Court of Justice of the EU.[83] The European Defence Agency plays auxiliary but important role.[84] This simply means that there is no legal basis for creation of Common EU Army by legislative act. Common EU Army would have to be created by specific rules and procedure of CSDP.

From the brief consideration provided above a conclusion can be drafted – the TEU does involve rules that seem to be the concrete legal basis for creation of Common EU Army as defined in the Introduction. Question is whether the Court of Justice of EU would find this legal basis as properly determined or rejected it as legal basis with similar but different aim.

6. Definition of sovereignty

Sovereignty is defined by International Public Law as independence with two aspects: (1) internal, (2) external.[85] The internal aspect means that the state is exercising highest and exclusive power over its territory and citizens.[86] The external aspect means that the state is not subordinated to any higher power.[87] The relationship with other states and organisations is only cooperation.[88]

Part of the external aspect of sovereignty is the state's capability to create international legal norms or to be part of such legislative process; so called *ius tractati*.[89] Part of *ius tractati,* therefore part of sovereignty, is the capability of a state to transfer some of its sovereign powers onto another entity.[90] The sovereignty is preserved after such transfer if the state can wilfully and independently take its sovereign power back.

The organic theory defines the internal aspect of sovereignty as an exercise of a public power not submitted to another subject of International Law over the

[82] Ibid.
[83] Ibid.
[84] Art. 45 TEU
[85] DAVID, Vladislav, BUREŠ, Pavel, FAIX, Martin, SLADKÝ, Pavel, SVAČEK, Ondřej. *Mezinárodní právo veřejné s kazuistikou*. Praha: Leges, 2011, p. 133
[86] DAVID, BUREŠ, FAIX, SLADKÝ, SVAČEK: *Mezinárodní právo veřejné s kazuistikou…,* p. 133
[87] Ibid.
[88] Ibid., p. 134
[89] Ibid.
[90] DAVID, BUREŠ, FAIX, SLADKÝ, SVAČEK: *Mezinárodní právo veřejné s kazuistikou…,* p. 134. Interestingly it is not a new idea; first legally significant mention is from Case of the S. S. "Wimbledon", P. C. I. J. 1923

population's community and territory through a respective, independent political administration.[91] The external aspect defines as a capability to assert its own interests and enter into legal relationships with other subjects of International Law.[92]

7. Infringement of sovereignty as a result of Common EU Army

Would creation of Common EU Army breach the Member States' sovereignty? There are three major aspects to this question: (1) the compliance of Subsidiarity and Proportionality, (2) the control over Common EU Army, (3) the transfer of sovereignty.

The aspect of the compliance of Subsidiarity and Proportionality is explained above. Without meeting these two principles EU cannot act, cannot pass the legislature establishing Common EU Army, cannot exercise control over it. It is explained above that Subsidiarity and Proportionality could be met, therefore, Common EU Army could be legally established.

The Subsidiarity is a tool enabling the Member States exercise sovereignty because primarily the Member States should act; EU action is secondary (subsidiary) only if the Member States failed to act.[93] Such primary action of Member States is under scrutiny of local press, therefore electorate, therefore the politicians are more accountable,[94] therefore more likely to decide based upon "people's will". Since the people are the bearers of sovereignty such decision means exercise of sovereignty.

The aspect of the control over Common EU Army is another step. The control can be fully exercised by centralised EU institution with no participation of the Member states. The control can be also fully exercised by the Member States through newly formed platform where EU institutions will hold no decision power. The control can be also exercised in any other way falling in between the first two possibilities of exclusive control. Within this range a wide variety of control (i.e. command) mechanisms can be created.

No matter what control mechanism would form we can draft a conclusion. The closer it will be towards the exclusive control by Member States, the lesser are chances that anyone would raise an objection of sovereignty infringement.

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91 Ibid.

92 Ibid.

93 Failed to act = failed to carry out the perquisite sufficiency and efficiency.

94 BARTON: *An Analysis of the Principle of Subsidiarity…,* p. 83

The closer it will be towards the exclusive control by EU institution, the bigger are chances that someone would raise an objection of sovereignty infringement. In my opinion, if the control would be exercised by already existing EU institution (let's say European Council) someone would definitely raise an objection of sovereignty infringement. Answer to this objection lies within the third aspect.

The aspect of the transfer of sovereignty is to ensure that possible infringement of sovereignty can be bridged. Even if creation of Common EU Army and its functioning would require transfer of Member States' powers onto EU institution resulting in deprivation of sovereignty it does not necessarily constitute the infringement of Member States' sovereignty.[95] Such transfer has been already conducted and has already been made legal under the EU constitutional law and under the Member States' constitutional law.

The Czech Constitution states that some sovereign powers of Czech Republic can be transferred onto international organization.[96] Article enabling such transfer was incorporated into Czech Constitution with the effect to the 1st of June 2002 while Czech Republic was preparing to join EU.[97] Later on this article enabled the acceptance of the Lisbon Treaty because under the Lisbon Treaty some Member State's powers are conferred on EU which would not be constitutionally possible for Czech Republic if it wouldn't be for this specific article.[98] EU constitutional equivalent is found in provisions of TEU and TFEU.[99]

If certain power is transferred exclusively onto EU, the Member State cannot exercise this power unless EU allows it.[100] This constitutes exercise of certain power over state. Such is enabled in case of Czech Republic by its constitutional law.[101] Such might be the breach of Czech sovereignty under the mere wording of the definition of sovereignty. But such breach can be bridged and therefore seizes to be a breach of sovereignty. Important argument in Czech Republic was the existence of art. 50 TEU.[102] It is so because art. 50 TEU fulfils the request of broad definition of sovereignty: state can take its power back anytime, without any obstacles laid by the entity it transferred its power to.

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95 This is discussed in chapter 5. of this essay as part of a *ius tractati*

96 Art. 10a, úst. zák. č. 1/1993 Sb., Ústava České Republiky, as amended to the day 10th October 2016.

97 Art. 1, úst. zák. č. 395/2001 Sb.

98 KŮHN, Zdeněk. *Nález ve věci Lisabonské smlouvy I. – obecné otázky*. [online]. Available at: <http://jinepravo.blogspot.cz/2008/12/nlez-ve-vci-lisabonsk-smlouvy-i-obecn.html>

99 Especially art. 5 TEU and art. 2 to art. 6 TFEU.

100 Art. 2 TFEU.

101 Supra note 96.

102 Decision of Czech Constitutional Court of 26th November 2008, Pl. ÚS 19/08-1; Decision of Czech Constitutional Court of 3rd November 2009, Pl. ÚS 29/09-3.

From the definition of sovereignty given above we can conclude that it is mostly the external aspect of sovereignty that might be threatened by creation of Common EU Army. Member States would lose their power to set their own security and defence objectives and then fulfil them on their own. But, even such a loss of power would not constitute the loss of sovereignty. This is under two conditions: (1) the Subsidiarity and Proportionality will be complied with when establishing Common EU Army and the mechanism of its control, (2) the transfer of sovereign power will be conducted in compliance with the Member States' constitutions and EU constitution enabling the Member States to take this power back without any obstacles.[103]

Moreover, we can't forget that question of Common EU Army is a question of the Shared Competence. It is primarily Member States who have the responsibility (maybe even duty) to act. Only if the Member States do not act, EU can act as a secondary actor. CSDP as currently defined is counting even then on Member States participation.[104] Briefly said: strictly from the legal viewpoint, there is no need to question Member States' sovereignty because it is themselves who actively decide whether the EU will act[105] and how.[106]

8. Conclusion

The main hypothesis explored in this essay is: It is possible to establish Common EU Army under the constitutional law of EU. Confirmation of this hypothesis consists of (1) the question of competence, and (2) the question of concrete legal basis. This hypothesis was confirmed as expected.

The competence was credibly established in chapters one to three of this essay. Creation and control of Common EU Army is a Shared Competence. EU can act if Member States fail to fulfil EU military objectives[107] sufficiently and efficiently enough. EU can act only in the manner necessary to fulfil its military objectives. The concrete legal basis was established with certain level of doubt.

[103] Here I think is no need for a new norm enabling the Member State to stay in the EU but take back its own competence to have its own army. It would be sufficient to use art. 50 TEU which would mean taking back all transferred competences and stepping out of the EU. Of course the first option would be more "political" and "friendly" which might make it easier to reach a consent on creating of Common EU Army. Another way could also be a "multi-speed Europe". But this would be a question for a whole other essay. Nevertheless, the mere existence of art. 50 TEU is important because it means that this legal condition is given in the present time.

[104] Articles 44 to 46 TEU.

[105] By their insufficient action or no action at all.

[106] By their involvement in the EU decision making process and CSDP processes.

[107] Of course only for defence and security purposes.

Therefore, it remains to be a question, whether the legal basis found in chapter four of this essay is sufficient.

Arguments supporting creation of Common EU Army are mostly economic arguments, and arguments oriented towards power attainment. These arguments are not of a legal nature but still legally valid. It is because of vague and subjective wording of art. 5 TEU.

Creation and control of Common EU Army would not mean infringement of Member States sovereignty. Under current law it is Member States who decides whether and how EU acts in the area of CSDP. Member States may have to transfer their military powers onto EU which would not constitute the breach of their sovereignty either because Member States are free to take transferred power back. Similar transfer already happened so it would comply with national constitutions.

As we can see, the real challenge in creating Common EU Army is not constitutional law of EU, neither the national constitutions of Member States. Legally it is most likely possible. In my opinion, the real challenge is politics; Common EU Army lies and falls with economic and political arguments controlled by the politicians and their consent.

In my opinion, there is not enough of political will within current EU to create Common EU Army. Especially given current mood; EU is jeopardized by so called Brexit that triggered a wave of populist's calls for leaving EU in other Member States (including Czech Republic). This rhetoric of political existentialism makes reaching the consent more difficult.[108]

Yet, I think that in creating unified army lies the paradox of strengthening the European unification. It is so because one populist argument for leaving EU says that EU cannot protect its members (and citizens) enough from external danger (immigrants, Islamic State, Russia, etc.). By creating unified army EU would take away this argument. Maybe even some populists who are now calling against EU would start calling for EU

[108] Cardiff Law School professor of law Jiří Pribáň defines political existentialism as a politics which turns the question of decision making process and constitutionality into the questions of cultural existence and national fate. PŘIBÁŇ, Jiří. *Obrana ústavnosti, aneb, Česká otázka v postnacionální Evropě*. Praha: Sociologické nakladatelství (SLON), 2014, p. 14–15.

"Democratic Deficit" in the European Union – Supranational Bodies and Democratic Legitimacy. Ideas for a Reflection

Claudia Biffali*

Summary: This study tries to understand the causes and the effects of the problem of democratic deficit in the European Union (EU). The paper begins by exploring different definitions of democracy as well as the historical development of democratic political systems. It, then, analyses the European Union's decision-making institutions. In the context of future EU Treaty reforms, it considers potential remedies for the democratic deficit: there is a multitude of reasons and solutions regarding the democratic deficit in the EU, which lead to complex interpretations. Generally, academic literature on the issue of democratic deficit in EU relies on two opposing arguments. The major argument is that there is democratic deficit in the EU; the less common argument rejects this view. This study supports the major argument.

Keywords: European Union, legitimacy, democracy, representation, EU institutions, democratic deficit

1. Introduction

The issues of participation and democracy are one of the areas in which the EU has encountered major difficulties in recent years. This article intends to investigate about the discourse on the existence of a democratic deficit, with focus on the role of the European Parliament.

The concept of a *democratic deficit* in the European Union refers to the idea that EU governance is somehow lacking in democratic legitimacy.

However, the first use of the term has been attributed to David Marquand[1] in 1979. In that year, referring to the European Economic Community, the

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[1] David Ian Marquand, (born 20 September 1934) is a British academic and former Labour Party Member of Parliament (MP): *"The resulting democratic deficit would not be acceptable in*

forerunner to the European Union, Marquand criticised, in particular, the transfer of legislative powers from national governments to the European Council of Ministers. This criticism would lead to the creation of a European Parliament, provided with the faculty of approving or rejecting draft laws of the Union.

The expression *'democratic deficit'* can be understood, on one hand, as lack of democratic legitimacy of the European institutions accompanied by lack of attention towards the requests of the citizens; on the other hand, as the resulting lack of consensus and participation of European citizens to the political and legislative activities of the European Union. This can be noticed mainly in turnout rates during elections of the European Parliament.

This essay aims to fully understand the causes that led to the democratic deficit and to provide insights for further reflections. At first, it is important to highlight, according to the original decision-making model provided for in the Treaty, that the monopoly of legislative initiative was given to an executive body, the Commission, entirely devoid of democratic legitimacy.

In this sense, from a legal point of view, the democratic system could be recovered by incrementing the functions of the European Parliament. *"No integration without representation"* is the title of the last chapter of a book on the evolution of the European Parliament that compellingly evokes the shared need to find a solution to the EU's democratic deficit, firstly, by strengthening the representation of citizens[2]. According to the classical view, Parliament is the only (or, at least, the main) repository of legitimacy and democracy[3]. Thus, the strengthening of the European Parliament and the direct election of the same (1979), if followed by a strong turnout, could have eliminated the democratic deficit.

