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ARTICLES

Recent Developments in Detention and Return of Illegal Migrants: In Need for More Differentiated Approach

Michal Petr*

Summary: Current political situation, agitated by the hitherto unprecedented influx of irregular migrants, has brought about a public discussion concerning stricter rules on handling such migrants. It is worth recalling that the EU addressed the issue of return and detention of illegal migrants already in 2008 by the Return Directive, which has been criticised for compromising the fundamental rights of migrants; making the rules even stricter would thus be very controversial from the human rights point of view. Still, the Commission has heeded these calls and has recently issued a recommendation, suggesting a stricter interpretation of the rules currently in place. In his regard, it is important to realize that the rules contained in the Return Directive cover all persons being (currently) illegally on the EU territory, both those who have come fully in accordance with the law, in particular in order to work or provide services, and those who have entered the EU illegally, hide their identity and do not follow the rules on migration. We suggest in this article that differentiation between these categories of migrants may be in order.

Keywords: detention; entry ban; human rights; irregular migrants; migration; removal; Return Directive

1. Introduction

In 2008, the Return Directive[1] was adopted and in the following two years implemented in the EU member states. It meant a significant change in member states' laws on detention and return of illegal migrants, as it introduced *common standards*, not only minimum standards for harmonization, as is typically the case with legislation on migration and asylum.[2] The Return Directive thus unifies the

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1 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

2 See eg. MITSILEGAS, Valsamis. *The Criminalisaiton of Migration in Europe. Challenges for Human Rights and the Rule of Law.* Springer, 2015, p. 94.

process of return and removal of illegal migrants, while the legality of their stay is still predominantly the matter for member states to decide.[3]

It is worth recalling that the Return Directive has been criticised from the outset not only by scholars,[4] but also by international organizations,[5] for not protecting sufficiently the fundamental rights of illegal migrants, in particular as far as the extent of their detention is concerned.

From the point of view of current circumstances, it needs to be observed that more than 1.5 million people need to be deported from the EU and according to available data, the rate of return of illegal migrants from EU member states does not significantly exceed 30 %.[6] This situation has brought about public demands for starker measures in connection with return policy, in particular on national level.

In 2015, the Commission adopted the European Agenda on Migration,[7] which identified return policy as its essential part. Following that, the Commission presented its Action Plan on Return,[8] including 36 concrete actions to improve the efficiency of the EU's return system. The European Council called for a reinforcing of national administrative processes for returns in October 2016.[9] Following that, the Malta Declaration[10] of Heads of State or Government of 3 February 2017 highlighted the need for a critical review of EU return policy with an analysis of how the tools available at national and EU level are applied.

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3 In detail, see eg. BALDACCINI, Anneliese. The EU Directive on Return: Principles and Protests. *Refugee Survey Quarterly*. 2009, vol. 28, no. 4, p. 116.

4 See eg. ACOSTA, Diego. The good, the bad and the ugly in EU migration law: Is the European Parliament becoming bad and ugly? (The Adoption of Directive 2008/15: The Returns Directive). *European Journal of Migration and Law*. 2009, vol. 11, no. 1, p. 19.

5 See eg. the report of the Special Rapporteur on the human rights of migrants, François Crépeau, to the United Nations General Assembly of 24 April 2013, A/HCR/23/46, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, par. 46 *et seq*. See also UN News Center, 18 July 2008, *Proposed EU policy on illegal immigrants alarms UN rights experts.* [online]. Available at: <http://www.un.org/apps/news/story.asp?NewsID=27414#.WjKK8EribmE> (15 December 2017).

6 See eg. press release of the European Commission of 27 September 2017, IP/17/3406 *State of the Union 2017 – Commission presents next steps towards a stronger, more effective and fairer EU migration and asylum policy*.

7 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A European Agenda on Migration* of 13. 5. 2015, COM(2015) 240 final.

8 Communication from the Commission *EU Action Plan on return* of 9 September 2015, COM(2015) 453 final.

9 The European Council Conclusions of 20 and 21 October 2016, EUCO 31/16.

10 Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, European Council press release 43/17 of 3 February 2017.

In March 2017, the Commission adopted a recommendation on making the return policy more effective (hereinafter referred to as "Recommendation");[11] according to it, *"it is necessary to use to the full extent the flexibility provided for in [the Returns Directive] […] [and to] reduce possibilities of misuse of procedures and remove inefficiencies"*.[12] The Recommendation was immediately criticised by human rights organization; for example, the European Council for Refuges and Exiles (ECRE) put forward that *"[a]s well as falling short in terms of good governance, the Commission document puts forward an interpretation of human rights that effectively undermines them."*[13]

It is not the aim of this article to review the whole Return Directive or indeed the EU migration policy. We will only concentrate on several selected topics, namely the scope of the Return Directive (Chapter 2), the – putatively – preferred route of voluntary return (Chapter 3), the Removal and Detention of illegal migrants (Chapter 4) and imposition of entry bans (Chapter 5), taking into account also the recent jurisprudence of the Court of Justice of the European Union (hereinafter referred to as "CJ EU") and the Recommendation. We will then strive to identify the limits of the legal regime currently in place and propose certain measures that might make the system both more effective and fair (Chapter 6).

2. Scope of the Return Directive and Illegal Migrants

The Return Directive defines *illegal stay* as the presence on the territory of a member state of a third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of the Schengen Borders Code.[14] A third-country national[15] may therefore be staying legally or illegally, and thus fully covered by the Return Directive, without there being any "third option".[16] Even applicants for renewal of already expired permit are staying illegally.[17]

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[11] Commission recommendation of 7 March 2017, on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C(2017) 1600 final.

[12] Recommendation, par. 6.

[13] ECRE, 3 March 2017, *New EU Commission plans on returns and detention will create more harm and suffering.* [online]. Available at: <https://www.ecre.org/new-eu-commission-plans-on-returns-and-detention-will-create-more-harm-and-suffering/> (15 December 2017)

[14] Return Directive, Art. 3 (2).

[15] Return Directive, Art. 3 (1)

[16] HAILBRONNER, Kay, THYM, Daniel. *EU Immigration and Asylum Law. A Commentary. Second Edition.* C.H.Beck/Hart/Nomos, 2016, p. 677.

[17] *Ibid*, p. 678; under such circumstances, the member states shall nonetheless consider refraining from issuing the return decision [Return Directive, Art. 6 (5)].

The Return Directive applies to *all* illegally staying third-country nationals.[18] Individual member states may however opt for an exemption,[19] allowing treating differently certain categories of illegal migrants. For the purposes of this paper, the category of migrants apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a member state, who have not subsequently obtained an authorisation or a right to stay in that member state, should be pointed out. Clearly, this provision covers only the illegal crossing of the EU external borders and cannot be applied to persons who have left the border area.[20] Even if this exemption is applied, the fundamental limitations, including the principle of non-refoulement, detention conditions or limitation on use of coercive measures contained in the Return Directive do apply.[21]

The Return Directive thus does not in any way distinguish between, on the one hand, those who – originally – stayed legally on the EU territory and only subsequently lost the legal status, including those whose application for renewal of residence permit is pending,[22] and, on the other hand, those whose stay has been illegal from the outset.[23] We will argue that this lack of differentiation may constitute a significant problem.

3. Return Decision and Voluntary Departure

If a third-country national is found to by staying illegally in a member stay, such state is obliged to issue a return decision.[24] This procedure is obligatory,[25] unless specific exceptional circumstances are met;[26] in particular, the member state may

[18] Return Directive, Art. 2 (1).

[19] Return Directive, Art. 2 (2).

[20] CJ EU judgment of 7 June 2016 C-47/15 *Sélina Affum*, ECLI:EU:C:2016:408, par. 71.

[21] Return Directive, Art. 4 (4). In detail, see BALDACCINI, Anneliese. *The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive.* European Journal of Migration and Law, 11 (2009), p. 4.

[22] HAILBRONNER, Kay, THYM, Daniel (sub 16), p. 672.

[23] The Return Directive, Art. 12 (3), only enables to relax the formal requirements on return decision with respect to the migrants who have illegally entered the territory of the member state.

[24] Return Directive, Art.5 (1); the return decision is defined as *"an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return"* [Art. 3 (4)].

[25] See eg. HAILBRONNER, Kay, THYM, Daniel (sub 16), p. 687. See also CJ EU judgement of 28 April 2011 C-61/11 PPU *El Dridi*, ECLI:EU:C:2011:268, par. 35: *"the directive provides, first of all, principally, for an obligation for Member States to issue a return decision against any third-country national staying illegally on their territory"*.

[26] Return Directive, Art. 6 (2), (3) and (5).

"legalize" the stay of the national in question for *compassionate, humanitarian or other reasons*.[27]

In the original draft of the Return Directive, the power to issue a return decision was explicitly subjected to fundamental rights obligations; in the final text, the fundamental rights obligations have nonetheless been removed from the main text and relegated to the preamble,[28] to the criticism of human rights advocates. Even though the Return Directive specifically refers to the principle of non-refoulement, best interests of the child, family life and state of health, the member states shall only *take due account of them*.[29] This may lead to incoherence of practice among member states. Indeed, the Commission criticises those member states that do not *systematically* issue return decisions[30] and urges all the member states to put in place measures to effectively locate and apprehend third-country nationals staying illegally and to issue return decisions regardless of whether the national in question holds an identity or travel document.[31]

Due process is to be guaranteed in course of adopting the return decision. In particular, the illegal migrants must be given an opportunity to express, before the adoption of a return decision concerning them, their point of view on the legality of their stay, on the possible application of exemptions from issuing the return decision (see above) and on the detailed arrangements for their return, including the period for voluntary departure (see below). They must also be allowed to consult a legal adviser, the member states however do not need to bear the costs of it.[32]

The return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days,[33] which may be extended, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.[34] To avoid the risk of absconding (see below), specific obligations, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of certain documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure;[35] conversely, if there is no evidence for the risk of absconding, such measures may not be imposed.[36]

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27 Return Directive, Art. 6 (4).
28 See eg. BALDACCINI, Anneliese (sub 21), p. 7. See also Return Directive, recitals 22 – 24.
29 Return Directive, Art. 5.
30 Recommendation, par. 11.
31 Recommendation, par. 5.
32 In detail, see CJ EU judgement of 11 December 2014 C-249/13 *Boudjlida*, ECLI:EU:C:2014:2431.
33 Return Directive, Art. 7 (1).
34 Return Directive, Art. 7 (2).
35 Return Directive, Art. 7 (3).
36 CJ EU judgement C-61/11 PPU *El Dridi* (sub 25), par. 37.

Even though the voluntary departure is a preferred[37] and – when the conditions are met – also a mandatory course of action,[38] it seems that the Recommendation aims at limiting its use in practice. Fist, the member states shall grant it only when the illegal migrant specifically asks for it;[39] admittedly, it is in line with the Return Directive,[40] it nonetheless might be questioned whether an alternative which ought to be default should be asked for. Secondly, the member states shall grant the shortest possible period for voluntary departure, i.e. seven days; even though the Recommendation acknowledges that individual circumstances of the case need to be taken into account,[41] such a recommendation in practice limits the possibility of voluntary departure of people staying in the member state for a longer period of time. At the same time, the rational of a recommendation that a period longer than seven days should only be granted when the person in question actively cooperates cannot be disputed.[42]

Voluntary departure shall not be allowed only exceptionally, under strictly defined conditions, which must be assessed on the basis of individual examination on the case in question.[43] According to the Return Directive,[44] these are:

(i) risk of absconding;
(ii) an application for a legal stay has been dismissed as manifestly unfounded or fraudulent; or
(iii) the person concerned poses a risk to public policy, public security or national security

As these concepts, especially the risk of absconding, are crucial for application of other legal instruments contained in the Return Directive, separate sections will be dedicated to them.

3.1. Risc of Absconding

As defined by the Return Directive,[45] the risk of absconding is such a broad concept that it led some commentators to observe that a wide application of the

[37] Return Directive, recital 10.
[38] HAILBRONNER, Kay, THYM, Daniel (sub 16), p. 694.
[39] Recommendation, par. 17.
[40] Return Directive, Art. 7 (1).
[41] Recommendation, par. 18.
[42] Recommendation, par. 20.
[43] CJ EU judgement of 6 December 2012 C-430/11 *Sagor*, ECLI:EU:C:2012:777, par. 41.
[44] Return Directive, Art. 7 (4).
[45] According to the Return Directive, Art. 3 (7), *'risk of absconding' means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national*
who is the subject of return procedures may abscond.

risk of absconding exception can render entirely inapplicable the implementation of the voluntary return provisions.[46]

The CJ EU has repeatedly held that any assessment relating to the risk of the person concerned absconding must be based on an individual examination of that person's case.[47] Still, the Recommendation advises member states to introduce rebuttable presumptions that the risk of absconding may be inferred in following circumstances:[48]

(i) irregularities concerning identification, in particular refusing to cooperate in the identification process, using false or forged identity documents, destroying existing documents, refusing to provide fingerprints;
(ii) opposing violently or fraudulently the operation of return;
(iii) not complying with measures aimed at preventing absconding imposed by the return decision (see above);
(iv) not complying with an entry ban; or
(v) unauthorised secondary movements to another member state.

Indeed, the fact that migrants have breached some of their duties may indicate the risk of absconding. It is definitely the case with (ii), (iii) and probably (iv), it is however more difficult to establish a direct causal link (and thus a presumption) between refusal to provide fingerprints and the risk of absconding. Concerning the identification, the CJ EU has explicitly declared that the fact that a third-country national has no identity documents cannot, on its own, be a ground for extending detention,[49] which is only allowed when there is a risk of absconding (see below).

It also ought to be observed that presumptions always pose danger to individual assessment of a particular case; as the CJ EU observed with regard to public policy (see below), when the member state relies on presumptions, without properly taking into account the national's personal conduct, it fails to have regard to the requirements relating to an individual examination of the case concerned and to the principle of proportionality.[50] In our opinion, the introduction of such presumptions is therefore highly controversial.

In addition to these presumptions, following criteria shall according to the Commission be taken into account as an "indication" that a person poses a risk of absconding:[51]

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46 BALDACCINI, Anneliese (sub 3), p. 128.
47 CJ EU judgement C-430/11 *Sagor* (sub 43), par. 41.
48 Recommendation, par. 15.
49 CJ EU judgement of 5 June 2014 C-146/14 PPU *Bashir Mohamed Ali Mahdi*, ECLI:EU:C:2014:1320, par. 73.
50 CJ EU judgement of 11 June 2015 C-554/13 *Zh and O*, ECLI:EU:C:2015:377, par. 50.
51 Recommendation, par. 16.

(i) explicit expression of the intention not to comply with the return decision;
(ii) non-compliance with the period for voluntary departure; or
(iii) an existing conviction for a serious criminal offence.

As far as reasons (i) and (ii) are concerned, there is in our opinion no doubt that under such circumstances, the risk of absconding has materialised. Arguably, it is not so with reason (iii). Indeed, the conviction may motivate the person in question to leave the country, and thus avoid the sanctions imposed. At the same time, the nature of the crime is not at all taken into account, even though it is well established in the CJ EU's case law, though in the area of free movement of EU citizens, that the existence of a previous criminal conviction can only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.[52]

As will be described below, the rather extensive interpretation of the term risk of absconding, as introduced by the Recommendation, has direct implication for other instruments of the Return Directive, in particular for decisions on detention.

3.2. Dismissed application for a legal stay

Whereas the reasons concerning absconding (3.1) and public policy and security (3.3) are based on a *risk*, in this case, the mere fact that the application for a legal stay has been found *manifestly unfounded* or *fraudulent* suffices. Even though in principle understandable, these terms will need to be interpreted very carefully in order not to discourage certain migrants from applying for legal stay at all.

The Recommendation has not addressed this issue.

3.3. Risk to public policy, public security or national security

Concerning interpretation of these terms, it is possible to recourse to an analogy with the case law on free movement of EU citizens;[53] we will therefore not discuss these terms in detail. As the CJ EU has explained, an illegal migrant cannot be deemed to pose a risk to public policy on the sole ground that he is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law; other factors, such as the nature and seriousness of

[52] See eg. CJ EU judgement of 27 October 1977 30/77 *Bouchereau*, ECLI:EU:C:1977:172, par. 28. With respect to public security, see STEHLÍK, Václav. Discretion of Member States vis-a-vis Public Security: Unveiling the Labyrinth of EU Migration Rules. *International and Comparative Law Review*, 2017, vol. 17, no. 2, p. 127.

[53] HAILBRONNER, Kay, THYM, Daniel (sub. 16), p. 696.

that act and the time which has elapsed since it was committed may be relevant in the assessment.[54]

The Recommendation has not addressed this issue.

4. Removal and Detention

Removal means physical transportation of immigrants out of the member state where they are illegally staying.[55] Member states shall only recourse to removal in order to enforce the return decision if:[56]

(i) no period for voluntary departure has been granted (see above); or
(ii) the obligation to return has not been complied with within that period.

Crucially, a sentence of imprisonment cannot be imposed on illegally staying third-country nationals on the sole ground that they remain on the territory of the member state contrary to an order to leave that territory within a given period[57] or that they entered it illegally, resulting in an illegal stay.[58]

In accordance with the principle of proportionality, member states are obliged to use in all stages of the return procedure the least intrusive measures; that implies that even if a hitherto non-cooperating returnees credibly demonstrate their willingness to cooperate and readiness to depart voluntarily, member states shall refrain from enforcing the removal.[59]

For the purposes of removal, detention may be employed in order to prepare the return and carry out the removal process, in particular when there is a risk of absconding (see above) or the returnee avoids or hampers the return process, unless other sufficient but less coercive measures can be applied effectively in a specific case.[60] The list of circumstances under which detention may be imposed is not exhaustive (*in particular*), which is arguably not in line with the jurisprudence of the European Court of Human Rights on Article5 of the European Convention.[61]

Any detention shall be for as short a period of time as possible and only maintained as long as removal arrangements are in progress and executed with due

[54] CJ EU judgement C-554/13 *Zh and O* (sub 50), par. 65.
[55] Return Directive, Art. 3 (5). See also HAILBRONNER, Kay, THYM, Daniel (sub 16), p. 698.
[56] Return Directive, Art. 8 (1). The conditions for postponement of removal (Art. 9) and specific conditions for return and removal of unaccompanied minors (Art. 10) will not be discussed.
[57] CJ EU judgement C-61/11 PPU *El Dridi* (sub 25).
[58] CJ EU judgement C-47/15 *Sélina Affum* (sub 20), par. 93.
[59] In detail, see HAILBRONNER, Kay, THYM, Daniel (sub 6), p. 699.
[60] Return Directive, Art. 15 (1).
[61] In detail, see BALDACCINI, Annaliese (sub 21), p. 13.

diligence,[62] it however cannot exceed six months.[63] Only exceptionally, it may be prolonged for additional twelve months if the removal operation is likely to last longer than six months, due to lack of cooperation by the returnee or delays in obtaining the necessary documentation from third countries.[64] The period of time during which the removal decision is suspended due to court review is to be taken into account in calculating the period of detention;[65] on the other hand, this limitation period does not apply to those migrants who have asked for asylum protection.[66]

The period of 18 months cannot be prolonged under any circumstances.[67] Not even the fact that the person in question is not in possession of valid documents, his conduct is aggressive and he has no means of supporting himself and no accommodation or means supplied by public authorities for that purpose does not allow the detention to continue.[68]

A maximum detention of 18 months is a rather long period[69] for non-criminal conduct;[70] some member states have therefore opted not to adopt these maximal time limits. The Recommendation however urges all the member states to provide for the maximum periods for detention in their national legislation.[71]

The aim of detention is to secure removal of the person in question; thus, when it appears that a reasonable prospect of removal no longer exists for legal or other considerations, detention ceases to be justified and the person concerned shall be released immediately.[72] As the AG Mazák summarised in the *Kadzoev* case, the existence of an abstract or theoretical possibility of removal, without any clear information on its timetabling or probability, cannot suffice.[73]

If the detention is terminated because the prospect of removal is no longer realistic or because the maximum limitation period has elapsed, what is the legal status of the person in question? The law is silent in this regard, which allowed

[62] Return Directive, Art. 15 (1).
[63] Return Directive, Art. 15 (5).
[64] Return Directive, Art. 15 (6).
[65] CJ EU judgement of 30 November 2009 C-357/09 PPU *Said Samilovich Kadzoev (Huchbarov)*, ECLI:EU:C:2009:741, par. 57.
[66] CJ EU judgement of 30 may 2013 C-534/11 *Mehmet Arslan*, ECLI:EU:C:2013:343, par. 49.
[67] CJ EU judgement C-357/09 PPU *Kadzoev* (sub 65), par. 60.
[68] *Ibid*, par. 71.
[69] In this regard, see in detail eg. BALDACCINI, Anneûiese (sub 3), p. 130.
[70] As the AG Bot explained in opinion to case C-473/13 and C-514/13 *Adala Bero and Ettayebi Bouzalmate*, par. 92, detention does not constitute a penalty following the commission of a criminal offence is not to correct the behaviour of the person concerned; any idea of penalising is missing from the rationale forming the legal basis of detention.
[71] Recommendation, par. 10 (b).
[72] Return Directive, Art. 15 (4).
[73] Opinion of AG Mazák to case C-357/09 PPU *Kadzoev*, par. 35.

some commentators to claim that the person affected is left in legal limbo.[74] The CJ EU only held in the *Mahdi* case that member states cannot be obliged to issue to such persons an autonomous residence permit or other authorisation conferring a right to stay, they however have to provide such person with a written confirmation of his situation.[75]

5. Entry Bans

Return decision shall be systematically accompanied by an entry ban of up to 5 years if no period for voluntary departure has been granted or if the obligation to return has not been complied with; entry ban may also be imposed in other situations.[76] Entry ban is EU wide, ie. it consists in prohibiting entry into and stay on the territory of the member states for a specified period of time.[77]

The obligatory imposition of entry bans made this provision of the Return Directive one of the most controversial.[78] In the Recommendation, wider use of discretionary imposition of entry bans is encouraged.[79]

It is in particular relevant that the entry ban may be systematically added to the return decision,[80] while the member states shall only *consider* withdrawing or suspending it when the migrant has orderly returned;[81] this might significantly limit the motivation to return voluntarily.[82]

6. Limits to the Current System of Return and Removal and a Way Forward

As mentioned in the introduction, the current system of return and removal of illegal migrants is facing its limits. Many problems are extraneous to the Return Directive, in particular the cooperation of states to which the migrants shall be returned. That is predominantly the task for European External Action Service,

74 MITSILEGAS, Valsamis (sub 2), p. 103; see also BALDACCINI, Annaliese. (sub 3), p. 138.
75 CJ EU judgement C-146/14 PPU *Mahdi* (sub 49), par. 89. See also the Return Directive, recital 12.
76 Return Directive, Art. 11 (1).
77 Return Directive, recital 14 and Art. 3 (6).
78 HAILBRONNER, Kay, THYM, Daniel (sub 16), p. 708. See also BALDACCINI, Annaliese (sub 3), p. 133.
79 Recommendation, par. 24.
80 Return Directive, Art. 11 (1), par. 2.
81 Return Directive, Art. 11 (3).
82 In detail, see BALDACCINI, Annaliese (sub 21), p. 10.

consisting in negotiating international readmission agreements with the states concerned. The EU is well aware of this task and 17 readmission agreements have already been concluded, negotiations with several crucial states, including Algeria and Morocco, have however not significantly advanced.[83]

Other problem is connected with identification of the migrants, whose identity documentation might be missing; this presupposes cooperation on part of the migrant himself as well as the state of that he claims to be the citizen. Again, this is a practical problem difficult to be addressed by the Directive itself, but with profound consequences for the migrant in question.

This can be demonstrated on the *Ali Mahdi* case, in which the named illegal migrant was not issued identification documentation by his home country because he apparently conveyed to the representative of his embassy that he was not willing to return; the CJ EU refused to determine whether such a situation may be classified as "non-cooperation" on part of the migrant, leaving it on the national court as a question of the facts.[84]

There are however other problems, inherent to the Return Directive itself, which might be tackled by legislation. As we have observed, its most controversial provisions are connected with detention, which can last up to (but cannot exceed) 18 months, and with entry ban, which is to be systematically imposed on practically all the illegal migrants. At the same time, while the problem of entry bans is "only" concerned with the willingness of illegal migrants to return voluntarily, the issue of detention may threaten the entire system enshrined in the Return Directive: if the detention is too long, it will be in breach of fundamental human rights, if it is too short, it will not be effective and the return policy would collapse.

In this respect, we put forward that, as is often the case, the one-size-fits-all approach is not adequate. As is obvious form recent activities of the Commission, it is preoccupied with migrant illegally entering the EU and mostly not fulfilling the requirements for legally staying therein.[85] With regard to such migrants, making the return policy more stark, or – as the Commission puts it – *to use to the full extent the flexibility provided for in the Directive*[86] may be warranted;

[83] Communication from the Commission to the European Parliament and the Council *On a More Effective Return Policy in the European Union – A Renewed Action Plan*. 2 March 2017, COM(2017) 200 final (hereinafter referred to as "Renewed Action Plan").

[84] CJ EU judgement C-146/14 PPU *Mahdi* (sub 49), par. 72.

[85] See eg. Return Action Plan, p. 13, which argues that the measures contained therein should *"send a clear message to those migrants that will not have a right to stay in the European Union that they should not undertake the perilous journey to arrive in Europe illegally"*.

[86] Recommendation, par. 6.

indeed, such migrants will probably not be inclined to return voluntarily to their home country.

In this context, it is also legitimate to ask whether the exemption from the regime of the Return Directive for migrants illegally entering the EU and subsequently apprehended shall be retained, as it is obvious that these are the "typical" illegal migrants that are to be removed from the EU; with regard to them, starker measures might be justifiable.

On the other hand, we believe that those migrants who have entered the EU legally and were entitled to stay there, often with their families, and who, during that time, established strong social connections in the place of their residence, deserve a more forthcoming approach. Arguably, this can only be achieved if the definition of illegal migrant, contained in the Return Directive, is modified, allowing for distinction between these two categories of migrants. We strongly support such a legislative change.

7. Conclusions

The Return Directive was drafted in times of "normal" level of migration into the EU, but it is not well adjusted for present situation. The attempts of the Commission to "flexibly" reinterpret it in order to contain the influx of migrants illegally entering the EU are stretching the limits acceptable from the point of view of fundamental human rights; at the same time, such attempts have disproportionately negative consequences for those migrants who have entered the EU legally.

We put forward that a legislative amendment to the Return Directive is in order. The Directive should fully cover also migrants apprehended in connection with illegally crossing the external EU boarder, and the place of their apprehension should not be limited to close vicinity of the boarder; otherwise, the Directive would not apply to "typical" illegal migrants, as we currently experience. Such migrants, if their stay in the EU is not "legalised" (eg. by being granted asylum), indeed need to be removed from the EU, and if they do not cooperate with the competent authorities, their detention, if need be even longer than 18 months, might be justifiable. On the other hand, those who have legally entered and stayed within the EU, but lost this status, should be treated more favourably. For example, entry ban would only rarely be justified.

Even though such an approach (but for the prolonged time of detention) might be covered by the Return Directive in its current wording, we are afraid that the latest interpretative approaches, including the Recommendation, go in the opposite direction, and an explicit amendment would be significantly more effective.

The Charter of Fundamental Rights of the European Union as a factor affecting the 'European consensus' notion (the example of *'due process'* rights)

Nasiya Daminova*

Summary: The Charter of Fundamental Rights of the European Union can be seen as an instrument to defend the EU legal order autonomy which facilitated the creation of the EU independent standards in the area of Human Rights protection. Nevertheless, the possible effects of the CFREU on the 'European consensus' notion have been largely understudied, although the European Union includes the majority of the European Convention on Human Rights signatories (namely 28 of 47). The aim of this paper is to explore the possible effects of the EU Charter on the notion of 'European consensus', given the incredible uncertainty surrounding this issue. The author proposes to use a group of the so-called *'due process'* rights for a case study, due to their crucial importance for the Council of Europe and EU systems of Human Rights protection functioning. To illustrate the impact of the EU Charter *'due process'* provisions on the 'European consensus' notion, an attempt is made to analyse the European Court of Human Rights jurisprudence employing the Charter as a criterion of the 'European consensus' with a special emphasis on Arts. 6, 7, 13 ECHR and Art. 4 of Protocol No. 7 ECHR. The claim of this paper is that both the corresponding EU Charter provisions (Arts. 47-50) and the EU Charter-based jurisprudence of the Court of Justice of the European Union are quite capable of *(as a minimum)* putting the European consensus under the question or *(as a maximum)* inspiring the European Court of Human Rights to follow the EU standards. Importantly, the ECtHR tends to apply the CFREU provisions and pertinent CJEU case-law not only to raise the level of Human Rights protection in accordance with Art. 52(3) CFREU, but also to transpose the EU-specific derogations from the European Convention standards on the basis of Art. 52(1) CFREU. Arguably, these trends may be explained by the ECtHR's willingness to avoid the conflicts with European Law due to the growing EU Human Rights' acquis which is being developed through the CJEU case-law after the Treaty of Lisbon entry into force.

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1. Introduction

The 'European consensus' is a concept used by the European Court of Human Rights (further – the ECtHR, the Strasbourg Court) in order to apply evolutive interpretation of the European Convention on Human Rights (further – the ECHR, the European Convention) and to keep the meaning of the ECHR rights both contemporary and effective.[1] The ECtHR summarised this interpretative technique as follows: '…The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The *consensus emerging from specialised international instruments and from the practice of Contracting States* may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases ... It will be sufficient for the Court that the relevant international instruments denote a *continuous evolution* in the norms and principles applied in international jaw or in the domestic law of the *majority of member States of the Council of Europe* and show, in a precise area, that there is *common ground* in modern societies'.[2]

Bearing in mind the interpretation given by the Strasbourg Court, there is no doubt that the Charter of Fundamental Rights of the European Union (further – the CFREU, the EU Charter) has a significant potential as a factor affecting the 'European consensus' notion. At present, the European Union includes the *majority* of the ECHR signatories (namely 28 of 47), and has a great *harmonising effect* within the national legal orders of the EU Member States[3] due the

[1] DZEHTSIAROU, Kanstantsin. European Consensus and the Evolutive Interpretation of the European Convention on Human Rights. *German Law Journal*, 2011, vol. 12, no. 10, p. 1730-1733.

[2] *Demir and Baykara v. Turkey,* The European Court of Human Rights (2008, no. 34503/97), paras. 85-86.

[3] In that sense, see for example SCHÜTZE, Robert. An Introduction to European Law. Cambridge: Cambridge University Press, 2015, p. 88; ARNULL, Anthony, CHALMERS, Damian (eds). The Oxford Handbook of European Union Law. Oxford: Oxford University Press, 2015, p. 209; JUNGE, Fabian. Maximum Harmonization by Directives Itselves. Groningen: GRIN Verlag, 2013, pp. 3-15; HUSABØ, Erling, Johannes, STRANDBAKKEN, Asbjørn. Harmonization of Criminal Law in Europe. Antwerpen: Intersentia, 2005, pp. 79-83.

primacy[4] and *direct effect* of the European Law.[5] The EU Charter is traditionally described as the contemporary 'Bill of Rights developed explicitly for the European Union'[6] and the document that 'constitutes the expression, at the highest level, of a democratically established political consensus of what must today be considered as the catalogue of [the EU] fundamental rights guarantees'.[7] The binding legal force of the CFREU granted by the Treaty of Lisbon facilitated the creation of autonomous standards of Human Rights protection within the EU legal order, due to the increased use of the Charter provisions by the Court of Justice of the European Union[8] (further – the CJEU, the EU Court of Justice). The CJEU *Opinion 2/13* precluding the EU from accession to the ECHR in the near future and the 'survival' of the *Bosphorus* presumption[9] preventing the Strasbourg Court from the review of EU legislation will arguably contribute to the development of this trend. Although the European Court of Human Rights case-law referring to the CFREU and the Charter-based jurisprudence of the EU Court of Justice is quite voluminous, possible effects of the EU Charter provisions on the 'European consensus' have not been studied extensively. The aim of this paper is to explore the possible effects of the CFREU on the notion of 'European consensus', given the incredible uncertainty surrounding this issue.

The group of the so-called *'due process'* rights captured by Arts. 6 ('right to a fair trial'), 7 ('no punishment without law'), 13 ('right to an effective

4 Flaminio Costa v E.N.E.L., The Court of Justice of the European Union (1964, Case 6-64), *Internationale Handelsgesellschaft* mbH *v. Einfur- und Vorratstelle für Getreide und Futtermittel,* The Court of Justice of the European Union (1970, Case 11/70).

5 *Van Gend en Loos v Nederlandse Administratie der Belastingen,* The Court of Justice of the European Union (1963, Case 26/62).

6 ZETTERQUIST, Ola. The Charter of Fundamental Rights and the European Res Publica, in DI FEDERICO Giacomo (ed). The EU Charter of Fundamental Rights*: From Declaration to Binding Instrument*. Heidelberg: Springer, 2010, p. 3.

7 *Booker Aquaculture and Hydro Seafoods v Scottish Ministers* (2003, Opinion of AG Mischo *in Joined Cases C-20/00* & *C-64/00*), para. 126.

8 In that sense, see for example *DE BÚRCA*, *Gráinne*. After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? *Maastricht Journal of European and Comparative Law*, 2013, no. 20, pp. 168-172; DOUGLAS-SCOTT, Sionaidh. The European Union and Human Rights after the Treaty of Lisbon. *Human Rights Law Review,* 2011, no. 4, pp. 645, 649; EECKHOUT Piet. Human Rights and the Autonomy of EU Law: Pluralism or Integration? *Current Legal Problems*, 2013, no. 66, pp. 169, 184-185; AUGENSTEIN, Daniel. Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law. *German Law Journal*, 2013, vol. 14, no. 10, pp. 1917, 1919; HAMULAK, Ondrej. Idolatry of Rights and Freedoms – Reflections on the Autopoietic Role of Fundamental Rights Within Constitutionalization of the European Union, Chapter in KERIKMAE, Tanel (ed). *Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights*. Heidelberg: Springer, 2013, pp. 190-191.

9 *Avotiņs v. Latvia,* The European Court of Human Rights (2016, App. no. 17502/07).

remedy') and Art. 4 of Protocol No. 7 ECHR ('right not to be tried or punished twice') was chosen for this study for the following reasons. The *'due process'* rights occupy a central position in the Council of Europe system of Human Rights protection due to their importance for realisation of the individual's substantive rights stemming from the European Convention, and therefore remain the procedural provisions most frequently invoked by the parties before the European Court of Human Rights.[10] However, the EU *'due process'* rights (captured by Arts. 47-50 of the EU Charter) are also crucial for proper functioning of the EU's internal market and often applied in conjunction with other CFREU rights drafted specifically for the EU legal order.[11] In view of different aims of the European Union and the Council of Europe (economic integration in the case of the EU and the protection of the individual for the CoE system), the risk of diverging interpretations of corresponding provisions of the CFREU and the ECHR is higher than in other areas of overlap – which can lead to unpredictable Charter effects on the 'European consensus' notion.

The claim of this paper is that both the corresponding CFREU provisions (Arts. 47-50) and pertinent case-law of the EU Court of Justice are quite capable of (*as a minimum*) putting the 'European consensus' under the question or (*as a maximum*) inspiring the Strasbourg Court to follow the EU standards of Human Rights protection. It will be argued that the ECtHR tends to apply the EU Charter provisions and pertinent CJEU case-law not only to raise the level of protection in accordance with Art. 52(3) CFREU, but also to transpose the EU-specific derogations from the European Convention standards on the basis of Art. 52(1) CFREU.[12] This strategy might be explained by the Strasbourg Court's willingness to avoid possible conflicts with European Law due to the growing EU Human Rights' *acquis* which is being developed through the CJEU case-law after the Treaty of Lisbon entry into force. The situation, however, turns out to be quite challenging since as many as 19 of the European Convention signatories do not currently participate in the European Union. Thus, the non-EU Council of Europe Members are arguably exposed to the risk of being forced to follow the legal standards developed within the EU legal order, which they either chose not to join or were not allowed to join.

[10] VITKAUSKAS, Dovydas, DIKOV Grigoriy. Protecting the right to a fair trial under the European Convention on Human Rights. Strasbourg: Council of Europe, 2012, pp. 7-8.

[11] Such as, for example, Art. 15 ('Freedom to choose an occupation and right to engage in work'), Art. 16 ('Freedom to conduct a business'), Art. 17 ('Right to property') of the Charter of Fundamental Rights of the European Union.

[12] *Charter of Fundamental Rights of the European Union*, Official Journal of the European Union *(2010, OJ C83/02).*

To illustrate these developments, *firstly*, an attempt is made to analyse the Strasbourg Court's jurisprudence employing the EU Charter provisions as a criterion of the 'European consensus' before the Treaty of Lisbon, with a special emphasis on Arts. 6, 7 ECHR and Art. 4 of Protocol No. 7 ECHR. *Secondly*, this paper elaborates on existing Strasbourg case-law using the CFREU and the CJEU jurisprudence developed on the basis of Arts. 47-50 of the EU Charter, after the Treaty of Lisbon entry into force. The concluding part of the paper is devoted to the possible future impact of Arts. 52(3) and 52(1) CFREU on the notion of 'European consensus' in the area of *'due process'* rights, considering the possible after-effects on the European Convention signatories. The author does not claim to provide an exhaustive analysis of the CFREU effects on the 'European consensus', but rather to focus on the specific area of *'due process'* rights – to demonstrate if and how possible divergences between the ECHR and the EU Charter interpretation may be reflected within the Strasbourg Court's jurisprudence employing the 'European consensus' interpretative tool.

2. The Strasbourg Court before the Treaty of Lisbon: Art. 52(3) CFREU & 'European consensus'

The provisions of Art. 52(3) provide that the EU Charter rights derived from the ECHR must be interpreted *consistently* with the Convention. However, the additional clause of Art. 52(3) does not prevent Union law from providing *more extensive protection* in comparison with the ECHR and the ECtHR case-law, in light of the 'autonomy' of EU Law and the EU Court of Justice, which the ECHR's limitation rules cannot 'adversely affect.'[13] Historically, the second sentence of Art. 52(3) CFREU was considered a tool to upgrade the ECHR level of guarantees, especially on the basis of '… some articles of the Charter which, although based on the ECHR, go beyond the ECHR because Union law *acquis* had already reached a higher level of protection.' The *'due process'* rights, with a special emphasis on the 'right to an effective remedy and to a fair trial' (Art. 47 CFREU) and the 'right not to be tried or punished twice in criminal proceedings for the same criminal offence' (Art. 50 CFREU), have been seen as providing more extensive protection in comparison with corresponding Convention

[13] Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union (2007, OJ C303/02), explanatory note concerning Art. 52.

provisions in accordance with Art. 52(3) of the CFREU [14] – which later has been mirrored in the Strasbourg Court jurisprudence.

One can contend that the early European Court of Human Rights jurisprudence indicated the trend to apply pertinent CFREU *'due process'* provisions in order to raise the European Convention level of protection. As pointed out by former Strasbourg judge George Nicolaou, 'in so far as the Charter is concerned, the Strasbourg Court will, more particularly, be comparing the respective provisions in order to ascertain whether the rights depicted in the two instruments correspond or whether the Charter provides a more extensive protection: Art. 52(3). If the latter is the case, the Court will reflect on whether it can follow in the same direction through a dynamic and evolutive interpretation of the Convention text'.[15]

Initially, the EU Charter was used as a criterion of 'European consensus' in Strasbourg cases involving the Convention signatories participating in the European Union, but then it was invoked even in cases directed against non-EU ECHR State parties. One shall mention that, although the judgments of the ECtHR are compulsory only for those States, which are parties to the proceedings and therefore do not have effects *erga omnes*,[16] the binding effect of ECtHR case-law in respect of its interpretative authority (*res interpretata*) is beyond doubt.[17] This circumstance may be of lesser significance for the EU Member States (which are already obliged to follow the CFREU standards, at least in cases where the application of the EU Law is involved)[18] rather than for the non-EU Convention signatories (since the EU Charter remains a foreign law within their legal systems).

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[14] Final report of Working Group II, 'Incorporation of the Charter/ accession to the ECHR' (Constitution for Europe Official Website, 2002) <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00354.en02.pdf>, accessed 6 February 2018, 7.

[15] NICOLAOU George. The Strasbourg View on the Charter of Fundamental Rights, *Research Paper in Law,* 2013, no. 3, p. 7.

[16] Art. 46 of the European Convention on Human Rights (1950, 213 U.N.T.S. 222).

[17] CHRISTOU, Theodora, RAYMOND, Juan, Pablo (eds). *European Court of Human Rights, remedies and execution of judgments*. London: British Institute of International and Comparative Law, 2005, pp. 1-3.

[18] Art. 51 CFREU 'Field of application', para. 1 reads as follows: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'.

2.1. The EU Charter, 'European consensus' and the EU Member States

Even before the obtaining binding legal force, the EU Charter was used for the identification of an 'international consensus,' enabling the Strasbourg Court to extend the scope of a right guaranteed by the European Convention. As argued by Groussot, the Charter of Fundamental Rights of the European Union is a more progressive and innovative instrument than the European Convention, and the first ECtHR's mentions of the Charter were made in relation to 'progressive' rights,[19] including several references to Arts. 47-50 CFREU. For instance, in the joint concurring opinion in case of *Martinie v. France* three judges pointed out the inconsistency in the application of Art. 6(1) ECHR and advocated for a fundamental reconsideration of the Strasbourg Court's case-law in light of Art. 47 CFREU, in order to expand the Convention right to a fair trial to all categories of public servants.[20] This Opinion demonstrated the willingness of the ECtHR to consider the CFREU as a relevant indicator of 'European consensus' for the development of the ECHR guarantees in line with the 'living instrument' doctrine, as well as the great potential of Art. 47 as a key provision of the EU Charter in the area of *'due process'* rights.

In fact, the reasoning in the progressive concurring opinion was recognised a year later in case of *Eskelinen and Others v. Finland*. The case of *Eskelinen* concerned eight Finnish policemen; upon transfer to a remote part of Finland they were, after more than seven years of proceedings, denied the right to monthly individual wage supplements. The applicants alleged violation of Art. 6(1) ECHR on account of denial of an oral hearing and the excessive length of the proceedings. The consensual value of the EU Charter is particularly obvious in *Eskelinen* judgment since the Strasbourg Court supported its spectacular overruling of its previous Pellegrin jurisprudence[21] by reference to the right to a fair trial of Art. 47 of the CFREU, and to the CJEU jurisprudence dedicated to the principle of effective judicial protection.[22]

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[19] AROLD LORENZ, Nina-Louisa, GROUSSOT Xavier, PETURSSON, Thor Petursson. The European Human Rights Culture – A Paradox of Human Rights Protection in Europe? Leiden: Martinus Nijhoff Publishers, 2013, p. 64.

[20] *Martinie v. France*, The European Court of Human Rights (2006, App. no. 58675/00, Joined concurring opinion of Judges Tulkens, Maruste and Fura-Sandström), para. 2.