Altiero Spinelli[4], on February 10, 1977, during the debate for ratification of the Convention for the direct elections to the European Parliament, clearly expressed the aforementioned argument: *"If the word 'people' means a set of men who are and feel part of common institutions, through which they express and try to realize common commitments, with this direct election we will see the birth of the 'European people'"*. Instead, on a political level, Spinelli's prediction

a Community committed to democratic principles. Yet such a deficit would be inevitable unless the gap were somehow to be filled by the European Parliament."

2 RITTBERGER, Berthold. *Building Europe's Parliament. Democratic Representation Beyond the Nation State*. Oxford: Oxford University Press, 2005.

3 WEILER, J.H. *La trasformazione dell'Europa*. Bologna: il Mulino, 2003.

4 Altiero Spinelli (31 August 1907 – 23 May 1986) was an Italian Communist politician, political theorist and European federalist. Spinelli is referred to as one of the founding fathers of the European Union due to his co-authorship of the Ventotene Manifesto, his founding role in the European federalist movement, his strong influence on the first few decades of post-World War II European integration and, later, his role in re-launching the integration process in the 1980s.

did not happen. On the contrary, the continuous increase in the powers of the European Parliament was accompanied by "a parallel, constant decrease in the rate of participation in European elections"[5].

The latter statement is demonstrated by the following data: in 1979, the average attendance to elections was equal to 63% of those eligible to vote; in 1989, the average attendance dropped to 58.5%; in 1994, it still fell to 56.8%; in 1999, it dropped below the threshold of 50%, with percentages below 30, not only in Britain but also in the Netherlands. This negative trend continued in the 2004 and 2009 elections (43.08%). In 2014, in total, 43% of all eligible voters in the 28 Member States of the Union actually voted.

Then, throughout the history of the European integration, the question of democratic legitimacy has increasingly acquired importance. The treaties of Maastricht, Amsterdam and Nice show the implementation of a progressive advancement towards a democratic legitimacy of the institutional system in two ways: on one hand, by strengthening the powers of the Parliament with regard to the designation and control of the European Commission; on the other hand, gradually expanding the scope of application of the *co-decision procedure*.

Subsequently, with the Treaty of Lisbon, signed in 2007 and enforced in 2009, the legislative and budgetary powers of the European Parliament have been increased to ensure greater control over the Commission (a strengthened role in the procedure for appointing the President of the European Commission has also been granted to the Parliament); in addition, the co-decision procedure, which makes Parliament the co-legislator in all respects, has risen to the rank of the ordinary legislative procedure. Nonetheless, the establishment of the *citizens' initiative* ratifies the will to give effect to the democracy of the European Union by providing for a new form of direct participation to European Union policy and recognizing the importance of dialogue between the European institutions and civil society.

But how have these reforms impacted the effective reduction of the democratic deficit? In the following paragraphs the ability of the European Parliament to be an actor, able to assert effectively its prerogatives and thus to affect the process of strengthening of representative democracy in the Union, will be explored.

[5] MAJONE, Giandomenico. *Integrazione europea, tecnocrazia e deficit democratico*. [online]. Available at: http://www.osservatorioair.it.

2. The democratic gap in the European institutions

In order to better understand the democratic gap that reflects the European institutions, it is necessary to focus on which are the main institutions involved in the legislative process in the EU. In particular, there is the European Parliament, which represents the EU's citizens and it is directly elected by them; the Council of Ministers, representing the Governments of the Member States; and the European Commission, which represents the interests of Europe as a whole.

These three institutions process together, through the *ordinary legislative procedure* (former *co-decision procedure*)[6], policies and laws that are to be applied throughout the EU. In principle, the Commission proposes new legislative acts that the European Parliament and the Council should adopt[7]. The Commission and the Member States apply the rules, and then the Commission shall ensure that they are properly applied and enforced.

The European Parliament, despite the direct election since 1979, is still characterised by a serious democratic deficit that is apparent in its involvement in Council decisions adopted under a *special legislative procedure*[8]. This involve-

[6] One of the important changes introduced by the Lisbon Treaty is the fact that *co-decision* becomes the *ordinary legislative procedure*, i.e. what used to be the exception in decision-making has become the norm for most policy areas. As defined in Article 294 of the TFEU, the co-decision procedure is the legislative process which is central to the Community's decision-making system. It is based on the principle of parity and means that neither institution (European Parliament or Council) may adopt legislation without the other's assent.

[7] MULLER-GRAFF, Peter-Christian. Direct Elections to the European Parliament. *Case Western Reserve Journal of International Law*, 1979, vol. 11, p. 3: *"Political consensus of the founders estabilished four institutions for the activities of the Community: the Assembly, the Council, the Commission and the Court of Justice. (...) the bodies were fixed according to the ideal of functions which the classical theory of the separation of powers had in mind: Assembly and Council as legislative powers, the Commission as an executive power and the Court of Justice as a judicial power"*.

Also, LODGE, Juliet. Making the Election of the European Parliament Distinctive: Towards E-Uniform Election Procedure. *European Journal of Law Reform*, 2000, vol. 2, p. 195: *"What survives however is the idea that direct participation in supra-national political life via the vehicle of direct elections is an element of EU citizenships which confirms the direct link between the EU citizen and the EU sovereign without an intermediary"*.

Also, BIGNAMI, Francesca. The Democratic Deficit in European Community rulemaking: a Call for Notice and Comment in Comitology. *Harvard International Law Journal*, 1999, vol. 40, p. 456: *"In the Community, lawmaking power is vested in the commission, council and Parliament acting togheter under a formula that depends upon the policy area as set out in the E.C. Treaty"*.

[8] The art. 289, paragraph 2 of the Treaty of Lisbon sets out a distinctive criterion providing, for special proceedings, the non-joint adoption by the Parliament and the Council of a legislative act. The provision affirms *"in the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the*

ment may consist in mere consultation or in the need of its approval of the act. In many matters that directly affect individual rights (European citizenship, family law, social policy, etc.) the Parliament has maintained an advisory role. In other matters, there is no form of participation of the EP in the legislative process (for example, on the subject of serious economic difficulties, or of direct taxation).

Another key EU organ is the Council of Ministers, which exercises, jointly with the European Parliament, legislative and budgetary functions. The essence of the deficit issue largely lies in the attribution of a legislative function to an organ representing the executive of Member States; an organ, furthermore, not subject to an effective control by European citizens represented in the European Parliament. The latter is not involved in the appointment of the President of the Council and of its formations.

Another component of the European institutional framework is the Commission, which holds a strong power of legislative initiative and it is also an executive and monitoring body. Its Commissioners are chosen among prominent personalities of the Member State of affiliation. The European Parliament participates only partially to the choice of the President of the Commission, while it is not involved in the appointment of the Vice-President (who plays a key role in drawing the EU's common foreign and security policy).

2.1. The European Commission

The European Commission[9] is probably the more representative institution of the international organization known as the European Union: it is the most visible institution in the dialectic of the relations among institutions and Member States. The Commission has always assumed the role of the "supranational"[10] institution, composed by entities acting in the mere interest of the European Union; therefore, it is representative of the interests of the Union as such.

The European Commission, in the European Union's institutional logic, holds an important position because it has the monopoly of legislative initiative in the EU; such solution, initially, had its own *ratio* because the Parliamentary Assembly of that time had no power except from that of an advisory nature: this choice gave a proactive role for development and European

Council, or by the latter with the participation of the European Parliament, shall : constitute a special legislative procedure".

9 STROZZI, Girolamo, MASTROIANNI, Roberto. *Diritto dell'Unione Europea, parte istituzionale*. Torino: G. Giappichelli Editore, 2013, pp. 109–127.

10 TSEBELIS, George, GARRETT, Geoffrey. The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union. *International Organization*, 2001, vol.55, issue 2.

integration to an entity different from the one representative of the states. Today, this monopoly of legislative initiative entrusted to the Commission is less understandable considering that the European Parliament has become a body elected by universal suffrage, it has incisive powers in its relations with the other institutions, it is a body that works like a real Parliament and then co-decides with the Council in relation to all legislative activities of the Union. The exclusion of the European Parliament from the legislative phase is no longer a good idea as this would alienate and reduce the closeness between the electorate and the elected.

The Commission, ex art. 17 TEU, is composed by citizens of the Member States; the members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt. These criteria, however, are particularly vague and elastic. Initially, the members of the Committee were 9, all chosen by the Member States by common accord. "Common accord" meant that each State chose one member, while larger States could chose two of them. This system has been consistently applied for decades, until, with the growth of the European Community, the principle has been amended and the praxis whereby each State designates one Commissioner has been established.

What was particularly innovative, from the prospective of modernization of the system, is the Commissioners' appointment procedure which, in part, has resized the exclusive power of the states in the choice of Commissioners. This procedure is composed of various phases: first of all, the Presidential candidate is chosen by the European Council with a qualified majority, taking into account the results of the European elections. Then, the Parliament, by a majority of its component members, elects the candidate, but this election is conditioned by the choice of a person coming from a majority of the States in the European Council. Parliament can disagree about the candidate, but it cannot replace the proposal by designating another person: in this case, another proposal from the Council would be needed.

After the choice of the President begins a second phase, i.e. the choice of the other members of the Commission. This choice involves the Member States, but it must be done in common accord with the Presidential candidate. Therefore, the States suggest a person to other States, but also to the President who then must approve this proposal. Subsequently, the European Parliament which plays a particularly important role, submits all the Commissioners' candidates to a suitability test in front of competent Commissions. Therefore, the actual phase of members' appointment of the Commission and their election is attributed exclusively to the European Parliament. The latter, nonetheless, cannot choose

other members of the Commission, but it can only reject the choices made by the President and the Member States.

The approval of the European Parliament is then followed by the European Council's appointment. Nonetheless, this step is rather a formality.

Basically, even though the Commissioners are not chosen directly by European citizens, they are chosen by people who are chosen by the citizens through vote: the European Parliament through the European elections, the European Council through national elections.

2.2. The Council of Ministers

The Council of Ministers is composed by the Ministers of the Governments of the Member States who are submitted to a parliamentary control in their Member States. This implies that there is a form of indirect popular representation[11]: thus, there is no direct control of the European citizens because national parliamentary elections, which are hold to form these Governments, are not the European elections in which it is possible to propose and discuss European policy issues. The entrustment of the decision-making power to the Council means, essentially, that the States retain control of the international behaviour of this organization. Although existed, since the original texts, matters in which the Council could adopt resolutions by a majority, during the first decades of the community, the Council could deliberate especially unanimously; this meant that each State, through his representative, had the opportunity to ask a veto on a decision that was not appreciated. Obviously, that could lead to situations of crisis due to the fact that some States refused to take part in the meetings of the Council to safeguard their own interests, impeding the possibility of adopting resolutions.

2.3. The European Parliament

The analyses of the European Parliament[12] goes to the heart of the whole question of the democratic deficit in the European Union. This institute, defined as the democratic body for excellence, in fact, has no power to legislate as national parliament: notwithstanding, article 14 of the Treaty on the European Union clearly states that *the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions as well as functions of political control and consultation.* As stated in the Treaties, the Commission is the only body

[11] VILLANI, Ugo. *Istituzioni di Diritto dell'Unione europea*. Bari: Cacucci editore, 2013.
[12] TESAURO, Giuseppe. *Diritto dell'Unione Europea*. CEDAM, 2012, pp. 22–28.

capable of conducting a process of law-building, while the Parliament can only approve the law or defer the same to the Commission to make changes.

However, there are exceptions to this general rule; for example, art. 223 TFEU[13] affirms that the Parliament can elaborate a project for the application of uniform rules for the election of the Parliament by direct universal suffrage. This is only a proposal power but not a deliberative one because, in the end, the decision is of the Council. In fact, this article was never implemented because there is no uniform procedure for the elections[14] of the European Parliament.

Always in accordance with art. 223 TFEU, the European Parliament, on its own initiative, with a special legislative procedure after seeking an opinion from the Commission and with the approval of the Council, shall lay down the regulations and general conditions governing the performance of the duties of its Members. This refers to the European Parliamentary statute, which contains provisions related mainly to additional immunity, and also to financial prerogatives to which MEPs are especially careful. Therefore, it is the Parliament, which writes its own statutes (this makes sense considering these are rules of a democratic body); the Commission, in this case, only has the task of writing a non-binding opinion, but requires the approval of the Council (it is the Council that must approve what the Parliament writes, negotiates, and then deliberates).

Another task of the Parliament as a legislator[15], that is, however, shared with the Council, is the adoption of regulations on the functionality of political parties at a European level. This provision has not been enforced for a long time.

The requests of the European Parliament to be involved in the legislative phase, have led to the creation of the art. 225 TFEU[16] , which incorporates, in

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[13] Art. 223 TFEU: *"The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.*

The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parlia ment, which shall act by a majority of its component Members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements".

[14] The European Parliament elections are held in the various Member States in accordance with procedures substantially different; the only ground rule, which dates back to an old Council decision, is that the system should be proportional, (not majoritarian): this make the European Parliament a chamber as representative as possible though not necessarily functioning whereas it is difficult to create a majority that comes from the sum of the votes of the main parties.