[21] In accordance with *Pellegrin* line of reasoning, the actions concerning access to services, unlawful dismissal, or the reinstatement of public officials who occupied their functions as depositaries of the state power were regarded as falling outside of the scope of Art. 6 ECHR. See *Pellegrin v. France*, The European Court of Human Rights (1999, App. no. 28541/95), paras. 64-71.

[22] VAN DROOGHENBROECK Sebastien. Labour Law Litigation and Fair Trial under Art. 6 ECHR, in DORSSEMONT, Filip, LÖRCHER Klaus, SCHÖMANN Isabelle (eds.). The

Referring to the *Johnston* judgment,[23] the European Court of Human Rights noted that if an individual can rely on a material right guaranteed by the EU Law, his or her status as a holder of public power does not render the requirements of judicial control inapplicable. The ECtHR also took into consideration the Explanations annexed to the EU Charter, stating that they constitute a *'valuable tool of interpretation intended to clarify the provisions of the Charter.'* The Court concluded that in the context of EU Law the guarantees stemming from Art. 47 of the EU Charter (corresponding to Art. 6 ECHR) are not only confined to civil and criminal matters and that the CFREU provides for a codification of the wider approach taken by the CJEU in its case-law.[24] Thus it established a new presumption of the applicability of Art. 6 ECHR for public law disputes and decided in the favour of applicants' claim on account of the length of the proceedings.[25]

Next, in the case of *Scoppola v. Italy (No.2),* Art. 49 (1) of the EU Charter rights were also used to progress Convention rights in the interpretation of *'no punishment without law'* principle. The Strasbourg Court in *Scoppola* held with respect to Art. 7 ECHR that 'a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law'.[26] The ECtHR accepted the more beneficial principle of the retrospective application of more lenient criminal law, which is embodied in Art. 49 CFREU and also forms a part of the general principles of European Law as decided by the CJEU in the *Berlusconi* case. Thus, the reliance of the Strasbourg court on the EU Charter rights has resulted in emergence of another common European standard of Human Rights protection. In light of that consensus, the European Court of Human Rights considered that it was necessary to depart from its previous case-law and to affirm that Art. 7 (1) of the European Convention guaranteed not only the principle of 'non-retrospectiveness' of more stringent criminal laws but also, implicitly, the principle of retrospectiveness of the *more lenient* criminal law.

Subsequent practice of the ECtHR demonstrated the readiness of the Strasbourg Court to extend the usage of the EU Charter as an indicator of the European

European Convention on Human Rights and the Employment Relation. London: Bloomsbury Publishing, 2014, p. 174.

[23] *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, The Court of Justice of the European Union (1986, Case 222/84).

[24] *Vilho Eskelinen and Others v. Finland,* The European Court of Human Rights (2007, App. no. 63235/00), paras. 28-30.

[25] *Vilho Eskelinen and Others v. Finland* (no. 24), paras. 62-64.

[26] *Scoppola v Italy (no. 2),* The European Court of Human Rights (2009, App. no. 10249/03), para. 106.

consensus on other ECHR provisions in the area of *'due process'* rights. In *Micallef v. Malta*, decided just before the Lisbon Treaty entry into force, a reference was made to Art. 47 CFREU for identifying *consensus* under the section 'Comparative and EU Law and practice'. In some respects, this judgment correlates to the *Eskelinen* case as the Grand Chamber again extended the scope of application of Art. 6 ECHR, yet may be with a more cautious reasoning. In this case the ECtHR had to decide whether Art. 6 of the European Convention (the right to a fair trial) should cover pre-trial stages of proceeding. The ECtHR established that there is a consensus among the Member States to guarantee the right to fair trial on the pre-trial stage, stating that Art. 47 of the Charter of Fundamental Rights of the European Union guarantees the right to a fair trial and, unlike Art. 6 of the Convention, the provision of the EU Charter does not confine this right to disputes relating only to civil rights and obligations or to criminal charges but also to any rights and freedoms.

It could be argued that the broader scope of the CFREU provision was decisive and essential for the new approach taken by the European Court of Human Rights. After explaining why there is a need to develop its jurisprudence, the ECtHR extended the application of guarantees in Art. 6 ECHR to include interim measures and injunction proceedings.[27] The ECtHR seems to have used the EU Charter as 'an updated version of the Convention'[28] to indicate the newly shaped common values and emerging consensus in International Law, therefore developing the jurisprudence in accordance with the 'living instrument' doctrine and improving the position of the EU individual.

2.2. The EU Charter, 'European Consensus' and the Non-EU ECHR Signatories

However, the reference to the EU Charter to reverse the ECtHR's case-law as an indicator of the European consensus, even on the basis of Art. 52(3) CFREU may sometimes be considered as rather problematic. It is important to remember that when the EU Charter is used as a legal basis for such modifications, it unfolds an impact also on those ECHR signatories which do not currently participate in the European Union. The key argument against basing an evolutive interpretation of Convention rights on developments under EU Law may be that non-EU Member States deliberately steered clear of these developments by not acceding to the

[27] *Micallef v Malta,* The European Court of Human Rights (2009, App. no. 17056/06), para. 32.

[28] LOCK, Tobias. The Influence of EU Law on Strasbourg Doctrines. [online]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922462>, accessed 6 February 2018, p. 21; DICKSON, Brice. The EU Charter of Fundamental Rights in the case law of the European Court of Human Rights. *European Human Rights Law Review*, 2015, no. 1, pp. 27, 40.

EU.[29] Moreover, as said by Chalmers, since the European Convention covers forty-seven states, '…it is committed to a *less intense* form of political integration and governs a *more diverse* array of situations than the European Union. Under these circumstances, it is quite doubtful that the judgments of a court such as the European Court of Human Rights, using higher CFREU standards in such a different context, can be accepted almost unquestionably'.[30] Nevertheless, the Charter of Fundamental Rights of the European Union has showed itself as a valuable tool for identification of the 'European consensus' even in cases involving the non-EU Convention signatories.

The case of *Salduz v. Turkey* related to the interpretation of Art. 6(3)c *('right to legal assistance'*) of the European Convention may be quite illustrative in this regard. In this case the connection to Art. 48 CFREU (*'the rights of the defence'*) was made in the operational part of the judgment, listing this provision as having the same scope as the equivalent right guaranteed by the Convention providing for the right of access to a lawyer during police custody. Further, the horizontal provision of Art. 52(3) CFREU providing for an interpretative bridge to the ECHR right of Art. 6(1) (*'right to a fair trial'*) was mentioned.[31] These comparably brief first remarks can be explained by the fact that the EU Charter provisions almost fully corresponded to the Convention rights, and that the relevant Contracting Party was not the EU Member State and hence not subjected to the rights stemming from the EU Charter. However, one can argue that the Strasbourg Court also emphasised the severity of alleged violations of the ECHR rights in the *Salduz* case, by relating to the pertinent International Law sources (including the CFREU).

In subsequent case of *Pishchalnikov v. Russia* regarding the access to legal aid, the ECtHR continued to use the EU Charter as the criterion of the international consensus. The Strasbourg Court was forced to interpret the possibility of the limitation of the right to legal assistance within the framework of criminal investigation. The Court again said that, following Art. 52 (3) of the Charter, the right guaranteed under its Art. 48 CFREU (*'presumption of innocence and right of defence'*) is among those which have the same meaning and the same scope as the equivalent right guaranteed by the European Convention on Human Rights.[32] Following the Charter approach, the ECtHR concluded that the lawfulness of restrictions on the right to legal assistance during the initial stages of

[29] LOCK (no. 28), p. 6.

[30] CHALMERS, Damian, DAVIES, Gareth, MONTI, Giorgio (eds). European Union Law*: Text and Materials*. Cambridge: Cambridge University Press, 2010, p. 244.

[31] *Salduz v. Turkey,* The European Court of Human Rights (2008, App. no. 36391/02), para. 44.

[32] *Pishchalnikov v Russia,* The European Court of Human Rights (2009, App. no. 7025/04), para. 42.

police interrogation should be considered in light of their overall impact on the right to a fair hearing, and it unlikely that the applicant could reasonably have appreciated the consequences of being questioned without legal assistance. It thus found a violation of Art. 6 of the Convention because there had been no valid waiver of the right to legal assistance.[33]

It is worthy of being mentioned that the ECtHR relied on the CFREU as a criterion of consensus between the majority of the European Convention signatories to provide fundamental guidelines for the interpretation of the *ne bis in idem* principle. In famous case of *Zolotukhin v. Russia*, the ECtHR has decided to interpret the concept *'idem'* in light of the CFREU and the CJEU case-law, which marked a clear departure from the earlier Strasbourg jurisprudence. Art. 50 CFREU protecting *ne bis in idem principle* was listed among the International Law sources when the applicant's complaint (that he had been tried twice for the same disorderly conduct) was considered.[34] After demonstrating that both sanctions were of a criminal nature, the ECtHR examined the meaning of the right not to be tried or punished twice.

As to whether the offences were the same, the Court noted that it had adopted a variety of approaches in the past and that the demand for legal certainty called for a harmonised interpretation. Looking at relevant and comparative international texts the Court deduced that the approach used should be based strictly on the identity of the material acts and not on specific legal classification. Thus the term 'same offence' of Art. 50 of the EU Charter was used to validate a new interpretation of Art. 4 of Protocol No. 7 ECHR which now prohibits the prosecution or trial for a second offence in so far as it arose from identical facts or facts that were 'substantially' the same as those underlying the first offence.[35] This decision was confirmed already in the same year by *Maresti v. Croatia.* This case was likewise concerned with an application alleging a violation of the *ne bis in idem* principle as the applicant was tried and finally convicted twice for the same conduct. In the merits of the case concerning the *idem* element the Strasbourg Court set out the relevant passages of *Zolotukhin v. Russia* and with that also indirectly referred to the Art. 50 CFREU, following higher standard of protection established by the EU Charter.[36]

The above mentioned judgments were directed against Turkey, Russia and Croatia (before the accession to the European Union), which demonstrates the ECtHR's willingness to consider the EU Charter a valid indicator of newly

[33] *Pishchalnikov v Russia* (no. 32), paras. 91-92.

[34] *Zolotukhin v Russia,* The European Court of Human Rights (2009, App. no. 14939/036), para. 33.

[35] *Sergey Zolotukhin v Russia* (no. 34), paras. 79, 120-122.

[36] *Maresti v. Croatia,* The European Court of Human Rights (2009, App. no. 55759/07), para. 62.

shaped common values and emerging 'consensus in international law', even in cases involving the ECHR parties that are not the participants of the European Union. Due to the exceptional CFREU value as a modern Human Rights law instrument,[37] as well as the European Court of Human Rights' objective to interpret the Convention provisions in a dynamic manner to provide the maximum protection of Human Rights,[38] the provisions of Art. 52(3) CFREU has therefore led to the so-called *'spill-over' effects*[39] within the Strasbourg Court practice on Arts. 6 ('right to a fair trial'), 7 ('no punishment without law') and Art. 4 of Protocol No. 7 to the European Convention ('right not to be tried or punished twice'), i.e. the judgments in cases involving non-EU Convention signatories, where an evolutive interpretation of the Convention was mainly based on a consensus between EU Member States.

The approach chosen, however, raised concerns because of the risk of the 'EU majority' hegemony and undermining the principle of the Convention subsidiarity in relation to the national legal systems.[40] Although none of the ECtHR judgments issued before the Treaty of Lisbon entry into force invoked the EU Charter as the sole evidence of a consensus justifying a departure from previous Strasbourg case-law, Arts. 47-50 provisions seemed to have played a primordial role in some cases. This may already be considered an evidence of increasing significance of the Charter of Fundamental Rights of the European Union as a factor affecting the 'European consensus' notion, or even of the EU Charter's increasing role of the *'standard-setter'* within the Council of Europe legal order in the area of 'due process' rights.

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[37] JAASKINEN, Niilo. The Place of the EU Charter within the Tradition of Fundamental and Human Rights, in MORANO-FOADI, Sonia, VICKERS, Lucy (eds). Fundamental Rights in the EU*: A Matter for Two Courts*. London: Bloomsbury Publishing, 2015, p. 12.

[38] *European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th Anniversary of the European Convention on Human Rights (Rome, 3-4 November 2000)*. Strasbourg: Council of Europe – 2002, p. 83.

[39] LOCK (no. 28), p. 26.

[40] In that sense, see for example ARDEN, Mary. Human Rights and European Law*: Building New Legal Orders*. Oxford: Oxford University Press, 2015, pp. 77-80; MURRAY, John. Consensus, Concordance of Hegemony of the Majority? in *Dialogue between judges, European Court of Human Rights.* Strasbourg: Council of Europe – 2008, p. 22; DAUTRICOURT, Camille. A Strasbourg Perspective on the Autonomous Development of Fundamental Rights in EU Law: Trends and Implications. [online]. Available at: <http://www.jeanmonnetprogram.org/wp-content/uploads/2014/12/101001.pdf>, accessed 6 February 2018, pp. 53-56.

3. The Strasbourg Court after the Treaty of Lisbon: a move towards 'consistent' interpretation?

The Treaty of Lisbon appeared to herald a new, promising era for the protection of fundamental rights within the European Union legal order.[41] The number of cases in which the EU Court of Justice mentioned the EU Charter in its reasoning has significantly increased, and the CJEU has engaged substantively with and given prominence to the EU Charter arguments[42] since, as underlined by Allan Rosas, its application has become a matter of daily business due to the CFREU legally binding status.[43] However the way the EU Charter provisions were interpreted and applied by the EU Court of Justice added more complexity to the Luxembourg and Strasbourg Courts' relationship. The author contends that the CJEU post-Lisbon practice in the field of *'due process'* rights is characterised by such trends as, *firstly*, the CJEU's preference to apply the EU Charter rights rather than the European Convention or the Strasbourg case-law as a source of fundamental rights (the so-called 'Charter centrism')[44] and, *secondly*, defining the EU-specific level of protection of *'due process'* rights, which is not necessarily equivalent to one proposed by the Strasbourg Court (*Kadi, DEB, Fransson* lines of reasoning).[45]

Although the majority of the CJEU post-Lisbon judgments propose to follow the ECHR standards or to increase the level of guarantees provided by European

41 SHARPSTON, *Eleanor*. *Reconciling Mutual Trust* and Individual Fundamental Rights. [online]. Available at: <http://www.ecba.org/extdocserv/conferences/lux2015/Sharpston.pdf >, accessed 6 February 2018, p. 1.

42 *DE BÚRCA* (no. 8), p. 169.

43 ROSAS, Allan and KAILA, Heidi. L'application de la charte des droits fondamentaux de l'Union européenne par la Cour de justice: un premier bilan. *Il diritto dell'unione europea,* 2011, no. 1, pp. 5-8.

44 KORENICA, Fisnik. The EU Accession to the ECHR*: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection*. Heidelberg: Springer, 2015, p. 63.

45 In this sense, see for example, ANDERSON, David and MURPHY, Cian. The Charter of Fundamental Rights, Chapter 7 in BIONDI, Andrea, EECKHOUT, Piet (eds). EU Law after Lisbon. Oxford: Oxford University Press, 2012, p. 179; AROLD LORENZ, Nina-Louisa, GROUSSOT Xavier, PETURSSON (no. 19), pp. 64-65; WEIS, Wolfgang. The EU Human Rights Regime Post Lisbon: Turning the CJEU into a Human Rights court? Chapter 5 in MORANO-FOADI, Sonia, VICKERS, Lucy (no. 37), p. 70; HAMULAK, Ondrej and MAZÁK, Ján. The Charter of Fundamental Rights of the European Union *vis-á-vis* the Member States – scope of its application in the view of the CJEU. *Czech Yearbook of International Law*, 2017, vol. 8, pp. 161, 163.

Law (*DEB,*[46] *Jaramillo,*[47] *E.ON*[48]), the diverging line of reasoning appeared, focussing on the possibility of the EU-specific derogations from the European Convention standards on the basis of Art. 52(1) CFREU. Despite the tendency towards unification between two European systems of Human Rights protection, Art. 52(1) CFREU allows for a divergent interpretation exceptionally where the EU Law provides less favourable regime of Human Rights protection. In accordance with Art. 52(1) of the EU Charter, particularly in respect of the European Union's legal autonomy, it must be permissible for the CJEU to impose the limitations on the exercise of the CFREU rights. Since Art. 53 of the EU Charter guarantees the level of protection *equivalent* to one proposed by the Convention – this also means a derogation from a specific interpretation by the Strasbourg Court. These derogations are admitted if 'provided by law' (i.e. contained in EU secondary law) and 'meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others', while respecting the 'essence of the right' and the principle of proportionality.[49] The issue of actual derogations from the ECHR standards on the basis of Art. 52(1) CFREU has already been discussed by the CJEU after the Lisbon Treaty entry into force in more than 30 cases, including several groundbreaking judgments in the area of the '*due process* rights'.[50]

Giving consideration to these developments, it comes as no surprise that in 2010 the European Court of Human Rights first mentioned the EU Charter's *legally binding nature*,[51] and later referred to on several occasions as to the integral part of the European Union's *primary law*.[52] Since 2012, the ECtHR predictably

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[46] *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland,* The Court of Justice of the European Union (2010, Case C-279/09), paras. 36-36, 39-42.

[47] Oscar Orlando Arango Jaramillo and Others v European Investment Bank, The Court of Justice of the European Union (2013, Case C-334/12 RX-II), paras. 41-44.

[48] *E.ON Földgáz Trade Zrt v. Magyar Energetikai és Közmű-szabályozási Hivatal,* The Court of Justice of the European Union (2015, Case C510/13), paras. 50-51.

[49] DE HERT, Paul. EU criminal law and fundamental rights, in MITSILEGAS, Valsamis, BERGSTRÖM, Maria, KONSTADINIDES, Theodore (eds). *Research Handbook on EU Criminal law.* Cheltenham*:* Edward Elgar Publishing, 2016, p. 111.

[50] For instance, the judgments concerning interpretation of the right to a *fair trial and an effective remedy* (*Kadi II,* 2013*,* C-584/10; *Alassini,* 2010*,* C-317/08*), presumption of innocence and right of defence (WebMindLicenses,* 2015*,* C-419/14*)* and *ne bis in idem* principle in European law (*Spasic,* 2014*,* C-129/14) allow to limit the rights in question, pursuing such EU-specific interests as guaranteeing (inter) national security, quicker settlement of disputes to guarantee the effectiveness of EU Law, prevention of fraud falling within the scope of European law or an effective functioning of Area of Freedom, Security and Justice.

[51] *Neulinger and Shuruk v. Switzerland*, The European Court of Human Rights (2010, App. no. 41615/07), para. 56.

[52] See, *inter alia*, *K.M.C. v. Hungary*, The European Court of Human Rights (2012, App. no. 19554/11), para. 18; *M.M. v. the United Kingdom*, The European Court of Human Rights (2012, App. no. 33394/96), para. 144; *Gáll v. Hungary,* The European Court of Human Rights

initiated to rely on the Charter-based Luxembourg jurisprudence as an indicator of the pan-European political consensus[53] to further develop an interpretation of Art. 6 ('right to a fair trial'), Art. 13 ('right to an effective remedy') and Art. 4 of Protocol No. 7 to the European Convention ('right not to be tried or punished twice'). It will be stated that the post-Lisbon jurisprudence of the Strasbourg Court demonstrates the willingness to apply the CFREU provisions and pertinent CJEU case-law not only to raise the level of Human Rights protection in accordance with Art. 52(3) CFREU, but also to transpose the EU-specific derogations from the ECHR standards on the basis of Art. 52(1) of the EU Charter, to give an interpretation of the Convention which is *consistent* with the EU Court of Justice interpretation of corresponding provisions of the Charter of Fundamental Rights of the European Union.

The 'technical' factors which arguably led to abovementioned changes in the Strasbourg Court's practice following the Treaty of Lisbon entry into force were, at first, the perspective of the EU accession to the European Convention on Human Rights[54] and, after the CJEU *Opinion 2/13,* the Strasbourg Court's aspiration to avoid possible collisions with developing body of the CJEU case-law with autonomous substance. One shall note, however, the Strasbourg Court's willingness to continue application of the EU Charter and the CJEU case-law based on Arts. 47-50 CFREU in cases involving the non-EU signatories to the European Convention. As the EU Charter or the EU Court of Justice case-law do not yet have any 'official' status in that regard within the Strasbourg Court practice, these legal sources are still being treated by the ECtHR *as on a par* with other sources of International Law.

3.1. The EU Charter, 'European consensus' and the EU Member States

For instance, inspired by Art. 30 of the Charter of Fundamental Rights of the European Union (*'protection in the event of unjustified dismissal'*) and Art. 24 of the European Social Charter (*'the right to protection in cases of termination of employment'*), the Strasbourg Court gradually extended protection against unfair

(2013, App. no. 49570/11), paras. 19 and 69; *M.S.S. v. Belgium and Greece*, The European Court of Human Rights (2011, App. no. 30696/09), para. 61.

53 LENAERTS, Koen and GUTIÉRREZ-FONS, José. The Place of the Charter in the EU Constitutional Edifice, in PEERS, Steve, HERVEY, Tamara, KENNER, Jeff and WARD, Angela (eds). *The EU Charter of Fundamental Rights: A Commentary*. Oxford: Hart Publishing, 2014, p. 1560.

54 FABBRINI, Federico and LARIK, Joris. Dialoguing for Due Process: Kadi, Nada and the EU Accession to the ECHR. [online]. Available at: <http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp121-130/wp125-larik-fabbrini.pdf>, accessed 6 February 2018, p. 2.

dismissal in the KMC *v. Hungary* case. The European Court of Human Rights held that the dismissal of a civil servant without giving reasons, permitted under Hungarian law at the time of the case consideration, meant that the dismissal could not be practically and effectively challenged independently in a hearing before an impartial tribunal, contrary to Art. 6 of the European Convention (*'right to a fair trial'*).[55]

In subsequent case of *Urbšienė and Urbšys v. Lithuania*, the European Court of Human Rights was asked to interpret the provisions of Art. 6(1) ECHR, in relation to the refusal of legal aid which prevented the applicants from the effective realisation of their right of access to the court. One can state that the *Urbšienė and Urbšys* judgment was a long-awaited response to the *CJEU DEB* case, proposing the wider protection of the right to legal aid provided by EU Law in comparison with the ECtHR's jurisprudence, primarily on the basis of Arts. 47 and 52(3) of the EU Charter.[56] To determine the existence of the majority consensus on this issue, the Strasbourg Court conducted a thoughtful analysis of the pertinent CFREU provisions and the EU Court of Justice practice in the 'Relevant European Union law and practice' section.

The ECtHR demonstrated an awareness of the legal reasoning in *DEB*, where the CJEU recognised that the right to an effective remedy before a court enshrined in Art. 47 of the EU Charter applies to both natural and *legal persons*, and the assessment of the need to grant that aid must be made *on the basis of the right of the actual legal person* whose rights and freedoms as guaranteed by European Law have been violated, rather than on the basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid.[57] To justify the raising of the Strasbourg standard of Human Rights protection primarily on the basis of Art. 47 CFREU and its interpretation by the CJEU, as well as (arguably) for the greater legitimacy of the approach chosen, relevant *DEB* passages referring to the earlier ECtHR jurisprudence have been cited to demonstrate the coherence and consistency of the practice of two European Courts on the matter.[58] On the basis of the legal assessment conducted, the European Court of Human Rights found Lithuania in breach of Art. 6(1) of the Convention and stated that the failure to provide legal aid for the applicants in a bankruptcy proceeding of unlimited company deprived them of the opportunity to present their case effectively to the domestic courts.[59]

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55 *K.M.C. v. Hungary (no. 52)*, paras. 18-19.

56 *DEB* (no. 46), paras. 35-39.

57 *Urbsiene And Urbsys v Lithuania,* The European Court of Human Rights (2016, App. no. 16580/09), para. 32.

58 *Urbsiene And Urbsys v Lithuania* (no. 57), para. 33.

59 *Urbsiene And Urbsys v Lithuania* (no. 57), paras. 47-54.

The Strasbourg Court's jurisprudence concerning the *right not to be tried or punished twice* (Art. 4 of Protocol No. 7 ECHR) also presents an interest for the purposes of present contribution. One of the first post-Lisbon applications on *ne bis in idem principle* lodged against the EU Member State was one made in *Grande Stevens v. Italy*[60] case. In this case, the ECtHR had to deal with the prevention of double jeopardy and the right to a public hearing of the persons responsible for market manipulation, and the CFREU and pertinent CJEU case-law seemed to have a significant impact on the case outcome. The Strasbourg Court scrutinised the Italian regulation on market abuse in light of Art. 4 of Protocol No. 7 and Art. 6 of the Convention. Under Italian Legislative Decree no. 58 of 1998, the same *corpus legis*[61] provides for both criminal and administrative sanctions for market manipulation: where the former is issued by the judiciary, the latter by the Authority (CONSOB) 'which in the Italian legal system, has the task, *inter alia*, of protecting investors and ensuring the transparency and development of the stock markets'.[62] Importantly, the criminal proceedings which had followed the imposition of the financial penalty provided for by Art. 187 of the Decree were authorised by Art. 14 of Directive 2003/6/EC (the so-called 'Market Abuse Directive').[63]

The sensitivity of the issue arguably instigated the Strasbourg Court to follow the proposal of the applicants (Mr. Grande Stevens and Mr. Gabetti) to use Art. 50 of the EU Charter and pertinent CJEU jurisprudence as a criterion of the 'European consensus' in this case. The ECtHR turned to the analysis of the CJEU *Spector Photo Group* case to reaffirm the *possibility* for EU Member States to set both criminal and administrative sanctions to combat market abuses, but not an obligation to establish the 'double track procedure' system in accordance with Directive 2003/642, in order to establish an effective mechanism to fight market manipulation and abuses[64]. The references were made to the *Åklagaren v. Hans Åkerberg Fransson* judgment, on the subject of value-added tax, where the CJEU stated that, under the ne bis in idem principle, a State could only impose a double penalty (fiscal and criminal) in respect of the same facts if the first penalty was *not* criminal in nature.[65] Therefore, the Directive 2003/6 did

[60] *Grande Stevens and Others v. Italy,* The European Court of Human Rights (2014, App. no. 18640/10).

[61] Legislative Decree of Italian Parliament no. 58 of 24 February 1998 (Decreto Legislativo 24 febbraio 1998, n. 58, 'Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52', pubblicato nella *Gazzetta Ufficiale* n. 71 del 26 marzo 1998 – Supplemento Ordinario n. 52).

[62] *Grande Stevens* and Others *v. Italy* (no. 60), para. 9.

[63] *Grande Stevens* and Others *v. Italy* (no. 60), *paras.* 34, 43, 46, 91.

[64] *Grande Stevens and Others v. Italy* (no. 60), para. 229.

[65] *Grande Stevens and Others v. Italy* (no. 60), para. 229.

not provide a duty to establish criminal sanctions to combat market abuses, nor banned it. In light of these considerations, the European Court of Human Rights concluded that there had been a violation of Art. 6 (1) ECHR (*'right to a fair hearing within a reasonable time'*), a violation of Art. 4 of Protocol No. 7 (*'right not to be tried or punished twice'*) and that the respondent State was to ensure that the new criminal proceedings brought against the applicants, in violation of Art. 4 of Protocol No. 7, which were still pending in respect of Mr. Gabetti and Mr. Grande Stevens, were closed as rapidly as possible.[66]

Similar approach was chosen by the European Court of Human Rights in subsequent case of *Kapetanios and Others v. Greece*, where the criminal proceedings were brought against each of the three applicants on contraband (*criminal*) charges, combined with the obligation to pay the *administrative* fines for illegal imports, or fiscal fines for contraband.[67] In this connection, the ECtHR noted the convergence between the Strasbourg interpretation of Art. 4 of Protocol No. 7 and that of the CJEU with regard to the criminal nature of a penalty: 'Lastly, the Court observes that in the judgment in the *Åkerberg Fransson* case, referred to by the Greek Government in its observations, the Court of Justice of the European Union stated that under the *ne bis in idem principle,* the State may impose a double penalty (both tax and penal) for the same offence only on condition that the first sanction is *not* of a criminal nature. The Court notes on this point that in assessing the criminal nature of a tax penalty the CJEU relies on the three criteria used by the [Strasbourg] Court in *Engel and Others* case… The [Strasbourg] Court therefore finds that the two courts have reached a *consensus* in the assessment of the criminal nature of a tax procedure and, *a fortiori*, on the application of the *ne bis in idem* principle in tax and penal matters (see, to that effect, *Grande Stevens and Others)*'.[68]

In light of the *Fransson* judgment, the European Court of Human Rights commented, however, that the principle *non bis in idem* would not have been breached had the two possible forms of penalty (i.e. imprisonment and pecuniary) been envisaged as part of *a single set of judicial proceedings*, or if the criminal court had *suspended the trial* following the opening of the administrative proceedings and subsequently brought the criminal proceedings to a close once the Supreme Administrative Court had confirmed the fine. As that had not been the case, the Strasbourg Court concluded that there had been a *violation* of Art. 4 of Protocol No. 7 in respect of the three applicants.[69]

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66 *Grande Stevens and Others v. Italy* (no. 60), paras. 235-237.

67 *Kapetanios and Others v. Greece,* The European Court of Human Rights (2015, nos. 3453/12, 42941/12 and 9028/13).

68 *Kapetanios and Others v. Greece* (no. 67), para. 73.

69 *Kapetanios and Others v. Greece* (no. 67), paras. 71-75.

3.2. The EU Charter, 'European Consensus' and the Non-EU ECHR Signatories

Interestingly, one of the first Strasbourg references to the EU Court of Justice CFREU-based jurisprudence (*Kadi I*) was made in case of *Nada v. Switzerland*, concerning the possibility to impose limitations on the right to an effective remedy of persons suspected of association with terrorism (Art. 13 of the European Convention).[70] It will be stated that the application of the famous *Kadi* litigation's outcomes within the Strasbourg *Nada* shall be seen as a very specific case of the consensual application of the Charter of Fundamental Rights of the European Union. The judgment in *Kadi I* clarified certain procedural rights of persons suspected of association with terrorism, including the right to an effective remedy and the right to a fair trial (Art. 47 of the EU Charter).[71] However, this line of reasoning was often criticised for allowing to limit the rights in question, pursuing such EU-specific interests as guaranteeing (inter) national security and *primacy* of European Law within the European Union legal order.[72]

One can contend that the *Kadi I* impact on the Strasbourg Court's reasoning in *Nada* had extremely far-reaching consequences on the European Convention relationship with the UN legal order because the ECtHR elaborated on how to deal with acts attributed to a Contracting Party in cases involving the UNSC Resolutions' implementation, in light of the Convention 'margin of appreciation' doctrine. This example of consensual usage of the CJEU case-law by the Strasbourg Court is also of special significance as Mr. Nada's complaint was lodged against Switzerland, which is the non-EU signatory to the European Convention.

In 2012, the Grand Chamber of the European Court of Human Rights issued its judgment, where the Court was to clarify whether a ban which had been imposed on the applicant as a result of the addition of his name to a list annexed to the Swiss Federal Ordinance, in the context of the implementation of United Nations Security Council counter-terrorism resolutions, breached his rights under Arts. 8 and 13 of the European Convention on Human Rights. Importantly, the Strasbourg Court *accepted* the possibility to limit the Convention rights in question on the basis of relevant UNSC Resolutions as a matter of principle.[73] At

[70] *Nada v Switzerland,* The European Court of Human Rights (2012, App. no. 10593/08).

[71] Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, The Court of Justice of the European Union (2008, Case C-402/05 P).

[72] TZANAKOPOULOS, Antonios. Legal acts, Chapter 4 in RYNGAERT, Cedric, DEKKER, Ige, WESSEL, Ramses (eds). *Judicial Decisions on the Law of International Organizations.* Oxford: Oxford University Press, 2016, pp. 229-232.

[73] *Nada v Switzerland* (no. 70), para. 172. The relevant resolution is Security Council is Resolution 1390 of 28 January 2002, UN Doc. S/RES/1390 (2002).

the same time, the Grand Chamber evoked the special situation of the applicant, who had been prohibited from leaving an Italian enclave of approximately 1,6 square kilometres despite his medical needs. The ECtHR considered that the relevant SC Resolution did not specifically require such restrictive measures, a circumstance that enabled the Grand Chamber to assess the legality of Switzerland's conduct.[74]

According to the Strasbourg Court, Switzerland should have provided Mr. Nada with access to the effective judicial review by Swiss courts, by which means he could have challenged the measures implementing UNSC Resolutions' sanctions regime. Swiss tribunals did look at his case, but only to conclude that they could go no further than to state the primacy of UNSC resolutions within the national legal order, on the basis of Art. 103 of the United Nations Charter.[75] Consequently, at the Swiss level, review options were open, but not efficient, since no institution found itself competent to challenge the sanctions. As the Court considered that Switzerland had failed to harmonise the international obligations that appeared contradictory, the Court found that there had been a violation of Art. 8, and also Art. 13 of the European Convention.[76]

In reaching this conclusion, the ECtHR was evidently inspired by the EU Court of Justice reasoning in the *Kadi I* case, which evidenced the CJEU's role in the governance of global anti-terrorism law.[77] The Strasbourg Court referred to the finding of the CJEU that *'it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations'.* The ECtHR was of the opinion that the same reasoning was applicable to *Nada* case, more specifically to the review by the Swiss authorities of the conformity of the Taliban Ordinance with the Convention. It further found that there was nothing in the Security Council resolutions to prevent the Swiss authorities from *introducing mechanisms to verify the measures taken at national level* pursuant to those resolutions.[78] The *Nada* judgement thus echoed the approach

[74] *Nada v Switzerland* (no. 70), para. 195.

[75] *Nada v Switzerland* (no. 70), paras. 45-48. Art. 103 of the Charter of the United Nations is worded as follows: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[76] *Nada v Switzerland* (no. 70), para. 214.

[77] MURPHY, Cian. The legal response to terrorism of the European Union and Council of Europe, Chapter 39 in SAUL, Ben (ed). *Research Handbook on International Law and Terrorism.* Cheltenham: Edward Elgar Publishing, 2014, p. 691.

[78] *Nada v. Switzerland* (n. 70), para. 212.

of the EU Court of Justice and the General Court in the *Kadi I* judgment, holding that regional implementing measures taken by the European Commission were to be judged against human rights standards binding on the Union institutions. However, the *Nada* case outcome has wider geographical ramifications than *Kadi* since it applies to all 47 Member States of the Council of Europe, including three permanent members of the UN Security Council.

The CJEU reasoning in *Kadi* litigation, however, had further implications on the notion of 'European consensus' within the ECtHR's jurisprudence. Less than two months after the decision of the CJEU in *Kadi II*, similar reasoning was adopted by the European Court of Human Rights in subsequent *Al-Dulimi* case, where the Court found a violation of Art. 6(1) ECHR ('right to a fair trial'), because Swiss courts did not provide meaningful judicial review of the applicants' listing by the Sanctions Committee of the Security Council.[79] The case was transferred for the consideration of the Grand Chamber; it upheld the previous decision of the Strasbourg Court with the similar reasoning supported by the references to the *Kadi II* judgment. The Grand Chamber stated that no UNSC resolution 'explicitly prevented' the Swiss courts from reviewing the measures taken to implement the international sanctions and concluded that no real conflict of obligations had arisen.[80] The Court added that because the relevant UNSC resolutions did not exclude domestic judicial review *expressis verbis*, the resolutions, when properly interpreted, left the door open for such review, which was required by Art. 6 of the Convention. However, that review would be relatively minimal, ensuring that the listing of the person in question was not *arbitrary*.[81]

In so doing, the Strasbourg Court avoided (similarly to *Nada*) ruling on whether Art. 103 of the United Nations Charter – establishing the principle of the UN Charter primacy over other international agreements concluded by the UN Member States – was capable of displacing the European Convention in the first place, in case there was a genuine norm conflict.[82] The ECtHR, again, referred to the relevant passages of *Kadi II: 'it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under*

[79] *Al-Dulimi and Montana Management Inc. v. Switzerland*, The European Court of Human Rights (2013, App. no. *5809/08*).

[80] *Al-Dulimi and Montana Management Inc. v. Switzerland*, The European Court of Human Rights (2016, App. no. 5809/08), para. 143.

[81] *Al-Dulimi and Montana Management Inc. v. Switzerland* (no. 80), paras. 147.

[82] *Al-Dulimi and Montana Management Inc. v. Switzerland* (no. 80), para. 149.

Chapter VII of the Charter of the United Nations'.[83] As the ECtHR has already observed, the Security Council was required to perform its tasks while fully respecting and promoting human rights. To sum up, the Court took the view that paragraph 23 of Resolution 1483 (2003) could not be understood as precluding any judicial scrutiny of the measures taken to implement it, therefore developing a presumption in favour of the UN not to impose obligations on its Member States requiring a violation of fundamental rights.[84]

Considering that the above passages of *Kadi I* and *Kadi II* were extensively quoted in *Nada* and *Al-Dulimi*, there are good reasons for assuming that, over the peculiarities of the different cases, the Strasbourg Court *de facto* transposed the standard of judicial review proposed by the EU Court of Justice. In order to solve the conflict of obligation to carry out Security Council decisions under Art. 25 of the UN Charter and to implement the ECHR norms effectively, the ECtHR seemed to have endorsed the more stringent version of 'equivalent protection' (*Solange I*) doctrine.[85] It is evidenced in the paragraph of *Al-Dulimi* where it is stated that, given the serious consequences that the denial of the Swiss courts to fully examine the claims before them has from the perspective of the European Convention, the absence of an explicit prohibition by the UNSC to permit judicial review of the conduct implementing the measures it has adopted, should be understood as an authorisation for *national courts* to exercise scrutiny.[86] In view of these strong statements, the point at issue is whether the standards of judicial review applied to the UN blacklisting system in both *Nada* and *Al-Dulimi* are fully consistent with those requirements of flexibility that are necessary for ensuring the balance of interests at stake.[87] In other words, whether an equivalent protection argument shaped on such high standards of judicial review can be

[83] *Al-Dulimi and Montana Management Inc. v. Switzerland* (no. 80), para. 148.

[84] RAVASI, Elisa. Human Rights Protection by the ECtHR and the ECJ*: A Comparative Analysis in Light of the Equivalency Doctrine.* Leiden: BRILL, 2017, p. 127.

[85] In the *Solange I* case, the German Federal Constitutional Court ruled in 1974 that European law had not yet reached a level of protection of fundamental rights equivalent to that provided by national constitutional law, as well as a similar level of democratic legitimacy for its law-making powers. In the light of these factors, in the hypothetical case of a conflict between EU Law and the guarantee of fundamental rights under the German Constitution, German constitutional rights prevailed over any conflicting norm of the EU law. According to *Solange I* the German Courts therefore shall determine whether Union law infringed German constitutional law and reserve the right to apply national constitutional law ahead of Union Law.

[86] *Al-Dulimi and Montana Management Inc. v. Switzerland* (no. 80), para. 146.

[87] ARCARI, Maurizio. UN Security Council Resolutions before the European Court of Human Rights: Exploring Alternative Approaches for the Solution of Normative Conflicts, Chapter 2 in ACCONCI, Pia, DONAT CATTIN, David, MARCHESI, Antonio (eds*).* International Law and the Protection of Humanity*: Essays in Honor of Flavia Lattanzi*. Leiden: Martinus Nijhoff Publishers, 2016, p. 35.

considered as the best way to attain a 'fair balance' between the goals of peace maintenance and protection of the ECHR *'due process'* rights.

Similarly, in the case of *Tomasović v. Croatia*,[88] the EU Charter was cited by the Strasbourg Court to identify an emerging consensus while interpreting the *ne bis in idem* principle. The applicant's constitutional complaint, alleging a violation of the right not to be tried or punished twice, was dismissed by the Constitutional Court of the Republic of Croatia on 7 May 2009 (before the previously mentioned *Maresti* judgment was delivered). It was dismissed on the ground that the Croatian legal system did not exclude the possibility of punishing the same person twice for the same offence when the same act is prescribed both as a minor offence and a criminal offence. In the *Tomasović* judgment, the ECtHR found a violation of Art. 4 of Protocol no. 7, having referred to the relevant passages of the *Zolotukhin* case citing the relevant provisions of the EU Charter (Art. 50 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence').[89] It pointed out that the applicant was prosecuted and tried for a second time for an offence of which she had already been convicted. Moreover, in the *Tomasović* judgment, the ECtHR concluded for the first time that it is irrelevant if the first penalty has been discounted from the second in order to mitigate the double punishment.[90]

The same line of reasoning was continued by the Strasbourg Court in *Milenković v. Serbia*, which concerned a violation of the applicant's right not to be tried twice because the domestic criminal courts tried him in 2011 and 2012 for the second time for a criminal offence for which he had already been convicted in misdemeanor proceedings in 2007.[91] Like in *Tomasović,* the ECtHR made a reference to the relevant passages of the *Zolotukhin* case mentioning pertinent provisions of the EU Charter to indicate an 'international consensus' on the issue of double punishment for the same offence. The Court said that at the time the misdemeanor conviction acquired the force of *res judicata*, the criminal proceedings were pending before the first instance court (the Municipal Court in Leskovac).[92] In these circumstances, the ECtHR considered that the Municipal Court in Leskovac should have terminated the criminal proceedings following the delivery of a 'final' decision in the first proceedings. It furthermore noted that in his appeal against his conviction by the Municipal Court the applicant complained of a violation of *non bis in idem* principle. However, the appellate court upheld the applicant's conviction in respect of the same offence for which

[88] *Tomasovic v Croatia*, The European Court of Human Rights (2011, App. no. 53785/09), para. 26.
[89] *Tomasovic v Croatia* (no. 88), para. 26.
[90] *Tomasovic v Croatia* (no. 88), para. 27-32.
[91] *Milenkovic v Serbia,* The European Court of Human Rights (2016, App. no. 50124/13).
[92] *Milenkovic v Serbia* (no. 91), para. 38.

he had already been punished in the misdemeanor proceedings.[93] Lastly, when deciding the applicant's appeal, the Constitutional Court failed to bring its case-law in line with this Court's approach taken in the *Zolotukhin* case.[94] In light of these considerations, the ECtHR unanimously held that there has been a violation of Art. 4 of Protocol No. 7 to the Convention.[95]

In sum, the evolution of the Strasbourg case-law (*Zolotukhin, Maresti, Tomasović, Milenković, Grande Stevens, Kapetanios*) tended to show that Art. 4 of Protocol no. 7 to the ECHR precluded measures for the imposition of both administrative and criminal penalties in respect of the same acts, thereby preventing the commencement of a second set of proceedings, whether administrative or criminal. On the other hand, the abovementioned CJEU *Åkerberg Fransson* judgement interpreted the principle of *ne bis in idem* as not directly prohibiting an imposition of both administrative and criminal sanctions for tax evasion in light of Art. 50 of the EU Charter. It could be said that the noted differences in the interpretation of Art. 4 of Protocol no. 7 by the ECtHR and Art. 50 CFREU by the CJEU placed the Strasbourg Court in a very difficult position, considering that this kind of legal collisions often arose within the context of the Strasbourg litigation against the non-EU Convention signatories.

However, the European Court of Human Rights partially solved this legal puzzle in the *A. B. v. Norway* Grand Chamber judgement on the application of the non bis in idem principle.[96] Unlike previous case of Grande Stevens which concerned the 'double track procedure' in the EU-specific context of market manipulation, or the case of *Kapetanios* regarding two separate sets of proceedings, *A. and B. v. Norway* concerned two taxpayers who submitted that they had been prosecuted and punished twice – in the national procedure combining the elements of both administrative and criminal sanctions – for the same offence. Tax surcharges were imposed on the applicants following administrative proceedings because they had omitted to declare certain income in tax returns; in parallel criminal proceedings they were also subsequently convicted and sentenced for tax fraud for the same omissions. The *A.* and *B.* complained under Art. 4 of Protocol No. 7 to the European Convention that they had been prosecuted and punished twice in respect of the same tax offence. The ECtHR explicitly referred to the interpretation of Art. 50 CFREU proposed by the EU Court of Justice in *Åkerberg Fransson*, which seemed to have a decisive impact on the case outcome. The long-awaited judgment was supported by some Council of Europe Member States (for instance France, as third party

[93] *Milenkovic v Serbia* (no. 91), paras. 40-42.
[94] *Milenkovic v Serbia* (no. 91), paras. 46-48.
[95] *Milenkovic v Serbia* (no. 91), para. 48-49.
[96] A. B. v. Norway, The European Court of Human Rights (2016, nos. 24130/11 and 29758/11).

intervener in the case),[97] however may also be seen as quite controversial due to the development of the principle of subsidiarity to the (possible) detriment of the Convention rights' effectiveness.

The Strasbourg Court's cautionary reasoning indicated the complexity of the problem: the ECtHR concluded that it had no cause to cast doubt on the reasons why the Norwegian legislature had opted to regulate the socially harmful conduct of non-payment of taxes by means of an integrated dual (administrative/criminal) process. Nor did it call into question the reasons why the Norwegian authorities had chosen to deal separately with the more serious and socially reprehensible aspect of fraud in the context of criminal proceedings rather than an ordinary administrative procedure. The Court then continued the discussion with the reference to the AG Opinion in the *Fransson* case, which clarified that many European jurisdictions accepted the 'two-track' system of criminal proceedings and administrative penalties, in line with their constitutional traditions.[98] This easily explains, in the eyes of the Court, that as many as six states intervened in support of the Norwegian government.[99] Moreover, the Strasbourg Court evidently followed the CJEU judgment in the above mentioned case, which interpreted the *ne bis in idem* principle laid down in Art. 50 of the EU Charter as *not* precluding a (EU) Member State from imposing *successively*, *for the same acts* of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.[100]

On the basis of these premises, the ECtHR pointed out that, in principle, Art. 4 of Protocol 7 ECHR does not exclude that the Convention signatory can legitimately provide a *system* of punitive measures for the socially offensive conduct (such as the tax evasion). However, these coordinated legal responses brought against a subject shall be *'sufficiently closely connected in substance and in time'* to form *'a coherent whole'*, and *'do not represent an excessive burden for the individual concerned'*.[101] In particular, the Strasbourg Court emphasised that Art. 4 of Protocol No. 7 ECHR does not pose an absolute ban on States to impose an administrative sanction (even though it can be qualified as 'substantially criminal') for those tax evasion in cases, where it is also possible to prosecute and punish for an element other than the mere non-payment of the tax, such as a fraudulent conduct, to which the mere 'administrative' procedure

[97] A. B. v. Norway (no. 96), paras. 90-92.
[98] A. B. v. Norway (no. 96), para. 118.
[99] A. B. v. Norway (no. 96), para. 119.
[100] A. B. v. Norway (no. 96), para. 52.
[101] A. B. v. Norway (no. 96), para. 130.

could not be adequately applied.[102] Considering these premises, the ECtHR found no violation of Art. 4 of Protocol No. 7 to the Convention in respect of either of the applicants and said that, while different penalties had been imposed by two different authorities in the context of different procedures, there had nevertheless been a sufficiently close connection between them, both in substance and in time, for them to be regarded as forming part of an *overall* scheme of sanctions under Norwegian law.[103]

4. Conclusion

In this paper an attempt was made to shed some light on the influence of the group of the so-called EU Charter *'due process'* rights on the notion of 'European consensus' within the practice of the European Court of Human Rights. The author analysed the usage of the EU Charter as a criterion of 'European consensus' within the practice of the Strasbourg Court, with a special focus on the *'due process'* rights (i.e. Arts. 6, 7, 13 and Art. 4 of Protocol 7 to the European Convention) and discussed possible influence of the EU Court of Justice jurisprudence on Arts. 47-50 CFREU on 'European consensus' notion in the future. The main argument presented was that the Charter's influence on the notion of 'European consensus' in the area of *'due process'* rights in years to come, is likely to remain significant. However, the application of the EU Charter provisions capturing the *'due process'* rights as an indicator of 'European consensus' remains a very sensitive issue, due to the different legal contexts where the CFREU and the Convention are applied, as well as different *raisons d'être* of the Strasbourg and Luxembourg regimes of Human Rights protection. There are several crucial points which are worthy of being mentioned.

Firstly, the analysis of the Strasbourg Court's judgments released before the Treaty of Lisbon entry into force demonstrated the ECtHR's willingness to use Arts. 47-50 of the EU Charter to raise the level of the Human Rights guarantees in comparison with the standard previously existed in the European Court of Human Rights's practice. For example, such lines of reasoning as *Micallef* and *Salduz* (right to a fair trial, Art. 6 ECHR), *Scoppola No.2 (*no punishment without law, Art. 7 ECHR), *Zolotukhin* (right not to be tried or punished twice, Art. 4 of Protocol No. 7 ECHR) demonstrated the potential of Art. 52(3) CFREU as a factor affecting 'European consensus' notion and could be quite telling on this point. Importantly, the ECtHR has employed the EU Charter provisions as an

[102] A. B. v. Norway (no. 96), para. 123.
[103] A. B. v. Norway (no. 96), para. 147, 153, 154.

indicator of 'emerging consensus' not only in cases involving the EU Member States, but also in cases directed against non-EU Convention signatories (such as Russia,[104] Turkey[105] and Croatia before its accession to the European Union).[106]

Secondly, one could claim that the binding legal force of the Charter of Fundamental Rights of the European Union brought significant changes to the Strasbourg Court's practice in the area of '*due process*' rights. Despite the views expressed in academia earlier on the 'consensual' value of the EU Charter *only* in cases when it provides a more extensive protection on the basis of Art. 52(3),[107] the post-Lisbon practice of the European Court of Human Rights demonstrated that this statement is not necessarily correct. Rather, it can be concluded that the ECtHR demonstrates the aspiration to use pertinent CFREU-based jurisprudence of the EU Court of Justice to propose the *consistent* interpretation of the European Convention, even in cases where a possible derogation from the ECHR standards of protection might take place and/ or the application concerns the non-EU Convention signatory (*Nada/ Al-Dulimi, Kapetanios/ A and B v. Norway* lines of reasoning). Considering the *res interpretata* effects of the ECtHR's decisions, it will be stated that the Strasbourg Court demonstrates an endeavour to choose wherever possible an interpretation of the European Convention that is not only compatible with, but even conducive to a proper application of the EU Charter *'due process'* provisions by national authorities of the EU Member States,[108] acting within the scope of European Law. This tactic of 'conflict avoidance' is understandable as, in light of the CJEU *Opinion 2/13*, the time-frame and likelihood of success of any future negotiations to achieve EU accession to the European Convention remain unclear, while the need in coherent application of two main European legal instruments for the Human Rights protection is beyond doubt. Therefore, the influence of the EU Charter provisions on the 'European consensus' method usage is likely to increase further with the CJEU becoming more and more active in framing for the derogations from the ECHR standards on the basis of Art. 52(1) of the EU Charter, given that they are provided for by European Law, respect the essence of the rights and do not violate the principle of proportionality.

Thirdly, the higher degree of specificity achieved by the EU fundamental rights' standards in the area of *'due process'* rights may result in subjecting

[104] *Pishchalnikov v. Russia* (no. 32*), Zolotukhin v. Russia* (no. 34).
[105] *Salduz v. Turkey* (no. 31).
[106] *Maresti v. Croatia* (no. 36).
[107] NICOLAOU (no. 15), p. 7.
[108] POLAKIEWICZ, Jörg. Europe's multi-layered human rights protection system: challenges, opportunities and risks. [online]. Available at: < http://eulawanalysis.blogspot.ru/2016/03/europes-multi-layered-human-rights.html>, accessed 6 February 2018.

non-EU Member States to additional layers of obligations stemming from the EU Charter autonomous interpretation and given in the specific context of the EU legal order. This point may be well illustrated by the Strasbourg *Nada* or *Al-Dulimi* judgments which *de facto* obliged Switzerland to raise the standard of national judicial review, in order to make the application of national legislation consistent with the requirements of Arts. 6 and 13 of the European Convention. One could state that under these circumstances the ECtHR should provide a deeper scrutiny of the EU Charter interpretation to define the rationale of the CJEU approach – the EU-specific purpose of the market integration or the protection of the EU individual. Under these circumstances, the Strasbourg Court should also remain open to *not* following a 'European consensus' if there are good reasons for doing so. In connection with the previous discussion, one of these good reasons – though not actually employed by the European Court of Human Rights so far – could be that in a case brought against a non-EU ECHR signatory a consensus is mainly based on developments in European Law.

Principle of Ne Bis In Idem in the Context of European Criminal Law

Dávid Kaščák*

Summary: The academic article deals with one of the essential principles of criminal procedures that is with principle *ne bis in idem*, that has been ranked among the essential legal terms within the criminal procedures of the European Union. At first, the article describes and defines the principle of *ne bis in idem* in general, and afterwards within the broader context, as well as in the context of the European Union, while the European standard arises from the highest-principled international and European documents where it has been embodied.

Keywords: Fundamental Principles, Fundamental Principles of Criminal Procedure, The Principle of Ne bis in idem, Double Jeopardy, Not Twice in the Same Thing, Convention for the Protection of Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights, Charter of Fundamental Rights of the European Union, Convention implementing Schengen Agreement, Roman Statute of the International Criminal Court, European Convention on Extradition, European Court of Human Rights, Court of Justice of the European Union.

1. Introduction

The essential principles of criminal procedures are characterized as the leading legal ideas where its status has been acknowledged by the legislation act itself. Due to its features they are the bases, the whole of the criminal procedures and the adjustment of the functioning of the authorities appearing within the scope of criminal procedure, has been built on. Its significance has been given like this as the whole of the criminal procedure lies on it and it has been considered to be the essential part of the criminal procedure. Inevitably, the significant influence on the whole of the criminal procedure must be admitted, from the very beginning till its final phase and conclusion. Such an influence must be also admitted to the principle *ne bis in idem* known also as the principle not twice in

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the same subject or as double jeopardy. The essential principles of the criminal procedures play significant role while following the aim and the purpose of the criminal procedures, despite this fact it is practically often breached, misused and not respected.

2. Essential characteristic of *ne bis in idem* principle

In general and simplified way, the Latin name for *ne bis in idem* principle for the purpose of the criminal procedure, might be determined as the right not to be prosecuted or punished within the criminal procedure twice for the same criminal act – for the same offence.

The principle *ne bis in idem*, known also as *non bis in idem*, can be found also in the Bible, particularly in Nahuma prophet's book, expressed in the form "God will not punish the same thing twice, not in this world and the world to come...".[1] The right not to be punished twice for the same offence, later during the Roman times, comes from the Roman law where it was expressed that „an issue once decided must not be raised again".[2]

The significance and the aim of the principle *ne bis in idem* lies within providing the legal assurance for the person being lawfully punished for the criminal offence or being dispensed of accusations, not to be punished in the same subject and offence second time and thus the new criminal procedure threat is eliminated. Taking the criminal procedures into consideration, as well as the jurisdiction in general, such doctrine must have a stable and strong status.[3] Justifying the whole of the matter within the criminal procedure is, that once the society realized the legal right to punish the person committing crime, the right to do so was in force, and as it was done, it cannot be executed once again for the same crime.[4] In connection to this there must be reminded that *ne bis in idem* principle is closely connected to and creates an inseparable part of *rei iudicatae* principle, the Latin meaning of word is: a matter/subject (legally) sentenced and judged. The word means a matter where the court brought a verdict and thus such a matter represents an absolute obstacle to accusation from the same reason.

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1 The Bible, Book of prophet Nahum 1:9 [online]. Available at: http://biblehub.com/commentaries/nahum/1-9.htm

2 BUCKLAND, William, Warwick. *A Text-book of Roman Law from Augustus to Justinian* [online]. Available at: https://archive.org/details/textbookofromanl00buckuoft

3 IVOR, Jaroslav, KLIMEK, Libor, ZÁHORA, Jozef. *Trestné právo Európskej únie a jeho vplyv na právny poriadok Slovenskej republiky*. Žilina: Eurokódex, 2013, pp. 132.

4 KLIMEK, Libor. *Základy trestného práva Európskej únie.* Bratislava: Wolters Kluwer, 2017, pp. 130-131.

Currently, the *ne bis in idem* principle belongs to one of the basic human rights. We can find it in the international documents, adopted as resolution of the European Council, United Nations Organization and of course of the European Union. Most of such agreements are not documents of criminal procedures, but the ones modifying human rights.[5]

3. Principle *ne bis in idem* on the international and European level

Within the international and the European criminal context, the *ne bis in idem* principle is a part of many international treaties, some of them of territorial character, applicable within the area of the European Union. Some of the international treaties involve *ne bis in idem* principle are applicable to special acts of crime or subjects, others are of general character and are applicable within the autonomous understanding on the whole of criminal law.[6]

The most essential general meaning international documents are Convention for the Protection of Human Rights and Fundamental Freedoms, accepted by Council of Europe in 1950 and The International Treaty of Civil and Political Rights, coming into force in 1966 in UNO.[7] The most significant international documents of territorial character, applicable on the area of the European Union, are The Charter of Fundamental Rights of the European Union, first announced as common memorandum of the European Parliament, Council and Commission in 2000 as well as the Agreement, by which the Schengen Agreement dated back in 1985 is carried out. The international documents, applicable to special subjects and acts of crime are for example the Roman Statute of the International Crime Court, adopted by signatory parties in 1998, and the European Agreement, concerning handing the villains over from 1957, accepted by the European Council and many more.

3.1. Convention for the Protection of Human Rights and Fundamental Freedoms

The Convention for the Protection of Human Rights and Fundamental Freedoms, coming into force on 4th November1950 and its protocols involve a few rights

[5] KLIMEK, Libor. Transnational Application of the Ne bis in idem Principle in Europe. *Notitiae ex Academia Bratislavensi Iurisprudentiae*, 2011, vol. 5, no. 3, pp. 15.

[6] VAĽO, Michal. Ne bis in idem v slovenskom (európskom) trestnom práve a potrestanie za priestupok. *Justičná revue*, 2009, vol. 61, no. 6-7, pp. 759.

[7] KLIMEK, Libor. *Základy trestného práva Európskej únie.* Bratislava: Wolters Kluwer, 2017, pp. 123.

where also principle *ne bis in idem* is embodied. The international guarantee not to be punished twice for the same criminal proceeding, is embodied in the Article 4 in Protocol No.7 of this Convention. I tis this Article 4 in Protocol No.7 of this Convention for the Protection of Human Rights and Fundamental Freedoms, providing *ne bis in idem* principle in the form to be tried or punished again in the following way:

"Article 4
Right not to be tried or punished twice

1. *No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*
2. *The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceeding, which could affect the out come of the case.*
3. *No derogation from this Article shall be made under Article15 of the Convention."*[8]

Based on this right, as stated in the Article 4, Paragraph 1 of Protocol No. 7 of this Convention for the Protection of Human Rights and Fundamental Freedoms, nobody can be punished within criminal proceeding under jurisdiction of the same State for the criminal act he has been punished for or freed, according to jurisdiction of that particular State. What is important is to notice the connection in the Article 4, Paragraph 1 „jurisdiction of the same State", the realization of which is limited only to the national level. Due to Paragraph No. 1 we can say that *ne bis in idem* principle involves only cases when the person has been sentenced or freed by valid judgement, in accordance with jurisdiction of that particular State. I tis required to have the verdict as definite and final. The above mentioned, according to Article 4, Paragraph 2 of Protocol No.7 of Convention for the Protection of Human Rights and Fundamental Freedoms does not mean an obstacle while reopening the trial according to jurisdiction of particular State in cases when new or newly discovered facts or a substantial mistake within the previous proceeding could influence the judgement in the subject. That means that the case can be reopened again if there is evidence of new or newly discovered facts

[8] European Convention on Human Rights, Article 4 to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

could influence the case result in accordance with the jurisdiction of particular State.[9] There is, in the Article 4 Paragraph 3 of Protocol No. 7 of Convention for the Protection of Human Rights and Fundamental Freedoms stated a fact that the Article 4 cannot draw away.

Within the Article of Convention for the Protection of Human Rights and Fundamental Freedoms there were problems administering the *ne bis in idem* principle, and it was reflected by the decision making procedure of the European Court for Human Rights. It is, for example, applying the principle of offence and criminal act. Important decisions of the European Court for Human Rights were sentenced first in case *Gradinger c/a Austria*[10], later on *Oliveira c/a Switzerland*[11], then *Franz Fischer c/a Austria*[12] and *Zolotukhin c/a Russian Federation*[13]. There also was for example the application problem, concerning the language interpretation and translation. It must be mentioned here that it is not important as to meaning of particular notions and terms in Convention for the Protection of Human Rights and Fundamental Freedoms within the jurisdictional systems of particular States. Each of the terms in Convention for the Protection of Human Rights and Fundamental Freedoms has its own autonomous meaning, not depending on the meaning in particular participated State. Such an attitude was pointed out in case *Öztürk c/a Germany*[14] but also in case *Engel and others c/a Netherland*[15]. The terms, having autonomous meaning and particular application problems can be only discovered from the content of decisions of the European Court for the Human Rights.

3.2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Right was approved in 1966 by UNO and came into force based on the Article 49 on 23rd March 1976. This

[9] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[10] See: Judgment of the European Court of Human Rights of 23 October 1995 in Case No. 15963/90 – *Gradinger c/a Austria.*

[11] See: Judgment of the European Court of Human Rights of 30 July 1998 in Case No. 25711/94 – *Oliveira c/a Switzerland.*

[12] See: Judgment of the European Court of Human Rights of 29 May 2001 in Case No. 37950/97 – *Franz Fischer c/a Austria.*

[13] See: Judgment of the European Court of Human Rights of 10 February 2009 in Case No. 14939/03 – *Zolotukhin c/a Russian Federation.*

[14] See: Judgment of the European Court of Human Rights of 21 februára 1984 in Case No. 8544/79 – Öztürk *c/a Germany.*

[15] See: Judgment of the European Court of Human Rights of 8 June 1976 in Case No. 5100/71, 5101/71, 5102/71, 5354/72 a 5370/72 – *Engel and others c/a Netherlands.*

international document states in its Article 14 Paragraph No. 7 the principle *ne bis in idem*, and thus provides the right not to be punished twice for the same subject.

Article 14 Paragraph No. 7 of the International Covenant on Civil and Political Rights states and expresses the *ne bis in idem* principle in the following way:

> *"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."*[16]

Based on the right not to be tried or punished twice for the same offence according to the Article 14 Paragraph No. 7 of the International Covenant on Civil and Political Rights, a criminal procedure cannot be started against someone who was sentenced for the same offence before by the valid legal judgement of the Court, where the accused was found guilty or he was acquitted of the crime offence or accusation.

It is important to draw the attention to a few facts. Expressing the principle *ne bis in idem* within the above mentioned Article results that the obstacle avoids only new criminal procedure, but does not to a new criminal and does not mean that the person sentenced or freed cannot be for the same act of crime, within other crime procedure, punished. Within the context of *ne bis in idem* principle it is not clear what decision means an obstacle to a new procedure, whether it is the valid judgement on being guilty or not or any other valid judgement for the same offence despite the fact that it was not judged as criminal act or offence and the judgement was sentenced in another criminal procedure and it is also important to judge from legal point of view if that is the same crime act, no matter what was the legal judgement. Furthermore, a significant fact is that the mentioned Article does not required the act, the crime proceeding was stopped to be referred to as crime act, or to be handled within the crime procedure. What results from the Article is only that the act, was, by the court decision and its valid judgement, sentenced as guilty or freed. Such a crime procedure, either the accused sentenced as guilty or not, obviously will not be a deliquency or any other actionable tort procedure. The terms sentenced guilty or freed from accusation can be factful only within the crime procedure. The above mentioned Article also shows that the obstacle to a new crime proceeding is created by a valid decision and judgement concerning the act, not about the act of crime, that means about the same fact not the same legally sentenced fact. All the States are compulsory to apply Article 14 Paragraph No. 7 The International Treaty of Civil and Political Rights obviously only for criminal procedure.

[16] International Covenant on Civil and Political Rights, Part III, Article 14 paragraph 7.

Despite the fact that an additional provision of this international Treaty, expressing the rights and duties, the participating States agreed to provide for their citizens, are set explicitly in a way to executable directly. All the involved States, agreeing to the above mentioned International Treaty of Civil and Political Rights do not grant the rights involved for people directly under their jurisdiction or assumed a commitment based on the Article 2 Paragraph No.2 of the Treaty.[17] The attribute is set in a following way:

"Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[18]

Finally, it must be added that the International Treaty of Civil and Political Rights does not state expressis verbis, whether the principle *ne bis in idem* should be applied only to domestic decisions or it has an international effect, also in relation to decisions of other State's bodies or multinational bodies like for example International Crime Court. Based on the recommendation of the Board of UNO for the Human Rights the Article 14 Paragraph No.7 including *ne bis in idem* principle, does not possess international effect and applies only to court decisions of the same State.[19]

3.3. The Charter of Fundamental Rights of the European Union

Within the Charter of Fundamental Rights of the European Union, declared for the very first time at the end of year 2000 there are included the particular parts of essential rights with also the non-criminal rights. It must be said that the range of rights, involved in the Charter of Fundamental Rights, is considerably wider in comparison to any other international document, dealing with human rights. Nearly all the rights are taken from older international documents therefore they cannot be considered as new ones. The Rights are adopted mostly from The European Convention on Human Rights. One of the adopted rights is also the *ne bis in idem* principle, that is explained in the Charter as the Right not to be tried or punished twice in criminal proceedings for the same criminal offence. This right and principle *ne bis in idem* is modified in the Article 50 of the Charter of

[17] VAĽO, Michal. Ne bis in idem v slovenskom (európskom) trestnom práve a potrestanie za priestupok. *Justičná revue*, 2009, vol. 61, no. 6-7, pp. 760.

[18] International Covenant on Civil and Political Rights, Part II, Article 2 paragraph 2.

[19] Recommendation of the United Nations Committee on Human Rights of 2 November 1987 in Case No. CCPR/C/31/D/204/1986 – *A. P. c/a Italy*.

Fundamental Rights of the European Union in part VI. Title called Justice, and i tis expressed by the following way:

> *"Article 50*
> *Right not to be tried or punished twice in criminal proceedings for the same criminal offence*
> *No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."*[20]

As quoted in the Article 50 of the Charter of Fundamental Rights of the European Union, no one can be punished within crime procedure for crime act, the one he was, within the European Union freed or sentenced by the legal valid court decision.

As it was said before, this provision is adopted from the European Convention on Human Rights, more specifically in the Article 4 Protocol No. 7.

Firstly, comparing the appropriate provisions of the Charter of Fundamental Rights of the European Union and the the European Convention on Human Rights concerning the *ne bis in idem* principle we can say that the content and the range of the Article 50 of the Charter is identical with the Article 4 of the Protocol No. 7 with Convention.[21] Secondly, applying *ne bis in idem* principle, as it is stated in in the Convention, is possible only on the national level as it has been limited to one State jurisdiction and the difference is that the Charter has a value added by using and limitlessness of principle *ne bis in idem* only to domestic level but allowing to apply it within the whole of the jurisdiction system of the European Union, that means also behind the borders of the member State.[22]

3.4. Convention implementing Schengen Agreement

Another guarantee of the European Union while applying *ne bis in idem* principle is the Agreement to apply the Schengen Agreement[23] dated 1985, also called as Schengen Executing Agreement. Despite the fact that the initial aim of this Agreement

[20] Charter of Fundamental Rights of the European Union, Title VI, Article 50.

[21] Draft Charter of Fundamental Rights of the European Union (text of the explanations relanting to the complete text of the Charter). CHARTE 4473/00, CONVENT 49, pp. 45.; Commentary of Charter of Fundamental Rights of the European Union. EÚ Network of Independent Experts on Fundamental Rights, 2006, pp. 384.

[22] IVOR, Jaroslav, KLIMEK, Libor, ZÁHORA, Jozef. *Trestné právo Európskej únie a jeho vplyv na právny poriadok Slovenskej republiky.* Žilina: Eurokódex, 2013, pp. 133.

[23] The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of

was to make the free movement of people easier by eliminating the border line controls among the member Sates of the European Union, there were introduced such steps as the cooperation of police and judicial forces in criminal procedures. The above mentioned steps were introduced to solve the problems concerning the public safety resulting from moderate border line controls.[24] One of the main reasons of cooperation was also applying the *ne bis in idem* principle. The Convention on Schengen Agreement deals with this principle with a complete Chapter No. 3 called *Application of the ne bis in idem principle*[25], and it consists of five Articles (Articles 54-58). The Article 54 represents the establishing of *ne bis in idem* principle and creates the core of the whole Convention on applying the Schengen Agreement. The principle *ne bis in idem* is expressed there in the following way:

> *"APPLICATION OF THE NE BIS IN IDEM PRINCIPLE*
> *Article 54*
> *A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."*[26]

As it is quoted, the person to be sentenced or freed by one of the contracting party, cannot be prosecuted for the same criminal act by other Contracting Party under condition that the sentence was served or has actually been served, or according to jurisdiction of the State where the verdict was judged, cannot be executed once again.

The guarantee provided by the Article 54 of Schengen Agreement are basically similar in comparison to Article 4 of Protocol No. 7 Convention for the Protection on Human Rights and Fundamental Freedoms as well as to Article 14 Paragraph 7 of International Covenant on Civil and Political Rights. While the above mentioned documents are closer compared we will discover that the Schengen Agreement has an added value. The principle *ne bis in idem* within the Schengen Agreement has got some of the international impacts, or better to

Germany and the French Republic on the gradual abolition of checks at their common borders. Official Journal of European Communities L 239, P. 19-62, 22.09.2000.

[24] BANTEKAS, Ilias, NASH, Susan. *International Criminal Law*. *Second edition.* London – Sydney – Portland: Cavendish Publishing, 2003, pp. 236 –237.

[25] Note: This is a modification of the name in the English version of the Convention implementing the Schengen Agreement, but in other language versions it is in another form, for example, "Prohibition of double punishment", etc.

[26] The Schengen acquis – Convention implementing the Schengen Agreement, Title III, Chapter 3, Article 54.

say international ones, in contrast with the above mentioned documents, having only domestic impact.[27] Executing the Schengen Agreement, the impact of *ne bis in idem* principle is within the whole Schengen area.[28] Extensive interpretation of the principle regulates the member States of the European Union and they must accept not only the judicial decisions but also the domestic criminal procedures of the member States.[29] Person having the right to move freely on the area without borders, cannot be prosecuted for the same criminal act by other contracting party due to reason of getting beyond the borders. Due to this fact, the member States, as stated in Schengen Agreement, are obliged to respect the results of procedures in other member States.[30]

There is a question arising in the context of *ne bis in idem* principle, whether apart of criminal law, also the administrative procedures fall under. The rightfulness of such question is there as from one point of view, the level of application is limited to criminal law but from other point of view, many of the member States of the European Union the administrative procedures play significant role while penalising certain types of behaviour. Basic fact is that some of the types of procedures belong to criminal law in one State while in the other State the same can also belong to criminal law or both of them. Such differences can impair the patronage, offered by *ne bis in idem* principle, stated in Schengen Agreement.[31]

Of course, there were some application problems with *ne bis in idem* principle in practice in Convention on applying the Schengen Agreement. These were solved by the Court of Justice of the European Union, mainly as to pre-jurisdiction questions by member States. Mainly it was about the application problems as in case of time effect *Van Esbroeck*[32], absolute discharge by lawful legal discharge in case *Van Straaten*[33], case of limitation of action in case of *Gasparini*[34],

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[27] CONWAY, Gerard. Ne Bis in Idem in International Law. *International Criminal Law Review*, 2003, vol. 3, pp. 221.

[28] ZÁHORA, Jozef. Aplikácia zásady ne bis in idem v Európskej únii. Jelínek, J. (ed). *O novém trestním zákoníku. Sborník příspěvků z mezinárodní konference Olomoucké právnické dny, květen 2009: trestně právní sekce.* Praha: Leges, 2009, pp. 181.

[29] CHALMERS, Damian, DAVIES, Gareth, MONTI, Giorgio. *European Union Law. Second edition.* New York: Cambridge University Press New York, 2010, pp. 611.

[30] IVOR, Jaroslav, KLIMEK, Libor, ZÁHORA, Jozef. *Trestné právo Európskej únie a jeho vplyv na právny poriadok Slovenskej republiky.* Žilina: Eurokódex, 2013, pp. 462.

[31] VAN BOCKEL, Bas. *The ne bis in idem Principle in EU Law.* Alphen aan den Rijn: Kluwer Law International, 2010, pp. 22.

[32] See: Judgment of the Court of Justice of the European Communities of 9 March 2006 in Case C-436/04 – *Criminal proceedings against Leopold Henri Van Esbroeck*.

[33] See: Judgment of the Court of Justice of the European Communities of 28 September 2006 in Case C-150/05 – *Jean Leon Van Straaten against Staat der Nederlanden and Republiek Italië*.

[34] See: Judgment of the Court of Justice of the European Communities of 9 September 2006 in Case C-467/04 – *Criminal proceedings against Giuseppe Francesco Gasparini and others*.

case of amnesty in *Bourquain*[35], cases like aborting the accusation, judgement by prosecuting attorney in case *Gözütok & Brügge*[36], the case of questions, what judgements of prosecutor fall under *ne bis in idem* principle in case *Miraglia*[37], lawful discharge before accusation in case *Turanský*[38], etc.

Just to make it complete we can add that before the Convention on applying the Schengen Agreement, in force since 1987 there was an Agreement on dual criminal sanction, planning to introduce *ne bis in idem* principle among the member States of the European Union, but has never come into force as it was not ratified sufficiently. It was this Agreement that served as platform for the Schengen Agreement. At the conclusion, there was introduced a proposal of framework decision in 2003 concerning *ne bis in idem* principle, while the Articles 54-58 of Schengen Agreement should be abolished. The fact is that the framework decision was not agreed and did not come into force.

3.5. Roman statute of International Criminal Court

Some of the significant international documents, including *ne bis in idem* principle, belongs the Roman statute of International Criminal Court, accepted on the diplomatic conference on 17th July 1998 in Rome. The document involves the criminal act of genocide, crime against humanity, war crimes and crime of aggression.

The principle *ne bis in idem* is mentioned in Article 20 of the Roman statute of the International Criminal Court, and is expressed in the following way:

"Article 20
Ne bis in idem

1. *Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.*
2. *No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.*
3. *No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:*

[35] See: Judgment of the Court of Justice of the European Communities of 11 December 2008 in Case C-297/07 – *Klaus Bourquain*.

[36] See: Judgment of the Court of Justice of the European Communities of 11 February 2003 joined Cases C-187/01 a C-385/01 – *Hüseyin Gözütok and Klaus Brügge*.

[37] See: Judgment of the Court of Justice of the European Communities of 10 March 2005 in Case C-4369/03 – *Criminal proceedings against Filomeno Mario Miraglia*.

[38] See: Judgment of the Court of Justice of the European Communities of 22 December 2008 in Case C-491/07 – *Criminal proceedings against Vladimír Turanský*.

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."[39]

Based on the Article 20 of the Roman statute of the International Criminal Court, the *ne bis in idem* principle determines that no person shall be tried before International Court for behaviour, creating the base of criminal acts, the ones he was sentenced or freed of by this Court. The principle also guarantees that no person will be tried by other Court for the same act of crime, he was sentenced or freed of by International Criminal Court. Of course, these regulations took into consideration acts of crime like genocide, crimes against humanity, war crimes and crime of aggression.

3.6. European Convention on Extradition

Another international document, though not the one of human-rights nature, but the one where *ne bis in idem* principle is reflected, is the European Convention on Extradition. The European Convention on Extradition was released and agreed by the European Council on 13th December 1957 in Paris. The name of the Article, involving *ne bis in idem* principle within the European Convention on Extradition is in the form *non bis in idem*[40], or is called as the obstacle to valid judgement. The above mentioned principle is modified within the Article No. 9 of the European Convention on Extradition in a following way:

"Article 9
Non bis in idem
Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences."[41]

[39] Rome Statute of the International Criminal Court, Part II, Article 20.
[40] Note: This is a modification in the English version of the European Convention on Extradition, but in other language versions it is in another form, for example, "Obstacle to a lawful matter", etc.
[41] European Convention on Extradition, Article 9.

Based on quoted clause, the extradition is not allowed in cases when particular authorities of requested Party made the final verdict within the criminal procedure against the claimed person about the one or more acts of crime, why he has been claimed for. The extradition can be rejected when the particular authorities of the requested Party decided not to start or stop the criminal procedure for the same one or more criminal acts.

As to the first sentence of this Article, it concerns the case when the final verdict was made, either the one to claim him guilty or not. Based on this, the extradition should be rejected from the reasons that there is no way to start the criminal procedures again and the final judgement came into force. Under the word final judgement, according to Article 9 of the European Convention on Extradition, it should be understood that all the means of appealing were done, while the delayed verdict as well as the verdict *ultra vires* is not considered to be the final. The second sentence that has permissive character involves such person towards the one verdict has been judged and it actually causes obstacles to proceeding or its completion, mainly in cases when the court decision state that there are no reasons for criminal proceeding. In such cases the extradition can be rejected. If there new or other evidence and facts, having effect on decision, such principle cannot be realized and the person must be extradited, by the exception according to Article 8[42] is the execution of procedure or requested Party against the person based on the objective Article.[43]

Finally I feel to be important to mention that the above mentioned Article No. 9 of the Convention is applicable within the procedure of extradition due to the reason to avoid prosecution of the person more than once for the same act of crime in different jurisdictions.[44] It also must be said that the European Convention on Extradition is out of date and is not applied as to the area of the European Union and the executions on it as it was substituted by extradition of people based on the European warrant of apprehension.[45]

[42] European Convention on Extradition, Text of the Article 8 – Pending proceedings for the same offences: "The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offences for which extradition is requested."

[43] Explanatory Report to the Article 9 to the European Convention on Extradition.

[44] BIEHLER, Gernot.: *Procedures in International Law.* Berlin – Heidelberg: Springer, 2008, pp. 255.

[45] IVOR, Jaroslav, KLIMEK, Libor, ZÁHORA, Jozef. *Trestné právo Európskej únie a jeho vplyv na právny poriadok Slovenskej republiky.* Žilina: Eurokódex, 2013, pp. 460.

4. Conclusion

The above mentioned principle *ne bis in* idem, within democratic States, belongs to generally respected principles of the criminal procedures and it also belongs to basic rights in crime procedures. As one of the basic human rights there is also the one considered not to be punished twice for the same criminal act, the one when person was punished for or freed of accusation. Some of the judicial codes and norms do not have the *ne bis in idem* principle expressed in the same way. Therefore it is necessary while this principle is applicable, to come out from the wording of this legal enactment, applied to particular case. A helping hand, while decisions are made reviewing the cases, is the wide range of the practice of the courts offered by domestic, as well as, and in substantial extent, by the international courts, having priority in such examples. Taking the importance of *ne bis in idem* principle into consideration, it is necessary to respect and know the practice of the courts as well as the legal norms concerning this principle, either of domestic or international character.

Freedom in the Context of Political Power in European Political Thoughts: H. Arendt, J. Patočka a V. Bělohradský

Pavel Hlavinka*

Summary: This text deals with the concept of freedom and its related responsibilities as space while creating the moral dimension of political action. In this context we are analyzed Arendt, Patocka and Bělohradský terms sovereignty, political power, totalitarian system and liberal democracy. Their reflection is guided by a deep respect for the Socratic-Platonic tradition of political thought. Mentioned thinkers also combines their common interest in the phenomenological method. Arendt perceives freedom as the very reason of the existence of politics. Bělohradský repeats Husserl's and Patočka's appeal consisting in the search for the original European legacy, i.e. the return to the last instance of your decision-making – personal conscience.

Keywords: freedom, policy, totalitarian system, liberal democracy, fenomenology.

1. Hannah Arendt's social ethics

Hannah Arendt learnt the philosophical craft from the masters of her times: Edmund Husserl, Martin Heidegger, Roman Guardini and Karl Jaspers. As one of the most prominent representatives of political philosophy of the 20th century, she also focused on human behaviour in the social context. Arendt, a Jewish thinker, distinguishes between two types of moral behaviour: contemplative life (*vita contemplativa*) and active life (*vita activa*).

Spiritual and moral dispositions, in Arendt's words – the religious character, provide humans with the capability to harmonically combine both these life approaches. In reference to Aurelius Augustinus, she says that a man as the image of God is endowed with the ability to walk the path of knowledge towards his innermost self. At the same time, men should not refuse the political aspect of their nature, actively seeking to serve the human community.

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Arendt claims that action[1] means initiating something new in the sense of creating. In this way, humans are redoing the act of creation, thereby giving rise to something principally new. A man is a being endowed with freedom[2], which should, similarly as the gift of faith, be accepted as the condition to humanity. Only faith opens the world up to people, consequently causing automatisms of the everyday life to disappear. Like fire, this everyday life eats away the uniqueness of the earthly existence of each of us. An active life is a practical implementation of the expression of love and the miracle capable of changing the routine way of the world, i.e. the expression of human freedom. According to Arendt, the first thinker to draw a connecting line between freedom, love and faith, was Aurelius Augustinus, a man living at the time of the collapse of the Roman Empire and, at the same time, the one who built the foundations of the Christian philosophy and doctrine. He elaborated on the concept of freedom as the freedom to choose, to decide (*liberum arbitrium).* However, Arendt draws more benefit from his

[1] Raised by the hermeneutic etymological approach of her teacher, M. Heidegger, H. Arendt studies etymology of the word to act in Greek. The first one is *archein* – to initiate, guide, but also to rule, and the second one is *prattein*, to manage, accomplish, or do something. Latin equivalents are *agere* – set in motion and *gerere*, translated by Arendt either as withstanding or supporting the continuity of past deeds. This results in historical acts that are called *res gastae*.
In both cases, action takes place in two stages. *Archein* in Greek means acting or ruling, which, at that time, was the privilege of free citizens. Arendt thus equates experience of being free with initiating new things. Rulers were liberated from self-consuming procurement of life needs and could therefore, with others alike, focus on leadership and try to accomplish (*prattein*) a historic deed. Also in Latin, the author discloses a unique connection between *agere* and *gerere*, this time supported by more historical documents. For Romans, the notion of freedom was based on the fact of foundation (agere) of Rome, which obliged them to manage, expand and preserve the continuity of tradition (*res gestae)* of the Roman republic. However, Roman writers were unable to come up with such a concept of freedom that would theoretically support their political experience of freedom. Neither the Greeks, according to Arendt, had a clear idea of the relationship between the freedom they described and the philosophically substantiated inner freedom from external desires and the freedom of a citizen of a community.

[2] Arendt even perceives freedom as the very reason of the existence of politics: *"The raison d'être of politics is freedom, and its field of experience is action. (…) Freedom as a demonstrable fact and politics coincide and are related to each other like two sides of a coin. (…) This is the realm, where freedom is the worldly reality, tangible in words that can be heard, in deeds which can be seen, and in events which are talked about, remembered and turned into stories before they are finally incorporated into the great storybook of human history. (…) This, of course, belongs among the fundamental tenets of liberalism which, its name notwithstanding, has done its share to ban is the notion of liberty from the political realm. For politics, according to the same philosophy, must be concerned almost exclusively with the maintenance of life and the safeguarding of its interests. Now, where life is at stake, all action is, by definition, under the sway of necessity. and the proper realm to take care of life's necessities is the gigantic and still increasing sphere of social and economic life, whose administration has overshadowed the political realm ever since the beginning of the modern age."* In: ARENDT, Hannah, *The Crisis in Culture*. Praha: Mladá fronta,1994, pp. 68–79.

theories on freedom seen as an existential characteristic of a human being in the world. Human birth and the revelation of freedom are identical. For Augustinus, humans are free, since they have been created. And this creative beginning recurs whenever a new person is born, who can initiate something new in the world (in Greek *archein*, in Latin *agere*). Arendt finds support for this concept of freedom also in the New Testament. Human power resulting from human freedom comes to its climax not in the will, but in faith.

Faith acts through miracle, which is nothing else than: *"a process in whose framework it occurs and whose automatism it interrupts – that is something which could not be expected."*[3] Arendt considers the automatisms to be an integral part not only of cosmic and organic, but also of historical processes. The permanent repetition of these natural processes allows for a kind of a scientific insight, the automatism gives rise to new life in the nature, guiding it to an inevitable end. However, Arendt believes that human beings are provided, from time to time, at timely historical moments, with the capacity to interrupt the course of a certain automatism *by action*. Only the very start of these automatisms, the creation of the world and time, is, of course an act of a *miracle*, our whole existence depending on something which safeguards, exceeds and controls the natural flow of things from the invisible background. In this anthropocentric concept of Christianity, Arendt views humans as the only being in the world capable of active participation in the miracle. It is obvious that this entire theory is beyond the scientist's grasp: *"The very impact of an event is never wholly explicable; its factuality transcends in principle all anticipation. The experience that tells us that events are miracles is neither arbitrary nor sophisticated. It is, on the contrary, most natural and, indeed, in ordinary life almost commonplace. Without this commonplace experience, the part assigned by religion to supernatural miracles would be well-nigh incomprehensible."*[4]

Arendt believes that the history of European ethical and political thinking saw a fatal shift in the concept of liberty as the very condition of humanity and action, known already to the Greeks, towards freedom of the will in the sense of *being able to want something* or *control something or someone*. If I find that my will does not suffice for my self-control – meaning the defeat of my weaknesses – then my effort for the implementation of my own freedom is transformed in the desire to control others. Most notably, according to Arendt, this step was most explicit in the bizarre confusion and fusion of three principally different terms: humanity founding freedoms, free will and sovereignty in political philosophy of Jean Jacques Rousseau. He believes that *state sovereignty* in the sense of

[3] Ibid, p. 93.
[4] Ibid, p. 95.

indivisible power derives from the notion of *general will* representing the free will of each citizen.[5] And this is the biggest mistake of all, since, according to Arendt, the sovereignty of the state and the preservation of human freedom are mutually exclusive: *"The famous sovereignty of political bodies has always been an illusion, which, moreover, can be maintained only by the instruments of violence, that is, with essentially non-political means. Under human conditions, which are determined by the fact that not man but men live on the earth, freedom and sovereignty are so little identical that they cannot even exist simultaneously. Where men wish to be sovereign, as individuals or as organised groups, they must submit to the oppression of the will, be this the individual will with which I force myself, or the 'general will' of an organized group. If men wish to be free, it is precisely sovereignty they must renounce."* [6]

In addition to the above-specified *action* there are two other activities providing foundations to the being of humans: work and production. Yet it is only through action and communication that people form free relationships and create a space for mutual self-fulfilment. Free space refuses violence and thus political power is to be perceived as a gift of communicative action, for which violence as an act of "unlove" is always fatal. The modern age dazzled by scientific and technological successes placed far too much emphasis on work and production. This reduced the space for free action and personal responsibility mainly by the effect of bureaucracy, modern technology and mass culture. These are the phenomena that enhance anonymity and a buck-passing approach to life namely in cases when individuals hide behind the mask of state institutions. Arendt believes that the interest in public affairs naturally decreases, opening up the way to totalitarian regimes.