[15] STEUNENBERG, Bernard, THOMASSEN, Jacques. *The European Parliament: Moving toward Democracy in the EU*. Oxford: Rowman & Littlefield Publishers, 2002.

[16] Article 225 TFEU: *"The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it*

substance – with some small modifications – what was first approved in Maastricht, in 1992. The article attributes to the European Parliament a proactive role on the Commission's initiative: the legislative proposal remains of the Commission, but the European Parliament may request to present *"appropriate proposals"* on the matters for which the Parliament considers useful a legislative intervention, within the competences of the EU. These requests require an absolute majority of the Members of the Parliament (if approved in Parliament, these requests have a significant value). For example, the Parliament has requested to submit a legislative proposal to harmonize national laws on the protection of pluralism of television information; or, more recently, to codify the EU administrative procedures. From a legal point of view, the main concern is which value should be attributed to these Parliament's proposals: the text of the Treaty does not provide an answer; the Lisbon Treaty added a small indication, which obliges the Commission to give reasons for any refusal to proceed with such proposals.

Another provision of considerable importance, in terms of democratic legitimacy, is article 10 TEU which states that "the functioning of the Union shall be founded on representative democracy. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens [...]".

A more detailed analysis shows that the reference to the representativeness of the European Parliament is certainly relevant because of the many decisions that now, on the basis of the Lisbon text, must be adopted in accordance with the *ordinary legislative procedure* – substantially equivalent to the previous *co-decision*. This procedure, providing for the joint adoption of the act by the Council and the European Parliament, essentially gives to the latter a power of veto, but does not allow, in the absence of an agreement of the Council, to direct the action of the European Union according to its will, as the concept of representative democracy would require.

Furthermore, the reference to the fact that each Member of the European Council or of the Council is accountable to their respective national Parliament, does not confer democratic legitimacy to those institutions at EU level. These continue to be excluded from the political control of the European Parliament; they are the expression of the executives of their respective States and their members are politically accountable to their national parliaments in relation to

considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons".

the pursuit of national interests, not of general interests of the European Union. Therefore, none of these institutions can be considered as a second chamber, democratically elected, of a bicameral parliamentary system; therefore, even though the legislative function is exercised in the European Union jointly by the European Parliament and the Council (art. 14, n. 1 and art. 16, n. 1, TEU) one cannot talk of a bicameral Parliament in a democratic system.

2.3.1. The strengthening of the European Parliament's powers

hroughout the years, there has been an increase of the European Parliament's powers. This occurred thanks to revisions of the treaties so, through the will of the States to change the system in order to extend the tasks of the European Parliament with respect to the original scheme that saw it, basically, as an advisory body.

So in the ,70's, to engrave on the enlargement of the Union's democratic basis, were strengthened the Parliament's prerogatives. This was possible only by changing the original system of parliamentarians' choice. Initially, there was the *dual mandate mechanism* so that the choice of a portion of MEPs was entrusted to the individual Parliaments of the Member States; the number of parliamentarians assigned to individual States were determined by the Treaty on the basis of population. This system was a symptom of weakness both for the lack of authoritativeness of the people who became members of the European Parliament, and for the mechanism of choice that was not of direct democracy (that would be the popular election, namely universal suffrage).

In 1979, that system was changed introducing universal suffrage. Today, the members of the European Parliament are chosen by the citizens of the Member countries. This was a turning point in respect of the powers of the European Parliament and, more generally, in respect of the progress of democracy of the system as a whole: a Parliament elected by universal suffrage has a representative force greater than a Parliament appointed by the national parliaments. Thanks to the direct universal suffrage, the elected parliamentarians are not representative of the States, but they are representative of the European people, which means that when they take possession of the seat of the European Parliament should not follow the purely national interests. It is certain that there are political groups in the European Parliament, but these groups do not move according to their nationality. The group that nowadays is more numerous is that of the parliamentarians of the European People's Party (EPP), of the centre-right. The second group is the Democratic Socialist Party, of a socialist orientation. Of course, the composition of these groups is independent from nationality. The strengthening of the powers of the European Parliament certainly happened also from the point

of view of legislative procedures, because in the ordinary legislative procedure the European Parliament holds, substantially, the same powers of the Council, as a deliberative body. In particular, following the entry into force of the Lisbon Treaty, the *co-decision procedure* has become the *ordinary legislative procedure* (article 294 TFEU). This procedure gives the European Parliament the faculty of adopting the acts, in agreement with the Council of Ministers, becoming a co-legislator (except in the cases provided in the treaties where are applied the procedures for consultation and approval). The Lisbon Treaty also extends the number of sectors covered by the co-decision procedure, thus contributing to the strengthening of the powers of the European Parliament.Other prerogatives of great importance which have increased the powers of the European Parliament concern its participation in the conclusion of international agreements, as well as its participation in the system of judicial review of the functioning of the other institutions, so to review the legality of the acts.

As regards international relations[17], the European Parliament participates, in a more effective way than the previous system, to the procedures for concluding international agreements. The EU, like any international organization, has international subjectivity[18]. In this case the international subjectivity exists, not only because in article 47 TEU is affirmed that the *Union shall have legal personality*; the assignation or not of international personality to the Union (and this is applied to any organization) is an issue that must be examined solely in the light of the principle of effectiveness: so, when certain international organizations in fact exercise the prerogatives proper to subjects of international law, such organizations are subjects of international law. In particular, thanks to the treaties, the European Union has the power to conclude international agreements with third countries or other international organizations. This power to conclude international agreements is developed and implemented through the procedures codified in the Treaty and which entail the presence of the European Parliament among the actors involved in the process of conclusion of treaties. Initially, the European Parliament could only express an opinion: for some international treaties the European Parliament should be consulted in order to express its position on a text that, however, had already been negotiated by the Commission. This

[17] FINCK, F. L'évolution de l'équilibre institutionnel de l'UE sous le prisme des relations extérieures depuis l'entrée en vigueur du Traité de Lisbonne. *RTD eur*., 2012.

[18] International subjectivity is a prerogative of the subjects of international law which, in the case of international organizations, comes from their active presence in international relations. Therefore, international subjectivity is not simply the consequence of the choice attributed by the States to create the international organization, qualifying it as with subjectivity; it is essential that this is reflected in actual conducts, including the ability of these organizations to conclude international agreements

prerogative had a little practical effect because any proposal which Parliament had been able to express at that time, hardly was then reflected in the text of the agreement. Parliament, however, even in this context, has seen an increase in its powers and this occurred thanks to the initiative of Parliament itself: in the Regulation of procedure of the European Parliament are codified some procedures which provide for the consultation of the same at the stage of negotiating international agreements, i.e. the phase in which the Commission decides the contents of them together with partners of the other Member State or other international organization.Subsequently, Parliament has succeeded in obtaining, with revisions of the treaties, powers even more important from the point of view of the incidence on the text of the treaties, both from the standpoint of negotiation (i.e. writing texts), and of the phase of conclusion of the Treaty: once a text of the treaty is completed, it is subjected to the *assent procedure* which today is called, after the entry into force of the Lisbon Treaty, *consent procedure*[19]. Then, for some types of agreements, in particular for the association agreements with third countries or for the accession agreements of a new EU Member State[20], the European Parliament has a power of veto, so that the Treaty shall enter into force after approval by the European Parliament: the contrary opinion of the European Parliament on a text of an international agreement blocks its entry into force.

Also in the field of litigation, the European Parliament has seen its powers increase; the treaties provide for judicial procedures, in order to examine and decide on the lawfulness of EU acts or deciding on inaction of the institutions.

[19] The consent procedure (formerly assent procedure) is one of the special legislative procedures of the European Union, as established in the Lisbon Treaty. It was introduced by the Single European Act. Under this procedure, the Council of the European Union must obtain Parliament's assent before certain decisions can be made. Acceptance ("assent") requires an absolute majority of votes. The European Parliament can accept or reject the proposal but not amend it. However, the Parliament can produce an interim report making recommendations for modifications, and a conciliation has also been introduced.

[20] The Treaty on European Union has extended the scope of application of this procedure, including:
- Changes to the right of residence and transfer of citizens (free movement of persons);
- Creation of the Cohesion Fund and Structural Fund reform;
- Elaboration of uniform voting procedures for the election of the European Parliament;
- Admission of new States;
- Amendments to the Statute of the ESCB;
- Association agreements providing for specific obligations and rights, cooperation measures or spending requirements and changes to acts approved by the co-decision procedure.

Following the adoption of the Treaty of Amsterdam, sanctions imposed on an EU Member State for a serious and persistent breach of fundamental rights requires Parliament's assent under Article 7 of the EU Treaty.

In the EU's judicial system, the power to decide on the legality of the legislative function and on the legality of administrative action are both attributed to the European Court of Justice. National Courts cannot examine the legality of EU acts and if they have doubts about their validity, are obliged to request the Court of Justice to give a ruling. The European Parliament, since the beginning, was excluded among the persons entitled to have recourse before the Court of Justice in order to present the possible unlawfulness of acts; so, the EU Parliament was not included among those subjects who hold the so-called *locus standi*, i.e. that they have the power to contest the acts; the *locus standi*, to the actions for annulment was only provided for the Council and the Commission in the area of institutions, and then, under certain conditions, for the Member States and individuals. At a time when the European Parliament has increased its powers, especially in the context of participation in the legislative procedure, it has also raised the interest of the same to respect this legislative procedure. So, it happened that the European Parliament, without a legal basis provided by the Treaties, began to contest before the Court of Justice acts of the Council, considering them as adopted on the basis of an incorrect provision of the Treaties (a provision of the treaties which did not see the active participation of Parliament in the legislative procedure). The Court of Justice, at first, replied negatively basing its own ruling on the letter of the treaties, arguing that *in the absence of explicit indications in the text of the treaties on Parliament's power to contest the acts, this cannot be permitted, under penalty of violating the Treaty*. This reply, from a formal point of view, was probably incontestable; from the substantive point of view, it created institutional imbalances because the European Parliament, although did not have the *locus standi*, could be sued by the other institutions because the Treaty did not contain exhaustive provisions on the subjects that could be sued in legal proceedings. Therefore, the Council and the Commission could challenge acts of Parliament, while the latter could not appeal against the acts of the Council and the Commission. Thus, the European Parliament, in a second attempt before the Court of Justice, invoked a general principle of law, immanent in the system: *the principle of inter-institutional balance*[21], able to interpret or better to rewrite the text of a provision of the Treaty.

[21] *The principle of institutional balance* in the EU implies that each of its institutions has to act in accordance with the powers conferred on it by the Treaties, in accordance with the division of powers. The principle derives from a 1958 judgment by the Court of Justice (*the Meroni judgment*) and prohibits any encroachment by one institution on the powers of another. It is the responsibility of the Court of Justice of the European Union to ensure that this principle is respected. Put at its simplest, this refers to the relationship between the three main EU institutions: the European Parliament, the Council of the European Union and the European Commission. The dynamics between these bodies have evolved considerably over the years with the adoption of new treaties. The competences of the European Parliament, in particular, have expanded,

By judgment of 22 May 1990, the Court of Justice stated that although the Treaties contain no provision giving the Parliament the right to bring an action for annulment, it would be incompatible with the fundamental interest in the maintenance and observance of the institutional balance which they establish for it to be possible to breach the Parliament's prerogatives without that institution being able, like the other institutions, to have recourse to one of the legal remedies provided for by the Treaties which may be exercised in a certain and effective manner. Consequently, an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging breach of them. Provided that condition is met, the Parliament's action for annulment is subject to the rules laid down in the Treaties for actions for annulment brought by the other institutions.

Initially, the Court of Justice stated that Parliament could bring an action for annulment only if it was invoked the violation of its prerogatives and not any violation of the treaties.

In accordance with the Treaties, the Parliament's prerogatives include participation in the drafting of legislative measures, in particular participation in the cooperation procedure laid down in the EEC Treaty.

Later, this condition has been cleared with the Treaty of Nice: today, the European Parliament can challenge any act of the others institutions without having to justify its interest in acting.

3. The empowering of National Parliaments

The provisions on democratic principles, grouped in title II of the TEU, are complemented with a series standards, almost all introduced by the Lisbon Treaty, for the involvement of national parliaments in the good functioning of the European Union. These rules are summarized in arts. 10 and 12 TEU and supplemented by other provisions of the TFEU and of the Protocol n. 1 annexed to the Lisbon text, on the role of national parliaments in the European Union.

First, Article 10 TEU, in addition to presenting the system of *representative democracy*, adds that even those who are not part of the Union are involved in the democratic and institutional life of the same. These subjects are added by the Treaty, in order to strengthen the democratic principle. So, it is possible to speak about the participation of national parliaments, which are involved not

giving it the right of co-decision with the Council (under the ordinary legislative procedure) in the majority of EU policy areas, as well as wider budgetary powers.

only in the process of revision of the treaties, but also in the writing of the new EU legislative sources which, according to the classical model, belongs to the competence of Parliament and the Council (referring both to the Council of Ministers and to the European Council).

Also crucial is the art. 12 (let. a) TEU, which states that National Parliaments contribute actively to the good functioning of the Union, (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union; according to the said Protocol no. 1, 'draft European legislative acts' shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a European legislative act. These information requirements are intended to allow the national parliaments to exercise supervisory powers (and, in some cases, veto) prescribed by other provisions of the treaties.

To understand the discipline of national parliaments it is necessary to face the speech concerning the basic principles regarding the manner of exercise of the European Union's competences. It is possible to distinguish between *exclusive* and *shared competences*: the exclusive are those for which the treaties provide for a complete devolution to the European Union; the shared are those that still involve a joint attribution of competence attribution both to the Union and to the Member States. The exclusive competence is the most advanced base in the process of European integration because it represents a phase where States gives up the exercise of their powers; for the first time, the Treaty of Lisbon introduces that the number and manners of the competences conferred on the European Union may also change over time: it is not a final devolution , because States can safely change the treaties reducing the powers of the European Union rather than increase them. Instead, when the competence is shared it is necessary to understand who intervenes among individual Member States and European Union. Here, it is possible to talk about the *principle of subsidiarity* codified in art. 5 of the Treaty on European Union. This article affirms, in the third paragraph, that *in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

To identify the institutions that apply the principle of subsidiarity, there is a Protocol which is expressly stated in paragraph 3 of article 5 TEU: it is the

Protocol on the application of the principle of subsidiarity and proportionality[22]. In this regard, it is especially emphasized the art. 12 (let. b), TEU, according to which *National Parliaments contribute actively to the good functioning of the Union by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality*; they may send to the Presidents of the European Parliament, the Council and the Commission reasoned opinions if they consider that this principle is not respected. The effects of such reasoned opinions are those provided in the *Protocol n. 2 on the application of the principles of subsidiarity and proportionality*. This *Protocol n. 2*, modifying previous inter-institutional agreements and other Protocols, establishes the procedures for the implementation of the principles of subsidiarity and proportionality, contemplating a very incisive intervention of national parliaments. First of all, are repeated the above information requirements of National Parliaments, already provided in Protocol n. 1, respect to any proposal for a legislative act of the European Union. Such proposal, pursuant to art. 5 of Protocol n. 2, *shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a European framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved*. Furthermore, according to article 6 of this Protocol, *any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers*.

[22] The Protocols annexed to the treaties, as a general rule, have the same value as the treaties. They stand in the hierarchy of the sources of the European Union at the same level as the founding treaties, as primary sources (it is a text that completes what is written into the treaties assuming the same rank from the point of view of the hierarchy of sources).

Considering the only case in which the act requires the ordinary legislative procedure, if a majority of national Parliaments have forwarded such reasoned opinions, the proposal must be reviewed by the Commission. The review may lead to the maintenance, modification or withdrawal of the proposal. In case of maintenance, the Commission must explain in a reasoned opinion why it believes that the proposal complies with the principle of subsidiarity and has to refer the matter to the Council and to the European Parliament. At this point, in order to ensure that the proposal is abandoned, it is necessary that the Council or the European Parliament adopt a decision of non-compliance with the principle of subsidiarity; it is necessary the majority of 55% of its members or of the votes cast. In conclusion, with respect to the maintenance of a proposal, even with opposition from the majority of national parliaments, the last word is up to the Council or the European Parliament, each of whom, if the majorities required are not achieved, can determine that maintaining. However, if a national Parliament believes that an act of the European Union is contrary to the principle of subsidiarity can always induce its Government to present a recourse to the Court of Justice, pursuant to art. 8[23] of Protocol n. 2. The latter rule provides that a national State can present a legitimate appeal to the Court of Justice, pursuant to art. 263[24] TFEU, for violation of the principle of subsidiarity, also on behalf of its national Parliament, thus giving the latter the possibility the indirect opportunity to defend his objections to a proposal. Obviously, the European Union law cannot discuss the merits of the discipline established in each Member State about the relationship between Parliament and Government, and thus cannot impose to a State to bring an action to the Court as required by the national parliament. The art. 8 of Protocol n. 2, in fact, states that the transmission of an action by a State on behalf of its Parliament takes place *"in accordance with their legal order on behalf of their national Parliament or a chamber of it"*.

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[23] Article 8 Protocol n. 2: *The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.*
In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.

[24] Article 263 TFEU: *The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties*.

Protocol n. 1 does not provide other cases, except from that of non-compliance with the principle of subsidiarity, whereby the national Parliaments can react, by sending a reasoned opinion, to a draft legislative act of the European Union.

The art. 12, (letter c), TEU provides that national parliaments take part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty.

The article 12, (letter d) TEU, affirms the national parliaments take part *in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;* this article provides for a simplified revision procedure, which concerns the possibility of excluding the unanimity requirement in favour of the adoption of the procedure of qualified majority for certain Council decisions; article 48 TUE concerns also the change, in some cases, of the Council procedure decision from the special legislative procedure to the ordinary legislative procedure. In both these cases, the European Council is required to transmit the proposed amendment to the national Parliaments and cannot adopt it if one of them notifies its opposition within six months. The silence of national Parliaments within six months allows the European Council the adoption of the amendment, which will come into force without need for further ratification or approval by Member States.

So, it is introduced, a procedure for concluding international agreements not provided for by the Constitution: this procedure could raise delicate problems of constitutionality, as has already happened in other countries with reference to the similar rule contained in the previous *Treaty for establishing a Constitution for Europe*, not entered into force.

The article 12, (letter e) TEU also mentions the right of national Parliaments to be "informed" *of applications for accession to the Union, in accordance with Article 49 TEU*.

Finally, article 12, (letter f) TEU stipulates that national Parliaments take part, together with the European Parliament, in an "inter-parliamentary cooperation" programme defined in , articles. 9 and 10 of the said Protocol n. 1, which also provide that a Conference of parliamentary committees for Union may discuss matters covered by the common foreign and security policy, without that discussions are connected to particular legal consequences.

Although the examined rules give to national Parliaments only some rights of information and control, to which are linked general powers essentially inherent in observance of the principle of subsidiarity, they present, in appearance,

positive aspects in terms of democratisation of the functioning of the European Union and of their proximity to the citizens represented in national Parliaments.

However, these rules are suitable for a less positive reading. In fact, it is the strengthening of the role of the European Parliament (acting in the general interest of the citizens of the European Union), and not of the national Parliaments (acting in the interests of the citizens of the respective Member States), the mode of democratisation of the European Union that is more coherent with the overall characteristics of the system.

The involvement of national Parliaments provided in the treaties can be seen as an implicit delegitimization of the European Parliament, to the detriment of the general interest of Europe's citizens that it represents, as well as an attempt by Member States to further put under the protection Community method, enhancing the resources at its disposal to influence the development. It should finally be noted that, although from the involvement of national Parliaments could be derived some conditioning on the activity of the respective representatives of the Member States in the Council, such conditioning will only be in the sense of safeguarding the interests of nationals represented in those parliaments. This involvement will not be worth to give democratic legitimacy to the Council, at EU level, to assimilate it to the second Chamber of a bicameral system, since that this legitimacy can only arise from the direct election of members of the Council.

4. The new "European Citizens' Initiative"

"Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen".

Article 10 (3) TEU

In addition to the representative democracy, already discussed above, in the European Union there is another principle, namely the *principle of participatory democracy*[25]: in representative democracy, the citizen delegates a member to represent him at the institutional level; in participatory democracy, instead, citizens are involved in the direct participation of democratic life, through the mechanism of the *citizens' initiative*. The new European Treaty approved in Lisbon and came into force on 1st December 2009 introduced, for the first time in the history of the EU[26], this instrument of direct participation of citizens in

[25] MARCHETTI, Maria Cristina. Democrazia e partecipazione nell'Unione Europea. Roma: FrancoAngeli, 2013.

[26] WARLEIGH, Alex (eds). *On the Path to Legitimacy? a Critical Deliberativist Perspective on the Right to the Citizens' Initiative, in Governance and Civil Society in the European Union: Normative Perspectives*. Manchester: Manchester University Press, 2007, p. 64.

Community policy. This is the first Regulation ever in the history of democracy which allows citizens of different States and nationalities to promote together transnational legislative initiative.

The article 11 (4) of the Lisbon Treaty affirms that "not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union".

According to this provision not less than one million Union citizens may ask the Commission to submit any appropriate proposal on matters where they consider necessary to intervene. This is essentially a procedure that has the task of involving European citizens in the formation of legislation. This provision finds a completion, as often happens in the discipline of the treaties, in the Treaty on the functioning of the European Union where are provided further rules with respect to the application of this principle; in particular, there is art. 24 TFEU, which is only a reference that gives Parliament and the Council the power to adopt the Regulation to discipline in detail the performance of this procedure.

The task that the Treaty on the functioning attributes to the Parliament and Council is to adopt a regulation, *Regulation n. 211 of 2011*, which shall identify the various procedures necessary for carrying out the initiatives. The purpose is to avoid that the legislative proposals affect only some citizens of member countries or even one country. So, to reach the minimum of one million citizens is necessary to involve more than one State, providing a minimum of involvement and sharing within each state (at least seven states)[27].

According to this Regulation, with regard to the discipline of this procedure, first there is the creation of a Committee which should have representatives from various countries who intend to open a procedure for sharing a proposal within all Member States. After creating the Committee, the latter aims to propose the legislative initiative in an argument that members choose and then to publicize the existence of this procedure, through mechanisms of information that the law provides for and collect in the various Member countries.

Actually the problem is that of the knowledge of this procedure which could be solved with online diffusion. This not happens and, in fact, many citizens are not aware of these initiatives. For example, there was an initiative that concerned the request to the European Commission to regulate, through the rapprochement

[27] AUER, Andreas. European Citizens' Initiative. *European Constitutional Law Review*, 2005, no. 1.

directives of the laws, the rules relating to the ownership and control of the media. So, the goal was to create a single system or, at least, to bring together national laws and thus giving the possibility for citizens to have diversified sources of information of mass media. This initiative did not reach the minimum number of signatures to the Treaty stipulates, that of a million. The problem is that this mechanism is very weak and becomes even weaker on the basis of the fact that, after the creation of the Committee, after raising a number of signatures that exceeds the limit provided for in the Treaty, and after submitting the proposal, the Commission operates an admissibility exam especially with regards to the framing of the proposal within the powers of the Union (it is checked if the proposal is totally alien to the scope of the European Union).

Actually, the Treaty does not say which is the results collected from the signatures; the Regulation, however, simply affirms that if the Commission at an initial stage of procedure considers inadmissible the request of collecting signatures because, for example, is alien to the powers of the Union, in this phase it is possible to contest the decision of the European Union before the competent Court, which is the judge of the European Union, asking to cancel the position taken by the Commission in response to the request of formalization of the proposal.

Therefore, the lack of success of this procedure, which falls as a typical characteristic of the representativeness of the Union, depends from some complexities of the procedure, in large part by the lack of information and by the negative outcome due to the fact the Commission is not obliged to act upon this long procedure.

5. A challenge still open

Despite the novelties introduced with the Treaty of Lisbon, many experts have critiqued the democratic deficit in the European Union. Among these experts, *Karl Albrecht Schachtschneider*, Professor of Public Law at the University of Erlangen, affirmed that *"the European integration suffers from an irrecoverable democratic deficit. There is no "European identity" able to legitimate the employment of the sovereignty of the Union. This type of identity can only be created with a European constitution, upon which all citizens agree through a referendum"*. It is clear, therefore, that the Treaty of Lisbon did not represent an arrival point, but the beginning of a long, yet inexorable, process of legitimacy, that all European institutions will have to face. This process, however, cannot take place if not supported by European citizens, who are still in need of a strong identity and still have a feeble sense of belonging, which has actually worsened gradually due to the economic crisis and the introduction of austerity measures.

The structural reasons of the limits of such reforms are substantially two: the first concerns the fact that member States do not currently share a common vision about the potential evolution of the European Union. On one hand, are those States that wish to reinforce the prerogatives of national powers. On the other, are those that would prefer to reinforce and democratize the European institutions. The consequence of this structural situation is that only exceeding the unanimity provided for in the treaties, the current *impasse* could be escaped. The second reason is that only accomplishing the federal leap, and, thus, assuming the characteristic of a proper State (founded on the consensus and the direct legitimacy of citizens), with its prerogative of sovereignty, the Union could eliminate the democratic deficit, inherent in its nature of confederal organization. Nonetheless, the solution to the problem of the democratic deficit has been postponed from time to time at each revision of treaties. This should not surprise, and seems, to a certain extent, expectable in the current context of the European integration. As a matter of fact, the only way to actually remove the democratic deficit remains that of respecting the principle of the division of powers[28] in the context of the European Union – attributing the legislative power to a democratically elected body, which would also be in charge of the political control of the executive.