In this context, the following train of thought of Hannah Arendt, who as one of the few world renowned social philosophers or political scientists still holds Plato in esteem: *"We can rise above specialization and philistinism of all sorts to the extent that we learn how to exercise our taste freely. Then we shall know how to reply to those who so frequently tell us that Plato or some other great author of the past has been superseded; we shall be able to understand that even if all criticism of Plato is right, Plato may still be better company than his critics. At any rate, we may remember what the Romans – the first people that*

[5] Cf. for example ROUSSEAU, Jean, Jacques, *Discourse on the Origin and Basis of Inequality Among Men*. Prague: Svoboda,1989, p. 247. *"On this view, we at once see that it can no longer be asked whose business it is to make laws, since they are acts of the general will; nor whether the prince is above the law, since he is a member of the State; nor whether the law can be unjust, since no one is unjust to himself; nor how we can be both free and subject to the laws, since they are but registers of our wills."*

[6] ARENDT, Hannah, *The Crisis in Culture*.Praha: Mladá fronta,1994, p.89.

took culture seriously the way we do – thought a cultivated person ought to be: one who knows how to choose his company among men, among things, among thoughts, in the present as well as in the past."[7]

2. Patočka's concept of Europe

As a living amendment to the above-discussed text on contemplating freedom written by Hannah Arendt, comparison with the opinions of two Czech philosophers, Jan Patočka and Václav Bělohradský, come to mind. They represent an attempt to concisely outline some aspects of the genesis of European philosophical-political heritage.

Anthropocentrism, typical for Greek thought, is free of Sumerian theocentric fatalism, Egyptian thanato-centrism, Indian oneness with the universe or the life style of ancient China, seeking harmony in union with natural cycles.

Greek philosophers searched for salvation by grasping the truth through notions, thus allowing for the establishment of the Greek civic society. Historical man emerges by accepting the burden of asking questions. Where the "mythic answer" is made problematic the peculiarity of the fact that "being exists" emerges. We find ourselves on the boundary of the world open to its wholeness and we are set in historical motion. However, if men start posing questions regarding the whole, they can rise above the everyday struggle to provide for their life needs. Patočka believes that the key in history is this openness of humans to events that shatter the everyday course of life.

Greece is also still too much in thrall of the temporalization through *chronos* (mechanical repetition of the individual *present moments*). Christianity introduces *kairos:* time, in which things ripen, and the dimension of the future and development takes over.

Socrates's requirement to define notions awakened by the voice of consciousness (daimonion) thus teams up with Christian eschatology.

European historicity, in Patočka's terms, stems from the care for the soul as seen by Socrates and Plato terms that reveals *freedom* to men (facilitated by the present relationship to the past in view of the future), which is inseparable from (if not identical with) *responsibility*.

Jacques Derrida interprets Patočka's concept of history from the *Heretical Essays on the Philosophy of History* as a genealogy of responsibility, which consists in the conversion of three mysteries. Orgiastic mystery (the demonic, esoteric and the sexual) in itself contains Platonism as the embodiment (incorporation)

[7] Ibid, p.152.

which is subordinated, subjected and disciplined by orgiastic revelry. Christianity exposes men to the fearful mystery (mysterium tremendum) and, at the same time, thanks to the infinite resolution of God-man, life is accepted as a gift. Man becomes a person, who in the ultimate decision-making process, does not relate to Plato's idea of Goodness, albeit the noblest of all ideas. It becomes the internal relationship with infinite love that makes it clear that the person is free and, at the same time, responsible as being guilty due to general sin. *"This transition from externality to inwardness, but also the attainable to the unattainable is the transition from Platonism to Christianity."*[8]

Nevertheless, we can only make sense of the genealogy of European responsibility if related to the present. Patočka rightly speaks of whether today *"historical man still wants to acknowledge history"*[9]. This is the aim of an essay entitled "Is Technical Civilization Decadent, and Why?" Aside from marvellous positive properties and the destructive impact on nature, technology also has the capability of unification and neutralization. Therefore, it necessarily results in indifference and boredom, thus bringing back the demonic. Technical civilization is characterized by sexual charge, fascination by aesthetics and, above all, the individualism heralded in a way in Nietzsche's work. Yet not personal individualism, but *roles and tasks*, each individual engaged in the operation of the disorganized planetary monster *is to play and fulfil*. Patočka perceives this as the climax of the metaphysics of power, seizing everything that can be taken. Knowledge has long lost its contemplative or moral dimension. In an unforeseen manner, applied mathematics intensifies the impact of men on the particulars – in which men then get lost and escape their own selves and the world outside.

Phenomenological philosophy of Patocka's interpretation has lead into a life of truth. The truth, however, is not the traditional importance as a statement of compliance with the object. Living in truth rather stems from man's readiness to open oneself to giving the sense of phenomenon.

Concussion sense in the modern era is evident however, does not lead to moral reap, but is obscured. Metaphysical world, as it has been objectified (and must be) informed by science modern man, wholly absorbed in things and primitive narcissism refuses. In an ideal world, God, good or Existence can not calculate. But it is precisely the impossibility of calculation with this not-being lone man invites forfeited negative nihilism to grasp the positive in the present uncertainty, the appeal is heard in the whole world.

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[8] DERRIDA, Jacques, Mystery, Heresy and Responsibility: Europe according to Patočka. *Filosofický časopis*, 1992,Vol. XL, no. 4, p. 555.

[9] PATOČKA, Jan, *Heretical Essays in the Philosophy of History*. Praha: Nakladatelství Lidové noviny, 1990, p. 126.

Justice (if not perceived only as retribution for the wrongs of the past and a tendency towards gender rising up out of envy) about the victim (unless self-sacrifice simply trade with a view to "better future") are – if they are to have a genuinely ontological dimension – a prerequisite for responsible of relating to personal existence that respect for one's neighbor, and is also responsible "for public affairs".

According to Patocka nor a man of liberal democracy is not possible to fully recognize the moral foundation of life in our essential negativity (pure consciousness and its intentional sense of giving the present givens) and runs to the irresponsible development of the will to power (that wants everything to discover that there is nothing and all living things be eliminated from the planet) supported by the natural human rights. Certainly not in principle no objection rights enshrined in human nature. If, however, remains the right (freedom) alone, if left without any obligation (responsibility), Western civilization itself wrest from its origin.

Patocka is convinced that the task of the philosopher is to care for the soul. Platonic philosophy, which is very struggling, she also finally had to bring to the knowledge of the care of the soul (epimeleiá tés psýchés) is taken into care of my own death (méleté thanatu). This care is clearly reflected in three aspects. In a first aspect, cosmological, which can not go here more depth encompasses the whole of it as being static movement acting. In terms of the doctrine of State makes his eventual transformation of the soul: "The village itself is still passionate intellectual movement of their members; and even prominent case in which you can use variations of the famous *Opsis tón adélon ta fainomena* ('phenomena enable us to see what is not manifested') – cf. H. Diels (W. Kranz – cit. d., Anaxagoras, B 21a) subtract the structure of the soul, which is the individual's hard to decipher."[10]

We can say that the structure and dynamics of the village is a projection of our own souls. What we seem to dislike its laws and institutions are in their origin of our own unresolved and sometimes unacknowledged motivation. The state is secular Total souls, and their merciless mirror. It is to foster the harmonious balance of all structures in the whole, because the soul is ripe if it is balanced in all its parts. For general sense, the soul of its own destiny in accordance with the Socratic-Platonic tradition,which phenomenologist Patocka reflects his personal example. It is obvious that the issue of statehood is not primarily an economic question, but it's a moral issue, a question relating to personal freedom and responsibility. To be tilted own soul is to self-surrender to the mystery of whole world. In terms of municipalities, then it means forget about self-assertion, for

[10] PATOČKA, Jan, *Evropa a doba poevropská*. Praha: Nakladatelství Lidové noviny,1990, p.75.

manifesting their own volition. Being a politician in the strict sense would mortify all your wishes and desires. The victim whole, however, is only capable of extremely ready, really ready to die.

Even so drastic action may be brought on those who would own limited human freedom surrendered in the service spirit. The third aspect of the care of the soul is finally mastering oneself. Man your uncertainty and insecurity in the world compensates for the effort to control the external physical world and others – a common political practice. Who wants to talk about governance, you must first truly conquer itself: to achieve its center, the immobility of his soul that nothing is required and only them. Then the person as a citizen possibly can begin with an explicit projection of his soul into the image of the municipality.

3. Bělohradský's Concept of the Crisis of Technical Age in Europe

Václav Bělohradský is a prominent Czech thinker, who managed to integrate perspective elements of phenomenological investigation of the natural world by Edmund Husserl and Jan Patočka into his concept of modern society seventies and eighties. In his extensive essay *The Crisis of the Eschatology of the Impersonal* (1982) he attempts to apply the political philosophical legacy of the late works by Patočka from the perspective of an exile author. The spirit of this work by Bělohradský is supported by the critique of the occurrence of the gap between personal awareness, responsibility and estranged state and bureaucratic power.

This gap first opened through Machiavelli's definition of the absolute state, which, in order to keep the internal peace, has to eliminate each attempt to proclaim personal awareness as general awareness, since state power has to be unbiased, i.e. impersonal. Absolute power as a means of protection against religious wars in the theory of Thomas Hobbes only confirms this idea: *"Religious belief presents the potential for a civil war, as it requires a sort of adamance, which poses a threat to the peace among the members of the community. This situation can only be resolved by transferring the competences to formulate and exercise laws from all individuals to the 'ruler' and, at the same time, binding them to absolute obedience of the laws formulated by the ruler. Personal opinions have no political impact. The legitimacy of power and legality of power are identical. This reduction of consciousness to something private is a rational condition to the existence of the state, thus also of civic peace."* [11]

[11] BĚLOHRADSKÝ, Václav, *A Critique of the Eschatology of Impersonality*. London: Rozmluvy, 1982, p. 30.

Enlightenment eliminates such dualism of the private belief, which stems from morality and an absolute state governed by the eschatology of the impersonal, as each political act is simultaneously seen as an ethical one. However, state power identified as identical with the moral law thus becomes even more dangerous. Rousseau's effort to build a sovereign state founded on the general will was a portent of a people's state. This "bastard" actually brings unlimited power to "the authorized", who understand "commands of the general will", while again underestimating the conscience of an individual.

The enlightenment effort to unite politics and ethics forms the cornerstone of modern ideologies, the inability to keep the difference between state power and personal conscience, i.e. between legality and legitimacy. Its outcome in the form of revolutionary dictatorships, Nazism and communism, is therefore a direct consequence of this uncontrollable identification of the state with its historical and messianic function.

This suffices in regard to totalitarian democracy, whose genealogy was followed in Bělohradský's text. On the other hand, *liberal* democracy does not become legitimate on the basis of any sovereign general will in the form of ideology, but through Locke's empiricism, which justifies political institutions, providing them with legitimate power from the individual will demonstrated in preference of potential future political decision-making tendencies. The participation of all citizens in political power is unfeasible, resulting in the necessary compromise of delegating the power to representatives of private interests.

However, liberal democracy entails the risk of such an autonomy of political parties as a result of technical progress and specialization that their contact with the electorate will again become redundant because, simply put, they only have a limited access to information. Here Bělohradský repeats Husserl's and Patočka's appeal consisting in the search for the original European legacy, i.e. the return to the last instance of your decision-making – personal conscience. There is no other protection against the central process in the development of modern state, which consists in a continuous increase of rationalization expanding across bureaucratic apparatuses and institutions to each individual and following each of their steps from birth until death. Bělohradský considers nihilism of our century predicted by Nietzsche: *"... to be the line running through the entire Western history from Plato to socialism; state is the instrument of this subordination of men and their earthly world to the 'world beyond', objective world, and this subordination took on a technical form, the form of manipulation of impersonal laws. Nihilism is the expansion of the impersonal. The new form of innocence of power therefore derives from the idea of technical neutrality of impersonal power with regard to opinions and morality."*[12] The effort

[12] Ibid, p. 37.

of the dissidents is not aimed at anything else than the restoration of personal conscience capable of turning power into guilt.

After describing the crisis of the modern state – not only totalitarian, but also liberal, since the totalitarian state is only a monstrous mirror of the "free Western society", Bělohradský attempts to identify the origin of the European legacy. His analysis distinctly shows the elements of the phenomenological theory of Husserl modified by Heidegger's concept of historicity. This consists in the autonomy of human consciousness, which is an Israeli-Greek heritage.

European legacy is characterized by the diarchy between the personal consciousness and institutions. The roots of this diarchy have to be tracked back to the Israeli prophet as the bearer of consciousness whose visions are then articulated for the community by an institutional priest. The situation in Greece is similar: the universal order of the existing things comprehensible by an individual reason corresponds to the law in the *polis*. Crisis in the society therefore arises, if this autonomous fundamental element is absorbed by the institutional one. It is necessary to maintain the balance of these two elements – legitimacy (natural experience of an individual) and legality (institution, law). *"Patočka's question 'whether historical man still wants to acknowledge history', is related to the very possibility of overcoming the decline of Europe, which implies the need to accept the burden of diarchy that will never allow us to escape from any action and to resort to the innocence of everyday life. Therefore it applies that 'the law is the law'."*[13]

Bělohradský's essay also addresses the sources of legitimacy. The primary source is Socrates, who views human liberties as the possibility of acting naturally based on one's own definitions of notions. He also draws on the Christian announcement of God's kingdom, which endows citizens with a more liberal relationship to political power. Finally, the legitimacy is granted through primary human sympathy – the ability to stay in harmony with others, an essential condition for any community.

Bělohradský also does justice to legality and defines its functions that are supposed to guarantee the rights of individuals by limiting and determining the behaviour of others: 1. by canonizing religious texts, i.e. institutionalizing those original religious experiences through the mediation of the prophets (stratification of the society), 2. rational formulation of the laws regulated by the apparatus guaranteeing the distance between the personal consciousness and the role as the "embodiment of the law" and the impartiality and general character of these laws.

[13] Ibid, p. 49

4. Conclusion

As a living amendment to the above-discussed text on contemplating freedom written by Hannah Arendt, comparison with the opinions of two Czech philosophers, Jan Patočka and Václav Bělohradský, come to mind. They represent an attempt to concisely outline some aspects of the genesis of European philosophical-political heritage. The philosophical outreach of Patočka's phenomenology is far too deep to be fully explained for example by the programme manifesto of Charter 77. The author therefore inclines to the opinion of Pavel Rezek's in his work *Philosophy and politics of kitsch*, stating that the dissidents' quest for "life in truth" was rather a willingness to live in conflict. What is then dateless in Patočka? It certainly is the genuine mergence of Heideggerian phenomenology and the Greek philosophical maxim, which is care for children. This care gives the European civilisation the necessity of permanent finding itself in a crisis. Europe and her legacy have undoubtedly been undergoing a fateful period. Yet, it would be interesting if true came Patočka's words on future unique position of East-European countries which will march in the front of protection of the best traditions of the European spirit, for it is them who experienced the cathartic bath of suffering.

Dillemas of Documenting Succession Rights in the EU

Mariusz Załucki*

Summary: In many legal systems, documents confirming the rights of the heirs and other people benefiting from the inheritance are issued in order to confirm the rights to the inheritance acquired. The purpose of such documents is to present the rights under *mortis causa* legal succession to a third party, and legitimisation of the right currently vested in the entitled person, or solving of the possible doubts. Since the respective instruments documenting the rights to inheritance are only of territorial nature, with the entrance into force of the EU Succession Regulation, the European heirs were offered a new instrument of trans-border consequences – the European Certificate of Succession. This new Certificate was supposed to eliminate the previous imperfections in the system of documenting succession rights. After nearly two years of applying the new legal act it may be assumed that the new provisions have not dispelled the doubts.

Keywords: inheritance, succession, EU Succession Regulation, confirmation of succession rights, EU

1. Initial Comments

Transfer of the property rights and duties from a deceased person to their legal successors is an obvious consequence of inheritance, usually regulated by the principles of the succession law[1]. Despite many attempts of unifying law in that regard at various levels, succession has remained the domain of domestic law of the European Union countries[2]. Member states have their own succession laws, which differ in many aspects, such as for example the principles of statutory succession, intestate succession or rights of the persons close to the testator. Along with the increased migration trends in the recent years, the citizens of the

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1 See KERRIDGE, Roger. *Parry and Kerridge: The Law of Succession.* London: Sweet & Maxwell, 2016, p. 1.

2 PINTENS, Walter. *Towards a ius commune in European Family and Succession Law*. Cambridge-Antwerp-Portland: Intersentia, 2012, p. 6 et seq.

particular EU countries acquire various assets in various member states, including real estate. After their death the matter of legal succession may be subject to the regime of many legal systems (domestic laws), which may be decisive as to who and on what principles acquires all of the rights and duties of the deceased[3].

In many legal systems, documents confirming the rights of the heirs and other people benefiting from the inheritance are issued in order to confirm the rights to the inheritance acquired[4]. The purpose of the documents is to present the rights under *mortis causa* legal succession to a third party, and legitimisation of the right currently vested in the entitled person, or solving of the possible doubts. In other words, in order to solve the uncertainty regarding the right to inheritance from the respective testator, the legislators introduce documents of legitimising nature, whose purpose is not only to document the fact of inheriting from the deceased by the respective heir, but also to confirm the nature and scope of the respective rights. Usually, these documents are the only evidence for the heir of coming into inheritance, and serve proving of the heirs' right in situations when this is necessary towards persons who claim specific rights against the estate of the deceased[5].

With regard to the difference of the particular systems of succession law, it comes as no surprise that the respective instruments documenting the rights to inheritance are only of territorial nature. Such state of affairs has been considered unsatisfactory for a long time, at least in the European Union. Therefore, along with the entrance into force of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[6], the European heirs were offered a new instrument of trans-border consequences – the European Certificate of Succession[7]. The objective of the document is to eliminate the previous imperfections in the system of documenting succession rights[8]. After nearly two years of applying the

[3] MODDERMAN, Henrik, Adriaan, Ewoud. *Internationaal Erfrecht.* Den Haag: Mouton, 1895 (Reproduction) 2013, *passim.*

[4] See, for example: DYSON, Henry. *French Property and Inheritance Law. Principles and Practice.* Oxford: Oxford University Press, 2010, pp. 326-328.

[5] See KREßE, Bernhard. Commentary to Art. 62. In Calvo Caravaca, Alfonso-Luis, Davi, Angelo, Mansel, Heinz-Peter (eds.). *The EU Succession Regulation. A Commentary.* Cambridge: Cambridge University Press, 2016, p. 673 et seq.

[6] Official Journal of 27.07.2012, No. L 201/107.

[7] CALVO VIDAL, Isidoro, Antonio. El reenvío en el Reglamento (UE) 650/2012, sobre sucesiones. *Millennium DIPr: Derecho Internacional Privado,* 2015, no. 1, pp. 17–25.

[8] See CRÔNE, Richard. Le certificat successoral européen. In Khairallah, Georges, Revillard, Mariel (eds.), *Droit européen des successions internationales. Le Règlement du 4 juillet 2012*, Paris: Defrénois, 2013, pp. 169–186.

new legal act (the provisions apply to the succession cases in which the testator died after 17 August 2015), it may be assumed that the new provisions have not dispelled the doubts. Admittedly, the Regulation removed certain imperfections but resulted in the origination of new ones.

The purpose of this article is to identify some of the imperfections, present the problems occurring in reference to the need of documenting succession rights within the laws of the European countries, as well as attempt to specify the interpretation direction, which could enable further improvement of that area of the succession law operation.

2. Confirmation of Succession Rights

Determination of legal succession after a deceased testator takes place on various principles in the particular systems of domestic law. To some extent this is related to the varied approach of the legislators to the matters of acquiring the rights to inheritance. Apparently at least three concepts of the succession property transfer to the legal heirs of the testator may be differentiated, i.e. 1) the *le mort saisit le vif*, 2) the *hereditas iacens*, and 3) the estate administration concept. Each of them is characterised with a different approach to the acquisition of the rights and duties of the testator by the heir[9] and, therefore, different needs with regard to instruments legitimising the heirs as the legal successors of the deceased. The legislators apply various instruments in that regard. The consequences of those instruments focus on providing the heirs with the possibility to refer to legal succession after the testator against third parties, as well as creating a presumption that the person whose rights have been confirmed in that way is a heir[10].

The traditional method of confirming the succession rights, at least from the point of view of some of the legal systems[11], namely the court confirmation of the succession rights[12], is only one of the possible models in that regard, and one that is actually very rarely applied in Europe. Admittedly, in the systems

[9] ZAŁUCKI, Mariusz. *Uniform European Inheritance Law. Myth, Dream or Reality of the Future*, Kraków: AFM Publishing House, 2015, p. 131.

[10] KARAKULSKI, Kazimierz. Stwierdzanie praw do spadku [Declaration of Succession Rights]. *Przegląd Notarialny,* 1947, no. 11, pp. 391–397.

[11] GWIAZDOMORSKI, Jan. Stwierdzenie praw do spadku [Declaration of Succession Rights]. *Przegląd Notarialny* 1950, no. 7–8, p. 57et seq.

[12] See GWIAZDOMORSKI, Jan. Stanowisko prawne spadkobiercy według polskiego prawa spadkowego [Legal Position of the Heir under Polish Inheritance law]. *Przegląd Notarialny,*1947, no. 1, p. 434. See also OHANOWICZ, Alfred, Przyjęcie i odrzucenie spadku w nowym prawie spadkowym [Acceptance and Rejection of the Succession in the New Inheritance Law]. *Przegląd Notarialny,* 1947, no. 1, pp. 423–432.

which may be considered the basic paradigms of many regulations, there are similar legal structures, for example the German *Erbschein*[13] or the Austrian *Einantwortungsurkunde*[14], it is also a regulation characteristic to the English law[15], but in a majority of the European domestic legislations, confirmation of succession rights is made outside court. In many European countries there have been developed notarial confirmations of inheritance, as for example the French *acte de notoriété*[16] or the Dutch *verklaring van erfrecht*[17]. As opposed to court documents, notarial confirmation consists in gathering the information on inheritance by a notary public and based thereon, issuing the respective certificate, mainly in indisputable cases. Still another model may be found (in Sweden and Finland), in which a private inventory is made, and based thereon the respective legal consequences are derived. In some other countries there are no adequate regulations in that area and the documentation of the rights of the heirs takes place on customary basis[18] and documentation of the 'coming to inheritance' within the meaning of this speech is issued[19]. There are also systems, as for example in Poland, where the notarial confirmation of succession[20] operates next to the court determination of the rights to inheritance. Generally, a conclusion may be drawn in that respect, that the domestic solutions serving the documentation of the legal status of the heir are not uniform.

[13] MICHALSKI, Lutz. *Erbrecht*, Heidelberg: C.F. Müller, 2010, p. 385 et seq.

[14] See VERWEIJEN, Stephan. *Verlassenschaftsverfahren: Handbuch*, Wien: Linde Verlag, 2014, p. 1 et seq.

[15] The English system obviously differs significantly from continental constructions in this respect, however, it is also necessary to obtain a court's confirmation of *grant of representation*, which is the only evidence of the rights to inheritance of a *personal representative*, the person managing the estate before its transfer to the heirs. See more broadly: KUCIA, Bartosz. Dokumentowanie praw do spadku w prawie angielskim [Documentation of Succession Rights in English Law]. In ROTT-PIETRZYK, Ewa, STRZEBIŃCZYK, Anita (eds.) *Akty poświadczenia dziedziczenia na tle harmonizacji prawa prywatnego* [Acts of Succession Certification Against the Background of Private Law Harmonisation], Bielsko-Biała: Od Nowa 2015, pp. 7-27. Se also KERRIDGE, Roger, supra note 1, p. 459 et seq.

[16] See POTVIN, Florent. *L'acte de notoriété successorale*. Bordeaux: Thèses et écrits académiques, 2004, p. 10 et seq.

[17] See de VOS, Johannes, Wilhelmus, Maria. *De notariële verklaring van erfrecht.* Amsterdam: Gouda Quint 1975, p. 10 et seq.

[18] MARGOŃSKI, Marcin. *Charakter prawny europejskiego poświadczeniaspadkowego. Analiza prawnoporównawcza aktu poświadczenia dziedziczenia i europejskiego poświadczenia spadkowego* [Legal Nature of the European Certificate of Succession. Comparative Legal Analysis of the Notarial Succession Certificate and the European Certificate of Succession]. Warszawa: Instytut Wymiaru Sprawiedliwości, 2015, p. 4.

[19] BONOMI, Andrea, Wautelet, Patrick. *Le droit européen des successions. Commentaire du Règlement no 650/2012 du 4 juillet 2012.* Bruxelles: Bruylant 2013, p. 702 et seq.

[20] GRZYBCZYK, Katarzyna, SZPUNAR, Maciej. Notarialne poświadczenie dziedziczenia jako alternatywny sposób stwierdzenia prawa do dziedziczenia [Notarial Certificate of Succession as an Alternative Means of Establishing the Right to Succession]. *Rejent*, 2006, no. 2, pp. 44–57.

The problem of non-uniform instruments for documenting the succession rights becomes particularly important in trans-border context, where the heir wishes to prove their rights to legal succession with regard to the estate left by the testator in another country. Traditionally, the document confirming the rights to inheritance issued in one country did not result in any legal consequences in another country. Only after the introduction of the provisions of the particular international conventions on the jurisdiction and execution of court adjudications in civil cases, the operation of such documents in other countries depended on their acceptance by the court of that other country, within a procedure provided by law. This is not, however, automatic. Such adjudication, in order to qualify for acceptance proceedings, must fulfil a series of preconditions determined by the specific domestic regulations. Nevertheless, this has not been satisfactory in the area of succession law for many years now, particularly because in the specific countries this could result in various resolutions[21].

3. A New European Instrument

Discrepancies in documenting the acquisition of rights to inheritance have been perceived by the European doctrine for a long time. The statements of the scientific circles have become one of the reasons for introducing uniform instruments in that regard on the European level. Already in the Green Paper regarding statutory succession and last wills[22], which opened consultations regarding the principles of *ab intestato* succession or testate succession, a need for introducing a common standard in that regard in the EU countries was perceived[23]. Among other things, it has been indicated there, that "it is essential for heirs to be able to assert their rights and take possession of the property to which they succeed", which would justify the establishment of "a certificate having uniform effects throughout the Community" and "would undeniably constitute value added". In that context, it has been considered how to solve some issues, including the basis for preparing

[21] See BASEDOW, Jürgen, DUTTA, Anatol, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 2010, no. 74, p. 672.

[22] COM (2005) 65.

[23] ZAŁUCKI, Mariusz. Ku jednolitemu prawo spadkowemu w Europie. Zielona księga Komisji Wspólnot Europejskich o dziedziczeniu i testamentach [Towards a Unified Inheritance Law in Europe. Green Paper of the Commission of the European Communities on Succession and Wills]. *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego,* 2009, vol. VII, no. 1, pp. 103–118.

such "certificate", the contents thereof as well as its consequences. Therefore, three questions were posed in the Green Paper: "Question 33: What effects should the certificate have?; Question 34: What information should appear on the certificate?; Question 35: Which Member State should issue it? Should the Member States remain free to decide which authorities are to issue the certificate or should certain criteria be laid down in the light of the certificate's content and functions?" This has resulted in some discussion, rather enthusiastic with regard to the possibility of enriching the set of legal succession instruments with such a solution[24]. In the opinion of many commentators it has been obvious that the respective solution will be included in a future legal act regulating the European succession law issues.

And this really happened. The provisions of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, comprise a respective regulations in that regard (Articles 62–73)[25]. On that background it must be mentioned that at the stage of the legislative works, the EU regulator considered at least several concepts for the future European solution. One of the suggestions was to dwell upon the existing tools in that regard and use for that purpose for example the certificate introduced by the Hague Convention of 2 October 1973 concerning the international administration of the estates of the deceased persons, which functions only in some member states, i.e. in Italy, Luxembourg, the Netherlands, Portugal, the Slovak Republic and the Czech Republic[26]. Moreover, the use of one of the instruments applied by the particular member states was taken into account. In that regard the German *Erbschein* was indicated as the model solution. Considered was also a solution consisting in preparing a certificate of succession by a notary public. Finally, an instrument was selected, which in its nature represents the notarial certificates of succession operating in some member states, and the European Certificate of Succession was introduced[27].

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[24] See, for example, HARRIS, Jonathan. The Proposed EU Regulation on Succession and Wills : Prospects and Challenges. *Trust Law International,* 2008, no. 4, pp. 229–235; Łukańko, Bernard. Europeizacja prawa spadkowego [Europeanisation of Succession Law]. *Europejski Przegląd Sadowy,* 2007, no. 7, p. 36.

[25] See BONOMI, Andrea, Wautelet, Patrick, supra note 19, pp. 769-934; Davi, Angelo, Zanobetti, Alessandra, *Il nuovo diritto internazionale privato europeo delle successioni*, Torino: G. Giappichelli Editore, 2014, pp. 231-248.

[26] See a list of signatories and States acceding to the Convention available online: http://www.hcch.net/, [last visited: 6.12.2017].

[27] ZAŁUCKI, Mariusz. Commentary to Art. 62. In Załucki, Mariusz (ed.) *Unijne rozporządzenie spadkowe Nr 650/2012. Komentarz* [EU Succession Regulation No. 650/2012. A Commentary], Warszawa: C.H. Beck, 2015, p. 287.

In accordance with Article 62.1 of Regulation No. 650/2012, there was created "a European Certificate of Succession [...] which shall be issued for use in another Member State and shall produce the effects listed in Article 69" of the Regulation. Accordingly to the latter provision, the consequences consist in creation, among other things, of a presumption that "the person mentioned in the Certificate as the heir, legatee, executor of the will or administrator of the estate shall be presumed to have the status mentioned in the Certificate and/or to hold the rights or the powers stated in the Certificate, with no conditions and/or restrictions being attached to those rights or powers other than those stated in the Certificate" (Article 69.2), whereas "the Certificate shall produce its effects in all Member States, without any special procedure being required" (Article 69.2). Therefore, the Certificate is an attempt to enable faster consideration of trans-border succession cases, and is to facilitate the determination of the legal succession status in a member state other than the state of the Certificate issue, e.g. in a member state in which the succession property is located (Recital 67 of the Regulation)[28].

Therefore, currently, next to the domestic instruments, in the European succession law there is operating a universal instrument confirming the status of the heir – the European Certificate of Succession. The reach of the domestic instruments is, as to the principle, limited to the territory of one country. The European Certificate of Succession should, thus, be used in trans-border matters. The new instrument does not take the place of the previously applied instruments but supplements them (Article 62.3 of the Regulation). In care for the principles of subsidiarity (confirmed with Article 5 of the EU Treaty), it was, therefore, decided that the Certificate will not replace the internal documents which may exist for the performance of similar objectives in the member states. The European Union has in this way divided the competencies in that regard between itself and the member states[29].

4. New Doubts

The above may raise some doubts *prima facie*, as the European Certificate of Succession is only a supplementation of the existing methods of documenting

[28] PISULIŃSKI, Jerzy. Europejskie poświadczenie spadkowe [European Certificate of Succession]. In Pecyna, Marlena, Pisuliński, Jerzy, Podrecka, Małgorzata (eds.) *Rozprawy cywilistyczne. Księga pamiątkowa dedykowana Profesorowi Edwardowi Drozdowi* [Civilist Debates. Memorial Book Dedicated to Professor Edward Drozd], Warszawa: Lexis Nexis 2013, p. 622.

[29] See. HERTEL, Christian. European Certificate of Succession – Content, Issue and Effects*, ERA Forum,* 2014, no. 15, pp. 393-407.

the acquisition of inheritance, and is not of obligatory but of optional nature. One of the major problems related to that, which might have been foreseen before the new Regulation came into force, was the previous or subsequent issue by the competent authority of a member state of a document confirming the acquisition of succession rights in the previous form. This issue has not been in any way solved by the Regulation, which means that the Certificate does not replace the internal documents used by the member states for similar purposes (Article 62.3 of the Regulation). Meanwhile, there occur collisions of the particular documents, at least in the situation when the European Certificate of Succession has already been issued and only then the domestic document, or when there already exists a domestic document at the moment the European Certificate of Succession is issued. As regards the estate of the deceased located in several countries, it is possible that several domestic documents are issued as well as the European Certificate, or even several independent European Certificates. Such situations cannot be avoided in the current state of affairs, similarly as the discrepancies between the contents of the respective documents cannot be avoided.

The problem was perceived at the very beginning of the Regulation provisions application. The doctrine indicated, among other things, that the conflicts between the contents of the European Certificate and the domestic instruments have not been solved in the Regulation and the Regulation has not provided any measures to help solving the discrepancies[30]. Some people have tried to prove that with regard to the alleged correctness, the consequences of the discrepant instruments are mutually excluded, which means that the legal status is equivalent to that, which would apply without any certification[31]. This was also the object of one of the first concerns of the preliminary ruling procedures, filed by the domestic courts to the European Court of Justice. In the case C-20/17 (*Vincent Pierre Oberle*), the German Kammergericht Berlin asked on 18 January 2017 whether Article 4 of the Regulation is to be interpreted such that it also applies the sole domestic jurisdiction to the issue of the domestic succession certificates by the member states, which are not replaced by the European Certificate of Succession (see Article 62.3 of the Regulation No. 650/2012), with the result that divergent provisions adopted by national legislatures, for example § 105 of the *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (FamFG[32]) in Germany, are ineffective on the ground

[30] DORSEL, Christoph. Europäische Erbrechtsverordnung und Europäisches Nachlasszeugnis. *Zeitschrift für die Steuer- und Erbrechtspraxis,* 2014, p. 212 et seq.

[31] WALL, Fabian. Richtet sich die internationale Zuständigkeit zur Erbscheinserteilung künftig ausschließlich nach Artt. 4 ff EU ErbVO?. *Zeitschrift für die Steuer- und Erbrechtspraxis*, 2015, p. 16.

[32] Bundesgesetzblatt I 2008, p. 2586 et seq.

that they infringe higher-ranking European law[33]. In effect the matter referred to a situation when an authority of one of the member states was competent with regard to a respective succession case of an EU citizen, and whether an authority of another country could document the rights to inheritance as regards the property located in the territory of that country.

In the light of the above, it must be mentioned that § 105 of the aforementioned German FamFG Act, regulating the conduct in family affairs and non-procedural matters, provides that in any proceedings regulated by the act, the German courts are competent, providing that the German Court has local jurisdiction. The local competence of the German court in the succession case was supposed to result from the contents of another provision of the same Act, § 343 FamFG, pursuant to which the court having local jurisdiction in a succession case is the court of the latest place of habitual residence of the testator. If at the time of death the place of habitual residence of the testator was not Germany, decisive will be the latest place of habitual residence in Germany. If that cannot be determined, then in case the testator was a German citizen or in case there is a succession estate in Germany, competent is the District Court in Schöneberg, Berlin, which due to serious reasons may hand-over the case for consideration to another court[34]. This enables, quite broadly, to indicate the jurisdiction of a German court and refers to the legal status from before the introduction of Regulation No. 650/2012, when the connection of citizenship was more important for the determination of the law applicable to a succession case.

In accordance with the facts of the case, the testator, deceased on 28 November 2015, was a French citizen with his latest place of habitual residence in France, but with the succession estate located in France and in Germany. On 8 March 2016 the certificate of succession was issued in France. Further, on 31 August 2016, the applicant, being one of the heirs under the French document, filed with the District Court in Schöneberg, Berlin, an application for the issue of a German certificate of succession, with consequences limited to the German legal territory, of the content identical as the French certificate. By decision of 17 November 2016, the District Court in Schöneberg decided that pursuant to Article 4, in relation to Article 15 of Regulation of No. 650/202, the German jurisdiction does not apply in that case. The court emphasised that the provisions of the German Act (§ 105 FamFG) cannot justify the German jurisdiction, as this would not be compliant with the prevailing standard of Article 4 of Regulation No. 650/2012. The applicant appealed against that decision, and the appeal

[33] Official Journal of 10.04.2017, No. C 112/19.

[34] See. MANKOWSKI, Peter. Gloss on the Order of Kammergericht of 10.01.2017, 6 W 125/16. *Zeitschrift für das gesamte Familienrecht*, 2017, pp. 566–568.

was directed for consideration to the second instance by the Kammergericht in Berlin, which by decision of 10 January 2017[35] posed the above question to the European Court of Justice[36].

The resolution of the Court of Justice is still awaited. In that context, it seems that for the purpose of uniform practices in the EU countries, it would have to be assumed that the provisions of Article 4 of the Succession Regulation applies the exclusive jurisdiction to the member state of the latest place of habitual residence of the testator to the whole succession case and, therefore, to the issue of a document confirming the right to the inheritance, preventing the documentation of succession in another member state. A document confirming the succession right issued in a member state in breach of Article 4 of the Succession Regulation, should then be treated as invalidly issued, which would enable a refusal to accept the consequences thereof. This shall not, however, apply to the European Certificate, as the Regulation does not provide for the possibility of refusing the acceptance of the consequences of the European Certificate of Succession in the other member states. As it may be expected, possibly the withdrawal procedure referred to in Article 71.2 of the Regulation will apply. This is, however, so complicated that also other stands are possible, therefore, we will have to wait for the practice of the member states and the final solutions, such as in the case C-20/17 (*Vincent Pierre Oberle*). Undoubtedly the relationship between the domestic documents and the European Certificate of Succession is unsure and perhaps there will be needed another intervention of the European Court of Justice.

5. What Follows?

On that background, there arises a question what may happen further. Surely the new European instrument certifying the succession rights is a revolutionary step in the succession law, which contributes to shortening of the procedures of the inheritance acquisition and reducing of the risk of acquiring the inheritance by unauthorised persons. Still, the instrument has some faults and imperfections, with the main being the continuous co-existence of the domestic instrument intended basically for the same purpose. It may be understood that when creating the new Regulation, the European legislator did not want to make a too significant revolution, or perhaps only expected a gradual evolution of that area of law. Originally, Regulation No. 650/2012 was supposed to be only an act of the private

[35] Available on line: https://www.jurion.de/urteile/kg-berlin/2017-01-10/6-w-125_16/, [last visited: 11.12.2017].

[36] See. LEIPOLD, Dieter. Gloss on the Order of Kammergericht of 10.01.2017, 6 W 125/16. *Zeitschrift für Erbrecht und Vermögensnachfolge,* 2017, pp. 216–218.

international law, instead of substantive law. This could not, however, been fully avoided, as the European Certificate of Succession is one of the best examples thereof. Further integration which seems to be necessary refers not only to the documentation of succession rights but to the whole European succession law.

The direction which may be followed in the future is complete resignation from the domestic instruments of documenting succession rights and leaving only the European Certificate of Succession. For that purpose one European register of the Certificates of Succession would have to be created, which would enable elimination of the co-existence of several certificates issued by the authorities dealing with succession in the particular countries.

That would be another revolution, which, however, may prove to be necessary and will actually become an evolution – with regard to many years of co-existence of various instruments documenting succession rights. So far, we still have to watch the practices of the member states. And the time for such changes will follow. As it may be considered, the closest opportunity to do that will come in a few years, fir it must be reminded that pursuant to Article 82 of the Regulation "by 18 August 2025 the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation, including an evaluation of any practical problems encountered in relation to parallel out-of-court settlements of succession cases in different Member States or an out-of-court settlement in one Member State effected in parallel with a settlement before a court in another Member State. The report shall be accompanied, where appropriate, by proposals for amendments". And the documentation of the rights to inheritance may be expected to be such "appropriate case".

Commitment decisions in practice of the European Commission in enforcing the European Union competition law in energy sector

Ondřej Dostal*

Summary: This article describes the use of instrument of commitments in the practice of application of the competition law of the European Union by the European Commission in energy sector. The article explores the reasons for increase in use of this instrument for resolving potential distortions of competition in energy sector, but also in other key sectors of the EU economy, as well as possible pros and cons of this approach. The text offers complex overview of the EU competition law provisions and summaries of documents by the European Commission and the Court of Justice of the European Union related to the topic. The article also enumerates and summarises the cases in which the European Commission accepted the commitments in the energy sector of the EU.

Keywords: commitment, competition, energy, electricity, agreement, gas, abuse of dominant position

1. Importance of the energy sector and its regulation by the competition law

Energy sector is a key sector of economy and its functioning in conditions of undistorted competition is a necessary precondition for proper functioning of all the sectors using energy commodities, most frequently electricity and gas, for their activity. The European Union and its member states share ambitious long-term goals of economic growth, safe and affordable energy for their citizens in simultaneous securing of protection of environment. The European union is at the same time still to considerable extent dependent on supplies of energy commodities from abroad and the importance of effective functioning of competition

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ensuring optimum distribution and use of resources within the Internal market is in these conditions ever-growing. The same applies for all branches of the energy sector from production and wholesale, transmission and distribution, through trading energy products, to retail and connected services.

Energy sector is undergoing significant changes. A prominent circumstance changing the European Union energy sector setup has been represented by the 2020 Strategy and related member state aids to the renewable energy resources and subsequent decline in electricity prices. Technical development enables slow diversion from classical energetics to decentralised solutions of energy needs, although conventional energy resources, including coal and nuclear ones remain indispensable. In current advanced phase of liberalisation through the EU directives the EU national energy markets are still characteristic by usually considerable markets shares of the incumbents, especially in production, distribution and wholesale, and also by relatively high degree of vertical integration. On the other hand, this situation has been constantly relativized by growing interconnectibility of national energy markets within the EU Internal market and related decline in market power of the dominant undertakings.

Independently on this development, the competition law of the European Union applies to the energy sector in its entirety, from prohibition of anticompetitive agreements and abuse of dominance, through control of concentration of undertakings to state aid control and in broader sense also regulation of public procurement. Competition law is also applicable to all economic activities in the energy sector, including the above-mentioned ones, from production to retail. Similarly to other sectors of the EU economy, the role of competition law dwells in prevention of artificial barriers to creating and using benefits of internal energy market, especially free movement of goods and services, which may result from anticompetitive actions of private companies, but also of EU member states.