This could be entirely realized only in two ways: either conferring to the European Parliament (already elected through a direct universal suffrage) the power to have the last say in the emanation of legislative acts, also in presence of disagreements with the Council, or allowing citizens to directly elect the Council. If this was the case, the Council would turn into a representative body of the States in a sort of High Chamber, or Senate, of a bicameral federal structure, in which national and/or regional bodies are represented. These solutions, however, would inevitably lead to a change towards a federal direction, and to a consequent loss of sovereignty of the member States. Since such change has, so far, been deemed to be politically unacceptable, the problem of the democratic deficit can only be attenuated, but not completely solved.

[28] VON HIPPEL, Gottlieb. *La séparation des pouvoirs dans les Communautés Européennes*. Nancy-Saint-Nicolas-De-Port, 1965.

INFORMATIONS, COMMENTARIES AND NOTES

Legal Aspects of Cross-Border Cooperation between Ukraine and European Union

Nataliia Mushak*

Summary: The article investigates the cross-border cooperation between Ukraine and the EU. The research analyzes common legal instruments of cross-border cooperation between Ukraine and the EU and provides their legal authority. The article defines the important areas of cooperation, including conflict prevention, the protection of borders, combating terrorism, the fight against organized crime, security sector reform etc.

Keywords: Frontex, cross-border cooperation, operational cooperation, third countries, common legal instruments.

1. Introduction

At the end of 2015 and at the beginning of 2016 the security system of the Schengen area faced with a number of terrorist attacks and large-scale illegal migration flows that have become a serious threat to the external borders and security of every European country in particular. After numerous series of attacks on 13-14 November 2015 in Paris, about 140 people were killed, massive assaults to women in Germany, Switzerland and Finland at the beginning of 2016 and after a number of terrorist attacks on March 22, 2016 in Brussels, where 32 people were killed and 260 people were injured, member states of the Schengen area had to review the mechanisms for strengthening of the security and stability in Europe.

The particular attention was paid to the activities of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States (FRONTEX Agency) – (hereinafter – Frontex). Taking into consideration the development and strengthening of Frontex cooperation with third countries, including Ukraine, this research has become particularly relevant and significant. Therefore, it requires the deep and detailed analysis.

The main purpose of the research is to study the Ukrainian cooperation with Frontex, to analyze the legal principles of such collaboration and to determine the main directions of cooperation and coordination between both parties.

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Nowadays mostly the western scholars cover the main issues of Frontex's activities and powers. In particular, S. Carrera analyzes the activities of agency in the context of the integrated strategy for management of the European Union external borders; G. Jorry in his researches analyzes the functioning of Frontex as an efficient mechanism of the EU common policy on its external borders. The legal aspects of the agency are investigated by E. Papastradivis, M. Polak, P. Slominsky and A. Baldachini. Special attention in regard of the structure of Frontex is focused in the works of S. Leonard.

It should be noted that the Ukrainian science of the European law only in works of V. Muraviov, Z. Makaruha, L. Grytsaenko, O. Streltsova and O. Svyatun covers the legal principles and the functioning of Frontex, agency's collaboration with another institutions of the European Union and other establishments. However, the Frontex cooperation with third countries, including Ukraine, is outside of the national scientific researches.

2. Key provisions of the research

Within the European Union to strengthen the protection of the external borders of the EU member states, identify primarily on early stage and prevent new threats from terrorist attacks and illegal immigration, the agency of Frontex is operating as a mechanism of cooperation with the EU neighboring countries, introduced in 2006.

The main directions of such cooperation are to prevent conflicts, to protect borders, to counter the terrorism, to fight against organized crime, to reform the security sector etc. These trends have been confirmed in the published legal document "Review of the European Neighborhood Policy" adopted by the EU Commission and the EU High Representative for Foreign Affairs and Security Policy on November 18, 2015.[1]

This document is aimed to ensure the security of neighboring states to prevent and in the future to avoid new challenges and threats facing the EU Member States. Moreover, the border security has been defined one of key priorities of the European Union and its institutions cooperation with third countries.

According to the document the particular attention is paid to the role of Frontex in the promotion, coordination and controlling of the European borders in

[1] Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee and the Committee and the Committee of the Regions. Review of the European Neighbourhood Policy {SWD (2015), Brussels, 18.11.2015. – [Electronic resource]. – Mode of Access: http://eeas.europa.eu/enp/documents/2015/151118_joint-communication_review-of-the-enp_en.pdf.

conformity with the Charter of Fundamental Rights of the EU and the concept of Integrated Border Management Agency and further cooperation with third countries.

The legal basis for the Frontex activity is the EU Council Regulation 2007/2004 of 26. 10. 2004[2] and Council Regulation EC №1168/2011 of 25. 10. 2011. The headquarters of the agency is located in Warsaw (Poland).[3] The main governing body of Frontex is the Council Board. It is composed of one representative of Border Service of the EU member state that is ex officio the head of the Border Guard, and two representatives of the European Commission. The Agency's budget consists of the EU general budget and the EU member states' contributions. Thus, the budget of the Agency at the beginning of 2005 accounted 6.3 mln euro, in 2013 – 94 mil Euro, and in 2016, in regard of the migration crisis, the budget was increased to 220 mln Euro.

Nowadays the basic agreement regulating the cooperation between Ukraine and Frontex concerning the border management is the Association Agreement between Ukraine, on one hand, and the European Union and its Member States, on the other hand (hereinafter – AA)[4], signed by Ukraine on 27 June 2014 in Brussels and ratified by the Verkhovna Rada of Ukraine and the European Parliament on 16 September 2014.

According to the AA the interaction and mutual cooperation concerning the border management is regulated by Chapter III "Justice, freedom, security" (article 16). This chapter provides the cooperation in border management area and involves training, exchange of best practices, including technological aspects, the exchange of information in compliance with the rules, the exchange of liaison officers and so on. To implement these directions the parties will make joint efforts for effective implementation of the principle of integrated border management; enhance the security of documents; development of an effective return policy and operational activities in the field of border management.

Apart from the Association Agreement the cooperation between Ukraine and Frontex is also regulated by the Working Arrangement on the establishing of

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[2] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the management of operational cooperation at the external borders of the member states of the European Union. -[Electronic resource]. – Mode of Access: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al33216

[3] Council Regulation (EC) No 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the management of operational cooperation at the external borders of the member states of the European Union.–[Electronic resource].–Mode of Access: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AL%3A2011%3A304%3ATOC

[4] Association Agreement between the European Union and its Member States, of the one Part, and Ukraine, of the other Part. – [Electronic resource]. – Mode of Access: http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2013/0290/COM_COM(2013)0290(PAR2)_EN.pdf

operational cooperation between State Security Service of Ukraine (hereinafter – SSSU) and Frontex, signed on 11 June 2007 in Luxembourg at the meeting of Ministers of Justice and Home Affairs of both parties.[5]

Although the document is not considered as an international agreement, it sets out the fundamental basis for cooperation between the parties in the field of border security policy.

According to the Working Agreement the main objectives of cooperation between the parties are: the prevention of uncontrolled migration and other illegal activity at the borders by border control; strengthening of border security between the EU and Ukraine; the development of good relations and mutual confidence between the border agencies at the border between the EU member states and Ukraine.

The operational cooperation in regard of border issues in accordance with clause 4 of the document is supported by Frontex Executive Director and the Chairman of the State Border Service of Ukraine. If it necessary the expert working groups will be established to consider specific issues or develop appropriate joint recommendations.

The main areas of cooperation between the parties are the exchange of information, joint analysis of the risks, the participation in joint operations and trainings.

After Working Agreement a pilot project "Five Borders – 2007" was introduced where beginning from August to December 2007 four cross-border operations at the Slovak, Hungarian, Polish and Romanian territories of the common border were conducted and operated. And since 2008 the regular joint operations at Ukraine-EU border have been conducted, that subsequently have acquired the strategic character.

It should be noted that the strengthening of cooperation on border management, improving the coordination between State Border Guard Service and Frontex on the evaluation, analysis and risk management at the common border also are stipulated by the Action Plan between Ukraine and the EU in Justice, Freedom and Security area.[6]

In addition, the procedure of exchange of information by introducing a system of joint contact offices has been simplified.

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[5] Working Agreement on the establishment of Operational Cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the Administration of the State Border Guard Service of Ukraine, 11.06.2007. – [Electronic resource]. – Mode of Access: http://frontex.europa.eu/assets/Partners/Third_countries/WA_with_Ukraine.pdf

[6] Action Plan Ukraine – EU Justice, Freedom and Security on June 18, 2007 – [Electronic resource]. – Mode of Access: http://zakon4.rada.gov.ua/laws/show/994_956

More progressive legal provisions governing the practical issues of border management between Ukraine and Frontex were established by the Association Agenda of March 16, 2015 – (hereinafter – Association Agenda) adopted by the Association Council between Ukraine and the European Union.[7]

According to clause 3.3 of the document the collaboration between parties is implemented through strengthening of border management and maintenance of a high level of border controlling and surveillance, expansion and modernization of fixed and mobile video surveillance tools; improving the efficiency of border protection through the introduction of joint border control and surveillance; ensuring the rapid exchange of information on contact points etc.

In addition, the Association Agenda provides the expansion of cooperation under the existing working agreements between State Border Service of Ukraine and Frontex, including the analysis and risk management.

For example, unlike the previous Association Agenda of 2009, that mainly regulated the issues of intensification and strengthening of cooperation between the parties, including analysis and risk management[8], Association Agenda of 2015 is covering more areas of such cooperation.

It is caused by the conclusion of the Association Agreement on 27 June 2014 and the Association Agenda that are the tools for facilitating of the AA provisions' implementation.

In particular, the final provisions of the chapter on border management stipulate that the parties have, since 2016, to develop and implement the next generation of integrated border management strategy, providing and ensuring the proper use of infrastructure, technical equipment, IT systems, financial and human resources.

In addition to the abovementioned documents every three years between State Border Guard Service of Ukraine and Frontex joint documents well known as plans of cooperation have been adopted. They were adopted for three year period in 2010–2012, 2013–2015 years. The latter was signed on February 26, 2016 in Warsaw. The term of its validity will expire in 2018.

In particular, the document defines the areas of cooperation to improve joint operational border security to prevent terrorist organizations activity, illegal migration and trafficking, joint operations, the practical implementation of key principles and tools for integrated border management, including border checks in joint border crossings, improving the exchange of information, joint risk analysis, expanding the network of contact points and others.

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[7] EU-Ukraine Association Agenda for facilitation of the implementation of the Association Agreement endorsed by the EU-Ukraine Association Council on 16 March 2015. -[Electronic resource]. – Mode of Access: http://eeas.europa.eu/ukraine/docs/st06978_15_en.pdf

[8] Association Agenda 2009. – [Electronic resource]. – Mode of Access: http://zakon2.rada.gov.ua/laws/show/994_990

Thus, according to the Plan of Cooperation State Border Service of Ukraine is participating in joint operations at land borders of Ukraine with the EU Member States; external maritime borders of the EU and checkpoints for air service. In addition, the State Border Service of Ukraine is participating in training projects to identify stolen vehicles; detecting counterfeiting documents; training dog handlers; providing English services for border guard officers.

Also the Common Core Curriculum and common web platform for border guards well-known as Virtual-Aula have gradually been introduced. Eventually, the parties agreed on the mechanism for information exchange in the field of risk analysis and the mechanism of exchange of data messages under urgent situations; a joint project of risk analysis "Eastern Borders" due to the border services of Ukraine, Belarus and Moldova has been introduced.

To enhance cooperation with Frontex the border guards of Ukraine have the opportunity to visit the headquarters of the European agency. In particular, in July 2014 within the EU funded project "Strengthening of Control and Potential of Bilateral Cooperation at the Common Border between Belarus and Ukraine (SURCAP)" the Ukrainian border guards visited Warsaw. In its turn, the experts of Frontex provided the practical advice and recommendations concerning the risk analysis and border control at the EU external borders, as well as in regard of the EUROSUR system.

26-27 February 2016 in Poland the Chairman of State Border Guard Service of Ukraine Vladimir Nazarenko had a meeting with the Executive Director of Frontex Fabrice Lejery. In particular, they discussed the strategic development and upcoming events for the future. They also discussed the adoption of a number of conceptual and policy documents, including the development strategy of State Border Service of Ukraine for the period until 2020, the concept of "Integrated Border Management" and State Program of construction and reconstruction of the of the Ukrainian borders.

During the visit, the Chairman of State Border Guard Service of Ukraine mentioned the performance within 2015 the Action Plan of Liberalization of the EU visa regime for Ukraine, the introduction of biometric control in 104 checkpoints through the first line of control; in 68 checkpoints through the second line; connection to Interpol databases of 39 checkpoints.

According to the requirements of the EU and Frontex the integrated risk and criminal analysis system has been implemented within the border agency. In order to implement the European standards of border management a number of pilot projects, particularly, at checkpoints of "Zhulyany" and "Gostomel" has also been implemented.

During the meeting it was also underlined that the enormous part of the illegal migrants is using Ukraine as a transit country. At the same time last year at

the Ukrainian borders only 0.1% (1,609 people) was detained of the total number of illegal immigrants who were found at the external borders of the EU. As a result of the meeting the parties signed a Plan of cooperation for 2016-2018 years.

In other words, such documents as Working Agreement concerning the establishment of operational cooperation between State Border Guard Service and Frontex, the Action Plan between Ukraine and the EU in Justice, Freedom and Security area, the Association Agenda of March 16 2015, Plans of Cooperation between State Border Guard Service of Ukraine and Frontex are the common legal instruments aimed at the development of operational cooperation between Ukraine and Frontex.

In order to implement the legal documents the Cabinet of Ministers of Ukraine adopted the Concept of Integrated Border Management on 28 October 2015 till 2020[9]. The legal act entered into force on 01 January 2016.

The document provides the improvement of the Ukrainian cooperation with Frontex, in particular, carrying out of the risk analysis, exchange of information, the participation in joint operations, performance of specialized trainings of Border Service personnel etc.

Therefore, Frontex is a platform for exchange of experience, obtaining of new knowledge, professional skills, and enhancing of border security at common borders of the Member States with third countries, and, in particular, with Ukraine.

3. Conclusions

For an adequate and immediate prevention to new threats caused by illegal immigration, smuggling, drug trafficking Ukraine cooperates with Frontex through a joint center for collecting, analysis of information, participation in joint operations, training of staff and coordination of actions at the external borders of the Member States of the European Union. Such joint actions are the important steps in order to improve border security of Ukraine for prevention of danger to the EU external borders.

Moreover, the Ukrainian participation in the projects of Frontex allows demonstrating the ability of our country to protect the common border with the EU, and to respond to contemporary challenges of border security. Furthermore, the strengthening of cooperation between Ukraine and Frontex will

[9] The Concept of Integrated Border Management adopted by the Cabinet of Ministers of Ukraine on 28 October 2015. – [Electronic resource]. – Mode of Access: http://zakon3.rada.gov.ua/laws/show/1149-2015-%D1%80.

provide greater opportunities in areas related to risk assessment, retraining of officers according to the European model of training, the Ukrainian border security integration into the European system of integrated border management, the development of modern technologies and systems of monitoring, automated passport control, etc.

The Analysis and Comparison of the Development of the Information Society in the Czech Republic and the EU

Jana Bellova*

Summary: The aim of the article is to provide an analysis and comparison of the development of the information society with the emphasis on e-Government in the Czech Republic which is compared with the data from the EU average and deduce the improvements of the position for the Czech Republic. In order to reach the aim, the information society indicators are used. These are provided by Joinup[1], which is a collaborative platform created by the European Commission in order to provide various services such as to help people who work for public administrations to share knowledge and experiences on e-Government.

Keywords: Czech Republic, average EU indicator, e-Government

1. Introduction

The development of e-Government consists of global analysis of the Information society indicators. The history of e-Government in each of the countries, Strategy and the process of its implementation, Legal framework, Main roles and the responsibilities of the e-Government actors, Main infrastructure components of the e-Government, e-Government services for citizens, e-Government services for businesses. For the purpose of this article the goal is to analyse and compare the development of the Information society indicators only and deduce the outcomes in comparison with the Czech Republic.

The Information society indicators, as used by Joinup, consist of two parts. The first part consists of the so called Generic indicators and the second part consists of the so called e-Government indicators.

The generic indicators are the following:

1. The percentage of households with Internet access
2. The percentage of enterprises with Internet access

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[1] For more detailed information on Joinup see https://joinup.ec.europa.eu/

3. The percentage of individuals using the internet at least once a week
4. The percentage of households with a broadband connection
5. The percentage of enterprises with a broadband connection
6. The percentage of individuals having purchased/ordered online in the last three months
7. The percentage of enterprises having received orders online within the previous year

The e-Government indicators are the following:

1. The percentage of individuals using the internet for interacting with the public authorities
2. The percentage of individuals using the internet for obtaining information from the public authorities
3. The percentage of individuals using the internet for downloading official forms from the public authorities
4. The percentage of individuals using the internet for sending completed forms to the public authorities

It needs to be said that the choice of these indicators, their interconnectivity or indeed their connection with the e-Government are not stated or anyhow explained in any of the annual reports that have been carried out by Joinup. It can only be assumed that the aim would be to reach as high a value of the indicators as possible and that would reach the goals defined by the e-Government society. It is not defined whether there is meant to be a connection between the generic indicators and the e-Government indicators. Again one can assume that the higher the level of Generic indicators the higher the level of the e-Government indicators for example the higher the level of the percentage of households with internet access the higher the percentage of individuals using the internet for interacting with public authorities and so on. In other words, one can assume that if people had better access to the internet they would use it for interaction with the e-Government authorities. Or is that so? Is there any connection between these indicators or what is the link between them? In other words, what does motivate individuals and businesses to actually use the benefit of e-Government if it is not the increase of their internet access and its usage?

At this stage it should be said that it was not managed to find any link between the Generic Indicators and the e-Government indicators. In other words, no matter how high the percentage of households with the Internet access and so on this does not lead to an increase in e-Government interaction. More on this will be discussed later on.

2. The Czech Republic in Comparison with the EU Average[2]

Based on the available data[3] the following can be deduced concerning the Information society indicators:

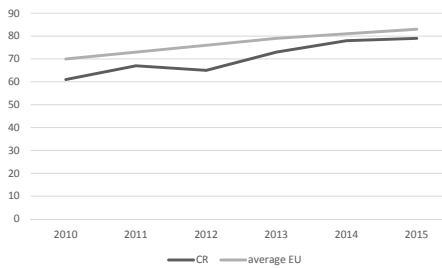
2.1. Generic Indicators

2.1.1. The percentage of households with Internet access

An assumption is drawn that the more households that have access to the internet the more likely they are to use it in order to support the process of the computerization of the public administration as well as to make the process of exchanging goods and services more efficient hence supporting both the efficiency of the public sector as well as the private one and fulfilling the aim of the e-Government. Then the goal seems to be to reach as high a percentage number as possible. The average EU in 2015 was 82% which we believe is pretty high (it was 70% in 2010) and though there has been a rise since 2010 with the original 61% while the average EU was 70%, the percentage as of 2015 was at 79% which is slightly less than the EU average of 82%.

The development of the indicator and its comparison with the EU average can be seen in the following graph:

Graph no. 1: Percentage of households with Internet access



Composed by the author with the data available from Eurostat

[2] The EU average is an average indicator of the following EU countries : Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia,Slovenia, Spain, Sweden, United Kingdom

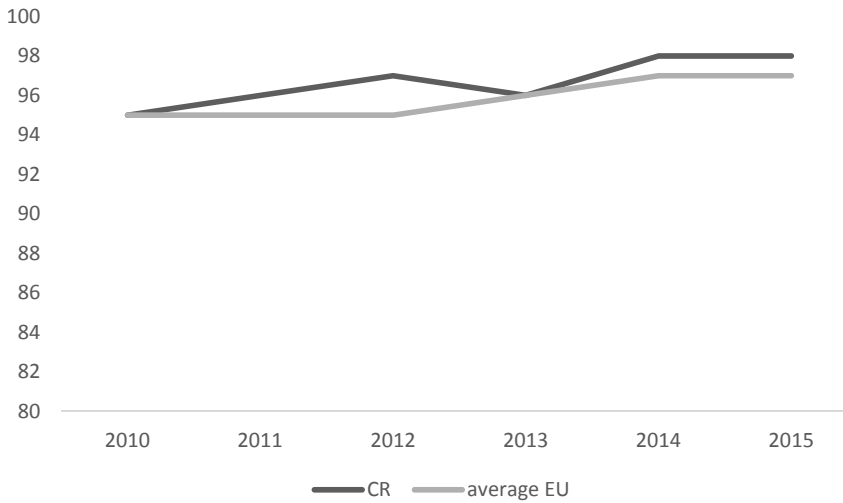
[3] For detailed information see BROŽKOVÁ, R. et al. *e-Government in the Czech Republic*. pp. 3–15.

2.1.2. The Percentage of Enterprises with Internet Access

An assumption is drawn that the more enterprises have access to the internet the more likely they are to use it in order to support the process of the computerization of the public administration as well as make the process of exchanging goods and services more efficient hence supporting both efficiency of the public sector as well as the private one thus supporting both the efficiency of the public sector as well as the private one and fulfilling the aim of the e-Government. In other words, the goal seems to be the same as in the case of the previous indicator which is to reach as high a percentage number as possible. The development in this indicator has led to a slight increase from the original 95% in 2010 to the current 98% which more or less copies the development of the EU average with the original 94% to the current 97% percentage rate as well. There does not seem to be much room for improvement though, in other words it seems to be as good as it is going to get.

The development of the indicators and its comparison can be seen in the following graph:

Graph no. 2: Percentage of enterprises with Internet access



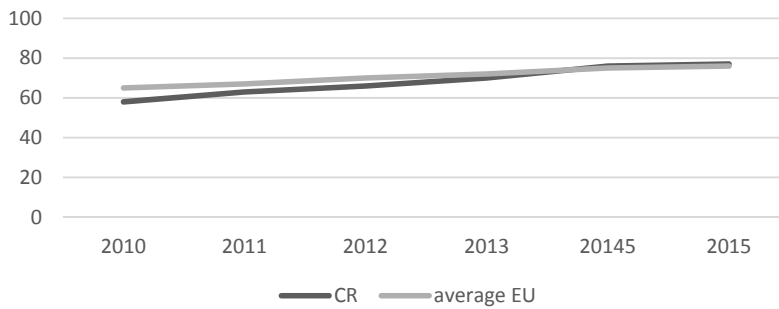
Composed by the author with the data available from Eurostat

2.1.3. The percentage of individuals using the internet at least once a week

An assumption is drawn that the more individuals that use the internet the more likely they are to support the process of the computerization of the public administration as well as make the process of exchanging goods and services more efficient hence supporting both the efficiency of the public sector as well as the private one hence supporting both the efficiency of the public sector as well as the private one and fulfilling the aim of the e-Government. In that case it seems to be the same as in the case of the previous indicators, which is to reach as high a percentage number as possible. The Czech Republic reached the EU average in 2015 with 77% and it has also shown a high rise in this indicator from the original 58% in 2010 with the EU average of 66% up to the above mentioned 77% for both in 2015.

The development of the indicators and its comparison can be seen in the following graph:

Graph no. 3: Percentage of individuals using the internet at least once a week



Composed by the author with the data available from Eurostat

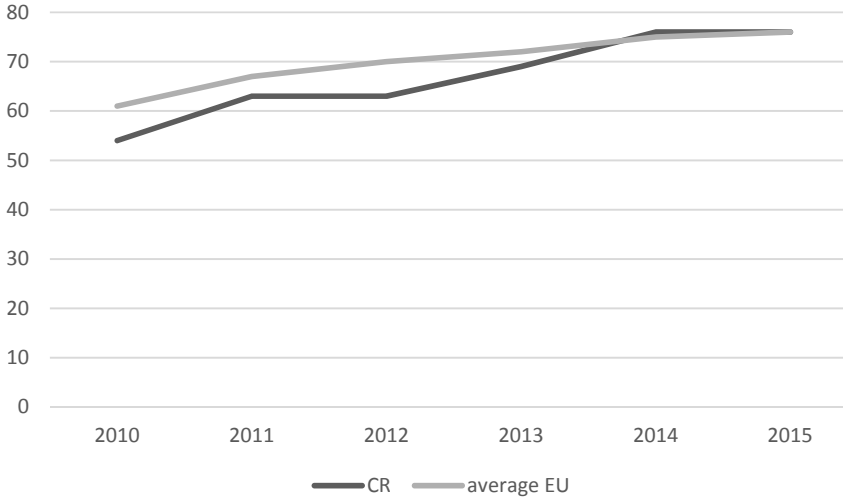
2.1.4. The Percentage of Households with a Broadband Connection

Like in the previous indicators it is assumed that the more individuals use the internet the more likely they are to support the process of the computerization of the public administration as well as make the process of exchanging goods and services more efficient and fulfilling the aim of the e-Government. Yet again the goal seems to be the same as in the case of the previous indicators, which is to reach as high a percentage number as possible though in this case we are looking at households rather than individuals. This indicator is still very slightly under

the EU average which was 79% with its current 76% in the Czech Republic but there have been indications of a rapid increase since 2010 from 54% while the EU average was 60% then.

The development of the indicators and its comparison can be seen in the following graph:

Graph no. 4: Percentage of households with a broadband connection



Composed by the author with the data available from Eurostat

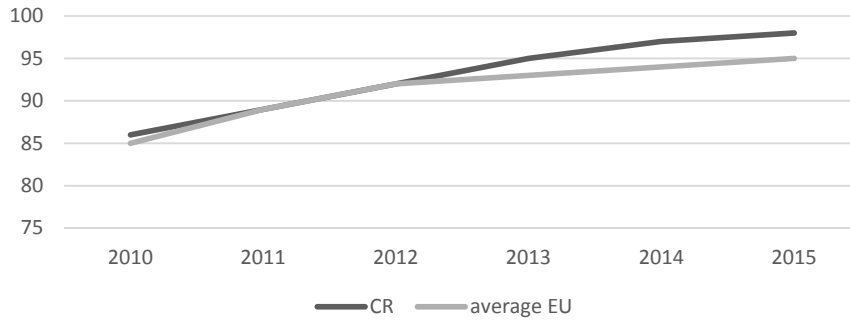
2.1.5. The percentage of enterprises with a broadband connection

Like in the previous indicators it is assumed that the more enterprises use the internet the more likely they are to support the process of computerization of public administration as well as make the process of exchanging goods and services more efficient hence supporting both the efficiency of the public sector as well as the private one and fulfilling the aim of the e-Government. In that case the aim should be the same as in the case of the previous indicators, which is to reach as high a percentage number as possible. Concerning this indicator, it has to be said that yet again the numbers are already very high. The Czech Republic is the country with a high percentage of enterprises with a broadband connection and has always been either over or equal to the EU average. The development of this indicator shows that though originally the rate of the EU and the Czech

Republic was the same in 2010 at 86% nowadays the rate in the Czech Republic which is 98% is slightly over the EU rate which is 93%.