Intensity of competition law enforcement has been rising hand in hand with the process of liberalisation and especially following the sector investigation of level of competition on electricity and gas markets by the European Commission in 2007. In the situation on the liberalised markets described above the most frequent investigated anticompetitive behaviour is represented by alleged abuses of dominance by incumbents. Besides classical types of abuse of dominance, such as requirements of long term and exclusive offtake, new forms of abuses have been declared in relation to e.g. energy infrastructure maintenance and investments. Seldom a prohibited agreement between energy sector undertakings is detected and punished. On the contrary quite frequent are cases of mergers and acquisitions serving, among others, to diversification of production and investing in energy production related sectors in situation of decrease in prices of electricity and stagnation of classical energy resources. These transactions

may be accompanied by remedies on the part of the concentrating undertakings allowing the European Commission to remove concerns related to the concentration's effects. Frequent are also cases of granting state aid to energy sector by the EU member states, be it for development of renewable energy resources, capacity mechanisms, but also for construction of new nuclear resources or for closing uncompetitive coal mines.

The competition law therefore serves not only as a tool of prosecution ex post, but also a tool supplementing or replacing ex ante regulation of the EU internal energy market. With respect to the importance of the energy sector for the rest of the economy, competition law enforcement in energy sector is a priority of the European Commission or more specifically its Directorate General for Competition.

Competition law cases in energy sector require complex factual and economic analysis of action usually by supranational undertakings with high potential impact on several member states of the European Union. This brings about high demands on notoriously limited capacities of DG COMP. Also due to this fact the European Commission more frequently, and in recent years indeed regularly, has agreed with implementation of commitments by the undertakings whose behaviour gave rise to competition concerns of the Commission. The frequency of use of this tool in energy sector outdoes such use in all other economy sectors dealt with by the Commission in its antitrust investigations. Despite originally intended rather rare, or certainly not overwhelming, use of commitments, this tool is currently the most frequently used instrument of protection of competition on the internal energy market of the European Union with potential impact on conditions of energy supplies for all the EU citizens[1].

2. Introduction to the concept of commitments in the EU competition law

The Council of the EU embedded the concept of commitments in the EU Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter Regulation 1/2003 or the Regulation), which came into force with the enlargement of the European Union in May 2004. Also before this date the Commission effectively ended some of the antitrust proceedings by means of commitments,

[1] Based on results of search in competition law cases database of DG COMPETITION available at: http://ec.europa.eu/competition/antitrust/cases/index.html

which, however, did not have explicit support in the predecessor of the Regulation 1/2003, the Regulation 17/1962 then in force[2].

Commitments belong among the alternative ways of resolving disputes on breaching the competition law. Regulation 1/2003 allows the European Commission to make legally binding the commitments proposed by undertakings in reaction to competition concerns of the Commission related to behaviour of the said undertakings. The advantages of using commitments should include quick and flexible solution of possible breach of competition rules, along with savings in costs of the European Commission on conducting the proceedings and using its resources on other cases. In practice the commitments may consist in changing the behaviour of the company on the relevant market (so called behavioural commitments) or changing the structure of an undertaking, for example by means of divesting a part of it (so called structural commitments) or structure of the market (for example by means of establishing a new power exchange as illustrated by one on the examples mentioned below). The structural commitments are considered more effective by the European Commission. An indisputable advantage for undertakings having decided to submit commitments to the Commission is the fact that in case of their acceptance by the Commission the undertakings avoid imposition of a fine up to 10 % of their turnover, and also avoid issuance of a decision stating a breach of competition law. That means, among others, that it would not be possible to use the mentioned decision as a direct proof of breach of competition law before a national court in a dispute on claims for damages caused by a breach of competition law. Both the Commission and the undertakings may also appreciate prevention of a potentially several years dispute that may continue before both instances of the Court of Justice of the European Union. The Commission may in addition rely on substantially lower probability of its commitment decision being challenged before the EU Court – and this is at the same time one of the main points of criticism of commitments, as using them results also in reduction of the Court case law specifying the behaviour of undertakings prosecutable by the competition law. However, the Commission may also choose to go back to the regular sanction proceeding anytime.

The European Commission subjects the proposed commitments to the so called market test consisting in publication of the draft commitments and a call to third parties including competitors to comment on the foreseeable impact of the commitments on the market and their sufficiency for rectifying the wrongful situation. Successfully passing the market test, however, does not close the case completely. The Commission may appoint a trustee for monitoring the

[2] See especially case IBM, 1984, commented in Competition Policy Newsletter of DG Competition, October 1998, page 7, available at: http://aei.pitt.edu/81768/1/1998_October_No_3.pdf

implementation of the commitments and the undertaking implementing the commitments is obliged to report regularly to the Commission about fulfilment of the commitments.

In case of breach of the commitments adopted the European Commission is entitled to impose a fine up to 10 % of their turnover in the preceding year and also penalties up to 5% of average daily turnover in the preceding year.

Use of commitments is, according to the Commission, excluded in case of horizontal agreements, especially so called hard-core cartels, for example on coordination of prices and sharing markets, as in such cases a substantial and irreparable distortion of competition is presumed, which cannot be remedied by implementation of a commitment by suspected companies. Although use of commitments in cases distorting competition in a "non-hard core" way is not excluded, as illustrated by a below-mentioned case, in overwhelming majority of cases the application of commitments has been related to concerns of the Commission as to abuses of dominant position in breach of Article 102 of the Treaty on Functioning of the European Union. This applies also to the energy sector, in relation to which complex cases of potential abuse of dominance by national incumbents have been dealt with virtually exclusively by means of commitments. Details of commitments application are presented in the following chapter.

3. Concept of commitments in the law of the European Union, case law of the Court of Justice of the EU and related documents

3.1. Regulation 1/2003

The concept of commitments is regulated by the Regulation 1/2003 and especially its below-mentioned special provisions, while the commitments proceeding are specified also by further general provisions of the Regulation common for all the competition protection proceedings. Detailed description of the process of adoption of commitments is described in chapter 3.3.below. The possibility of using the commitments is outlined in the preamble of the Regulation, according to paragraph 13 of which *"Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been*

or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine."

The concept of commitments itself is regulated by Article 9 of the Regulation, according to which

1. *Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.*
2. *The Commission may, upon request or on its own initiative, reopen the proceedings:*
   (a) where there has been a material change in any of the facts on which the decision was based;
   (b) where the undertakings concerned act contrary to their commitments; or
   (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Article 14 of the Regulation imposes on the Commission a duty *to consult* a draft commitment decision before its issuance with *the Advisory committee for restrictive practices and dominant position* composed of the representatives of offices for protection of competition of the EU member states, while it shall take utmost account of the position of the Committee.

For non-compliance with the commitments it is possible to penalize the relevant undertakings or their associations according to Article 23 of the Regulation *up to 10 % of their aggregate turnover for preceding economic year.* A remarkable trait of this provision consists in the possibility to impose the same amount of fine for breaching commitments imposed by a decision not declaring a breach of competition law as for a proven breach of competition law declared in a sanction decision. Similarly to sanction proceedings the European Commission is pursuant to Article 23 of the Regulation entitled *to impose a daily penalties* not exceeding 5 % of average daily turnover for preceding economic year for every day of delay from the day stipulated by a decision for performance of commitments, in order to make the undertakings or association thereof fulfil their commitments binding on them by the force of the Article 9. If the undertakings or associations thereof

eventually meet their commitments, for the fulfilment of which the penalties were set, the Commission may choose to set the final amount of the penalties lower than the one stipulated by the original decision on penalties.

The Regulation 1/2003 also sets the *obligation to publish the draft commitments* in its Article 27.

3.2. The Implementing regulation for the Regulation 1/2003[3]

Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (hereinafter the Implementing Regulation) deals with the commitments, or more specifically with preliminary assessment to which the undertakings may react by their commitments, in its Article 2, while issuance of the preliminary assessment is at the same time one of the moments when the Commission shall decide on commencement of the proceeding with the aim to adopt a decision pursuant to chapter III of the Regulation 1/2003.

3.3. Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU[4]

A detailed description and explanation of individual phases of the process of drafting, negotiation and acceptance of commitments is provided by the above-mentioned Notice in paragraphs 65,75, 77, 115 – 117; 118-133; 147 and 150.

3.4. Memorandum of the European Commission on the concept of commitments[5]

The European Commission issued a few months after coming into force of the Regulation 1/2003 an explanatory memorandum stating that the Commission may contemplate adoption of a commitment decision if 1) the investigated undertakings are willing to propose commitments, which dispel the preliminary concerns of the Commission expressed in its preliminary assessment; 2) the case at hand does not require imposition of a fine, which according to the Commission disqualifies from possibility of commitments the so called hard-core

[3] Official Journal L 123, 27/04/2004 P. 0018 – 0024, available at: <http://eur-lex.europa.eu/legal-content/CS/ALL/?uri=CELEX%3A32004R0773>

[4] (2011/C 308/06), available at: http://eur-lex.europa.eu/legal-content/CS/ALL/?uri=OJ%3AC%3A2011%3A308%3ATOC

[5] MEMO/04/217 Brussels, September 2004, available at: http://europa.eu/rapid/press-release_MEMO-04-217_en.htm

cartels; 3) the reasons of effectivity justify that the Commission restraints itself to issuance of a commitment decision and does not go as far as issuing a formal decision prohibiting anticompetitive behaviour. The memorandum also mentions possibility to reassess the situation anytime should a substantial change occur in any of the facts on which the decision was based, and also a possibility to relieve the undertaking from commitments that are no longer appropriate, i.e. do not meet their purpose (for example as a result of earlier than expected rectification of the state of competition on the relevant market).

The Commission also emphasizes that national courts must enforce the commitments by any means necessary under national law, including interlocutory injunction, and that the undertakings which have adopted commitments may still face enforcement of competition law by national competition authorities and courts provided that such proceeding does not preclude uniform application of the EU competition law.

3.5. Speech by the commissioner for competition[6]

The essentials of the Commission's approach to application of commitments are summarized in a speech by the former member of the European Commission responsible for protection of competition, Joaquín Almunia. According to the Commissioner, both the Commission decisions on sanctions and commitments are based on solid proofs and theory of harm, while in proceedings terminated by sanctions the analysis by the Commission must be more extensive in line with the case law of the Court of justice of the European Commission. The Commission prefers acceptance of commitments on markets where securing quick and effective restoration of competition and consumer welfare is of special importance; therefore among the sectors influenced by commitments decisions is also the energy sector. The ultimate goal of the Commission's action, including fines, remedies, commitments and settlements, is to instil all the undertakings operating in the EU culture of compliance with competition law. Use of commitments is not appropriate in cases where most of the anticompetitive action took place in the past or where it is most appropriate to order cessation of the anticompetitive behaviour and deter from its repeating by imposition of a fine. The Commission considers structural commitments more effective than the behavioural ones, for they have long term effect on the market. The Commission takes very seriously the question of fulfilment of the commitments by the undertakings which proposed them, and in case of non-fulfilment of the commitments does not hesitate

[6] Remedies, commitments and settlements in antitrust; March 2013, available at: http://europa.eu/rapid/press-release_SPEECH-13-210_en.htm

to impose draconic sanctions. Such was the case of company Microsoft which was imposed a fine of 561 million Euro for non-compliance with its commitment to enable selection of internet browser in operating system Windows.

3.6. Speech by the director general of the Directorate general for competition of the European Commission[7]

The above-mentioned statements by the Commissioner were followed by a complex summary of the Commission's approach to the concept of commitments in the speech by the then director general of DG COMP, Alexander Italianer. The decision by the Commission to adopt commitments is according to Mr. Italianer dependent on their quality, expeditiousness, sufficiency and practicality. The commitments should be proposed at the first opportunity and not in the end of the proceeding. The commitments should efficiently resolve the concerns of the Commission. They should not be over-complicated and difficult to implement and monitor. According to the Director General, the decision on proposing commitments is not necessarily easy for undertakings, as they, in comparison with the sanction proceedings, renounce the chance to convince the Commission to abandon the proceedings or alternatively to challenge the decision on prohibition of the behaviour and on sanction before the Court of the EU, which is seldom in commitments cases. The Commission itself chooses sanction procedure for the sake of punishment, deterrence and setting a precedent and also in cases where the only possible commitment of the undertaking is to refrain from the anticompetitive behaviour. The decisions on commitments have also value for self-assessment of behaviour of undertakings which want to avoid punishment for anticompetitive conduct. An advantage of the undertakings 'commitments dwell in potentially solid and tailor-made solutions using willingness and know-how of the undertakings proposing them and also expeditiousness of commitments implementation thanks to especially absence of court proceedings on appeals, which are more common in case of remedies that the Commission may impose in sanction proceedings. The aforementioned applies especially in case of structural commitments.

As far as optimum speed of the commitments offer is concerned, the undertakings should propose them as soon as possible, optimally before termination of investigation and statement of objections – because the aim of the commitments decision is speedy renewal of competition. On the contrary commitments proposed only as late as in the phase of oral negotiation on the

[7] *To commit or not to commit, that is the question*; December 2013, available at: http://ec.europa.eu/competition/speeches/text/sp2013_11_en.pdf

case may prolong the proceeding. Commitments should also be unconditional, that means propose unambiguous solutions that are possible to be implemented without unnecessary delays and do not require protracted monitoring – in this regard the Commission recommends inspiration by the Commission notice on the merger remedies. In this vein for example structural commitments should not be burdened by problematic possibility of finding a purchaser for the divested assets etc.

3.7. Judgement of the Court of Justice of the EU in Alrosa case[8]

Also the EU Court of Justice took a position on commitments in its first and so far only one of two decisions dedicated to the topic and especially the question of appropriateness of commitments. The court stated that the measure of appropriateness of remedies imposed in sanction proceedings pursuant to Article 7 of the Regulation 1/2003 is not obligatory for decisions on commitments pursuant to Article 9 of the Regulation. In its judgement the Court extensively agreed with the opinion by the advocate general Kokott[9] preceding the judgement. Accordingly, the EU Court of Justice provided for example the following interpretation of the concept of commitments:

> *"This is a new mechanism introduced by Regulation No 1/2003 which is intended to ensure that the competition rules laid down in the EC Treaty are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the Commission, binding in order to provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement. More particularly, Article 9 of the regulation is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns.[…] Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what*

[8] C 441/07, paragraphs 35-50, 61 and 90, available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-441/07

[9] Opinion of advocate general Julianne Kokott presented on 17 September 2009 in the case C441/07 P – Commission of the European Communities versus Alrosa Company Ltd., paragraphs 42-69, 70-74, 108, 210-220, 245 a 247, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007CC0441

the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine."

4. A critical view of the use of commitments by the European Commission

Despite all the above-mentioned positive argumentation of the European Commission representatives, apparent taste of the Commission to use the commitments in practice, and statements of the EU Court of Justice non-disputing the concept of commitments and its use, there are quite frequent sceptical comments by the expert public as to adequacy of commitments use or as to the number of positive aspects attributed to them[10].

Critics of commitments regularly suggest especially the following claims (each of the critical arguments is accompanied by a possible counter-argument in italics, which does not necessarily correspond with the view of this articles' author, but aims to propose a different point of view):

1) The alleged higher speed of the proceedings on commitments in comparison with sanction proceedings is relative, or only minimum, and in cases of alleged abuse of dominant position the sanction proceedings are even slightly faster.
   Counter-argument: The duration of the sanction proceedings should in fact include also the duration of hypothetical appeal procedure. From this point of view the proceedings on commitments are several times shorter.
2) The commitments decisions are not subjected to review by the EU Court of Justice, forasmuch the commitments are proposed by the very undertakings upon which they are subsequently imposed. Commitments prevent development of case law also in developing sectors that are in need of definition of prohibited behaviour. The catalogue of behaviour declared authoritatively by the EU Court of Justice's decisions is not evolving. The undertaking that proposed commitments for themselves do not have the need to challenge the Commission's decisions imposing the commitments, similarly to the

[10] See for example MARINIELLO, Mario. Commitments or prohibitions? The EU antitrust dilemma, *Bruegelpolicybrief,* 2014; COSTESEC, Dominique. Has the Commission kicked its addiction to commitments decisions? *Kluwer Competition Law Blog*, 2016; KEHOE, Killian. Commitments as a tool for energy sector liberalization, *MLex magazine*, 2011

competitors and third parties which used the possibility to market test the draft commitments.

Counter-argument: The court review of commitments decision is in fact still available and took place in at least two cases.[11] *The vigilance over satisfaction of the need for precedents is declared by the Commission representatives (see above). It may be also argued that a speedy action by the Commission by means of a commitments decision is especially useful on developing markets.*

3) Use of commitments allows the Commission to deal with cases of alleged distortion of competition also in situations which would remain untouched in case of need to conduct the whole proceeding to the sanction decision or which would not necessarily be upheld by the EU Court of Justice.

   Counter-argument: Undertakings leading negotiations on commitments may always choose to test the strength of arguments and the will of the Commission to conduct the proceedings to the end of sanction proceedings, while the potential length of sanction proceedings may be among the arguments for which they refuse to do so.

4) The Commission commitments decisions are non-transparent, or scarce in information on the distortion of competition in question and related theory of harm, in comparison with sanction decisions are several times shorter, the analysis of the alleged distortion of competition is not as extensive as in cases leading to sanction decisions by the Commission.

   Counter-argument: Savings of time and capacities of the Commission otherwise spent on conducting sanction proceedings including elaboration of a decision, are one of the main arguments in favour of existence of the concept of commitments. Decisions adopting commitments always contain description of the behaviour raising concerns of the Commission.

5) The commitments decisions enable the undertakings suspected of breach of competition to keep for themselves the potential profit resulting from anticompetitive behaviour, which reduces the deterrent effect of commitments and raises probability of recurrence.

   Counter-argument: Deterrence from future anticompetitive behaviour is not the main goal of imposing commitments (see for example arguments of the Court of Justice of the EU and the Advocate General above) and it can be stated that the very will of the undertakings to negotiate about the commitments shows their respect to the competition proceedings of the European Commission. The possible profit from alleged anticompetitive behaviour is

[11] Besides the above-mentioned judgement in Alrosa case see also case T-76/14 Morningstar, available at:
http://curia.europa.eu/juris/liste.jsf?language=en&num=T-76/14

compensated by the loss resulting from often far reaching behavioural and structural commitments (as may be illustrated by the below-mentioned cases). Any recurrence has not been proven so far (with the exception of imposition of a fine for non-compliance with the commitments to Microsoft).

6) Victims of possible breach of competition law are deprived of the possibility to use the classical sanction decision by the European Commission as evidence in national court disputes on damages caused by breach of competition law.

   Counter-argument: The purpose of the commitments proceedings is not qualification of a breach of competition law (see the judgement mentioned above), therefore it is not possible to presume the choice of the Commission between declaring distortion of competition and acceptance of commitments by undertakings. In other words, the commitments proceeding from its own very nature cannot deprive a party of a decision on distortion of competition. In case of need the Commission may always go back to a sanction proceeding and declare distortion of competition.

7) The prominently ex post regulation by the competition law tools is being used by the Commission (not only) in the energy sector for substituting ex ante regulation by sectoral liberalization law of the EU and for enforcing also other policies than protection of competition. This raises questions as to the competency of the Commission for such a proceeding and appropriateness of the tools used.

   Counter-argument: The Commission itself does not declare such a policy. At the same time one may ask whether such mixed approach can be completely avoided when the basic goals of liberalisation of energy markets and protection of competition are identical, i.e. aim at securing accessibility of markets to competition or at eliminating barriers preventing market entry. It must be born in mind that commitments are in principle proposed by the undertakings themselves and possible pressure by the Commission or selection of cases for the purposes of liberalizing markets by commitments may only be speculated. It is true that the results of potentially long implementation of the liberalisation directives may be at least partially replaced or supplemented by relatively quick opening of the market and elimination of barriers by commitments proposed from the own will of undertakings.

5. A chronological overview of cases of application of commitments by the European Commission in the energy sector

Company	Competition concerns	Main commitments offered
Distrigaz	Long term contracts on gas supply[12]	70 % of yearly gas supplies to large industrial customers will be open to competition; no contract covered by the commitments will be longer than 5 years.
E.ON	Manipulating wholesale market with electricity and market with regulatory electricity[13]	Divestiture of 5000 MW capacity for electricity production by various sources in Germany; divestiture of high voltage transmission network.
RWE	Preventing access to gas transport network[14]	Divestiture of high pressure network for transport of gas in West Germany.
Gaz de France	Preventing access to gas import infrastructure[15]	Quick and substantial limitation of long term capacity reservations for import of gas to France and their further reduction under 50% of the previous volume.
EDF	Long term electricity supply contracts[16]	Around 65% of the volume of electricity supplies contracted with large customers will be freed for market.
Svenska Kraftnät (SvK)	Limitation of export capacity on interconnectors[17]	Splitting the Swedish electricity transmission market to several bidding zones enabling adaptation of electricity trading to actually available transmission capacity.
E.ON	Long term reservation of capacity for gas transportation[18]	Freeing large capacity volumes on access points to the transportation networks; limitation of reservation of own access to transportation networks.

[12] 2007; case COMP/B-1/37966 available together with all other below mentioned case under their respective number at: http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=1

[13] 2008; cases COMP/39.388 a COMP/39.389

[14] 2009; case COMP/39.402

[15] 2009; case COMP/39.316

[16] 2010; case COMP/39.386

[17] 2010; case COMP 39351

[18] 2010; case COMP/39.317

ENI	Refusal of access to gas transportation network[19]	Divestiture of shares in three companies owning, operating and steering transportation capacity on international networks for gas transportation to Italy.
Areva/Siemens	Joint venture – non compete obligation[20]	Limitation of the non-compete obligation and its cancellation in relation to products and services non related to activity of the joint venture.
ČEZ, a.s.	Potentially pre-emptive reservation of transmission network capacity[21]	Divestiture of electricity production capacity of app. 800-1000 MW.
Deutsche Bahn Energie	Margin squeeze by setting prices of traction current[22]	Introduction of new system of prices for traction current applicable to all railway companies non including further discounts.
Bulgarian energy holding (BEH)	Restrictions on resale of electricity[23]	Offering certain volume of electricity on one-day market through new independent power exchange created by BEH and transferred to state, enabling anonymous trade.
GAZPROM	Territorial restrictions in gas supply contracts[24]	Abolishing and further non-application of all (non)direct contractual limitations on gas resale; facilitation of interconnection of Bulgarian gas market with surrounding EU countries; creating opportunities for bigger flow of gas to Baltic states and Bulgaria.

[19] 2010; case COMP/39.315
[20] 2012; case COMP/39736
[21] 2013; case AT/39727
[22] 2013; cases COMP/AT.39678 a COMP/AT.39731
[23] 2015; case AT.39767
[24] 2017; case AT 39.816 – in the phase of a proposal of commitments, the proceeding has not been finished yet.

6. Conclusion on the application of institute of commitments by the European Commission in the energy sector

Commitments enabled by the EU competition law are in the EU energy sector applied most frequently but not exclusively, to action by companies with dominant position on all levels of electricity and gas markets, specifically on their long term and exclusive commercial relationships and also potential refusal or prevention of access to essential facilities. On the other hand, the investigated behaviour includes also lack of action by dominant undertakings in trade and investments to infrastructure. This enumeration however does not nearly exhaust all the possible branches of energy sector and types of abuse of dominant position of prohibited agreements. Especially in the area of abuse of dominant position the European Commission shows capability for innovative approach to the definition of prohibited behaviour. The possible abuses of dominance according to the Commission could have aimed at both exclusion – or not letting in – of competition and exploitation of current customers. The European Commission in its hitherto practice accepted commitments to refrain from potentially prohibited behaviour but also commitments to act for the sake of renewal or even enabling competition on the market. In approximately same proportions commitments consisting in change of behaviour and significant structural changes in the market were accepted. The companies investigated and proposing the commitments came from both the original and new EU member states. The Gazprom case, illustrating, among others, the energy dependency of the EU, demonstrated the dedication of the Commission to deal also with behaviour of companies outside the EU. In the Energy sector, in comparison with the example illustrated above, the Commission has not found it necessary to impose a fine for a breach of a commitment.

Overall, the use of commitments in the energy sector is fully in line with the trend of the European Commission in enforcing the competition law on the markets with key importance for the EU Internal market. B

y the above-mentioned way the potentially very complex and time consuming cases with big impact on competition and consumers in substantial part of the Internal market are dealt with. With respect to the importance of the energy sector for competitiveness of the EU, corresponding need for quick reaction to the detected potential distortions of competition, but also with respect to the ongoing historical changes on the energy markets, the use of commitments in the above-mentioned context seems to be an acceptable compromise for both the European Commission and undertakings under investigation.

Has European public procurement law improved the competitiveness of public procurement?

Philipp Kunz & Richard Pospíšil*

Summary: The European Union (EU) laws lay out the harmonized public procurement procedures and rules that establish a fair and level playing field for businesses operating in the European market. These rules coordinate procedures for the award of work, supply, and service contracts to the public. The paper examines EU public procurement law highlighting the governing principles, directives, justification, and enforcement. Public procurement is a major non-tariff barrier to the functioning of a competitive internal market. The law governing this process has both – legal and economic justification. From an economic perspective, it introduces competitiveness, price convergence, and significant cost savings in the public sector. From a legal standpoint, it adheres to the EU's fundamental principles of free movement of goods, transparency, non-discrimination, and equal treatment. The introduction of the New Directives to replace the Old Directives aimed to increase flexibility and efficiency in the procurement process. However, compliance remains a challenge. Thus, effective implementation of the law requires a major change in the public procurement culture.

Keywords: EU public procurement law, Old Directives, New Directives, transparency, equal treatment, non-discrimination, price convergence, enforcement

1. Introduction

Public procurement is a powerful exercise. It demonstrates policy choices and represents the processes involved in the delivery of public services. It provides economic freedom and depicts trade relations among economic players. Essentially, public procurement is a significant non-tariff barrier and it works as an

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obstacle to the functioning of a competitive internal market.[1] Regulation of the procurement process encourages competitiveness and contributes to significant cost savings in the public sector. The EU law provides a platform for all businesses operating in the region. It sets out the minimum public procurement rules that guide procurement process. These public procurement rules are transposed into member states' laws and apply to tenders whose value exceeds certain threshold amounts.[2] If public tenders do not reach a certain threshold value (or below it), national rules of member states' budgetary laws will apply. According to International Comparative Legal Guides (2016), public procurement represents nearly 19% of the EU's gross domestic product (GDP).[3] It explains the tightening of regulation in the EU. Since the 1970s, it becomes directly relevant to the establishment of the European single market. Although the EU aims to ensure that its economic policy obeys the principles of an open market economy and free competition, public procurement requires authorities to develop a positive regulatory approach. That is why public procurement has now become an essential element of the EU in ensuring a competitive economy. The purpose of this research paper is to examine the EU public procurement law and recommends ways to improve enforcement and the procurement process in the region.

1.1. Directives

The primary legislation that regulates public procurements within the EU is in the public procurement directives. They include Directive 2004/17/EC that coordinates procurement procedures in the energy, transport, postage, and water services.[4] A recent 2014/25/EU supersedes that 2004/17/EC Directive. Directive 2004/18/EC coordinates procedures involved in the award of public works, service, and supply contracts.[5] Similarly, a recent 2014/24/EU one supersedes the 2004/18/EC directive. Directives 2004/18EC and 2004/17 EC are now Old

[1] DE KONINCK, Constant, RONSE, Thierry. *European Public Procurement Law: The European Public Procurement Directives and 25 Years of Jurisprudence by the Court of Justice of the European Communities: Texts and Analysis.* New York: Kluwer Law International, 2008, p. 643.

[2] PÎRVU, Daniela, BÂLDAN, Cristina. Access to the EU Public Procurement Market: Are There Disparities Based on the Origin of Economic Operators?. *Journal of Economic Issues,* 2013, vol. 47, no. 3, pp. 2-8.

[3] International Comparative Legal Guides 2016. *EU public procurement rules*. [online]. Available at: <http://iclg.com/practice-areas/public-procurement/public-procurement-2017/eu-public-procurement-rules>

[4] McCRUDDEN, Christopher. *European Public Procurement Law and Equality Linkages: Government as Consumer, Government as Regulator*. London: Oxford Publishing, 2007, p. 45.

[5] Official Journal of the European Union (OJEC). *European & UK procurement regulations*. [online]. Available at: <http://www.ojec.com/ directives.aspx>

Directives. The New Directives replaced them following a consultative process coupled with a series of legislative proposals. These rules regulate the purchase of goods and services by the member states and their various bodies. The new rules simply contain procedures of public procurement and make them flexible to the advantage of businesses. They pave the way for electronic procurement that is expected to increase the effectiveness of the procurement process. For example, only winning firms submit the papers to show that they qualify. As a result, the new directives will reduce the documentation required.[6]

Besides, the procurement law includes several specific rules for different sectors. Defense Procurement Directive (Directive 2009/81/EC) focuses on defense and security. Regulation EC1370/2007 focuses on public transport sector by road and rail. Directive 2007/66/EC amended Directive 92/13/89/665/EEC to increase the protection of tenderers against breaches of the law by contracting authorities when they award public contracts. It sets out the requirements concerning the remedies necessary for the violation of public procurement procedures.[7] European institutions establish directives as the legal instruments to achieve flexibility. The directives provide discretion to the member states regarding the method and form of implementing public procurement rules. They have the ability to harmonize public markets while considering the existing divergences in the legal systems of different states. The directives ensure that legal systems conform to the objectives of the European Community. However, it must be acknowledged that the divergences will remain. Essentially, this attributes to the fact that the EU does not have the power to override existing national legal regimes and impose a different one.[8]

Although the New Directives address some of the inherent weaknesses in the Old Directives, issues of transparency still arise.[9] For instance, Directive 2014/24/EU has not yet clarified the uncertainties that involve in the operation of single and multi-supplier frameworks.[10] Although one can affirm that some level of transparency exists, it is only present at the pre-award stage. Currently, there are inadequate provisions to guarantee transparency, especially during the award stage of the contract. One of the key issues that arise is the lowest price offer that contracting authorities should accept. A transparent or competitive

[6] THAI, Khi, SURYO, Robin, MAI, Tam. Symposium on European public procurement. *Journal of Public Procurement,* 2016, vol. 16, no. 4, pp. 455-462.

[7] Ibid.

[8] KAPTEYN, Paul Joan George, VERLOREN VAN THEMAAT, Pieter. *Introduction to the law of the European communities after the coming into force of the Single European Act*. London: Kluwer Law and Taxation Publishers, pp. 135-180.

[9] ANDRECKA, Marta. Dealing with legal loopholes and uncertainties within EU public procurement law regarding framework agreements. *Journal of Public Procurement*, 2016, vol. 16, no. 4, pp. 505-527.

[10] ANDRECKA, Marta. Framework agreements: Transparency in the call-off award process. *European Procurement & Public Private Partnership Law Review,* 2015, vol. 10, no. 4, pp. 231-242.

pattern does not guarantee and provides safeguards against under-priced patterns. However, it automatically disqualifies abnormally low offers as in the case of *SA Transporoute ET. Travaux v. Minister of Public Works*.[11] Even so, the New Directives allow for the achievement of societal goals, including environmental protection, as well as stimulation of innovation. They improve efficiency in public spending largely by simplifying existing rules as well as introducing flexibility in the procurement process.

1.2. Governing Principles

The contracting authorities in the public sector are subject to the EU General Principles even when the procurement itself is outside the scope of the New Directives.[12] These principles encompass equal treatment, non-discrimination, proportionality, mutual recognition, and transparency. Others include free movement of products and freedom to provide services. For public sector procurements that are outside the scope of the New Directives, the overriding principles are competition, transparency, and equal treatment. These principles require potential bidders to access the suitable information regarding the intention to award certain procurement. Therefore, it means that they should advertise to ensure that the contract is available to all parties to allow fair competition. The European courts have reinforced these principles in different case laws. In *Commission vs. Ireland*, the Court of Justice of the European Union (CJEU) concluded that the modification of the contract award criteria after reviewing the bids violated the principles of transparency and equal treatment.[13]

1.3. Importance of public procurement

Public procurement in the EU is a matter of immense economic value. According to BDI, awarding public contracts to businesses is critical in meeting the public needs and ensuring a cost-effective use of public resources.[14] It also serves as an important factor that allows companies or organizations from different parts

[11] Case 76/81, SA Transporoute et Travaux, Brussels vs. Minister of Public Works, Grand Duchy of Luxembourg. *Reports of Cases of the Court of Justice of the European Union*, 1982, pp. 418-430.

[12] EBRECHT, Caspar, WERNER, Michael Jürgen. *Public procurement in the European Union: overview*. [online]. Available at: <https://uk.practicallaw.thomsonreuters.com/9-522-6594?transitionType=Default& contextData=(sc.Default)&firstPage=true&bhcp=1>

[13] Case 249/81, Commission of the European Communities vs. Ireland. *Reports of Cases of the Court of Justice of the European Union*, 1982, pp. 4006-4024.

[14] The Federation of German Industries (BDI). *Public procurement – European and international law governing public procurement*. [online]. Available at: <http://english.bdi.eu/article/news/public-procurement-european-and-international-law-governing-public-procurement>

of the world to compete fairly. In the EU, member states award public contracts that exceed 2.2 trillion EUR annually.[15] This figure accounts for approximately 12–19 % of the GDP. Indeed, these figures show a macroeconomic value of public procurement. Thus, from an economic perspective, public procurement legislation aims to bring competitiveness, increase the penetration of imports, enhance trading of different public contracts, and bring about price convergence.[16]

The EU law ensures that the award of higher value for the provision of public goods and services must be transparent, fair, equitable, and non-discriminatory. It means that any public procurement activities with a value over that statet must be advertised in the European Union's Official Journal (OJEU). However for tenders of lower value, national rules apply, which have to respect the general principles of EU law, of course.

Table 1: Public Procurement Tresholds of the years 2016/2017

PUBLIC	Supply, Services and Design contracts	Works contracts	Social and other specific services
Central Government	135,000 EUR	5,225,000 EUR	750,000 EUR
Other contracting authorities	209,000 EUR	5,225,000 EUR	750,000 EUR
Small lots	84,000 EUR	1,000,000 EUR	n/a

UTILITY	Supply, Services and Design contracts	Works contracts	Social and other specific services
Utility authorities	418,000 EUR	5,225,000 EUR	1,000,000 EUR

DEFENCE AND SECURITY	Supply, Services and Design contracts	Works contracts	Social and other specific services
Defence and Security authorities	418,000 EUR	5,225,000 EUR	1,000,000 EUR

Source: European Commission. Current thresholds. [Online]. Available at: https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_de. [Accessed: 2018, January 26].

[15] Ibid.
[16] Ibid.

From a legal perspective, public procurement law is essential as it supports the free movement of people, goods, and services, and prohibits discrimination based on the nationality of an individual.[17] Thus, its liberalization reflects the desire of European institutions to end discrimination and preferential purchasing patterns in the public sector. It also shows the wish to create seamless interstate trade links involving both the private and public sector. Due to the importance and value of public procurement, European institutions have developed several rules at a national, regional, and international level. The goal is to create a predictable legislative framework that guides public procurement.

2. Methodology

The study used a combination of doctrinal research and qualitative approach. A doctrinal research was carried out by reviewing different case laws on the EU procurement and combing them with secondary research. The researchers accessed these articles from the leading law journals and government documents using the search terms, such as 'European procurement law,' 'procurement law,' 'effectiveness of European procurement law,' and 'recommendations to the procurement law.' An initial search yielded 30 articles, but after a close examination of the sources, this study chose only the following 15 articles as they met the inclusion criteria:

- ANDRECKA, Marta. Dealing with legal loopholes and uncertainties within EU public procurement law regarding framework agreements. *Journal of Public Procurement*, 2016, vol. 16, no. 4, pp. 505-527;
- ANDRECKA, Marta. Framework agreements: Transparency in the call-off award process. *European Procurement & Public Private Partnership Law Review,* 2015, vol. 10, no. 4, pp. 231-242;
- BOVIS, Christopher. Recent case law relating to public procurement: A beacon for the integration of public markets. *Common Market Law Review*, 2002, vol. 39, no. 5, pp.1025-1056;
- BOVIS, Christopher. *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing, 2012, pp. 490-492;
- CAVE, Bryan. *What is the future of EU public procurement law in the UK after Brexit*?. [online]. Available at: <http://www.lexology.com/library/detail.aspx?g=bb144c40-6008-4e07-8143-98a3bfa36ecc>;
- DE KONINCK, Constant, RONSE, Thierry. European Public Procurement Law: The European Public Procurement Directives and 25 Years of

[17] BOVIS, Christopher. Recent case law relating to public procurement: A beacon for the integration of public markets. *Common Market Law Review*, 2002, vol. 39, no. 5, pp.1025-1056.

Jurisprudence by the Court of Justice of the European Communities: Texts and Analysis. New York: Kluwer Law International, 2008, p. 643;
– EBRECHT, Caspar, WERNER, Michael Jürgen. *Public procurement in the European Union: overview*. [online]. Available at: <https://uk.practicallaw.thomsonreuters.com/9-522-6594? transitionType=Default& contextData=(sc.Default)&firstPage=true&bhcp=1>;
– Federation of German Industries (BDI). *Public procurement – European and international law governing public procurement*. [online]. Available at: <http://english.bdi.eu/article/news/public-procurement-european-and-international-law-governing-public-procurement>;
– International Comparative Legal Guides 2016. *EU public procurement rules*. [online]. Available at: <http://iclg.com/practice-areas/public-procurement/public-procurement-2017/eu-public-procurement-rules>;
– KAPTEYN, Paul Joan George, VERLOREN VAN THEMAAT, Pieter. *Introduction to the law of the European communities after the coming into force of the Single European Act*. London: Kluwer Law and Taxation Publishers, pp. 135-180;
– LICHÈRE, François, CARANTA, Roberto, TREUMER, Steen. *Modernising Public Procurement: The New Directive*. Copenhagen: DJØF Publishing, 2014, pp. 97-130;
– McCRUDDEN, Christopher. European Public Procurement Law and Equality Linkages: Government as Consumer, Government as Regulator. London: Oxford Publishing, 2007, p. 45;
– Official Journal of the European Union (OJEC). *European & UK procurement regulations*. [online]. Available at: <http://www.ojec.com/directives.aspx>;
– PÎRVU, Daniela, BÂLDAN, Cristina. Access to the EU Public Procurement Market: Are There Disparities Based on the Origin of Economic Operators?. *Journal of Economic Issues,* 2013, vol. 47, no. 3, pp. 2-8;
– THAI, Khi, SURYO, Robin, MAI, Tam. Symposium on European public procurement. *Journal of Public Procurement,* 2016, vol. 16, no. 4, pp. 455-462.

All of the 15 listed articles were those published in English law journals or on reputable websites. Later, the researchers analyzed the secondary sources and identified the key themes on EU public procurement law. The researchers also conducted the qualitative research to get deep insights into the effectiveness of the EU procurement law from the perspectives of contracting parties. This approach was necessary for identifying the procedure involved, its strengths, weaknesses, as well as recommendations, to improve the research process.

The researchers interviewed two managers of a Germany company, BAUER AG that has participated in several EU public contracts to determine their

experience. The BAUER AG is a construction and machinery manufacturer company with headquarters in Schrobenhausen, Germany. Founded by Sebastian Bauer in 1790, the company has grown and expanded to include several subsidiaries that employ over 10.800 people across the world. The Bavarian company has been awarded several public contracts in the EU due to its expertise in the area of operation. Thus, it was the best choice for obtaining more information about the EU public procurement law. The managers were contacted by mail and requested to participate in the study. They were informed about the purpose of the research and assured that their personal information and responses will not be divulged to third parties, but only for research purpose. After confirmation of their participation, the researchers organized a telephone interview with them on 12th August 2017 and recorded their responses using a mobile phone. See interview questions in the appendix section.

3. Results

The participants responded to a series of questions about the EU public procurement law and its enforcement. When asked about the competitiveness of the public procurement, they indicated that the legislation had made the process competitive. They stated they accorded the same platform to compete for the public contract. They affirmed that they learned about the process through an advert. When the researchers asked them about the effectiveness of the New Directives, they indicated that these directives upgraded the Old Directives and addressed the technical limitations. However, they affirmed that the New Directives did not wholly address the transparency aspect. They affirmed that public procurement had eliminated the barriers that, in turn, have allowed for the establishment of a competitive internal market. They indicated that the legislation provided a level-playing field that allowed them to compete fairly with other players.

Further the participants confirmed that the procurement law has contributed significantly to the convergence of price and economic policies of different economies. The participants further affirmed that the directives had harmonized the public procurement law. However, they noted that they had once did not get a chance to contract due to the revision of the award criteria after the bids had already been reviewed. The participants reported that the European Commission (EC) lacks the power to ensure effective implementation of Public procurement law. They affirmed that while some member states had failed to comply with the law, it took longer for them to forcefully follow the provisions. The member states are not subject to any sanctions that would force them to comply with the regulations.

4. Discussion

The EU law provides the basis for the creation of a common or a single market.[18] The treaties that establish the EU envisage a system of economic, political, and legal integration via a progressive convergence of different economic policies of the member countries.[19] An envisioned common market is the one in which free movement of people, goods and capital, and a single currency exists.[20] Other aspects of the market include the adoption of shared economic policies and the customs union that embraces economic aspects. Adherence to these principles is expected to remove any restrictions to the interstate trade. The degree of economic integration in the region will determine the extent to which the member states integrate with each other politically, which is the primary goal of the treaties.[21]

4.1. Exemptions to in-house contracts

The delivery of public service varies across the EU. Perhaps, this explains the differences in cultures and traditions concerning the practice. It is also important to acknowledge that the public needs vary widely due to social and geographical situations. Although national differences exist, case laws have confirmed that some contracts do not automatically fall outside the EU public procurement law. Based on the landmark case law, EU procurement directives do not cover in-house arrangements in which a contracting authority organizes for the purchase of works or services using internal resources.[22] Such contracts do not necessarily need to be advertised. Drawing from the case law, the process can proceed without a competitive or transparency process. For instance, a local authority can employ its internal staff for sewage line maintenance without following procurement directives. When a contracting authority anticipates an arrangement with a different legal entity, the in-house privilege applies only after satisfaction of two conditions. One of the conditions is that "the contracting authority exercises over the separate entity control that is similar to which it exercises over its

[18] CAVE, Bryan. *What is the future of EU public procurement law in the UK after Brexit*?. [online]. Available at: <http://www.lexology.com/library/detail.aspx?g=bb144c40-6008-4e07-8143-98a3b-fa36ecc>

[19] See Articles 2 and 3 of the Treaty of Rome (EC).

[20] Case 286/82, Graziana Luisi and Giuseppe Carbone vs. Ministero del Tesoro (Ministry of Treasury). *Reports of Cases of the Court of Justice of the European Union*, 1984, pp. 379-409.

[21] BOVIS, Christopher. *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing, 2012, pp. 490-492.