The development of the indicators and its comparison can be seen in the following graph:

Graph no. 5: Percentage of enterprises with a broadband connection



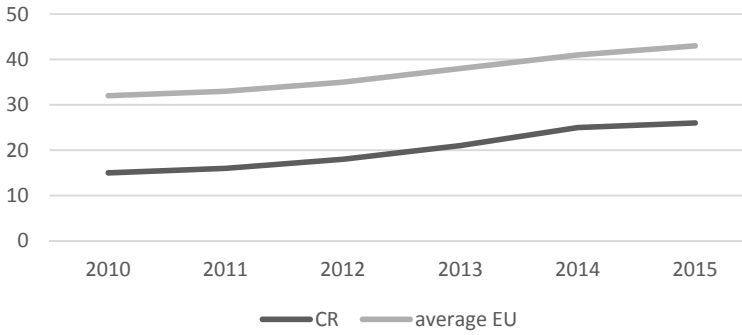
Composed by the author with the data available from Eurostat

2.1.6. The Percentage of Individuals Having Purchased/Ordered Online in the Last Three Months

It is assumed that the more individuals use the internet for on-line purchases the more likely they are to use the internet in order to support the process of computerization of the public administration as well as make the process of exchanging goods and services more efficient hence supporting both the efficiency of the public sector as well as the private one and fulfilling the aim of the e-Government. The higher the number the better. Regarding this indicator, it has to be said that generally the numbers are rather low and have been a bit below the EU average with the original 15% in 2010 to the current 26% in 2015 while the EU average was 32% in 2010 and went up to 42% in 2015. So this indicator certainly leaves room for improvement. On the other hand, it is hard to establish how much the fact that people shop online affects the efficiency of the public administration. If people shop online are they more likely to use the computer for communication with the public administration? To what extend?

The development of the indicators and its comparison can be seen in the following graph:

Graph no. 6: Percentage of individuals having ordered online in the last three months



Composed by the author with the data available from Eurostat

The above average EU countries in 2015 were the following: Denmark, Estonia, Finland, Germany, Ireland, Luxembourg, Netherlands, Sweden, United Kingdom.

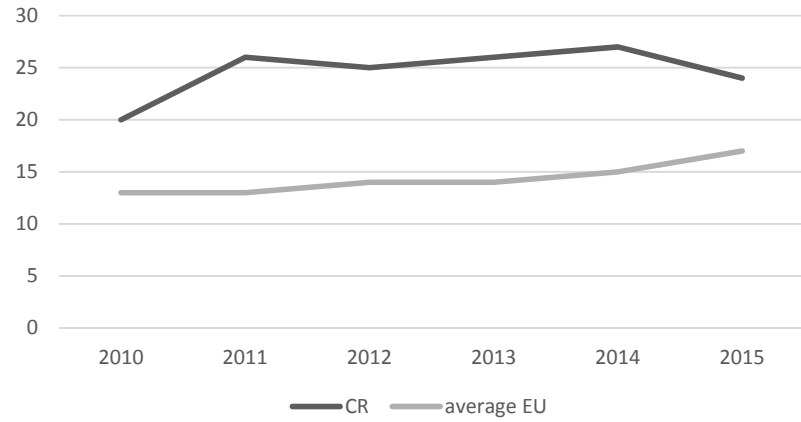
2.1.7. The Percentage of Enterprises Having Received Orders Online within the Previous Year

The assumption drawn is that the more enterprises receive orders online the more likely they are to support the process of the computerization of the public administration as well as make the process of exchanging goods and services more efficient hence supporting both the efficiency of the public sector as well as the private one and fulfilling the aim of the e-Government. These indicators would ideally reach as high a number as possible. It has to be said that the numbers for the Czech Republic are very low. On the other hand, the Czech Republic has always been above the EU average which means that almost a quarter of the Czech enterprises have received orders online within the previous year with the numbers starting at 20% in 2010 and rising to 26%, 25%, 26%,27% and falling to 24%. The development of this is interesting on its own and suggests either a very slight rise or more likely stagnation but the fact that the numbers are above the EU average which was 13% in 2010 and very slowly rose to 16% in 2015 which corresponds with the proposed very slight rise or stagnation are also interesting. Surely an increase in this indicator would be desired as it would certainly at least have made business more efficient, the question is why the numbers are so low and also why the average EU is even lower. This can be easily explained by the

graph no.8 illustrating the data for 2015 of all the EU countries. It can be seen that the companies have access to the internet and broadband connection (those numbers were over 90% in both indicators but also the number of individuals having purchased on line is higher than the number of enterprises having received orders on-line). The only conclusion that springs to mind is the fact that though the companies use the internet they do not actually use it to provide shopping on-line.

The development of the indicators and its comparison can be seen in the following graph:

Graph no. 7: Percentage of enterprises having received orders online within the previous year



Composed by the author with the data available from Eurostat

The above EU average countries are the following: Belgium, Croatia, Czech Republic, Denmark, France, Germany, Ireland, Lithuania, Portugal, Sweden, United Kingdom.

2.1.8. Summary of Generic Indicators

The development of the first five indicators is more than favourable. On the other hand, the last two indicators have not been developing at all as favourably as might have been hoped for. It clearly shows that computers are not used for shopping purposes. One may not necessarily see the connection between shopping online and using the internet for communication with the government authorities. It is assumed that should people use their computers for shopping

they are more likely to use them for communication with the authorities. But is that really the case? Surely there must be some other reasons behind it rather than just the availability of the internet connection.

The actual internet communication between people and the public authorities is shown in the following section analysing the development of e-Government indicators.

2.2. e-Government Indicators

2.2.1. The Percentage of Individuals Using the Internet for Interacting with Public Authorities

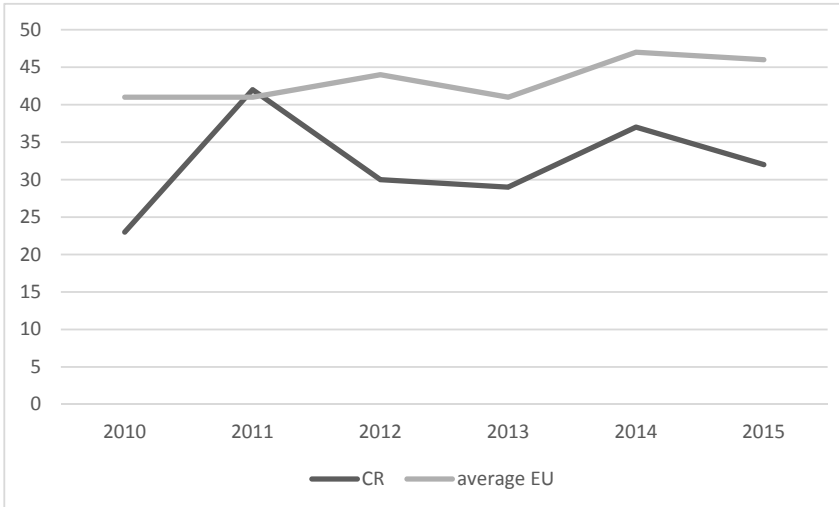
The development of this indicator in the Czech Republic is rather interesting with the original 29% in 2010 which was much lower than the EU average of 2010 of 41% but in 2011 the Czech Republic significantly increased to a percent higher than the EU average which was 41% in the EU average and 42% in the Czech Republic. In 2012 though the Czech Republic showed a significant drop to 30% while the EU average increased to 44%. In 2013 there were drops in both indicators with the Czech Republic falling to 29% and the EU average to 41%. In 2014 though both indicators rose with the Czech Republic significantly increasing to 37% the EU average was 45%. In 2015 the Czech Republic fell to 32% and the EU average was 44%.

This indicator is more directly connected with the process of computerization in public administration and should more or less directly reflect the success of the process where the desired goal is obviously a high number of computerized public administration processes leading to an increase in the efficiency of the public administration and hence the whole economy. Out of the EU countries Slovakia shows also a very interesting development as it has increased and stayed above the EU average reaching 59% in 2015. It would sure be interesting to learn why the number in Slovakia is so much higher compared to the other countries, was there a more efficient campaign carried out? Can people see the benefits of computerization? And why do people in other countries not seem to be of the same opinion? Do people find it more complicated and complex? On the other hand, all the indicators concerning the use of the internet and so on were not that much different so it is fair to say that it is not due to the accessibility of the internet. Is the level of computerization different in Slovakia to the rest of the countries? Or is it the mentality of people? Or can it have something to do with the electronic registration of sales?

Countries with above average EU results in 2015 are: Austria, Belgium, Denmark (84%), Estonia, Finland, Germany, Ireland, Latvia, Luxembourg, Netherlands, Slovakia, Spain, Sweden, United Kingdom.

The development of the indicators and its comparison is in the following graph:

Graph no. 8: Percentage of individuals using the internet for interacting with public authorities



Composed by the author with the data available from Eurostat

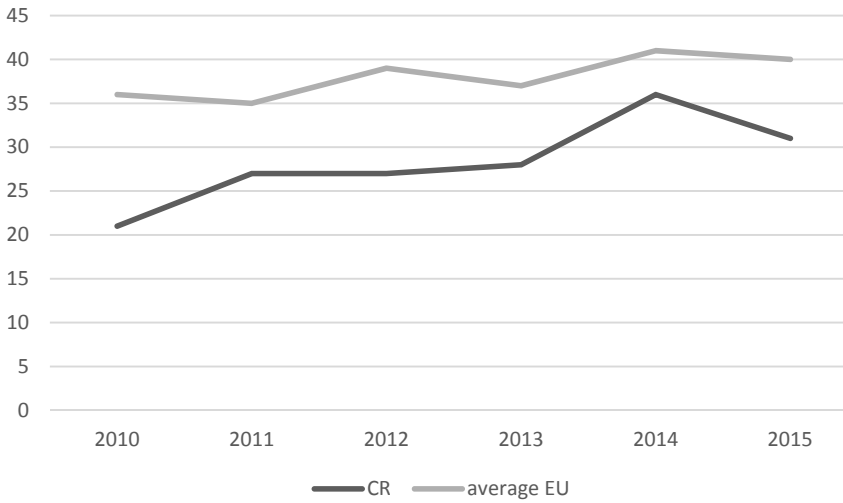
2.2.2. The Percentage of Individuals Using the Internet for Obtaining Information from Public Authorities

This indicator is also more directly connected with the process of computerization in public administration and should more or less directly reflect the success of the process where the desired goal is obviously a high number of computerized public administration processes leading to the increase in the efficiency of the public administration and hence the whole economy. The Czech Republic has been showing a gradual rise from the original 21% to 31% in 2015. The development of this indicator has been more or less copying the development of the EU average.

Countries with above average EU results in 2015 are: Austria, Belgium, Cyprus, Denmark, Estonia, Finland (100%), France, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Netherlands, Slovakia, Slovenia, Spain, Sweden.

The development of the indicators and its comparison can be seen in the following graph:

Graph no. 9: Percentage of individuals using the internet for obtaining information from public authorities



Composed by the author with the data available from Eurostat

2.2.3. The Percentage of Individuals Using the Internet for Downloading Official Forms from Public Authorities

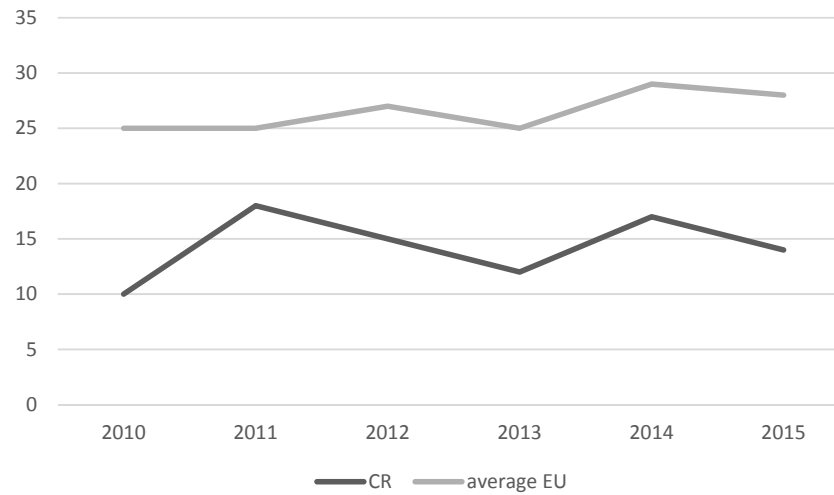
This indicator is also more directly connected with the process of computerization in public administration and should more or less directly reflect the success of the process where the desired goal is obviously a high number of computerized public administration processes leading to an increase in the efficiency of the public administration and hence the whole economy. Regarding the individuals using the internet for downloading official forms from public authorities the Czech Republic is a country with numbers below the EU average.