[22] Case 324/98, Telaustria Verlags GmbH and Telefonadress GmbH vs. Telekom Austria AG. *Reports of Cases of the Court of Justice of the European Union*, 2000, pp. 10770-10797.

departments." The second one is "the separate entity carries out the essential part of its activities with the controlling authority". The cases *"Teckal Srl v. Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia*[23] and *Parking Brixen GmbH. v. Gemeinde Brixen and Stadtwerke Brixen AG"* present important evidence of these two conditions.[24]

4.2. Enforcement of public procurement rules

Member states often implement public procurement directives. When carried out through the formulation of national legislation, the process is often under the judicial control of the European Community. Article 226EC grants the EC the right to initiate a proceeding in response to a member state complaint or on its own initiative:[25]

> *"In the course of its duties, the European Parliament may, at the request of a quarter of its component Members, set up a temporary Committee of Inquiry to investigate, without prejudice to the powers conferred by the Treaties on other institutions or bodies, alleged contraventions or maladministration in the implementation of Union law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings.*
>
> *The temporary Committee of Inquiry shall cease to exist on the submission of its report.*
>
> *The detailed provisions governing the exercise of the right of inquiry shall be determined by the European Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure, after obtaining the consent of the Council and the Commission."*[26]

A specific legal interest is not part of the condition that determines the admissibility of the step to take. The EC has the mandate to supervise, observe, and ensure that the legislation is applied appropriately. For instance, in a case *Farmaindustria vs. Consejeria de salud de la Junta de Andalucia* where a domestic litigation was withdrawn the EC moved to file a lawsuit against Spain for failing

[23] Case 107/98, Teckal Srl vs. Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia. *Reports of Cases of the Court of Justice of the European Union*, 2000, pp. 8139-8156.

[24] Case 458/03, Parking Brixen GmbH vs. Gemeinde Brixen and Stadtwerke Brixen AG. *Reports of Cases of the Court of Justice of the European Union*, 2005, pp. 8612-8638.

[25] Ibid.

[26] Article 226 EC Treaty (Maastricht consolidated version).

to comply with the Public Supplies Directive 77/62.[27] The Remedies Directive has introduced a correction procedure: Public Works and Public Supplies Compliance Directive.[28] The EC can intervene when it feels that a contravention of procurement rules have occurred as outlined in the Utilities Remedies Directive and public sector remedies directive. For the public sector Compliance Directive, the relevant provisions only apply in cases where the procurement process has breached the rules on contracts as laid out by public supplies Directive (93/36/EC) and public works Directive (93/37/EC). The EC often invokes the corrective procedure when it clearly manifests contravention of the procurement law. It often notifies the relevant state, as well as the contracting authority, about the situation and asks the parties to correct the infringement.

The concerned member state is expected to reply within 21 days and confirm whether it has corrected the issue or explain why it has failed to do so.[29] A member state that fails to reply within the stipulated time does not face any sanctions. At the same time, the EC does not enjoy special powers, even when a state invokes corrective mechanism. While there was a suggestion to grant the EC the powers to suspect the award procedure or procurement process on its own initiative, some member states opposed it. The Remedies Directives show that a state has breached the law, whether it gives a satisfactory response.[30] In practice, however, the corrective procedure does not provide any power or facilitates the EC to enforce public procurement law effectively. Above all, the remedies directives are not uniformly implemented across the member states.

5. Recommendations

The new rules are definitely a welcome step in the right direction, because they help to make the procurement process faster and less costly. However they are not enough to secure a fair public procurement. The authors are sceptical, if the promised aims: simplification, flexibility, legal certainty and increased transparency – can be realized.

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[27] Case 179/89, Asociacion Nacional de Empresarios de la Industria Farmaceutica (Farmaindustria) vs. Consejeria de Salud de la Junta de Andalucia. *Official Journal of the European Communities*, 27.06.1989, no. C 160, pp. 10-11.

[28] Public Works and Public Supplies Compliance Directive 89/665. *Official Journal of the European Communities,* 30.12.1989, no. L 395, pp. 33-35.

[29] LICHÈRE, François, CARANTA, Roberto, TREUMER, Steen. *Modernising Public Procurement: The New Directive*. Copenhagen: DJØF Publishing, 2014, pp. 97-130.

[30] PÎRVU: *Access to the EU Public Procurement Market...,* p. 7.

Unfortunately the directives have failed to achieve the goals of economic efficiency and market liberalization as anticipated. While the 2014 Directives address some of the weaknesses in the Old Directives, they only provide a limited solution to the compliance. Effective implementation of the legislation requires a major change in the public procurement culture. Imperative is to ensure that states and contracting parties understand the rules and the overall benefits of compliance with the set regulations. Although corrective procedures have been to ensure that states implement public procurement procedures as outlined in the legislation, they do not provide any powers or facilitate the EC to ensure effective enforcement of public procurement law. Thus, it is imperative for the state to give the EC powers to punish countries that breach the rules. Above all, there is a need to clarify the existing legislative framework to ensure greater precision and effective and proportionate sanctions as deterrents to the infringement on public procurement.

6. Conclusion

Regulation of public procurement is an important element of achieving an internal market in the EU. By introducing competitiveness, the price convergence will ultimately occur and, in turn, lead to significant cost reductions. Aside from the economic justifications, regulation of procurement has legal inferences that strengthen the fundamental principles that govern the EU, such as free movement of goods, transparency, non-discrimination, freedom to offer services, and equal treatment.

As the authors proved, the public procurement has a strategic importance in the integration of the EU into a single market. The European Court of Justice (EC) has continued to provide intellectual support in efforts to strengthen the institutions to uphold the fundamental principles that form the basis of public procurement regulation. Although efforts have been to address the technical deficiencies in the Old Directives with the introduction of New Directives, much should be done to comply with the general principles and procedures of the EU. Especially the EC should have the powers to ensure effective implementation of public procurement law. Logically the "modernization process" of public procurement in the EU only makes sense, if all member states implement the common rules into their national law. Otherwise the implementation should be strictly monitored and if applicable to be enforced with the help of appropriate penalties.

Appendix (the list of interview questions)

1. Has EU public procurement law improved the competitiveness of public procurement?
2. What is your opinion about prices of public contracts, do your quotations mirror those of other businesses that register interest in these contracts?
3. Are you aware of the New Directives and their purpose?
4. What are the key principles that govern the EU?
5. Have the New Directives strengthened these principles?
6. Have you ever been denied a public contract in the EU due to changes in an award criterion?
7. Is the EU public procurement law enforced properly by the European Commission?

Eu-China: New Impetus for Global Partnership

Inna Šteinbuka, Tatjana Muravska, Andris Kužnieks*

Summary: This paper is focussing on the place of the EU-China partnership in the changing world order. With the U-turn in the US approach to multilateral system of trade relations and climate change, some of the ways for the EU and China to move forward are getting different in their strategies. A successful cooperation in the future might be determined by the extent to which China accepts the 'European values', but the question will also arise as to whether EU is prepared to embrace the governance dynamics

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of China. The authors are trying to identify the new impetus of EU-China relations and give very concrete illustrations of where their potential future cooperation could be established, at the same time acknowledging that considerable uncertainty will still exist in the near future. China's relations with other global players such as Russia are of utmost importance, and the authors reflecting on how these relations might impact the advancements on EU-China dialogue and cooperation. The paper is illustrating China's ever increasing role and influence when it comes to trade and investments with EU countries, cooperation in energy, science and innovation as well as climate change. The paper is concluding that the recent changes in the world order and EU approach to multilateral system gave new impetus to the EU-China relations.

Keywords: climate, EU-China, global challenges, trade,

1. Introduction

Geopolitically from the European perspective, the world today looks very different to how it looked just few years ago. The European Union (EU) is facing unprecedented challenges, both global and domestic: regional conflicts, terrorism, growing migratory pressures, protectionism and social and economic inequalities. No doubt there is ultimate need to address the challenges of a rapidly changing world and to deal with both security and new opportunities within traditional and emerging global alliances. It is very important for the EU to have the opportunity to shape globalisation in line with its own values and interests. The evidence presented here clearly shows that globalisation can be beneficial where properly harnessed.[1]

Outside the EU, an effective European economic diplomacy will help write the Global rulebook and ensure European companies can prosper in fast-growing international markets. Their continuing success will deliver more and better jobs for European citizens. Equally, Europe should not shy away from taking measures to restore a level playing field where this is threatened.

In future the competition will increasingly come from emerging economies that are rapidly moving up the value chain. The divide between more technologically advanced regions and those that are less advanced is more likely to be widening, unless governments invest in education, equip their citizens with the right skills, encourage innovation, ensure fair competition and regulate smartly where needed. It is forecasted that in 2025, 61 % of the world's 8-billion

[1] EC. *Reflection Paper on Harnessing Globalisation.* [online]. Available at: <https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf>

population will be in Asia, predominantly in China and India. Europe's relative share of the world population will decline, with the EU-27 accounting for 5.5 %.[2] This may bring about a multipolar world order with different political, technological, economic and military powers, but it also means large new markets for European companies.

The current geopolitical situation seems to be beneficial to advance the EU-China relation. China's position in the world has strengthened during the last 20-25 years. President Xi Jinping's speech in Davos in January 2017 was more like that of a 'growing giant' and reminiscent of presidents' speeches calling for an open global economic system during the heyday of US hegemony.[3] China continues to grow economically, politically, and strategically. Its sheer size and strength are already challenging the West. President Trump's trade policies, such as abandoning the Trans-Pacific Partnership, hands China a golden platter. A disengaged United States could also undermine the rules-based international trading system, unless the EU becomes strong and united enough to stem the decline of the West.

Moreover the latest developments show the United States and its allies must think realistically about possible approaches to addressing the increasingly acute North Korean challenge, adopting a clear-eyed view of which approaches may work and which may not[4], where China will have important geopolitical leverage on future US-EU-China relations

The purpose of this paper is to analyse the EU-China relationships in the light of the recent geopolitical developments, challenges and uncertainties, especially the new US role in world politics, and the increasing interest of Russia in its relations with China. We make an attempt to assess the latest geopolitical situation from the viewpoint of specific aspects of EU-China cooperation such as trade and investments. Another important EU-China's cooperation fields are transport, logistics, energy and climate change as well as science, which under favourable conditions could be instrumental for growth and numerous opportunities for both the EU and China.

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[2] EC. *EU-China Summit: new flagship initiatives in research and innovation.*[online]. Available at <http://ec.europa.eu/research/index.cfm?pg=newsalert&year=2017&na=na-020617>

[3] DEMERTZIS, Maris, SAPIR, André, WOLFF, Guntram. *Europe in a new World Order.* [online]. Available *at: <http://bruegel.org/wp-content/uploads/2017/02/Bruegel_Policy_Brief-2017_02-170217_final.pdf>*

[4] EINHORN, Robert. *Approaching the North Korea challenge realistically.*[online]. Available at: <https://www.brookings.edu/research/approaching-the-north-korea-challenge-realistically/>

2. Global Challenges in EU-China Relationship

The EU and China are both central actors in international affairs, collectively accounting for almost 40% (in current market prices) of the world's gross domestic product (GDP). While addressing the key global challenges of the 21st century increasingly requires an entente between these two actors, their relationship is often plagued by conflicting interests. Whether or not the EU will grant market economy status to China still looms largely in the trade relations of the two; the EU is still yet to lift its arms embargo on China; and they also differ in climate action responsibilities, to name a few.[5]

Despite the multiple ongoing crises in Europe, China's EU policy still focuses on gaining access to the vast markets there in order to pursue its immediate economic activities. Beijing also continues to flex its economic muscles and apply the well-practiced 'divide and rule' strategy in its dealings with EU member states regardless of their sizes. In particular, Beijing puts strong emphasis on courting CEEC with its '16+1' cooperation framework, which has shown significant potential for generating a strong pro-China lobby within the EU.[6]

However, the European political elites must be aware that Beijing has devised several tactics to attain its economic diplomacy goals, which have also become more complex as a result of China's ongoing and much-needed efforts to transform the domestic economy. In particular, the ambitious 'Belt and Road' initiative under the aegis of President Xi Jinping is confusing and creates both, risks and incentives for EU member states to engage in further collaborations. For instance, with a view towards revamping its EU policy agenda, Beijing has intertwined this initiative with domestic players, who, however, are little known to the European policy makers. This type of change in bureaucratic management may exacerbate EU-China relations.[7]

The EU-27 remains the world's largest trader, investor and development assistance provider. EU is deeply integrated into global value chains and will continue to carry weight even as other powers emerge. Therefore it is very important for the EU to have the opportunity to shape relationship with China in line with its own values and interests, rather than sitting back and letting globalisation shape. The global players that impact success of EU-China include Association of Southeast Asian Nations (ASEAN), the US and Russia.

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5 UJAVARI, Balazs (ed). *EU-China Co-operation in Global Governance: Going beyond conceptual gap.* [online]. Avaialble at: < http://www.egmontinstitute.be/content/uploads/2017/04/ep92.pdf?type=pdf>

6 YU, Jie. *After Brexit: Risks and Opportunities to EU–China Relations.* [online]. Available at: <http://onlinelibrary.wiley.com/doi/10.1111/1758-5899.12440/full>

7 YU, Jie. *After Brexit: Risks and Opportunities to EU–China Relations.* [online]. Available at: <http://onlinelibrary.wiley.com/doi/10.1111/1758-5899.12440/full>

The essential factors that contribute to EU-China collaboration refer to the influence of ASEAN[8] region. In fact, Asia is the world's largest and most populous continent, of great geo-strategic importance to the EU. In Southeast Asia, ASEAN is a prime importance to the EU. Moreover, economically both regions are interdependent. EU-ASEAN cooperation was framed in the 2012 Plan of Action to strengthen the EU-ASEAN enhanced partnership (2013–2017), and the EU has a strategic interest in consolidating ties with ASEAN. The EU and individual ASEAN member countries pursue partnership and cooperation agreements (PCAs). Up to date the following agreements have been concluded: EU-Singapore (2014) and EU-Vietnam (2016). At present, negotiations with the other members of ASEAN are not in the agenda, although considering current protectionist policies of the US, these negotiations might progress.

Overall, the EU is ASEAN's second-largest partner, with a 13% share of ASEAN's total trade with the world. ASEAN is the EU's third largest partner outside Europe (after the US and China). Negotiations for a region-to-region FTA between the EU and ASEAN — the EU's ultimate goal — were revived in March 2017. EU-ASEAN two-way trade stood at EUR 208 billion in 2016, and the EU remained the largest external source of FDI flows into ASEAN in 2015, when they amounted to EUR 23.3 billion Although, negotiations for a region-to-region FTA with ASEAN were launched in 2007 and paused in 2009 to give way to bilateral FTAs negotiations.[9] Notably, a biannual ASEAN-EU Trade and Investment Work Programme frame cooperation between the two regions.

The EU and China are significant players in ASEAN. However, both are not fully accepted by ASEAN countries. Consequently it is important for China, the EU and its Member States to be active at all levels be it multilateral, regional or bilateral. Such policy could positively influence and enhance relations with Southeast Asian countries in future and, what is very important, to advance national and EU international and transnational interests.

What is more, in economic dimension EU and China will find themselves increasingly in competition in ASEAN when high tech Chinese products enter the market and European technological lead and investment in certain sectors

[8] In this respect it is quite significant that 2017 is the year of celebrations for the 60th anniversary of the creation of the European Economic Community (the predecessor of the EU). At the same time this is the year of 50th anniversary of the ASEAN, born in 1967 with membership of 27 nations in ASEAN Regional Forum in 2017 including China. Furthermore, it is 30 years since the ASEAN-EU Dialogue Relations were launched.

[9] EC. *EU-ASEAN*. [online]. Available at: <http://ec.europa.eu/trade/policy/countries-and-regions/regions/asean/>

could be reduced. China is becoming a serious competitor in foreign investment in Southeast Asia and as a donor country in development aid. According to experts, in theory this Sino-European competition should be beneficial to the ASEAN countries. In practice however, there is a potential for a stronger China to be to the detriment of ASEAN members or at least to the citizens of ASEAN countries. China is a responsible economic actor in China-ASEAN FTA. However, economic, security and other political questions are so intimately interlinked that it would be misguided to feel that economic relations could be dealt with in an isolated way. Agreement on a series of common objectives in the political, social, cultural and environmental fields would open an opportunity for China and the European Union to cooperate in meeting common challenges in Southeast Asia.[10]

The changing role of the US on the global arena is a second serious factor in shaping EU-China relation. Contrary to EU globalisation policies, President Donald Trump has been propagating America's retreat from the world, giving China a golden opportunity to fill the void and make its case for global leadership on issues such as trade and climate change. These declarations grew to a crescendo at the G-20 Summit in Hamburg, Germany. At the G-20 summit the German Chancellor Angela Merkel stood by her suggestion that Europe can no longer entirely rely on the US and declared that Germany and China can work together to help calm the world's problems.[11]

Today on global arena there is ongoing contest between the world's three most influential figures: Donald Trump, who is acting as a lightning rod for discontent since he publicly disavows multilateral actions; Xi Jinping, who proclaims China ready for global leadership while failing to explain in any way what that leadership would consist of; and Angela Merkel, whose skill in balancing will be scrutinized. German Chancellor Angela Merkel has suggested that Europe can no longer entirely rely on the US and declared that Germany and China can work together to help calm the world's problems. The expectation is that Donald Trump will be cornered and defeated, while Xi Jinping will emerge as a born again progressive internationalist, following his recent re-commitment to the Paris climate agreement in contrast with President Trump's reneging. Chancellor Merkel is seen as the clear-sighted umpire who will declare the defeat of the nefarious Donald Trump.

[10] CAMROUX, David. China and its Neighbors in a book China-EU A Common Future, (eds.) Crossick, S., Reuter, E., New Jersey: World Sceintific Publishing Co., 2017, pp.93-100.

[11] MOULSON, Geir. *G20 summit: Europe can no longer rely on US under Donald Trump's leadership.* [online]. Available at: <http://www.independent.co.uk/news/world/europe/g20-summit-latest-angela-merkel-donald-trump-europe-us-relations-germany-china a7826421.html>

Most of all, the expectations ignore China itself. A soft power victory is enjoyable for Xi Jinping, with Western pundits ignoring the inconvenient and long-lasting truths about China in order to focus on the current US president.

Two recent and publicly undisclosed events will serve as examples. In the lead up to the EU-China summit on June 2, 2017 in Brussels, Chinese negotiators and the Chinese prime minister himself seemed amenable to compromise on the thorny trade and investment issues that have prevented China from gaining market economy status. After years of paralysis, China seemed ready to concede the EU-China investment agreement that would surely include better access for European firms in China. At the last moment during the summit, the Chinese concessions were withdrawn without any explanation, and China also refused to co-sign a statement on climate policy. The same reversal had happened one day before in Berlin meetings between the Chinese and German governments on July 5, 2017. In fact, on both occasions China's government seemed to be superseded by a hidden but stronger authority – it is not too difficult to guess what that force was, given the extraordinary amount of personal power gathered by President Xi. The China-EU-US triangle is not what most commentators think it is. Europe's balancing act – leveraging the US on trade issues with China while leveraging China with the US on global policies such as climate – does not work, except for media purposes. This is because China refuses to play the game, or rather plays it very differently.

Beijing happily collects the public diplomacy benefits of Western dissensions, with Europe heaping praise on Xi Jinping to better underline Donald Trump's uncouth manners. But China will still prioritize outcomes with the US, especially to prevent strong measures on trade. It has understood Donald Trump's sensitivity and therefore goes out of its way to avoid antagonizing him publicly, therefore not joining the wailing over Donald Trump. And although it has flashed a more open card at the European Union, that card has been quickly withdrawn.

The above examples are only about trade and climate negotiations. Arguably, that's not the strategic heights of international relations. But trade issues are the bulk of the actual EU-China relationship, and climate politics are perhaps Europe's signature item in international affairs. On hard power issues, Europeans alone are a negligible global force, given the lack of common purpose and coordination.

The US is clearly paying a price in public diplomacy with Europe, and perhaps in substantial negotiating agreements, for its current unpredictability and lack of a coherent design. An almost totally ignored feature of current global relations is in fact more important and significant for Europe. With Japan finally coming to terms with the European Union on a free trade agreement that effectively creates the world's largest free trade area, the Europeans and Japanese

are in fact sending a concrete signal to both Donald Trump and Xi Jinping: protectionist postures by the US will not prevent other free market economies from moving ahead on the trade agenda, and China is not left free to pursue its mercantilist and bilateral ambitions with countries over which it now has trade dominance.[12]

If China's modern relationship with the US has received more than its fair share of attention – too much some might complain in both Asia and Europe – the same could hardly be said until very recently of its complex relationship with another important state with which it has had an even closer history: Russia. The two countries share one of the longest land borders in the world. The former USSR was for many years a close ally of the Chinese Communists. And though Russia may have abandoned communist rule – while China has not – the two today appear to be on excellent terms, so much so that China is now regarded by President Putin as Russia's indispensable friend while Russia and its much feted leader is now viewed in China in the most positive terms imaginable. But in spite of the mounting evidence that the two have formed what even they now call a 'strategic partnership', there are still many who doubt whether the relationship is especially secure one.[13]

The United States' ability to deal with the challenges posed by Russia-China partnership is commonly seen as in decline. The US position in the triangular relationship has deteriorated, to the satisfaction of leaders in Moscow and Beijing opportunistically seeking to advance their power and influence. Russia's tensions with the West and ever-deepening dependence on China, combined with constructive US engagement of China, have given Beijing the advantageous "hinge" position in the triangle that Washington used to occupy.[14]

[12] GODEMENT, Francois. *Hamburg G 20: A test for the China-EU-US triangle.* [online]. Available at: <http://www.ecfr.eu/arHYPERLINK "http://www.ecfr.eu/article/commentary_hamburg_g_20_a_test_for_the_china_eu_us_triagl"ticle/commentary_hamburg_g_20_a_test_for_the_china_eu_us_triangl>

[13] COX, Michael. *Not just 'convenient': China and Russia's new strategic partnership in the age of geopolitics.* [online]. Available at: < *http://eprints.lse.ac.uk/83632/1/Cox_Not%20just%20convenient.pdf*>

[14] CHASE, Michael S., MEDEIROS, Evan S., ROY, J. Stapleton, RUMER, Eugene B., SUTTER, Robert, WEITZ, Richard. *Russia-China relations: Assessing Common Ground and Strategic Fault Lines.* [online]. Available at: <*http://carnegieendowment.org/files/SR66_Russia-ChinaRelations_July2017.pdf*>

3. EU–China Trade and Investments

Free trade has played a key role in underpinning globalisation in the past decades. Both the European Union and China, the two largest trading entities in the world, have developed vested interests in furthering international trade liberalization efforts. In view of the deadlocked Doha Development Round (DDR), China has joined the global trend of negotiating free trade agreements in bi-and plurilateral fashion. Despite Beijing's involvement with free trade agreements (FTA), the country retains an interest in the further liberalization of trade in non-agricultural products through the World Trade Organisation (WTO). The EU, along with its continued support for the WTO track, is also engaged in a number of FTA negotiations, not least with Japan, Indonesia and the Philippines. The fact remains, however, that the EU finds its primary interests in the liberalization of trade in services – an area that largely escapes the Doha Development Round's agenda. In light of these structural differences in the stance of Beijing and Brussels – which currently also pursue negotiations on a bilateral investment treaty with a view to potentially concluding a comprehensive FTA in the mid-term – on global trade relations, the prospects of improved co-operation are worth a scrutiny.[15]

Moreover China seems to be committed to developing global free trade and investment, promote trade and investment liberalization and facilitation through opening-up and say no to protectionism. President Xi said at World Economic Forum in Davos 2017: "Pursuing protectionism is like locking oneself in a dark room. While wind and rain may be kept outside, that dark room will also block light and air. No one will emerge as a winner in a trade war".[16]

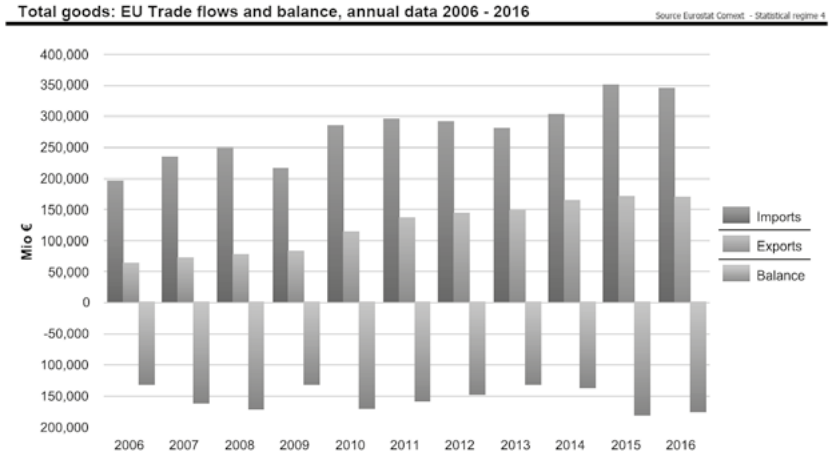
The EU and China are two of the biggest traders in the world. China is now the EU's 2nd trading partner behind the United States and the EU is China's main trading partner. EU-China trade has increased dramatically in recent years; for most trade items they are increasingly competitive [17] (Fig.1).

[15] UJAVARI, Balazs (ed). *EU-China Co-operation in Global Governance: Going beyond conceptual gap.* [online]. Avaialble at: < http://www.egmontinstitute.be/content/uploads/2017/04/ep92.pdf?type=pdf>

[16] WORLD ECONOMIC FORUM. *President Xi's speech to Davoce in full.* [online]. Available at: <https://www.weforum.org/agenda/2017/01/full-text-of-xi-jinping-keynote-at-the-world-economic-forum>

[17] Eurostat.2017. Economic relations between China and the EU. [online]. Available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/>

Figure 1. EU trade with China: EU Trade flows and balance, annual data 2006–2016



Source: Eurostat, 2017

China and Europe now trade well €1 billion a day. EU imports from China are dominated by industrial and consumer goods: machinery and equipment, footwear and clothing, furniture, and toys. EU exports to China are concentrated on machinery and equipment, motor vehicles, aircraft, and chemicals.

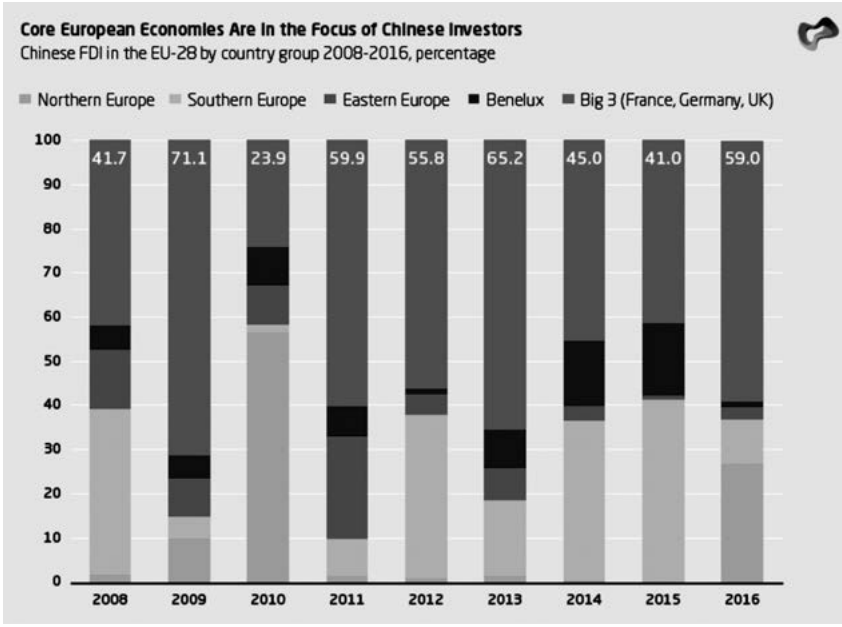
The EU is committed to widen trading relations with China. However, the EU wants to ensure that China trades fairly, respects intellectual property rights and meets its WTO obligations.

The 2008 financial crisis in Europe, and the subsequent (and still-ongoing) debt crisis which hit the continent in 2010, has caused European investors to hold on tightly to their wallets. Europe today doesn't have a cash problem; it has a liquidity problem. Businesses lack the confidence to spend the money they have. On the other side of the world, China is flush with cash from its economic boom. Chinese investors have stepped into the European investment void, buying properties, industries and financial assets[18]. China's global outward FDI has been on an impressive growth trajectory for the past decade, with an annual average growth rate of 30 per cent from 2005–2015. In 2016, Chinese outbound investment grew faster than this historical rate. The acceleration was

[18] HANEMANN, Thilo, HUOTARI, Mikko. *A New Record Year for Chinese Outbound Investment in Europe.* [online]. Available at: < http://rhg.com/reports/a-new-record-year-for-chinese-outbound-investment-in-europe>

driven by greater incentives for corporations to diversify in the face of a slowing domestic economy, financial stress and devaluation pressure on the Chinese currency. Official full-year data is not yet available, but we estimate that Chinese outward FDI came close to USD 200 billion in 2016, a 40 per cent increase compared to 2015. This cements China's role as one of the top direct investor nations globally.[19]

Figure 2. Chinese OFDI in the EU-28 by country group 2000–2016 (percentage)



Source: Rhodium Group, 2016

The 'Big 3' includes France, Germany and the UK; 'Benelux' includes Belgium, Netherlands and Luxembourg; 'Eastern Europe' includes Austria, Bulgaria, Czech Republic, Hungary, Poland, Romania and Slovakia; 'Southern Europe' includes Croatia, Cyprus, Greece, Italy, Malta, Portugal, Slovenia and Spain; 'Northern Europe' includes Estonia, Denmark, Finland, Ireland, Latvia and Sweden.

[19] HANEMANN, Thilo, HUOTARI, Mikko. *Record Flows and Growing Imbalances: Chinese Investment in Europe in 2016*. [online]. Available at: < http://rhg.com/wp-content/uploads/2017/01/RHG_Merics_COFDI_EU_2016.pdf>

Investment flows show vast untapped potential, especially when taking into account the size of the respective economies. China accounts for just 2-3% of overall European investments abroad, whereas Chinese investments in Europe are rising, but from an even lower base while, investments from the EU in China amount to a mere 5% of European investments abroad and only a fraction of the overall trade volume. In turn, Foreign Direct Investment (FDI) from China represents less than 3% of the total FDI inflow into the EU.[20] At the same time, the competition among EU states for Chinese capital has intensified, which weakens European leverage vis-à-vis China on important strategic questions. Moreover, investment patterns further aggravate existing economic concerns related to Chinese investment, most importantly the lack of equal market access for European companies in China and potential market distortions through state-owned and state-supported enterprises. Addressing those concerns now is critical as China expects to deploy an additional USD 1 trillion in outward FDI in the coming five years in Europe and globally. Chinese investors have broadly followed the footsteps of other foreign investors in Europe by putting most of their investments in the wealthiest and largest European economies.

Lately questions have arisen about investment in Europe's strategic industries. With increasing globalization, Chinese state-affiliated investors are increasingly eying strategic assets, such as ports, railroads, tunnels and other transit infrastructure in Europe and elsewhere. Therefore, instituting a credible investment screening mechanism in the EU is a *sine qua non* in helping to address the effects of global capital flows.

4. Climate and Energy

Climate change is becoming one of – if not – the most acute global issues whose effective solution requires an unprecedented level of international co-operation. Amongst the direct consequences are rising sea levels and inter-state conflicts over increasingly scarce water resources, which risks generating refugee flows across borders or internally within countries. The EU and China are both key actors in global climate politics given their present economic weight and pollution record. Europe as the pioneer of industrial revolution had once accounted for 90% of the planet's emission, whereas China now is the only country with an annual emission of more than 10 billion tons. Yet, the approaches of these two actors to

[20] HANEMANN, Thilo, HUOTARI, Mikko. *A New Record Year for Chinese Outbound Investment in Europe.* [online]. Available at: < http://rhg.com/reports/a-new-record-year-for-chinese-outbound-investment-in-europe>

how global warming should be tackled often differ. The key areas of disagreement between the EU's and China's position in the negotiations pursued under the United Nations Framework Convention on Climate Change (UNFCCC) and identifies possible solutions to overcome these differences.[21]

4.1. Implementing the 2015 Paris Agreement

At the 19th EU-China summit (EC, 2017)[22], set against the backdrop of US-President Trump's announcement of withdrawal from the Paris Climate Agreement, the two economies and major emitters of greenhouse gases reconfirmed their commitment to mitigating the effects of climate change. With the 2015 Paris Agreement the 195 signatories commit themselves to reduce the negative impacts of climate change by trying to keep 21st century global temperature rise well below 2 degrees Celsius above pre-industrial levels.[23] Such an alliance provides unrivalled potential for innovation in energy efficiency and renewable energy sources, which are at the heart of uni- and bilateral efforts for achieving the countries' respective climate pledges. The decision of the EU and China to take the lead on climate change has been welcomed worldwide, however, the alliance' efficacy must be doubted. Their economic relations seem to be problematic at the core, as trade and investment reappear as stumbling blocks on the most recent summit. Will the disagreement in trade and investment policy hamper common climate ambitions? It seems so.[24]

To be sure, EU-China cooperation and effectiveness on climate change holds great potential. EU demand for renewables has stimulated Chinese investment in renewables which has in turn reduced the global price of renewable energy production by 40% since 2010. The cornerstone of the partnership has been the establishment of a nationwide emissions trading system, the development of carbon capture and storage (CCS) solutions and the harmonization of energy labels of appliances, equipment and buildings. An informal 2017 EU-China joint statement,[25] which is more concrete than any before, clearly demonstrates the

[21] UJAVARI, Balazs (ed). *EU-China Co-operation in Global Governance: Going beyond conceptual gap.* [online]. Avaialble at: < http://www.egmontinstitute.be/content/uploads/2017/04/ep92.pdf?type=pdf>

[22] EC. *EU-China Summit: new flagship initiatives in research and innovation.* [online]. Available at: <http://ec.europa.eu/research/index.cfm?pg=newsalert&year=2017&na=na-020617>

[23] EC. *Paris Agreement.* [online]. Avaialble at: <https://ec.europa.eu/clima/policies/international/negotiations/paris_en>

[24] SEKULOVIC, Saba. *The EU-China climate alliance: new plans and old troubles.* [online]. Available at: <http://politheor.net/the-eu-china-climate-alliance-new-plans-and-old-troubles/>

[25] EC. *Energy Dialogue*. [online]. Available at: <http://ec.europa.eu/energy/en/topics/international-cooperation/china>

alliance's ambitions: The EU and China recognise the importance of developing global free trade and investment, and promoting the multilateral rule-based system to allow the full development of the low greenhouse gas emission economy with all its benefits. None of the bilateral initiatives including the EU-China 2016–2020 Roadmap on energy cooperation are binding.[26] Collaboration is mainly institutional and project-based.

4.2. EU-China Energy Dialogue

EU cooperation with China is based on so-called Sectorial Dialogues[27] which focus on individual economic areas. Since 1994, EU and Chinese officials have met throughout the year at the Energy Dialogue to cooperate on energy issues. The Dialogue's work forms part of the annual EU-China Summit. There are six priority areas of cooperation: (i) renewable energy, (ii) smart grids, (iii) energy efficiency in buildings, (iv) clean coal, (v) nuclear energy, (vi) energy legislation.

There is nothing new about EU-China energy cooperation, this simply signals the desire of both parties to up the tempo. Dialogue was established in 1981 and institutionalised in 1997 with the creation of an annual EU-China energy summit. The summit measured their progress on two main topics: energy security and energy efficiency, specifically, best practice sharing on nuclear safety for the former and smart grids, urban development and clean coal development for the latter. Meanwhile, climate change cooperation began in earnest in 2005, bringing us to the current phase of intensified relations that began in May 2012 with the creation of the EU-China High-Level Meeting, via two agreements, one on urbanisation, the other on energy cooperation. The deal was signed by Chinese Vice Premier, now Premier, Li Keqiang and the then President of the European Commission Emmanuel Barroso.

The agreement continues in the steps of the EU-China Roadmap aimed at speeding up the transition towards a low-carbon economy. Textually we see a lot of «enhancing mutual trust on market-related issues», or «contributing to the sustainable development of the global energy system». In practice, this should yield additional R&D development contracts for European firms and reduced costs for Chinese energy firms seeking to invest in renewables in Europe.

The 2016 Roadmap is an interesting text because of the detail it gives on renewables, through a focus on reducing development costs, expanding the biogas sector by increasing methane production, and a big emphasis on energy

[26] SEKULOVIC, Saba. *The EU-China climate alliance: new plans and old troubles.* [online]. Available at: <http://politheor.net/the-eu-china-climate-alliance-new-plans-and-old-troubles/>

[27] EC. *Energy Dialogue*. [online]. Available at: <http://ec.europa.eu/energy/en/topics/international-cooperation/china>

efficiency. The latter represents the interest of Chinese officials to benefit from the EU's leading position in the cogeneration industry, seeking to share best-practice in public policy planning along with the objective of adding a substantive combined heat and power (CHP) dimension to ongoing Chinese urban development. Cogeneration or CHP is the simultaneous use of a heat engine to generate electricity and useful heat, making it possible for energy suppliers to massively reduce their energy waste, and therefore enabling a lower running cost of their plants while helping public authorities reach their energy efficiency target. The EU generates 11% of its electricity using cogeneration and includes the world leaders in the business: Denmark, the Netherlands and Finland with 60% to 80% of their power produced through this method.[28]

However, traditional defenders of free trade like the United States and the United Kingdom are engulfed in domestic political scandal and flirt with protectionist politics, leaving China's President Xi Jinping to announce in 2017 that his country is developing free trade, promotes liberalisation and says «no» to protectionism[29]. These deepening energy ties could be a sign of the shape of things to come as the EU and China gear up to deploy a more cohesive voice on the governance agenda of the global economy.

4.3. China's Energy Expansion and Clean Energy Investments

China watchers and other commentators debate China's resolve and capability to fill the political vacuum left by the U.S. withdrawal from the Paris climate accord this month. Why would China be eager to take leadership on climate change? To understand this transition requires looking more closely at the interests and motivations of the Chinese leadership in the rapid growth and development of Chinese renewables.

Unlike political leaders in Europe or former US President Barack Obama, who link moral duty with climate action, China's leadership is not looking to support collective goals of reducing greenhouse gases. Rather, China will redefine global climate leadership to pursue the government's immediate goals of national economic development, control of energy infrastructure and the global economic competitiveness of Chinese industry[30]

[28] GRANDJOAN, Thomas. *EU and Chinese energy cooperation: Remodelling a new world order?* [online]. Available at: < http://politheor.net/eu-and-chinese-energy-cooperation-remodelling-a-new-world-order/>

[29] WORLD ECONOMIC FORUM. *President Xi's speech to Davoce in full.* [online]. Available at: <https://www.weforum.org/agenda/2017/01/full-text-of-xi-jinping-keynote-at-the-world-economic-forum>

[30] HSUEH, Roselyn. *Why is China suddenly leading the climate change effort? It's a business decision.* [online]. Available at: < https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/22/

China is near the forefront of global renewables, from hydro to solar and wind. The development of Chinese renewables began more than a decade and half before China's 2015 Paris pledge to curb fossil fuels and peak CO2 emissions by 2030. Shortly after China's accession to the World Trade Organization in 2001, the Chinese government introduced the Wind Power Concession to attract foreign direct investment through installation-based fiscal incentives and government subsidies for wind farm developers, as well as state-owned utilities and grid companies.[31]

With Chinese renewables controlling the domestic market, the Chinese government promotes these products globally with diplomacy and development finance. The Chinese government established the "South-to-South Cooperation in Climate Change" in 2014.[32] Declining to contribute to the UN Green Climate Fund, China promised $3.1 billion to the South-to-South Cooperation to build low-carbon parks, implement mitigation and adaptation projects, and provide climate change training in developing countries, including those covered by China's "One Belt, One Road" initiative, which promotes Chinese investment in Central Asia and Southeast Asia. With the United States taking a back seat on climate change, if China exerts leadership it would be about enhancing China's global prestige and economic clout — and diversifying energy sources at home, while managing China's energy infrastructure. This appears to be a clear win-win scenario for China, although it is less obvious whether the global community stands to gain from any reduction in greenhouse gases.[33]

5. Research and Innovation

China is building up its global competitiveness in knowledge-intensive sectors and its ambition to be a global leader in science and innovation by 2050 seems

why-is-china-suddenly-leading-the-climate-change-effort-its-a-business-decision/?utm_term=.cd03ade3d9b2>

[31] HSUEH, Roselyn. *Why is China suddenly leading the climate change effort? It's a business decision.* [online]. Available at: < https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/22/why-is-china-suddenly-leading-the-climate-change-effort-its-a-business-decision/?utm_term=.cd03ade3d9b2>

[32] GRANDJOAN, Thomas. *EU and Chinese energy cooperation: Remodelling a new world order?* [online]. Available at: < http://politheor.net/eu-and-chinese-energy-cooperation-remodelling-a-new-world-order/>

[33] HSUEH, Roselyn. *Why is China suddenly leading the climate change effort? It's a business decision.* [online]. Available at: < https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/22/why-is-china-suddenly-leading-the-climate-change-effort-its-a-business-decision/?utm_term=.cd03ade3d9b2>

well within reach. China outperforms the European Union in terms of expenditure on research and development as a share of its GDP, and already produces about the same number of scientific publications, and more PhDs in natural sciences and engineering, than the United States.[34]

The creation of scientific knowledge and its use in technology and economic and societal development has become increasingly global and multipolar. Europe and the United States have traditionally led in scientific development, but China in particular has emerged as a new science and technology (S&T) powerhouse. A key indicator of the rise of China in S&T is its spending on research and development (R&D). Chinese R&D investment has grown remarkably, with the rate of growth greatly exceeding those of the United States and the European Union. China is now the second-largest performer of R&D, on a country basis, and accounts for 20 percent of total world R&D (Fig. 8).

Figure 3. Share of Total Global R&D Spending

Share of Total Global R&D Spending			
	2014	**2015**	**2016**
North America	29.1%	28.5%	28.4%
U.S.	26.9%	26.4%	26.4%
Caribbean	0.1%	0.1%	0.1%
All North America	29.2%	28.5%	28.5%
Asia	40.2%	41.2%	41.8%
China	19.1%	19.8%	20.4%
Europe	21.5%	21.3%	21.0%
Russia/CIS	3.1%	2.9%	2.8%
South America	2.8%	2.6%	2.6%
Middle East	2.2%	2.3%	2.3%
Africa	1.0%	1.1%	1.1%
Total	100.0%	100.0%	100.0%

Source: 2016 Global R&D Funding Forecast by Industrial Research Institute

Increasing Chinese scientific power has provoked concern in the west that the flow of Chinese talent will slow. US universities import much of their scientific talent from abroad, particularly from Asia, and particularly from China.

[34] VEUGELERS, Reinhilde. *The challenge of China's rise as a science and technology powerhouse.* [online]. Available at: <http://aei.pitt.edu/88210/1/PC-19-2017.pdf>

There are therefore particular worries in the US about being able to continue to attract the best of the world's brains to power the US science machine. This concern, however, is so far not justified by the data, as this section will show (Veugelers, 2017).

European S&T policymakers should promote scientific collaboration not only within the China is a long standing key partner country on research and innovation cooperation for the European Union. The relationship is governed by the Science and Technology Cooperation Agreement signed in December 1998 and last renewed in December 2014. In addition, an Agreement between the European Atomic Energy Community (Euratom) and the Government of the People's Republic of China for R&D Cooperation in the Peaceful Uses of Nuclear Energy is in place since 2008. A new High Level Innovation Cooperation Dialogue (ICD) was inaugurated in 2013 raising the level and intensity of research and innovation relations with China and a new co-funding mechanism agreed at the 2015 Summit and ICD.

The EU Science Technology and Innovation Cooperation with China have intensified in recent years. China was the third most important international partner country under the EU's Framework Programme 7 (FP7) that run from 2007 to 2013, with 335 participations of Chinese organisations in 227 collaborative research projects and a total EU contribution of 33 million euros. Moreover, the Marie Skłodowska-Curie programme counted with around 316 Chinese participations.[35]

China remains a key partner country in Horizon 2020, the EU's Framework Programme for Research and Innovation running from 2014 to 2020. So far 695 applications from China were presented in 304 eligible proposals leading to 117 participations of Chinese organisations in 47 collaborative research projects.[36]

EU but also with non-EU countries, and should remove barriers that prevent such collaboration. The EU should do more to attract the best foreign talent, wherever it is located in the world, and should remove barriers that prevent such mobility. EU talent should be encouraged to be mobile outside the EU and go to the best universities and institutes, wherever they are in the world. Connections with these European outflows must be maintained, and incentives must be provided to encourage scholars to return home at optimal stages in their careers. Similarly, connections with foreign scholars who return home after their research stays in the EU should be supported. This is most notably the case for the Marie Curie Fellowships and the collaborative research programmes under

[35] EC. *EU-ASEAN*. [online]. Available at: <http://ec.europa.eu/trade/policy/countries-and-regions/regions/asean/>

[36] EC. *EU-ASEAN*. [online]. Available at: <http://ec.europa.eu/trade/policy/countries-and-regions/regions/asean/>

the EU's Horizon 2020 framework initiative (Veugelers, 2017). None of this requires major new initiatives at the EU level, but rather a stronger commitment to implementation of existing initiatives that are aimed at those parts of the world that are at the scientific frontier. EU programmes that support extra-EU cooperation and mobility should be based on excellence in terms of destinations for, and sources of, researchers.

6. Conclusions

The EU and China relations have never appeared as highly strategic as they are today and there is a good potential for the new global partnership. This opportunity comes in the environment where the United States' global role is still being reconsidered, moreover there are other players such as Russia that are contesting the EU – China growing as well as a new emerging region ASEAN that bring additional competition.

The recent changes in the world's geopolitical order have put pressure on the EU to redefine its global position. The EU has to be ready to defend its interests and act proactively. Strengthening the collaboration between the EU and China, two large global players would seem particularly relevant for traditional cooperation areas as trade and investment. The prospect of the EU-China free trade agreement in future could without doubt represent big gains for the world economy. The recent developments have showed that the EU and China could work closely together on many other important fields: not only trade and investment, but also energy research and innovation. The EU and China have taken step forward in addressing climate change and give impetus to green investment; furthermore to the development of a global low carbon economy. The EU and China could shape the global competitiveness by joining efforts and enhance cooperation in science, research and innovation.

However, it is clear that the potential of the EU – China enhanced global partnership has some risks. The prospects for overcoming China's and the EU's conceptual differences on global governance appears to stand a greater chance than ever. China's resistance to the EU accepted environmental, procurement and labour standards in its trade accords might continue to be major obstacle in moving forward. A successful cooperation in the future might be determined by the extent to which China accepts the European values, but the question will also arise as to whether EU is prepared to embrace the governance dynamics of China. One way to advance is to continue constructive EU-China dialogue and reach mutual understanding of how each other's principles and norms would impact their respective societies and economies.

Sovereignty Post-Brexit, The State's Core Function and EU Reintegration

K.A.C. O'Rourke*

Summary: With the successful 2016 BREXIT campaign, populist citizen demands directed the U.K. as a nation State to reclaim its diminished sovereignty and under Article 50 negotiations, to leave the European Union. Yet the negotiated transition of the U.K. and its 2019–2021 transitioni period carries with it potential implications not only for the future of the U.K. as a nation State and its legitimate expression of sovereignty but also for the remainder of 27 States who will need to reintegrate their partnerships within the regional bloc after the U.K. exits. This commentary proposes a 21st century GeoNOMOS model for the continuum of State sovereignty that outlines a core function for the State, constructs a framework of liberty that respects diversity, cultural heritage, domestic institutions while it promotes a new set of organizing principles in a society of economic traders. The GeoNOMOS model as proposed here, outlines a broad application not only for the U.K. as it restructures its sovereign function apart from the EU but also for those 27 remaining EU partnership States that struggle with the rise of populism across the Continent that demand more fiscal accountability and a centralized migration program within the European Union as a regional institution. Creating this new context for the 21st century expression of legitimate State sovereignty would potentially allow the U.K. to develop new best practices for other States to emulate and to lead a global conversation on matters related to the changing role of the nation State. The model outlined here defines sovereignty in terms of a State's two key functions: [1] first and foremost, how the State cares for its own people, protecting participatory democracy and individual liberty; and then, [2] how a State protects its domestic institutions as it successfully engages on an international level within the "international community of states" and within a marketplace guided by capitalist globalization.

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Keywords: BREXIT; State Sovereignty; Participatory Democracy, Heterarchy, GeoNOMOS; European Union; Framework of Liberty

1. The Brexit Focus on Sovereign Legitimacy

These are times of uncertainty on the European Continent. Oft defined not only by the very specific BREXIT trajectory as the U.K. leaves the forty-year partnership with the European Union in 2019, but also, exemplified by the rising demands of populism and anti-establishment attitudes fueling national election cycles between 2016–2018 that continue across the Continent itself. [1] These national elections inevitably address populist feelings about State sovereignty, nationalist integrity and the need for more economic equity in designing a new paradigm for capitalist globalization. The dynamic of this sea of change has thrust a monumental politico-economic tsunami that confronts the European Union not only as the BREXIT final departure arrives in March 2019 but also as the EU struggles to address its own bureaucracy and internal challenges for more accountability by current member States.[2] The wave of populism continued to sweep across the U.K., France, Austria, Italy, The Netherlands, Greece, and Germany election cycles in 2016–2018 but none was as drastic and profound as the 2016 BREXIT campaign in the U.K. where citizens voted to support a government negotiated plan designed to divorce itself from the European Union.

Both sides of the BREXIT campaign were very nationalist in their outlook suggesting that the profitable preservation of a capitalist economy was paramount based on a conservative sense of nationalism and sovereignty.[3] This commentary

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[1] FISHER, Max, TAUB, Amanda. Uncertainty, More Than Populism Is New Normal in Western Politics. [online] Available at https://www.nytimes.com/2017/06/10/world/europe/theresa-may-election-politics-populism-interpreter.html [June 10,2017].

[2] The bargain underpinning the EU is that compromises in national sovereignty through accession to regulatory compliance will bring economic and social benefits. Creating a common economic market that could rival the American economy would be a boost to lift all boats. Yet while greater access to markets and labor migration accelerated within the EU, public austerity measures produced cutbacks in domestic-level social programs, education and health. These public austerity measures are now at the forefront of domestic political review. For many working people, the benefits of EU membership did not appear to outweigh the stagnation in quality of life they experienced, combined with the loss of security

[3] BROWNE, John, *UK's Minister Commits to Successful Brexit*, Townhall Finance [online]. Available at http://finance.townhall,con/columnists/johnbrowne/2016/08/05/uks-prime-minister-commits-tosuccessful-brexit-n2201876; see also KIRKA, Danica, *UK Central Bank Tried to Soften BREXIT Shock in Economy,* ABC News/Associated Press [online]. Available at https://abcnews.go.cpm/International/wiresStory/uk-central-bank-economy-brexit-stimulus-41112988 [noting that while cheaper money will help households and companies the cost of loans is already

speaks briefly to the actual BREXIT campaign dynamics from the U.K. as an example of rising nationalist antagonism towards the European Union and then, outlines the changes in how sovereignty and the State expression of sovereignty has changed into this century. The discussion points to the dynamics of the proposed GeoNOMOS model[4] [see diagram] as a *continuum of sovereignty*[5], one that operates in such a way as to accommodate the role of a 21st century nation State and yet, moves beyond some of the tragic consequences that the neoliberal paradigm

very low and is not their primary concern right now, economists say. Business in particular is worried about whether to make investments or hire in Britain without knowing what the country's trade relationships with the EU will be]; see also DOLSAK, Nives, PRATKASH, Aseem, *Here's What Many Missed When Covering Brexit Vote*, Washington Post [online]. Available at https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/04/heres-what-many-journalists-missed-when-covering-the-brexit-vote/ [Noting that welfare states such as U.K. have had policies that helped free trade losers; pointing to political analyst John Ruggie who called this system for cushioning blows from the international economic system "embedded liberalism" and argued that the interventionist domestic welfare state made possible today's liberal trade order on a global scale. But these policies are eroding as winners are not compensating losers. In fact, private corporations that have gained enormously from globalization are using complex financial arrangements to escape taxes and wealthy individuals are doing the same. Economic inequality is increasing in a "winner-takes-all" society. Mainstream media that focuses on racism and xenophobia rather than on economic loss and inequality may not be taking into account these political policy shifts. Quoting Larry Summers who insisted in 2005 that financial markets could not fail now recognizes that the Brexit vote is a 'wake up call to elites everywhere on a need to redesign economic policy' that hears the anger expressed in the Brexit vote. The real issue in BREXIT was what did average British voter gets when and how from EU integration]

[4] The GeoNOMOS model outlined in this commentary [see diagram] is a graphic representation of the next evolution for State sovereignty because it differentiates several important principles. One, it posits conceptually that for all human activity, enterprise and undertakings, liberty represents the outer boundary [dotted line box] of any and all such endeavors. Beyond this *framework of liberty* nothing can, nor does exist, and all activity with the State falls within the four corners of this frame defined at its outer boundary by liberty. Two, the GeoNOMOS distinguishes, in contrast to other models which seek to develop an economic/legal model, or some other models for nation States from times long past, that the nation State and the nation State alone can function as a legal guarantor and can only vouchsafe liberty both toward the individual and also toward other nation States and supranational organizations who operate with semi-governmental character. Third, the proposed GeoNOMOS presented here designs a *single core function* for the State in relationship: [a] to its citizens [vertical axis] from whom it seeks domestic legitimacy in order to govern, and, [b] to its engagement in the global marketplace [horizontal axis] from a intentional long term strategic and sustainability perspective as a member of the international community of States.

[5] Definition of Continuum, adapted from www.merriam-webster.com/dictionary/continuum; Note in the process, the U.K. core function engages at the center of three overlapping circles [three forms of capital] and the center of the intersection of a *vertical axis* and a *horizontal axis* inside the GeoNOMOS Model©. [See diagram attached] This single core function incorporates three essential building blocks that belong to every nation State – economic capital, social capital, and human capital – all of which must remain inter-connected and continuously balanced in order for the State to maintain legitimacy as sovereign as to function.

[c. 1980–2010] of capitalist globalization has had on State sovereignty. The *continuum for sovereignty* protects the core function of the State with the framework of the liberty [dotted line box] beyond which no State can legitimately function.

The post-BREXIT campaign analysis shows that both the Leave (BREXIT) and Remain campaign relied on widespread publicly disseminated negative scare tactics rather than on positive arguments for solidarity or for sharing factual information comparing each of the issues and ramifications involved. Analysis of voters' demographics and news-consuming habits offer potential clues as to why BREXIT passed: Depending on one's perception, BREXIT can be viewed as an act of citizen desperation in the name of demanding "restored" State sovereignty. But, how much sovereignty had the U.K. actually sacrificed? During the BREXIT campaign, Euro-sceptics trotted out a litany of grievances, often to publicly mock the over-specificity and wide scope of EU regulations. Those mystified by the BREXIT vote showed contempt deriding it as a demonstration of one of the major shortcomings of democracy, namely when uninformed electorates make crucial decisions which affect everyone else that is to be governed. However, in a participatory democracy the process of respecting individual liberty means a referenda remains among the most democratic means of direct, collective decision-making. There are rightful concerns that public deliberation beforehand was confused, media coverage was agnostic to facts, and mistrust of expertise was absent. Either way, Brexit produced a confused desire by the majority of Brits for fortifying state sovereignty. It will not fix the underlying problems of economic stratification, withered public safety nets and a national pride injured by its lost investments in imperialism and colonization. The State model in general has failed to address the increasingly transnational problems of the world today, including a growing global economic inequality, mass migration, climate change and the whimsical destruction wrought by the transnational finance networks. It is easy to pin these on the institutions like the EU, but many border-defying problems are the direct result of past State actions — the same powers of national sovereignty Brexit supporters seek to bolster. BREXIT voters tended to be less educated, earned less money, appeared to work in non-skilled trades, lacked formal job qualifications, and represented voters who were not able to domestically compete in the global economy that had "trickled down into" the U.K. as part of the neoliberal paradigm [c. 1980–2010] – a paradigm that had been broadly institutionalized as an ideology and economically implemented as the dominant form of capitalist globalization over the last forty years.[6]

[6] The neoliberal premise of free trade bringing about wealth creation for all did not manifest. Ordinary working people are left to feel they paid the cost of U.K. national honor — of which the State is the protector — for questionable, partial, material benefits, which were disproportionately distributed to those who were already well-off. The riches of Brussels went to those who profit

According to some reports, these U.K. voters appeared to be reluctant to adapt to rapid social changes that integration into the global economy often requires as domestic markets shift rapidly. [7] As more and more domestic U.K. labor markets and manufacturing work opportunities changed, not because of intentional planning and public debate fostered by national legislatures or Parliament, but because of decisions made in corporate boardrooms, BREXIT voters had concluded they were being "left behind" by both global economic pressures for rapid short term profits, and by the social ramifications [eg, immigration mandates] of U.K.'s European Union membership. [8]

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the most from trade, banking, finance and so on. Social and economic stratification has such reproductive tendencies, and only further cement resentment. The rising sense of national pride, one ridden by angst about the state of the changing world, might appear irrational. But it betrays the underlying reason. An observer might miss it if they value the outcome in economic terms and political outcomes alone.

7 This is a partial resource list on the context for globalization of the late 20th century and the negative impact the neoliberal paradigm [c. 1980–2010] for global capitalism has had on exercise of State sovereignty and State autonomy: RAMIREZ, S.A., Taking Economic Rights Seriously After the Debt Crisis, *42 Loy. U. Chi. L. J. 713*, 2001; see also RODRIK, Dani, *The Globalization Paradox: Democracy and the Future of the World Economy*. New York: W.W. Norton & Co., 2011; see MILGATE, M., STIMPSON, S.C., *After Adam Smith: A Century of Transformation in Politics and Political Ideology*. New Jersey: Princeton University Press, 2009; see also KRUGMAN, Paul Krugman, *Trade and Wages Reconsidered.* Washington, D.C.: Brookings Institute: Papers on Economics, 2008; see McMICHAELS, P., *Development and Social Change: A Global Perspective.* New York: Sage Pubs, 2008; see NOLAN, P. *Capitalism and Freedom: The Contradictory Character of Globalization.* New York: Anthem Press 2008; see ABU-LOGHOD, J., Globalization in Search of a Paradigm. In ROSSI, I. [ed.] *Frontiers of Globalization Research: Theoretical and Methodological Approaches*. New York: Springer 2007; see also ABDELAL, R. *Capital Rules: The Construction of Global Finance*. Cambridge, MA: Harvard University Press 2007; see FINDLAY, R., O'ROURKE, K. H. *Power and Plenty: Trade, War and The World Economy in the Second Millennium*. New Jersey: Princeton University Press, 2007; see GILLS, B.K., THOMPSON, W. R. [eds]. *Globalization and Global History*. New York: Routledge 2006; see also BOGLE, John Bogle. *The Battle for the Soul of Capitalism*. New Haven, CT: Yale University Press 2005; see also EL-OJEILE, C., HAYDEN, P. *New Critical Theories of Globalization.* New York: Palgrave McMillan Press, 2006*;* see also SCHOLTE, J. A. *Globalization: A Critical Introduction.* New York: Palgrave MacMillan 2006; see also OSTERHAMMEL, J., PETERSSON, M. *Globalization: A Short History* [Dona Geyer, trans.], New Jersey: Princeton University Press 2005; ROBBINS, R. H. *Global Problems and The Culture of Capitalism* [3rd Edn]; London: Pearsons Press, 2005.

8 The bargain underpinning the EU is that compromises in national sovereignty through accession to regulatory compliance will bring economic and social benefits to all members. Creating a common economic market that could rival the American economy would be a boost to lift all boats. Yet while greater access to markets and labor migration accelerated within the EU, public austerity measures produced cutbacks in domestic-level social programs, education and health. These public austerity measures are now at the forefront of domestic political review in a number of countries including Italy, Greece, Spain, Ireland, Portugal, Poland, and Hungary. For many working people, the benefits of EU membership did not appear to outweigh the stagnation in quality of life they experienced, combined with the loss of security. The notion that immigrants are costly, take away employment

In Summary, BREXIT reflected a larger, more deep-seated citizen angst about the fragile State and the very underlying expression and legitimacy of U.K. sovereignty.[9] The 2016 BREXIT vote catapulted Theresa May into the role of Prime Minister where she established "The Department for Exiting the European Union" and a written BREXIT strategy before triggering the EU Article 50 process in March 2017.[10] Theresa May continued to lead the Conservative Party in talks with the EU, perhaps the most consequential set of negotiations that Britain has faced since World War II [11] She continued to rise above the public chaos in her own party through to December 2017 when the European Council finally

from U.K. citizens and interfere with the cultural values the U.K. citizens value most continue to be the political issues that stoke the BEXIT fires far away from Downing Street

9 The level of public political engagement on the questions of Great Britain's sovereignty seem to emerge around the issues of severely limiting immigration, "recovery" or "re-directing" of EU partnership payments by the U.K. in support of more nationalist social programs, and the pride of bolstering what appeared to be a shrinking of U.K.'s expression of State sovereignty. BREXIT supporters continually cited a number of reasons for leaving the EU including independence and injuries to British national pride that Brussels routinely imposed on the United Kingdom so much so that this over-regulation from outside the borders of Great Britain appeared to prioritize foreign corporate interests while forcing Britain to take particular refugees, especially from Syria and Eastern Europe, that created a general fear about cultural and religious disharmony; See also SWINFORD, Steven.*Theresa May pledges to Fight Injustice and Make Britain 'A Country that Works for Everyone' in Her First Speech as Prime Minister* [online]. Available at http://www.telegraph.co.uk/news/2016/07/13/theresa-mays-pledges-to-fight-injustice-and-make-britain-a-count/

10 Lisbon Treaty on the European Union.[online] Available at http://lisbon-treaty.org/WCM/the-lisbon-treaty/treaty-on-european-union-and-comments/title-6-final provisions/137-article-50.html [Noting that any Member State may decide to withdraw from the Union [EU]in accordance with its own constitutional requirements so long as the Member State notifies the European Council of its intention. This notice triggers a set of guidelines from the European Council to negotiate an agreement with that State for arrangements of the withdrawal and is to also take into account the framework for the future relationships of that State with the EU. The final agreement must have majority approval of the European Council members and the consent of the European Parliament. The Treaties between the parties cease from the date of entry of the negotiated agreement [See also Article 218(3)] or failing an agreement, two years after Article 50 notification is given by the State, unless the European Council unanimously decides to extend this time period]; See also BARBER, Nick, HICKMAN, Tom, KING, Jeff. The Article 50 Trigger. *Counsel* [Aug 18-19, 2016] [argues that the Prime Minister alone is unable to trigger withdrawal from the EU under TEU Article 50; Prime Minister must be authorized to do so by statute in order that the declaration is legally effective under domestic law and complies with the preconditions of triggering Article 50]; see also BUTLER, Miranda. Implications of Brexit: Who is Sovereign Now. *S.J. 2016*, vol.160, No 29, pp 30 [discussing what Brexit vote entails for UK parliamentary sovereignty and for UK influence in international issues; considers whether UK constitutional law requires not only government's use of 'crown prerogative' but also a parliamentary vote in favor of leaving EU].

11 CASTLE, Stephen. *May Won Election But Lost Majority.* [online]. Available at https://www.nytimes.com/2017/06/12/world/europe/uk-may-britain.html [noting that even after the election May insisted there would be no change in her strategy for seeking a clean break with the EU and withdrawing from its single market and customs union in March 2019].

approved the BERXIT, PART I set of drafted agreements. [12] BREXIT, PART II trade negotiations 2018–2019 were scheduled for March 2018.

Prime Minister May has repeatedly and publicly expressed her concerns as part of the post-BREXIT campaign noting in her public speeches about reaching out to "the working class" family, her plan to cut taxes for "ordinary people", consulting the people "far and wide" to create a more equitable society where benefits and burdens might be more "evenly distributed".[13] She publicly stated

[12] NIB, John. Theresa May Presentation at EU Summit Called Below Our Expectations. [online]. Available at https://jonnib.wordpress.com/2017/06/23/merkel-says-theresa-kay-brexit-proposals-not-a-breakthrough-we-will-not-allow-ourselves-to-be-divided/ [noting that Merkel and Macron both indicated that there will be no changes to the EU Treaty of Lisbon to accommodate BREXIT negotiations unless reform of the bloc demanded it because EU is based on common values]; see also SAVAGE, Michael. *Tory Donors Tell May: No Deal is Better than a Bad Brexit.* [online] Available at https://www.theguardian/politics/2017/Oct28/ [noting the growing frustration over Brexit Part I negotiations and suggesting that EU is stonewalling the divorce bill; that a "no deal" options must be left on the table because it is in the best interest of UK; various Conservative Tory donors who supported the Brexit campaign, and other economic sectors are reporting post-Brexit scenarios that include increased tariffs on food products imported from the EU and Ireland as follows: 22% food products, beef up 40%; Irish cheddar up 44%; discussed general fear that the London financial community said Euro 18-20BN and 35,000 jobs were at risk now as corporations were forced to put investment, recruitment and supply chain decisions on hold]; See Also CASTLE< Stephen. *EU Leaders Agree to Begin Next Phase of Brexit Talks*. [online] Available at https://www.nytimes.com/2017/12/15/world/europe/brexit-eu-leaders,html [noting that the European Council accepted the results of BREXIT, Part I negotiation efforts; and UK had agreed to enough of the immediate issues raised by the Article 50 mandates including the time limited role for the European Court of Justice in adjudicating rights of European Union citizens living in UK, the border agreement with Northern Ireland, and the continuing UK contribution to the EU of more than $52BN].

[13] Supra, Note 9, Swinford [Swinford noting that Theresa May has directly addressed working-class Britons who are "just managing" to cope with life as she vowed that her Government will not "entrench the advantages of the privileged few". In a searing speech outside Downing Street May pledged to "fight against the burning injustices" of poverty, race, class and health and give people back "control" of their lives; she vowed to "prioritise" tax cuts and legislation for working-class voters rather than the "mighty"; Her speech, setting out her vision as a "One Nation conservative", marked a clear attempt to distance herself from David Cameron's premiership and appeal directly to disenchanted Labour voters. She said that for an "ordinary working class family" life is "much harder than many people in Westminster realise" as she sought to heal the national divide after the EU referendum. Her speech highlighted her clear intention to reach out to Labour voters who feel alienated by Jeremy Corbyn in a move which could put the Tories in power for a decade. After arriving in Downing Street, May said that her "mission" as Prime Minister will be to make Britain "a country that works for everyone". She also vowed to "forge a bold new positive role" for Britain outside the European Union.]; AUTHORS NOTE: Note that these essential capital resources that May repeatedly references are currently available to the U.K. as its rights and benefits of EU membership but will need to be analyzed and carefully discussed precisely because the public spectrum of Brexit citizen political demands are significant and dominantly focused on creating measurable and concrete *domestic-based solutions* that address access to education, employment and healthcare.

that her government would deliver BREXIT, marshal all its available capital resources, and refocus its priorities on people whose needs were greatest: "When we make the big calls we will think not of the powerful but you," she said. "When we pass new laws, we will listen not to the mighty but to you. When it comes to taxes, we will prioritize not the wealthy but you. When it comes to opportunity, we won't entrench the advantages of the fortunate few – we will do everything we can to help anybody, whatever your background, to go as far as your talents will take you."[14] But in reality, these dynamics are very much a domestic agenda item that will ultimately be outlined in how the Parliament addresses State level development and utilization of it three essential capital resources and domestic regulations – these matters may never become part of the EU Council's formal 2018–2019 BREXIT trade negotiations.

The required balance between much needed U.K. domestic capital resource development and utilization [economic capital, social capital and human capital], existing global market demands, and responsibility to the international community of States will remain Prime Minister May's key three challenges as the U.K. enters 2018–2019 trade and financial negotiations with the European Council. These challenges are depicted at the core function of the State in the proposed model on *continuum of sovereignty*. Transition in how exactly the U.K. plans to meet these global mandates will simultaneously raise considerable *domestic pressure* by U.K. citizens for more elected official transparency as the State reviews how it will re- integrate its three readily available *capital resources* [economic capital[15],

[14] HELM, Tony. *Theresa May's First Pledge as PM was for a 'one-nation Britain'. Can She Deliver?* [online]. Available at http://www.theguardian.com/politics/2016/jul/16/theresa-may-one-nation-britain-prime-minister [Helm suggesting that "the core problem is that, as yet, no one in it [new British cabinet] knows what Brexit means, and what it will entail. May's cabinet is split between the likes of Hammond, who insists that whatever happens the UK must retain as much access to the single market as possible, and others, such as Davis and Johnson, who seem to believe the UK can thrive outside the single market if it has to, and this is the price the country has to pay to extricate itself from the EU's commitment to free movement of labor in order to control immigration]; see also Supra, Note 9, Swinford [commentary noting that Theresa May has directly addressed working-class Britons who are "just managing" to cope with life as she vowed that her Government will not "entrench the advantages of the privileged few"].

[15] Economic capital is the quantum of risk capital, assessed on a real basis, which an enterprise requires to cover the risks that it is running or collecting as a going concern, such as market risk, credit risk, legal risk, and operational risk. [online] Available at https://www.glynholton.com/2013/06/economic_capital. [noting that economic capital is the amount of money which is needed to secure survival in a worst-case scenario. Firms and financial services regulators, i.e., representing the nation-state should then aim to hold risk capital of an amount equal at least to economic capital. Typically, economic capital can be calculated by determining the amount of capital that a firm needs to ensure that its realistic balance sheet stays solvent over a certain time period with a pre-specified probability.] Therefore, economic capital is often calculated as value at risk. The balance sheet, in this case, would be prepared showing market value (rather than book

social capital [16] and human capital[17]] once the U.K. begins functions outside its EU

value) of assets and liabilities and thus economic capital is distinguished in relation to other types of capital which may not necessarily reflect a monetary or exchange-value. These forms of capital include natural capital, cultural capital and social capital, the latter two represent a type of power or status that an individual can attain in capitalist society via a formal education or through social ties. See also generally, RUPP, Jan C.C. Reworking Cultural and Economic Capital. In HALL, John R.[ed], *Reworking Class.* Ithaca, NY: Cornell University Press, 1997;pp221-246. [twelve essays on culture and economic capital development; Rupp reviews extensively how social space is defined by the global volume of economic capital within its bounds]; *Economic capital* can be defined as the amount of risk capital assessed on a realistic basis which a nation State requires in order to remain solvent over a period of time. Economic capital can be calculated. The other two types of capital [social capital and human capital] can be derived from economic capital but only at a cost based on the calculated effort of transformation initiated by the State at the State level. Individual economic capital is developed and utilized by the State in its role as a legal entity.

[16] The term Social Capital generally refers to (a) resources, and the value of these resources, both tangible (public spaces, private property) and intangible ("actors," "human capital," persons and people) but is in the GeoNOMOS© to be distinguished from human capital, (b) the relationships among these resources, and (c) the impact that these relationships have on the resources involved in each relationship, and on larger groups. The focus of social capital is generally as a form of capital that produces public goods for a common good. *Social capital* is understood as a stock of resources that *an individual* can control by how they invest their time in community organizations, educational institutions, religious organizations and neighborhood networks. It represents a *form of trust and reciprocity* that is developed within social networks in any given civil society setting. Economic capital and human capital are also forms of capital but they are generally more fungible in the sense that these two forms of capital are linked to private goods. Social capital which has an individual characteristic tends to aggregate and represents a *collective or public good* as part of a civil society. General resources and references that support this premise include: See BRATSPIES, Rebecca. Perspectives on the New Regulatory Era. *51 Ariz.L.Rev.2009*, 575 [suggesting that as new technologies underscore the divergence between market incentives and social welfare, social trust can be developed as a resource through creating regulatory agencies that function effectively in times of uncertainty] [this author noting that Bratspies's "social trust" equates as a form of social capital]; see SANDBROOK, P.,HELLER, C., EDELMAN, J., TEICHMAN, D. *Social Democracy in the Global Periphery: Origins, Challenges and Perspectives*. State University of New York, 2007 [Defining a social democracy regime as a widely supported set of norms, institutions, and rules constraining government to [a]be subjected to democratic control, and [b] activity regulate market forces and intervene to enhance equity, social protection and social cohesion]; see COLLIER, D. *The Bottom Billion: Why Poorest Countries are Failing and What Can be Done About It.* New York: Oxford University Press 2007][concluding that the world's poorest billion people live in States that have not globalized; globalization may not be the cause of this poverty; rather, bad governance, wars and being landlocked countries have been key factors]; see also BEROK, Janos, ELODIE, Beth. *OECD Overview for Managing Conflicts of Interest in the Public Service, 64-70* [OECD, 2005] [describing various self-interests that governments perceive as creating a conflict of interest sufficient to undermine a public official's ability to faithfully carry out the public's interest];

[17] *Human capital* is a term popularized by Gary Becker, an economist from the University of Chicago, and Jacob Mincer that refers to the stock of knowledge, habits, social and personality attributes, including creativity, embodied in the ability to perform labor so as to produce economic value. In the alternative, human capital is understood as a collection of

partnership. [18] The dominant U.K. economic model may not be able to continually sustain a shared economy built solely on the back of the U.K. financial sector of the past where citizens relied on the welfare state to redistribute to areas of the U.K. that were geographically left out of the London and South-east economic boom. British business leaders lobby for a "softer" form of BREXIT, calling for a "reset that prioritizes prosperity".[19] Immigration policy and the jurisdiction of the European Court of Justice were hotly contested issues in the original 2016

resources – all the knowledge, talents, skills, abilities, experience, intelligence, training, judgment, and wisdom possessed individually and collectively by individuals in a particular and defined population. Such resources are the total capacity of the people that represents a form of wealth which can be directed to accomplish the goals of the nation or state or a portion thereof. *Human capital* is a hybrid consisting of both quantitative and qualitative aspects. Human capital in this schematic focuses first and foremost on the individual and, then, on how that individual reaches maximum levels of capabilities/resource development and autonomy in order to contribute to society in ways that the individual actually can choose to develop his or her human capital.

[18] The level of public political engagement on the questions of Great Britain's sovereignty seem to emerge around the issues of severely limiting immigration, "recovery" or "re-directing" of EU partnership payments by the U.K. in support of more nationalist social programs, and the pride of bolstering what appeared to be a shrinking of U.K.'s expression of State sovereignty. BREXIT supporters continually cited a number of reasons for leaving the EU including independence and injuries to British national pride that Brussels routinely imposed on the United Kingdom so much so that this over-regulation from outside the borders of Great Britain appeared to prioritize foreign corporate interests while forcing Britain to take particular refugees, especially from Syria and Eastern Europe, that created a general fear about cultural and religious disharmony. See also Supra, Note 9, Swinford. AUTHOR NOTE: Note that these essential capital resources are currently available to the U.K. as its rights and benefits of EU membership but will need to be analyzed and carefully discussed precisely because the public spectrum of Brexit citizen political demands are significant and dominantly focused on creating measurable and concrete *domestic-based solutions* that address access to education, employment and healthcare.

[19] MERRICK, R. There is No Way Out of Failed Economy Without a Government that is Prepared to Intervene in the Economy [online]. Available at http://www.independent.co.uk/news/uk/politics/election-2017-jeremy-corbyn-uk-leave-eu-brexit-prime-minister-win-general-labour-leader-a7726551.html [noting that BREXIT strategy will need to include a multi-billion pound strategy to create new jobs and end 'deindustrialization' as the UK economy continues to be the slowest growing among advanced nations; The Labor Party, in opposition to May, suggest a National Transformation Fund and a network of Regional Development Banks to drive infrastructure investment, the development of green industry and the job skills and job creation through medium sized business development; Labor Party called for more local community control of sustainable economic models of development]; see also REVESZ, Rachel. Theresa May is ruining Brexit by Putting Conservatives Before National Interest [online]. Available at https://www.independnent.co.uk/news/uk/home-news/ [noting that former civil servants want national interests to be priority in Brexit negotiations; the Conservative Party cannot simply negotiate with themselves to bring the country to the next level of transparency and planning initiatives]

BREXIT vote and will remain so into the 2019 transition period. [20] As the domestic fury around BREXIT negotiations in the EU divorce settlement continues to be front and center for U.K. citizens, other countries begin to line up their capital cities to become the global financial center that London has enjoyed for more than one-half a century. The public perceptions that influenced the BREXIT voting patterns carried with it some immediate mandates, not the least of which remain substantive for 2018 BREXIT trade negotiations. [21] These mandates are complex in terms of addressing U.K. security followed shortly thereafter by significant internal planning and parliamentary review of the U.K.'s sovereign obligations that accompany its global contractual partnerships, Common Market collaboration, international as well as bilateral trade agreements, and international treaties on human rights. To date there has been little noted on the domestic Conservative Party agenda for U.K. Parliament that begins to "restructure" the domestic economy to include the kind of BREXIT health, education, housing and job creation demands that require substantial capital and infrastructure redesign at the domestic level.

All of the forms of capital and these transitions are highly integrated within the GeoNOMOS core function of the State [see diagram-economic, social and human capital functions] and the GeoNOMOS *framework of liberty* as that State strives to fully integrate and continuously balance its three capital resources along the functionality of its domestic vertical axis and its international horizontal axis. Eliminating the current BREXIT political risk would require a broader recognition by the U.K. of new ways to design, develop and balance the utilization of the U.K.'s three primary capital resources [economic, social and human capital]. The *continuum of sovereignty* proposed in this article begins to outline such a process that could be simultaneously accomplished by the U.K. in conjunction with the 2018 EU trade negotiations and during its 2019–2021 global transition.

The U.K. exit negotiations will prove to be much more difficult on the EU side of the equation because there is not a general consensus in European State capitals about the U.K., and because the future trading relationships in the region as a whole will be divergent based on that particular State's current trading

[20] ELGOT, J. *BREXIT Divisions Harden Across Britain*. [online] Available at https://www.theguardian.com/politics/2018/jan/26/uk-brexit-voters-mansfield-bristol-torbay-leeds-post-referendum

[21] CASTLE, Stephen. *EU leaders Agree to Begin Next Phase of Brexit Talks*. [online]. Available at https://www.nytimes.com/2017/12/15/world/europe/brexit-eu-leaders.html [December 2017] [discussing broad range of issues presented and compromise negotiated; the agenda required by the European Council is discussed; the role of the European Commission on future trade talks to begin in March 2018]; Emmanuel Macron, President of France, has repeatedly appealed to the 27 EU countries to stay together because there can be no separate State agenda of bilateral trade talks with the U.K. and called for a new global compact for the common good;

relationships with Britain. [22] The European Union for its part in the Article 50 divorce settlement negotiations with U.K. remains a somewhat fragmented organization which is not making the transition any easier for the U.K. The ripple fact of a U.K. departure means that the European Union will be faced with its own inevitable review, reorganization, and reintegration. This process not only challenges traditional notions about State sovereignty but also will address how sovereign States partner for regional programs that include more than just trade in a Common Market and regional security. These are matters that arise within the core function of the State and function along the horizontal axis of the proposed model outlined in this commentary.

Hamulak suggests that the European Union is akin to a *heterarchy* [23] *or "shared sovereignty"* with a divided power structure, [24] but these various matters will need to be publicly addressed as the EU manages the next internal phase of reintegration once the U.K. exits in 2019.[25] Notions of a "shared sovereignty" is

[22] *Ibid.*, Castle [Merkel in her EU leadership role on behalf of Germany, has indicated that it is not up to the European Union to lay out possible trade solutions to the problems created by the 2016 BREXIT vote in the U.K. Although the next round of BREXIT, PART II continued through 2018, Merkel will push hard for continued multilateralism for those who remain in the regional bloc as EU State partners enter a new era of internal challenges around State sovereignty and redefining the balance between how much sovereignty State must "give up" to enter into the regional EU partnerships.]

[23] *Heterarchy* is best defined as a system or organization made up of interdependent units [member States] where elements of the overall organization are not ranked, are usually circular and nonhierarchical in function, and thus, can be defined more by relationships between these units characterized by multiple intricate linkages that exist in a variety of ways. Usually are characterized by horizontal partnerships and linkages.

[24] HAMULAK, Ondrej. *National Sovereignty in the European Union*. Switzerland: Springer Pub [Springer Briefs in Law], 2016 at 47-51. [outlining a detailed summary of the sovereignty issues within the EU that will require an intentional level of engagement citing McCormick, Walker and others, that in order to deal with new legal realities that arise in the supranational organization, one will need a lot of legal imagination; offering an in depth analysis of sovereignty suggesting two approaches: the static perceptions of sovereignty based on notions of Westphalia, and the dynamic approach that rests on post-Westphalian notions where sovereignty and authority are understood as non-exclusive ideals so much as that such an understanding does not imply loss of State autonomy] This author notes that the EU Constitutional systems is very complex and there will need to be more open engagement and public conversations in order to address growing populist and EU accountability concerns of member States as they collectively seek to secure the operational future and integrity of the EU post BREXIT.

[25] *Ibid*., page 49-50, 57-59, 85-86 [the numerous coexisting legal systems and power networks challenge the nature of sovereignty but does not mean that EU member States have no sovereignty; citing MacCormick, Walker and Kumm, Hamulak argues that there is more likely a new "grey zone" where sovereignty is treated as a "category" and when EU integration occurs there are going to be changes. However, such changes do not by necessity lead to a world constitutionalism. According to Hamulak, we may be moving into a phase of "late sovereignty" rather than "beyond sovereignty" – this notion of "late sovereignty" aligns with the countries who have

reinforced by the idea that any EU member State, not unlike the U.K., can also exercise their rights under Article 50 and exit the European Union on a consensual basis. [26] In addressing this tension, the proposed model on *continuum for sovereignty* can be applied along the horizontal axis of the model where groups of States partner or share sovereignty in a regional partnership via treaty agreements or other contractual arrangements. [27]

This notions of *heterarchy* or "shared sovereignty" will present its own difficulty as the BREXIT negotiations come to a close in late 2018 and the EU Treaty itself comes under closer State member scrutiny. [28] The idea that EU

only recently in the late 20th century come out from under the Brezhnev Doctrine and so State sovereignty and autonomy are more accentuated in those settings and thus, these member States are more careful about any actual or perceived weakening of their State sovereignty; providing a well-documented overview of concepts of sovereignty from within the European Union and how members States and the EU as global institution balances and must reintegrate matters of overriding constitutionalism of EU structures in better balances with the role of nation sovereignty and EU integrity in relation to governance within boundaries of a State (includes the people who will reside within those geographic boundaries most all of their lives); suggesting there are new demands for a "shared sovereignty" model that is yet to be outlined in this century for operational mandates between the EU and its member States; suggesting that the EU is defined by pluralism and heterarchy; offering a "rating scale concept" as a tool for the EU integration that will be required as 2018 comes to a close and EU enters a new phase of operation].

[26] The European Union as an institution can control the *process* of the State member exit but it *cannot prevent the exit* of a State member. The BREXIT vote in the U.K. and the timing of how the U.K. triggered its Article 50 negotiations with the EU is evidence of this principle. But as pressures within the EU continue with U.K.'s exit, other States such as Poland, Hungary, Italy and Greece challenge EU legitimacy. While EU Law does not permit the EU as an institution to "expel" a State member, each member State has the absolute right of accession and of withdrawal.

[27] Supra, Note 24, Hamulak, page 82 [Pointing out that while member States are key players in the EU, it is important to remember to functional State rights – [1] the ability of member States in the EU to amend the underlying Treaty which remains as an important sign of preservation of the sovereign position of EU member States and [2] The EU has some "state-like" features, but the EU is not legally acting as a nation State in the traditional sense of sovereignty and international law. In fact, the EU is not even a *federation of States* because each member State determine by its own State Constitution the connection to the overall governing order of the European Union.

[28] *Ibid*., Hamulak, 79-83 [noting that each member State is not "absorbed" into the EU; Rather a member State in the EU determines what level of its own sovereign competence it will transfer to the European Union; thus, the EU can function based only on the powers expressly given to it by its member States; pointing out that power not transferred by the member States to the EU as an institution remains with the Sates as "masters of the treaties" and as outlined in the Treaty of Lisbon for the creation of the European Union, Art 48,Para.1- 5] This author notes that it is the principle of cooperation and loyalty under the Treaty of Lisbon that will continue to guide the integration and reintegration of the EU member States after the U.K. exits under Article 50 and given that fact that 21st century globalization will require a new role for States that has yet to be clearly defined other than to note that the neoliberal paradigm [1980–2010] of capitalist globalization is no longer effective set of economic organizing principles. The *continuum for state sovereignty* as outlined in this article supports the core function of the State within a framework of

member States have a "reciprocal flexibility" or supervising function of the EU Treaty, can be read to mean that as 2019 approaches, there is also a *possibility of negative Treaty revisions* that might limit or change the competence that member States have accorded to the EU as an institution. [29] Such a possibility of negative revisions to the structure of the overall operation of the EU is a real possibility given the rising populist demands across the Continent for more EU financial accountability, reduced austerity measures, heightened transparency as well as a more defined and centralized migration program for the Continent.[30]

And, as if the BREXIT exit negotiations and the internal EU approval process were not enough reorganization tension inside the institution, the European Parliament which currently has 751 seats, is open for its own election cycle in May 2019. As a political body of the EU, the EU Parliament will have a decisive vote on the final terms of the U.K. Brexit divorce settlement. This process is not without its own unique political quagmires. For example, the U.K. Independent Party which as no lawmakers in the British Parliament, has 20 seats in the European Parliament where winning seats in the European Parliament is often easier for them than in their home country because voter turnout is usually anemic.[31]

liberty that by necessity will include an enterprise of law but that these new organizing principles means that economic market principles follows the rule of law and not the other way around.