This indicator has shown similar development as the previous one with the Czech Republic lower than the EU average but does not show significant changes in either indicator with the 10% for the Czech Republic in 2010 as opposed to 26% of the EU average and 28% in 2015 while the Czech Republic rose to 14%. The Czech Republic shows an interesting development between the years 2010–2013 though, with the original 10% raising to 18% and dropping down to 15%, 12% and then bouncing back to 17% and finally down to the mentioned 14%. The development in the EU was similar though there were only very slight changes in percentage such as one to two percent.

Countries with above average EU results in 2015 are: Austria, Denmark (84%), Estonia, Finland, Germany, Ireland, Latvia, Luxembourg, Malta, Netherlands, Slovenia, Spain, Sweden, United Kingdom.

The development of the indicators and its comparison can be seen in the following graph:

Graph no. 10: Percentage of individuals using the internet for downloading official forms from public authorities



Composed by the author with the data available from Eurostat

2.2.4. The percentage of individuals using the internet for sending completed forms to public authorities

This indicator is yet again more directly connected with the process of computerization in public administration and should more or less directly reflect the success of the process where the desired goal is obviously a high number of computerized public administration processes leading to an increase in the efficiency of the public administration and hence the whole economy. Regarding the individuals using the internet for sending completed forms to public authorities this is probably the most important indicator of them all as this would be where the public administration would benefit from computerization the most along with the whole economy.

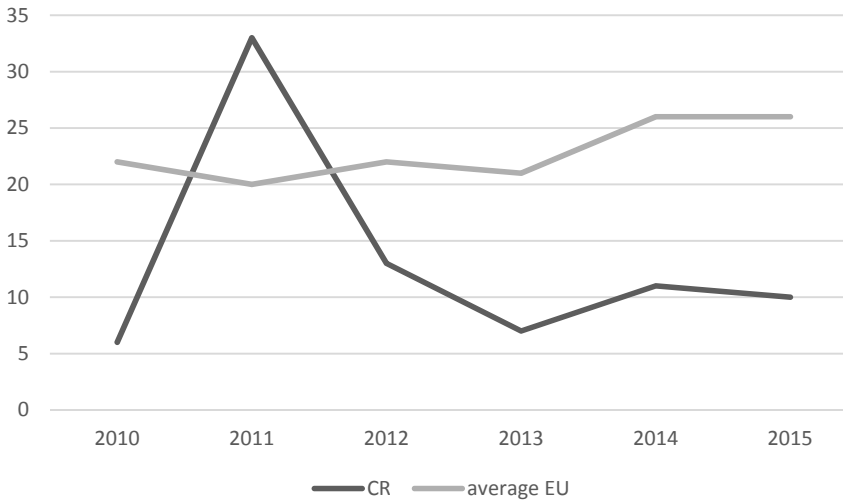
The development of this indicator is very interesting in the Czech Republic. While the EU average has been very slightly rising from the original 21% to the

current 26%, the Czech Republic with the original very low 6% in 2010 jumped to 33% in 2011 while the EU average was 20% but then in 2012 dropped down to 13% while the EU average rose to 22% and in 2013 went down to 21% while the Czech Republic kept dropping to 7%. In 2014 the average EU rose slightly to 26% and stayed at 26% in 2015 while the Czech Republic rose to 11% in 2014 and dropped to appalling 10% in 2015. This raises several questions such as what caused the magnificent rise of 27% from 2010 to 2011 and why did it not stay that way rather than falling down to 10% in 2015. Is it to do with the difficulty with filling in the forms? But that would not explain the rise, that might explain the low numbers. Or could it be that people tried and then found out that it was not as time efficient as they would have thought hence decided not to carry on? On the other hand, the development in the EU is showing a gradual rise which again could mean various things such as that some countries used a very successful campaign and so on.

Countries with above average EU results in 2015 are: Austria, Belgium, Denmark, Estonia, Finland, France, Ireland, Latvia, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom.

The development of the indicators and its comparison can be seen in the following graph:

Graph no. 11: Percentage of individuals using the internet for sending filled forms to public authorities



Composed by the author with the data available from Eurostat

2.2.5. Summary of e-Government Indicators

The development of the e-Government indicators has not been nowhere near as favourable as the Information society indicators. Out of the four indicators the last one, which probably happens to be the most important one, seems to be the one showing the most interesting development which would surely be worth looking into further. As surely the aim is to make the percentage of individuals filling and sending forms to the authorities as high as possible it would be rather interesting to look deeper into the reasons that led the Czechs to rise from 6% to 33% and then drop down to 12%. If it was possible to analyse the reasons behind this, it might be easier to persuade the public to increase the e-Government indicators all together as the Czech Republic has shown under average EU results in all of them. On the other hand, for example Slovakia has shown above average EU results in the first two indicators. Countries that have shown above average results in all of the four indicators are: Austria, Denmark, Estonia, Finland, Ireland, Latvia, Luxembourg, Netherlands, Spain and United Kingdom. These might be worth looking at closer to try and ascertain the motivation of the people.

3. Conclusion

The aim of the article was to provide an analysis and comparison of the development of the information society with the emphasis on e-Government in the Czech Republic which is compared with the EU average and deduce the improvements of the position for the Czech Republic. This was done with some limitations starting with the Information society indicators which are on their own limited.

The first part looked at the Generic indicators and though it was not possible to supply the reason behind the use of these indicators the outcomes of the analysis and comparison were provided stating that for example the development of the first five indicators is more than favourable. On the other hand, the last two indicators have not been developing at all as favourably as might have been hoped for. It clearly shows that the computers are not used for shopping purposes. One may not necessarily see the connection between shopping online and using the internet for communication with the government authorities. It is assumed that should people use computers for shopping they are more likely to use them for communication with the authorities. But is that really the case? Surely there must be some other reasons behind it rather than just the availability of the internet connection. It should also be stated that the results of the indicator

monitoring percentage of individuals having purchased/ordered online in the last three months were generally perplexingly different to percentage of enterprises having received orders in the previous year – meaning that the percentage of individuals that ordered was much higher than percentage of enterprises that received orders even when counted in quarter of year periods. Does it mean that individuals were ordering from individuals rather than enterprises? And did the percentage of enterprises receiving orders include orders from individuals as well as orders from other enterprises?

Generally, it needs to be stated that the reason behind these indicators is still unclear and raises questions.

The second part looked at the e-Government indicators and was rather more interesting though it must be said that the results for the Czech Republic were rather appalling as well as interesting – especially the development of the last indicator being the percentage of individuals using the internet for sending completed forms to public authorities. As it has already been stated it would be rather interesting to look deeper into the reasons that led the Czechs to rise from 6% to 33% and then drop down to 12%. If it was possible to analyse the reasons behind this, it might be easier to persuade the public to increase the e-Government indicators all together as the Czech Republic has shown below average EU results in all of them. Countries that have shown above average results in all of the four indicators are: Austria, Denmark, Estonia, Finland, Ireland, Latvia, Luxembourg, Netherlands, Spain and United Kingdom. These might be worth looking at closer to evaluate the motivation of the people.

Reviews

Hamuľák, O.: *National Sovereignty in the European Union. View from the Czech Perspective.* Cham: Springer, International Publishing AG, 2016, 89 p. ISBN 978-3-319-45350-7.

National sovereignty, independent performance of State power, the European Union or Czech position to any issue regarding the internal or international order in Europe are currently topics which are pending almost on a daily basis and through which is our complex present defined.

The dynamics of the relationships inside and outside of the united Europe, which goes through another significant, being said in a manner of an Europocentric hyperbole, crucial phase of its future history, does not leave at peace the politicians, political scientists nor lawyers. Topic of the European Union is de facto inexhaustible in its complexity and depends only on the angle from which you consider it.

One such point of view on the complicated present of relations defined by national, international, but particularly European Union law is offered by a new expert publication with the name of "National Sovereignty in the European Union View from the Czech Perspective". Its author is Dr. Ondrej Hamuľák, who belongs to the generation of young law experts working in Czech academia, who form their thoughts clearly, critically and refuse to accept the theory of the state sovereignty dissolved in Union organism without any reservations. Just as firmly he advocates the position, which was many times taken by the national constitutional courts, that the integration shall not mean a disintegration of statehood. His relatively extensive previous publication activity in the field of jurisprudence, constitutional law, European law as well as his language skills allow to zoom in the Czech point of view on current and also future problem of the European Union to whole professional Europe.

On a long-term basis Dr. Hamuľák is dedicated to such topics as e. g. case-law in law phenomenon, law principles and rules, basics of the judiciary in the EU or the internal market rules. From his publications it is possible to extract gradually and systematically built construction of logical and hermeneutic arguments, by which he presents his view of the European Union structure and the irreplaceable role of the Member States during the entire existence of this unique international organization with elements of statehood.

Above mentioned publication, published in electronic version and in eBook version, which was published in publishing house Springer Briefs in Law in 2016, within the OPVK CZ.1.07/2.3.00/30.0041 project, which was financially supported by the European Social Fund and state budget of the Czech Republic, is not any exception to stated facts.

Even when briefly going through the structure of the reviewed publication "National Sovereignty in the European Union View from the Czech Perspective" it is obvious that its author has constructed its content on a combination of legal, philosophical-legal and political scientific approaches, which justify in many ways unpredictable evolution or schism of the European integration, which has been called as a constitutionalising proceeding as well as Moloch (page 55) in the reviewed text.

The author clearly puts the Member States as Master of Treaties in the centre of all existence of the EU and it is obvious that the current development including the future secession of the United Kingdom from the Union shows that his point of view has been right so far.

However, it is not evident from any of his texts, if the process of integration develops into State-building or State-replacing. Both national (Holländer, Zemánek, Bobek, Komárek and others) and foreign authors (Weathrill, Habermas, Prechal and others) offer him different opinions and approaches, which he synthetically forms into several main theses that he has emphasized as a research thesis at the very beginning of his publication (page 4):

1. Sovereignty of Member State could be preserved if we skip into the new understanding of this theoretical construct while interpreting the constitutional requirements.
2. Sovereignty as the normative superiority is underlined by the constitutional claim of inviolability of core constitutional values.
3. Member States still remain in the position of Master of Treaties which gives them strong position in the future forming of European project.
4. Member States have an explicit right to withdraw from the Union so they are free to make decisions about their future "European Destiny".

On the other hand he does not omit the mixed character of the European integration and accepts the process of growing self-confidence of the EU including the process of gaining independence and autonomous constitutionalisation of the European Union. He sees EU as a new sovereign competing for power and creating the multi-level governance in the European region.

In his almost a hundred pages long text the author does not involve himself only in pure theory of sovereign Union relations in their ideal form, but analyses the practical, i. e. real-life sovereignty of Member States, especially the Czech

Republic. He presents the constitutional limits of robust normative creativity of Union itself (without denying the same robust Czech legislation, described as "a legislative whirlwind" nowadays) built on the recent case law of the Constitutional Court of the Czech Republic and accepts the effects of EU with reservation of non-violation of core constitutional values. In his opinion, which stems from the knowledge of the case-law of the Constitutional Court of the Czech Republic, according to which: "….indirect effect of EU law is limited by potential non-existence of national interpretation method (and on a constitutional level by the existence of the method of interpreting constitutional law) suitable for reaching the goals anticipated by EU law." He sees the frontier against the absolute supremacy of the Union law e. g. in the fact that: "The obligation to apply EU-consistent interpretation does not mean that the reading of constitutional norms must always be in line with the EU law requirements. It is limited by the content and systemic logic of the constitutional text."

The axis of his text is not pure bipolar – black or white, national sovereignty or united Europe, integration or statehood, but rather takes into account the necessity of a multi-level governance based on never-ending dialogue (page 87) about determining the superiority of one or of other. The mutual relationship between EU and its members is even more complicated since various norm-making centres exists, which on one hand allows shopping forum for individuals, but on the other hand makes a basic orientation in truly binding rules difficult to individuals. However, regardless this complexity, Dr. Hamuľák offers and unconditional argument to the effect that the transfer of state sovereignty to the EU is conditional from the perspective of the Czech Republic and therefore the exercise of competence on the Union level cannot affect basic guarantees assigned in the Czech Republic's constitutional law. Clearly this argument is soothing especially for individuals.

Those who are familiar with the previous work of Dr. Hamuľák are no longer surprised by his unique style, which sometimes almost in a prosaic manner describes complicated legal construction of the European whole and appreciate his way of critically commented description of the European Union.

The publication is worth reading and not only because of it has an escalating nature and offers comprehensible answers to a series of existential questions of contemporary Europe, which sets the publication apart from series of autotelic discursive publications in the field of European Union law.

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INSTRUCTIONS FOR AUTHORS

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