[29] *Ibid*., page 83 [outlining procedures for member States to join together to nominate the Council and ask the EU Commission to present a proposal for the abolition of legislation; The Lisbon reform of primary law included the whole concept of balancing rights when "increasing the 'federalizing elements' was accompanied by reform steps increasing legitimacy of decision-making in the EU and strengthening member States supervision possibilities." And overall how the principle of subsidiarity and proportionality [Art 4]is followed within the EU because every legislation needs to be submitted to the respective national parliaments of the member States]

[30] NIB, J. EUs Juncker Hails Macron.[online]. Available at https://jonnib.wordpress.com/2017/09/26/eus-juncker-hails-macron-speech-as-very-european. [Head of EU thanking Macron for France support on EU reform suggesting that the Euro-zone will need its own budget and finance minister; wanting to address the divisions between EU richer countries in the West and poorer States on the eastern side of the Continent]; NOTE ALSO, there are channels within the EU for populist demands arising in national State elections across the Continent to be brought by member States to the body – this would be a different endeavor than that evidenced by the BREXIT vote in 2016 and confirmed in 2017 in the U.K. where citizens directed their State to divorce the European Union altogether and exercise their State rights as a sovereign nation under Article 50. European Commission President, Jean-Claude Juncker has already called for a EU summit in early 2019 to detail and tackle the programs that will be re-designed after March 2019 when the U.K. departs.

[31] KANTER, James. Far Right Leaders Hate EU Institutions But Like Their Paychecks. [online]. Available at https://www.nytimes.com/2017/04/27/world/europe/ [noting that many alt-right candidates who despite the EU institution use the European Parliament as a protest platform and collect salaries of around $100,000 Euros, a generous per diem and an annual staff and office budget in excess of 340,000 euros. So while working to blame the European institutions for being onerous bureaucracies with no democratic accountability they also seem to enjoy the lavish perks of the office while they shun the daily grind of legislative work, miss votes, mock

European Commission President Jean-Claude Juncker also has repeatedly interjected his own EU integration agenda calling for a new "roadmap" to advance the EU nations that remain after BREXIT. For all of these tensions and the mounting challenges noted concerning U.K. transitions, the European Union reintegration, demands for more legitimacy concerning nation State sovereignty, the proposed GeoNOMOS and its *framework of liberty* addresses a more balanced approach to these pressures and priorities in support of protecting participatory democracy and individual liberty.

2. The Proposed Continuum for State Sovereignty

The appeal made by U.K. Prime Minister Theresa May since 2016 seeks to shape a different foundation for the twenty-first century U.K. as a nation State as she speaks about a social contract between government and those it seeks to govern that represents a more flexible *continuum for State sovereignty* – one that secures public decision-making, individual liberty, citizen opportunity and economic stability. Every one of these espoused efforts moves the public debate for defining the operative scope of British sovereignty on to a 21st century continuum – a *continuum for sovereignty* that is more relational in the domestic sector [vertical axis] and more actively functional in the international sector [horizontal axis].

The U.K. is in a unique position to design and sustain the modern demands of the nation State without a retrenchment to an older view of absolute Westphalian sovereign autonomy. [32] The world in relation to the operation of sovereign States has changed dramatically in the last half of the twentieth century demonstrated by the end of traditional colonialism and the sheer number of newly emerging nation States claiming and being accorded sovereignty. As a recognized global leader, the United Kingdom is now in a very unusual position to embrace, design, and impact the proposed model on *continuum of sovereignty.*

Furthermore, as global economic organizing principles have also changed over time, the ongoing function of State sovereignty was altered even into the

democratic processes on behalf of the EU. Marie Le Pen opposition presidential candidate in France, is a member of the European Parliament but has been stripped of her immunity several occasions due to fraudulent activities. Similarly, Nigel Farage form the UK is a member of the European Parliament and was leader of the U.K. Independent Party until recently. There are calls of reform for European Parliament elections so that candidates who run must support the democratic process and human rights values of the EU institutions the Parliament seeks to support]

[32] The Treaty of Westphalia [1648] originally was signed to stop the religious wars of the 17th century by securing a domestic jurisdiction and a defined geographic boundary for emerging nations, thus offering protection for nation States; Available at http://avalon.law.yale.edu/17th_century/westphal.asp

early twenty-first century. [33] As part of this dynamic process, dominant States within the European Union such as the U.K., France, Germany, Greece, Italy, Ireland continued to give up parts of their traditional scope of State sovereignty in exchange for what was perceived as the ongoing mutual benefits of these economic market partnerships in both the public and private international arena. [34] But as the 2016–2017 BREXIT vote show, in that transition process, the State relinquished its domestic control over issues and concerns of ordinary citizens which actually may have been politically overlooked, downplayed or dismissed over time. It appears that the functioning [or lack thereof] of domestic level institutions related to housing, health care and job opportunity are fueling a populist "back lash" both in the U.K. and across the Continent. These demands will require a more defined State collaboration both in addressing the legitimacy of its citizen's domestic concerns and in designing a new international market paradigm for globalization.

As nation States entered the early twenty-first century, numerous debates suggested traditional notions about State sovereignty would simply merge into a world governance model. [35] Others suggested that State was not dead but would

[33] Between 1980–2010 when the economic organizing principles of a neoliberal paradigm for global capitalism dominated globalization, there is overwhelming research which documents how these economic organizing principles negatively impacted States exercise of their rights as a sovereign State on behalf of the people they sought to govern. Supra, Note 7, Neoliberalism, for listing of resource materials on the neoliberal era [c. 1980–2010] and its negative impact of State sovereignty.

[34] The basis of a "common law of humanity" emerged after the end of the Cold War in the 1980's followed the emergence of independent States in Eastern Europe who were active in the United Nations and demanded equity and fair access into the global marketplace and international finance as well. The World Trade Organization was created in1995 as an evolution of the multilateral General Agreement on Tariff and Trade [1948]. These global trading contractual agreements between States coupled with many regional trade agreements in the late 20th century continued to erode the Westphalian notion of an absolute form and unilateral expression of State sovereignty. However, while cooperative behavior increased between sovereign States and seemingly eroded the authoritarian and more traditional Westphalian model of sovereignty, the endorsement of equality among sovereign States is also foundational to the United Nations Charter and other global institutions such as the International Monetary Fund, the World Bank, and the World Trade Organization.

[35] HARDT, Michael, NEGRI, Antonio. *Global Governance: Empire.* Cambridge, MA: Harvard University Press, 2000] [suggesting that international organizations are the likely successor to the nation State under single rule of logic; that there is a transition centered on individual nation-states where the threat to the rule of law exists by a monarchy comprised collectively of the USA and the G8 nations; this is a sovereignty form called "empire"]; see also HAYS, Peter. Supranational Organizations and United States Contract Law. *6 Va. J. Int'l L 195* [1966]; see also TANGREY, Patrick. The New Internationalism: The Cessation of Sovereign Competency to Super-national Organizations and Constitution Changes in U.S. and Germany. *21 Yale J. Int'l L 395* [1996]; see also JONES, Harold. *International Cooperation Since Bretton Woods.* New York: Oxford

remain a viable architect of world order well into the twenty-first century. This second debate presented new evolving typologies for State sovereignty that were emerging and relied more on State collaboration and interdependence models, thus presenting approaches that were more interactive than traditional Westphalian notions about sovereignty, and included relational definitions on how States could and should legitimately express their sovereignty. New functional typologies for the State could no longer simply be based on a traditional Westphalian authoritarian exercise of unilateral power.[36]

In the late twentieth century, Jack Donnelly proposed a new typology [a four sectioned rectangular box] that balanced State authority and State capabilities with sovereign rule and the State's scope of domination as it intersected effective components of formal sovereignty and material/normative weaknesses. [37] Francis Deng and Helen Stacey suggested two different typology arrangements for *sovereignty as responsibility* [38] and *relational sovereignty*.[39] Deng's typology analyzed a range of both internal and external State factors and then, correlated these factors with a new international standard of *responsible sovereignty as an irreversible process*.[40] Helen Stacey suggested that a new typology of *relational sovereignty* was emerging where the sovereign State would be judged by how well and by what means the State concretely and continuously "cares" for its people.

University Press, 1996] [explaining how IMF as one international organization has loan terms requiring a country engage in trade liberalization under neoliberal paradigm as well as in various domestic budget and credit restraints; summarizes historical perspectives from 1944 to 1996]; see also RABKIN, Jeremy. *Law Without Nations: Why Constitutional Government Requires Sovereign States.* New Jersey; Princeton University Press, 2005 [comparing global governance and constitutional government and discussing whether or not sovereignty is traded in trade agreements].

36 This literature search on State Sovereignty includes but is not limited to the following work: see PALOMBELLA, G., WALKER, N. [eds.]. *Relocating the Rule of Law*. New York: Hart Publishing, 2009; see BRATSPIES, R. Perspectives on the New Regulatory Era. *51 Ariz. L. Rev 575*, 2009; see ENGLES, Eric, Transformation of the International Legal Order. *23 Quinnipiac L. Rev. 23* [2007]; see also ROSENAU, James, Three Steps Toward a Viable Theory for Globalization. In ROSSI, Ina [ed.] *Frontiers of Globalization Research: Theoretical and Methodological Approaches*. New York: Springer Publications, 2007; see KRAHMANN, E. National, Regional and Global Governance: One Phenomenon or Many. *9 Global Governance 323* [2003]; see also ROTH, B. The Enduring Significance of State Sovereignty. *56 Fla.L.Rev.1017* [2004]; see KAHN, Paul. The Question of Sovereignty. *40 Stan J. Int'l L. 259*, 2004, pp 260-268; see KAHN, Paul. *Putting Liberalisim in its Place*. New Jersey: Princeton University Press, 2005; see CULTER, A. Clair. Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy. *27 Rev. Int'l Law Studies 133*, 2001; see FOWLER, M., BUNCK, J. M. *Law, Power and The Sovereign*. New York: Routledge, 1995.

37 FALK, Richard. Jack Donnelly: State Sovereignty and Human Rights. *Political Science Quarterly* [1981]

38 DENG, Francis. Frontiers of Sovereignty. *8 Leiden J. Int'l L. 249*, [1995]

39 STACEY, Helen. Relational Sovereignty, *55 Stanford L.Rev.210* [2009]

40 Supra, Note 38, Deng at 250-277

[41] A fourth typology by Julian Ku and John Yoo discussed a *popular sovereignty* based on the idea that people in a sovereign State govern themselves through Constitutional structures and institutions.[42] In this construct, the State can legitimately share sovereign power with its citizens without compromising the whole system.[43]

The model on *continuum of sovereignty* as a 21st century model builds on concepts noted above and points to yet another evolution in how sovereign States function in this century. [44] It is an interactive typology based on a *framework*

[41] Supra, Note 39, Stacey at 218-222

[42] KU, Julian, YOO, John. Globalization and Sovereignty, *31 Berkeley J. Int'l L 210* [2013][noting that sovereignty is in decline but the decline in national sovereignty is not desirable since State maintains decision-making and individual liberties. Suggesting a new form of popular sovereignty with shift away from Westphalian models to the right for people to govern themselves through institutions of the Constitution and its structures. Popular sovereignty is flexible to maintain national sovereignty and assumes State can share sovereign power without giving up entire system; popular sovereignty can co-exist with globalization and governance issues in ways that the rigidity of Westphalian system could not. State turning automatically to international organizations inconsistent with reliance and continued power of nation States; by referring to structural provisions of Constitution., eg. separation of powers, promotes state level democratic governance and incorporates the gains of international cooperation]

[43] *Ibid.*, Julian Ku and John Yoo at 218.

[44] An extensive literature search and historical review has informed the development of the proposed continuum of State sovereignty including the State's single core functions as outlined and its direct partnership with its people as part of the radical transformation of the 21st century State. This cumulative literature search to support the creation of a continuum for State sovereignty includes but is not limited to the following work: see generally KALETSKY, Anatole. *Capitalism 4.0: The Birth of A New Economy in the Aftermath of Crisis* [Public Affairs 2010]*;* see MENASHI, S. Ethno-nationalism and Liberal Democracy. *32 U. Pa. J. Int'l L.2010,* 57; see PALOMBELLA, G., WALER, N. [eds.]. *Relocating the Rule of Law*. New York: Hart Publishing, 2009; see WATERS, T. W. The Momentous Gravity of the State of Things Now Obtaining: Annoying Westphalian Objections to the Idea of Global Governance. *16 Ind. J. Global Legal Stud.25*, 2009; see ZUMBANSEM, P. Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law. *56 Am. J. Comp.L.769*; 2008; see MANOKHA, I. *The Political Economy of Human Rights Enforcement.* New York: Palgrave, 2008; see ROSSENAU, James. Three Steps Toward a Viable Theory for Globalization. In ROSSI*,* Ina [ed]. *Frontiers of Globalization Research: Theoretical and Methodological Approaches*. New York: Springer 2007; see also SASSEN, S. *A Sociology of Globalization.* New York: W. W. Norton 2007; see also ENGLES, Eric. Transformation of the International Legal Order. *23 Quinnipiac L.Rev.23*, 2007; see also COHEN, J. A. Cohen, Sovereignty in a Postmodern World. *18 Fla. J. Int'l L.2006*, 907,908-913; see BORZEL, T. A. Borzel, RISSE, T. Public-Private Partnerships: Effective and Legitimate Tools of International Governance. In GRANDS, E., PAULY, L. W. [eds]. *Complex Sovereignty: Reconstituting Political Authority in the Twenty –First Century* [Canada: University of Toronto Press, 2005]; see KAHN, Paul. The Question of Sovereignty, *40 Stan J. Int'l L.2004,* 259,260-268; see also general SLAUGHTER, A.M. *A New World Order*. New Jersey: Princeton University Press, 2004; see also ROTH, B. The Enduring Significance of State Sovereignty. *56 Fla.L.Rev.1017* [2004]; see ENGLE, E. A. Engle. The Transformation of the International Legal System: The Post-Westphalian World Order. *23 Q.L.R. 2004*; see KRAHMANN, E. National,

of liberty and ensures as the State secures its core function, it also remains the primary architect of world order. [45] [See diagram below] This continuum offers sovereign stability, operational flexibility and addresses the two primary functional components of any twenty-first century State, including the U.K.: [1] one component redefines how the sovereign State functions to create and sustain a civil society within its own *domestic sphere* [vertical axis] by addressing the specific needs of its populations who will live and work most of their lives within the geographic boundary of that State, and [2] one component redefines how the sovereign State constructively functions within its own *international sphere* [horizontal axis] by engaging within the public and private sector global marketplace and foreign investment sector, within a variety of public sector international institutions, and within an international community of States – all of which operates within the framework of liberty [dotted line on diagram].[46] The current crisis regarding U.K. sovereign legitimacy cannot be ignored – it is

Regional and Global Governance: One Phenomenon or Many. *9 Global Governance 2003*, 323; see FALK, Richard. Revisiting Westphalia, Discovering Post-Westphalia. *J. Ethics 311 2006*, 320-345; see CUTLER, A. Clair Cutler. Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy. *27 Rev. Int'l Law Stud 2001*, 133; see KRASNER, Stephen. Compromising Westphalia. In HELD, D. McGREW, A. [eds.] *The Global Transformation Reader*. New York: Polity Press 2000; see ULSNER, E.M. Producing and Consuming Trust. *115 Pol. Sci. Q. 2000*, 569; see FOWELR, Michael, BUNCK, J. M. *Law, Power and The Sovereign.* New York: Routledge, 1995; see THUROW, Lester. *The Future of Capitalism.* London: Brearley Pub, 1996; see COLEMAN, J.S. Social Capital and the Creation of Human Capital. *94 Am. J. Soc. S.1988*, 95; see GROSS, Leo. The Peace of Westphalia. *42 Am, J. Int'l Law 1948*, 20; see generally BODIN, Jean. *Six Books of the Commonwealth*. [M. J. Tooley, trans.]. New York: Barnes & Noble, 1967

[45] A continuum is referenced as the basis of this new typology for sovereignty because it represents a more flexible set of options given the range of possibilities in terms of how an individual State interacts with some sense of legitimacy on behalf of the people it is governing and interacts as a member of the international community of States; there is no limit to the possibilities offered as part of this proposal for a continuum of State sovereignty so long at it operates within a framework of liberty. See diagram and discussion detailed in this commentary. See definition of *continuum* at http://merriam-webster.com

[46] Without a doubt, the rapid and uncontrolled movement of private sector global capital and public sector capital and domestic finances in and out a State's legal boundaries also bears witness to these relational components of State sovereignty within the *international sphere* of the equation. The same flexibility of global movement never seemed to occur on the side of development or utilization of social and human capital. While economic capital was and remains highly mobile and unregulated, most human labor [human capital] is bound by State geographic boundaries and people's life circumstances and citizenship rights are dictated by those State boundaries. This is the *domestic re-balancing* that appears to be in demand as a result of Brexit vote in the U.K. and that is espoused by Theresa May's ideal of "one Nation conservative". There is an imbalance expressed and experienced by the U.K. citizen active in the Brexit campaign that the benefits of economic capital development have not *trickled down* to the social settings and human capital development in places where most U.K. citizens live every day.

reflective of a growing sense of *citizen entitlement*, and arises just as the U.K. strives to determine the proper structural balance of sovereign accountability for building a different kind of civil society that May defines as "one Nation conservative" apart from the European Union.

The model on *continuum of State sovereignty* presented here contributes to an analysis of the U.K. post- BREXIT transition because it suggests that the U.K. as a dominant nation State will remain a primary architect in shaping not only its own civil society but also in modeling a new world order for this century. A 21st century civil society further defined and delineated in 2018–2019 BREXIT negotiations could intentionally outline domestic level economic inclusivity based on a new paradigm for capitalist globalization, one that does not leave large groups of U.K. citizens out of its intended benefits; one that supports a sense of equity in sharing tax burdens from all sectors within the State, and one that provides opportunity, access to education and advancement in jobs for all. [47] Rodrik argues we badly need to redesign capitalism for the 21st century and that the blind spot of the capitalist globalization process in the neoliberal era [c. 1980–2010] consisted of deep and rapid integration in the world economy coupled with the idea that the required institutional underpinnings could catch up later at the domestic level of the State. [48] The opportunity to design a new market paradigm for capitalists globalization is ever-present in the EU Article 50 BREXIT negotiations.

[47] This neoliberal paradigm [c. 1980–2010] for global capitalism routinely required tremendous State reductions in domestic program development, public services, and public sector program funding as a calculated cost for continued access to global market development, foreign direct investment programs, and participation in world financial institutions that provide necessary access to public and private economic capital. Ms. May will be in a unique position to soften some of the past structural damage done domestically in the U.K. by this neoliberal paradigm [1980–2010] and has a citizen mandate to do so now as evidenced by the Brexit vote – By her own statements, May appears willing to address damages that have accumulated over time from the neoliberal economic paradigm of the 1980s, the benefits from which apparently have not "trickled down" to regular U.K citizens who in Brexit challenged State legitimacy and demanded broader State commitments to domestic concerns, programs, and citizen quality of life issues. The balance that needs to be struck between U.K.'s domestic program design and U.K.'s international obligations and global market participation is daunting but possible to address if the underlying basis of U.K. sovereignty can be re-configured prior to the completion of Article 50 negotiations on a transition agreement.

[48] RODRIK, Dani. *The Globalization Paradox: Democracy and the Future of the World Economy*. New York: W.W. Norton & Co., 2011; pp 231-242, 245 [discussing a dominant role for the nation State in relation to the principles of democratic decision-making which is the foundation for the international economic architecture; noting that when States are not democratic this scaffolding collapses and one cannot presume a country's institutional arrangements reflect the preference of its citizens]; See also RODRIK, DANI, *The Fatal Flaw of Neo-liberalism* [Online]. Available at https://www.theguardian.com/news/2017/nov/14/the-fatal-flaw-of-neoliberalism-its-bad-economics. [November 14,2017] [Noting Neoliberalism and its usual prescriptions – always more

Furthermore, Rodrik supports a basic principle that markets always require other social institutions [domestic level] to support legal arrangements and global market stabilizing functions so there can be fair redistribution, taxation, safety nets, and social insurance.[49] Regrettably, it is well documented during the BREXIT campaign that this infrastructure capacity building and domestic "catch up" process either never happened or occurred on a very geographically limited scope at the U.K. domestic level. As the U.K. adjusts its domestic legal arrangements [rule of law] and market functions[economic capital development] in the post-BREXIT era, careful review of several basic principles related to the proposed GeoNOMOS *continuum of sovereignty* and its core function of the State could ensure the balanced development of all its capital resources and be beneficial in several ways as the U.K. enters BREXIT 2018–2019 EU negotiations.

First, the singular neoliberal focus of the past era that relied on global market development by support concentrated economic growth and /or to secure private sector foreign direct investment inside the State should raise caution in the U.K. as it leaves the EU bloc but remains a member of the "international community of States". There is widespread documentation beginning late in the 20th century of the uneven implementation and tragic domestic results using the economic organizing principles tied to the neoliberal paradigm [c. 1980–2010] within the capitalist globalization process. [50] There is evidenced in the general

markets, always less government – are in fact a perversion of mainstream economics. Rodrik suggests that there is nothing wrong with markets, private entrepreneurship or incentives – when deployed appropriately. Their creative use lies behind the most significant economic achievements of our time. He notes as "we heap scorn on neoliberalism, we risk throwing out some of neoliberalism's useful ideas. The real trouble is that mainstream economics shades too easily into ideology, constraining the choices available and providing cookie-cutter solutions. A proper understanding of the economics that lie behind neoliberalism would allow us to identify – and to reject – ideology when it masquerades as economic science. Most importantly, it would help to develop the institutional imagination badly need to redesign capitalism for the 21st century"]; see generally MILGATE, M.,STIMSON, S.C. *After Adam Smith: A Century of Transformation in Politics and Political Ideology*. New Jersey: Princeton University Press, 2009.

[49] *Ibid*., Rodrick at 237-239 [setting out a series of statements in support of a State's right to protect their owns social arrangements, regulations and institutions; and suggesting that trade is a means to an end, not an end in itself so that globalization should be an instrument for achieving the goals that a society seeks: prosperity, stability, freedom and quality of life]; See also TIROLE, Jean. *Economics for The Common Good*. New Jersey: Princeton University Press,2017; [outlining the moral limits of the market at pp 33-50; creating a modern State at pp 155-169, and addressing the challenges to EU function at pp 265-289]; see also BOUSHEY, Heather, DELONG, J. Bradford, and STEINBAUM, Marshall [eds], *After Piketty: The Agenda for Economics and Inequality*. Cambridge, MA: Harvard University Press, 2017.

[50] The legitimacy of the neoliberal paradigm [c. 1980–2010] for the globalization process has increasingly been challenged following the 2008–2012 global recession and as global financial institutions were forced to wrestle with the regulatory boundaries of a global market, the growing/

dissatisfaction with notions of "trickle down" economic benefits to U.K. citizens that have not predictably or consistently occurred. For BREXIT voters, the idea of being "left behind" was and remains a dominant public sector and political accountability issue.

Second, Rodrik rejects the neoliberal paradigm [c. 1980–2010] as bad economics, and concludes that every State has the right to protect its own institutions, social arrangements, and domestic regulations so that globalization becomes an *instrument* for achieving the goals that a civil society seeks: prosperity, stability, freedom and quality of life. [51] It has been the uneven application of the neoliberal paradigm [c. 1980–2010] that has tragically limited State sovereignty in a variety

ongoing financial and political instability of State governments [Greece, Italy, Spain, Egypt, Ireland, Portugal and more], equity issues in the global political economy, and the growing demands to create a more humane paradigm for capitalist globalization. A partial resource list on the context for globalization of the late 20th century and the negative impact the neoliberal paradigm (c. 1980–2010) for global capitalism has had on exercise of State autonomy: RAMIREZ, S.A. Taking Economic Rights Seriously After the Debt Crisis. *42 Loy. U. Chi. L. J. 713*, 2014; see also *Supra*, Note 47, RODRIK, MILGATE AND STIMSON; see also KRUGMAN, Paul. *Trade and Wages Reconsidered.* Washington, DC*:* The Brookings Institute: Papers on Economics, 2008; See Supra, Note 7, Neoliberalism reference listing for the neoliberal paradigm [1980–2010].

[51] Supra, Note 48, Rodrik at 231-242, 245 [setting out a series of statements in support of a State's right to protect their own social arrangements, regulations and institutions; and suggesting that trade is a means to an end, not an end in itself so that globalization should be an instrument for achieving the goals that a society seeks: prosperity, stability, freedom and quality of life; noting that when States are not democratic this scaffolding collapses and one cannot presume a country's institutional arrangements reflect the preference of its citizens; concluding that non-democratic States must play by a different, less permissive set of rules in the global marketplace]; see also RODRIK, DANI. Rescuing Economics from Neoliberalism [online] Available at: http://bostonreview.net/class-inequality/dani-rodrik-rescuing-economics-neoliberalism [November 7, 2017] [noting that in economics, new models rarely supplant older models. Rodril suggests that the basic competitive-markets model dating back to Adam Smith was adjusted in historical order – monopoly, externalities, scale economies, incomplete and asymmetric information, irrational behavior, and more real world pressures. Rodrik proposes that understanding how real markets operate necessitates different lenses at different times. Rodrik notes that Neoliberalism must be rejected on its own terms for the simple reason that it is bad economics… "Just as economics must be saved from neoliberalism, globalization has to be saved from hyper-globalization. An alternative globalization, more in keeping with the Bretton Woods spirit, is not difficult to imagine: a globalization that recognizes the multiplicity of capitalist models and therefore enables countries to shape their own economic destinies. Instead of maximizing the volume of trade and foreign investment and harmonizing away regulatory differences, it would focus on traffic rules that manage the interface of different economic systems. It would open up policy space for advanced countries as well as developing ones—the former so they can reconstruct their social bargains through better social, tax, and labor market policies, and the latter so they can pursue the restructuring they need for economic growth. It would require more humility on the part of economists and policy technocrats about appropriate prescriptions, and hence a much greater willingness to experiment."]

of contexts, including within the U.K., so that corrective measures will require a re-balancing process in terms of outlining global trade as a means to an end and not an end in and of itself. [52] This re-balancing process suggested by the GeoNOMOS model as applied within the U.K. could be incorporated into the EU 2018–2019 trade negotiating strategy – it points directly to a debate needed on U.K. domestic socio-economic arrangements and its use of capitalist globalization as a blunt tool to achieve more equitable distribution of its domestic level benefits. A structured, transparent, and more balance internal functional review could witness the U.K. as a dominant nation State prioritizing a new definition and core function in support of State sovereignty – *a continuum for sovereignty* operating within a *framework of liberty*.

Third, the proposed model presented here designs a *single core function* for the State in relationship: [a] to its citizens [vertical axis] from whom it seeks domestic legitimacy in order to govern, and, [b] to its engagement in the global marketplace [horizontal axis] from a intentional long term strategic and sustainability perspective as a member of the international community of States. Applying the new typology proposed here suggests that the U.K. is in a unique position between 2018–2019 to develop a new set of economic organizing principles that consistently balances all three U.K. capital resources [economic capital[53], social

[52] GRAY, John, *False Dawn: The Delusions of Capitalism*. New York: The New Press,1998 [providing a detailed step-by-step review and analysis from the State's perspective outlining how a neoliberal set of global economic organizing principles functioned to destroy domestic level public sector budgets by transferring assets wholesale to the private sector as a pre-condition for market access, locked out democratic legislative oversight through private sector contracts, and more] AUTHORS NOTE: These dramatic restructuring to align neoliberal constructs shifted priorities for short term economic wealth not long term legal arrangements and market regulations that would support nation States goals of fair distributions, taxation, safety nets and social insurance] In other words, globalization was not a means to an end as Rodrik has suggested it should be, it was the end game – rule of law chased after globalization instead of the other way around – A new emphasis re-balancing process could design State level rule of law legal arrangements first, and out of that process, then position the State to design a new set of economic organizing principles.

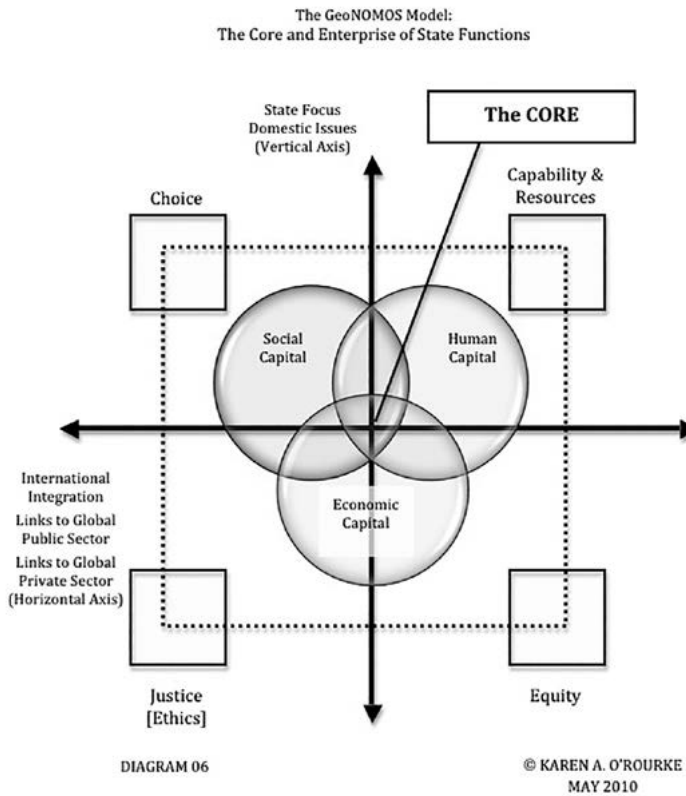
[53] The overlapping circles in the diagram show that economic capital must remain in a direct and balanced relationship with the other two forms of capital [social and human capital]. By necessity, this process of balancing economic capital will point to the State's relationship with non-state actors in the global marketplace. It is an open question whether rigorous risk analysis is or can be a necessary and required function of government. Yet, it can be reasonably presumed that it is part and parcel of any and all economic and commercial enterprise. Governments have no business to function and act as commercial enterprises just as much as business and commercial enterprises lack and perhaps should lack the legitimacy and authority to act and function as a sovereign government. Hence, it would be imprudent for government to want to assume risk[s] allocated to the realm of business and commerce, for when risk materializes as a calamity for government, it is anathema for government to bear the public costs and files for bankruptcy. Yet when business and commerce file for bankruptcy is the legally available process to protect all forms of private capital and reshapes to begin again.

capital[54], and human capital[55]] needed for the sustainability of the State's domes-

[54] ESLANGER, Eric M. *The Moral Foundations of Trust.* London: Cambridge University Press 2002; see SOBEL, Joel. Can We Trust Social Capital. *15 Journal of Economic Literature 2002, pp* 139,139-145; see also PUTNAN, Robert. *Bowling Alone: The Collapse and Revival of American Community.* New York: Simon & Schuster 2000; see historically, BOURDIEU, Pierre. *Forms of Capital*. New York: W.W. Norton, 1986. [Bourdieu would say that *social capital* is an attribute of an individual in a social context; one can acquire social capital through purposeful actions and can transform social capital in conventional economic gains; the ability to do this conversion depends on the nature of the social obligation connections and the networks that are available to one as an individual]; See also: PUTNAM, Robert. [ed] *Democracies in Flux: The Evolution of Social Capital in Contemporary Society*. New York: Oxford University Press, 2002 [comparing industrial countries and the erosion of individual participation in community affairs, the lack of trust in each other, and how this decline in sociability impacts the creation and necessary function of social capital]; See also OSTROM, Elinor, AHN, T.K. The Meaning of Social Capital and its Link to Social Action. In SVENDSEN, G. T., LIND, G., SVENDSEN, H. [eds.]. *Handbook of Social Capital*. Northampton, MA: Edward Elgar Pubs, 2010 [evaluates in depth the study of bonding and bridging of social capital]; See also LI, Yaojun, *Handbook of Research Methods and Application in Social Capital*. Northampton, MA: Edward Elgar Pubs., 2015 [suggesting that social capital is fundamentally concerned with resources in social relations; text offers scholar opinions on the determinants, manifestations and consequences of social capital]; see also FLAP, Henk, VOLKER, Beate. *Creation and Returns of Social Capital*. London: Routledge, 2004 [noting that research points to social networks as a valuable resource in every community]; see also STOLLE, Dietlind. The Sources of Social Capital. In *The Oxford Handbook of Political Behavior.* London: Oxford University Press, pp 19-42. [using a comparative approach, outlines how social capital is generated within civil society and then distributed]; See also ADLER, S. P., KWON, S.K. Social Capital: Prospects for a New Concept. *Academy of Management Review*, 1972, vol. 27, pp 17-40; BOURDIEU, Pierre. *Outline of a Theory of Practice*. New York: Routledge, 1972; other classical theory texts include: HANIFAN, L. J. The Rural School Community Center, *Annals of the American Academy of Political and Social Science*, 1916, Vol. 67:pp130-138 [suggesting there was similarity between the business corporation and the community as a social corporation]; See also HANIFAN, L. J. (1920) *The Community Center*, [1920] [suggesting that the school was becoming the community center as teachers devised a campaign to reviving community social life] Boston: 1920; See also SILVER. Burdett, JACOBS, Jane. *The Death and Life of Great American Cities*. New York: Random House, 1961, pp 138 [stating that "If self-government in the place is to work, underlying any float of population must be a continuity of people who have forged neighborhood networks. These networks are a city's irreplaceable social capital. Whenever the capital is lost, from whatever cause, the income from it disappears, never to return until and unless new capital is slowly and chancily accumulated"]; see COLEMAN, James. Social Capital in the Creation of Human Capital. *American Journal of Sociology*, Supplement,1988 vol.94: pp S95-S120; see WELLMAN, Barry, WORTLEY, Scot. Different Strokes from Different Folks: Community Ties and Social Support. *American Journal of Sociology*, 1990, vol. 96:pp 558-88; see BOWLES, S., GINTIS, S.(2002) Social Capital and Community Governance. *The Economic Journal*, 2002, Vol. 112;pp 419-436.

[55] WILSON, James. *Bowling with Others*. New York: Research Library Core, 124 Commentary Oct.2007, pp 3,30. [online] Available at https://www.unz.org [addressing the fact that social capital and human capital make the modern world possible]; See HEALY, T., COTES, Sylvain. *The Well Being of Nations: The Role of Human and Social Capital: Education and Skills*. Paris, France: OECD. Available at https://www.oecdwash.org/PUBS/puhshome.htm. [2001] [helping to clarify

tic institutions, regulations and social arrangements. [56] Embracing a *continuum of sovereignty* including a *framework of liberty* that secures *single core function*



concepts of human and social capital and evaluates their impact on economic capital, growth and wellbeing; includes thirteen pages of references and resource information]; See also SPENCE, Michael. Job Market Signaling. *Quarterly Journal of Economics,* 1973, Vol.87 (3):pp 355–374; See SPENCE, Michael. Signaling in Retrospect and the Informational Structure of Markets. *American Economic Review*.2002. Vol.92 (3): pp 434–459; See also WOESSMANN, Ludger. *Specifying Human Capital: A Review, Some Extensions and Developmental Effects*. Munich, Germany: University of Munich /Institute for Economic Research; Keil Working Paper No. 1007 [2000] [online]. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=246294. [reviews measurement of human capital and empirical research as well as human capital development, its implications for economic capital development].

[56] Supra, Note 15, 16 and 17 [Discussing forms of capital in this commentary for references and very brief definitions of three forms of capital noted in this new typology; this commentary suggests that every State has these three forms of capital and the differences in how States define their function is directly related to the amount of each form of capital that the State manages and oversees as a sovereignty entity.]

as the diagram outlines prior to completing Article 50 BREXIT negotiations, would provide the U.K. with the flexibility to manage its political and economic risks both along its *domestic axis* and its *international axis* where the U.K. must continue to operate in this century. This proposed model on *continuum of sovereignty* could embrace both the best of U.K. history and the challenges of a workable and sustainable EU exit strategy.

The Road to and from Brexit

Jana Bellová*

Summary: This chapter of the monograph examines the historical, current, and possible future political and economic consequences of the United Kingdom's referendum result to leave the European Union. The article briefly examines the roots of the British involvement in the European project and identifies some of the ideological differences between the UK and continental Europe. The author will also discuss the current position on the UK EU negotiations and the progress they have been making (or as the case may be the lack of progress). This will culminate in an examination of the possible outcomes of Brexit for both the UK and the certain member states of the EU in economic and political terms.

Keywords: Brexit, referendum, EU membership, crisis, changes

1. Introduction

There is no doubt that the British decision to hold a referendum on its continued membership to the European Union (EU) has caused some shock waves to ripple through member states. Its referendum vote it June 2016 may have set off a tidal wave which will sweep away the EU we know today. It cannot be said that the United Kingdom (UK) has always been a fully committed or positive force within the EU but the idea that it could abandon the EU and head out on its own was not considered likely by many.

This article aims to summarise the underlying forces that have contributed to the UK electorate voting to leave the EU in the 2016 referendum by 52% to 48%. In order to do this effectively it is important to take a brief look at the history of the UKs involvement in the European project. It is also vital to look at the shifting political situation within Europe and the rise of the populist and far right movements and the different crisis's which have fuelled these movements i.e. the financial crisis of 2008 which also raised the question of Grexit (Greece's exit of the EU) and its bailout, the Ukrainian conflict which borders four EU member states, and of course the immigration crisis which still continues today. This will hopefully make the reason for the UKs path to leaving

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the EU clearer from this point it is possible to continue along our journey and start to look at the future and possible political and economic effects for the UK and its EU counterparts.

2. The Circumstances

2.1. The United Kingdom's Historical Position in Europe

It may surprise some that the UKs referendum in June 2016 was not the first referendum the British have held on its membership to a European organisation. The first referendum was held in 1975 two years after the British entering the European Economic Community (EEC). Then two thirds of the electorate supported staying in the EU. "The United Kingdom being an EU member state since 1973 has always been something of an "insider-outsider" that keeps its distance. Britons place greater importance on the Crown than on EU membership"[1] It is true that the British have always viewed the EU as an economic union rather than a political union. Stephen George (1998) famously describe the UK as an "awkward partner" with the rest of Europe. As a result, a pragmatic and sceptical position about grand projects has been the British political class's approach to the EU, with a narrow focus on the economic costs and benefits of membership. This means that the UKs relationship with Europe has been seen as one of "conditional and differential engagement," in which the ambivalence of the British policymakers has placed the UK within an "outer tier" of the EU[2] This could be at the heart of British dissatisfaction with the EU as they feel they are being pushed into an EU they do not particularly want as stated above there has always been a reluctance by the UK to be fully interconnected with the EU. The British liaison with the European Union has admittedly been difficult. Although they are Europeans, the British still say they travel to Europe when they cross the channel[3] It is true that the British hold themselves apart from continental Europe this may be because they value their "special" relationship with the United States more or the fact that they have had an empire which still gives them special links with many other countries around the world but it is true that countries on continental Europe want a more fully integrated EU to rival the United States. The UK does

[1] WIELECHOWSKI, Michal, CZECH, Katarzyna. Brexit related uncertainty for United Kingdom economy. *Acta Scientiarum Polonorum. Oeconomia.* 2016, vol. 15, no. 4, pp 171-181.

[2] CORBETT, Steve. The social consequences of Brexit for the UK and Europe. *International Journal of Social Quality.* 2016, vol. 6, no. 1, pp 11-31.

[3] SINN, Hans-Werner et al. Rrexit:The Unintended Consequences. *International Economy.* 2016, vol. 30, no. 2, pp 6-28.

not view the possibility of a federal Europe as the logical or even desired outcome of the EU they are happier with economic co-operation.

2.2. Political changes

There is no doubt that the rise in populist politics has helped to increase Euroscepticism too. "Additionally, there are European states in which right wing parties have known an increasingly noticeable ascension in the last years, accompanied by the development of Euroscepticism. In France (National Front), Germany (Alternative for Deutschland), UK (United Kingdom Independence Party). In this line of thought, Brexit could be considered only the most visible symptom of this phenomenon begun in the first years of economic and financial crisis and growing with every other crisis Europe faced[4] There is no doubt as mentioned in the introduction that the EU has been put under tremendous pressure from events which are mainly very complex and emotive for the EU population. These events will be discussed later but they have helped to embolden populist and far right parties to grab hold of these events and use them to pursue isolationist and nationalistic agendas. So the political status quo is changing with the resurgence of these parties.

The rise of the United Kingdom Independence Party (UKIP) in the UK can be seen as one of the major contributors for the decision of David Cameron to hold a referendum. It is argued that he was worried about a possible challenge to his premiership with in his own party on the one hand and the rapid rise in support for UKIP on the other which would probably weaken their electoral position significantly. David Cameron, the Prime minister of the UK pledged to hold the referendum on the issue after winning the 2015 general election, as growing demand from his own conservative MPs and the UK Independence Party with a plea that Britain had not had a say since 1975 when it voted to stay in the EU in a referendum.[5] UKIPs main policies were based on a referendum to leave the EU and the control of immigration was at the base of this. It also happened to coincide with the refugee crisis which we will go into more detail later. The result was that Cameron took a gamble on the referendum strengthening his electability and silencing opposition in his own party. This gamble probably worked in the very short term as he managed to strengthen his majority in parliament in 2015 unfortunately it was a very short lived success and ultimately ended his political career in 2016 with the referendum result.

[4] BOGZEANU, Christina. From the treaty of Rome (1957) to forging a new way ahead for the EU. Post-Brexit security and defence. *Strategic Impact.* 2017, vol. 62, no. 1, pp 18-30.

[5] BUKHARI, Syed et al. Brexit: A challenge for United Kingdom and European Union. *Pakistan Journal of Social Sciences.* 2016, vol. 36, No.2, pp 665-674.

It is strange that David Cameron would be replaced by Teresa May as she also supported the remain campaign. It is perhaps a telling fact that those who campaigned so hard for Brexit were not so keen to lead their parties through this period i.e. Boris Johnson of the conservative party and Nigel Farage of UKIP (who stood down from his party's leadership after the referendum). Teresa May has not helped her position as her disastrous decision to hold a snap election in June 2017 left her in a very weak position as she ended up losing seats rather than gaining them. Which has now lead to a further weakening of her authority in her own party. The long established parties in the UK seem to be in turmoil Jeremy Corbyn struggles to fill shadow cabinet posts as very few labour MPs were willing to work with him as his vision was considered too leftist. UKIP seems to have lost favour with the British public as they did very badly in the 2017 election. It seems that uncertainty in British politics has crept in again as both the major parties are facing problems from within. It could lead to another coalition government which cannot be seen as a very palatable possibility. One thing is sure is that the new instability that has crept into British politics is not helpful at a time when there is so much uncertainty with the UK preparing to negotiate their departure from the EU.

3. Crisis's which have Shaken the EU

There is no doubt that there have been a series of crisis's over the last decade or so which have shaken confidence in the EU and caused some to question their continued membership. As stated earlier the UK has always been somewhat of a reluctant member mainly in the EU for the economic benefits of the free market so if doubt is put over the continuation of these economic benefits it is logical that the UK might consider its position more closely. In this section a number of crisis's will be examined. The financial crisis is a good starting point and it probably makes sense to look at Grexit (the term used for Greece's possible exit from the EU) at the same time. The Ukrainian crisis, the European refugee crisis and the numerous terrorist attacks which have been undertaken against EU member states. All these events have had an effect on member states and their positive or negative view of the EU.

3.1. The Financial Crisis

The idea that the financial crisis came out of the blue is an erroneous one, there were actually a few economists who had been warning against the housing bubble and the problem with sub-prime mortgages and the related risks this posed

to the financial system and society generally. Australian economist Steve Keen predicted such a crash as early as 2005 and Peter Schiff (an American economist) was giving TV appearances in 2006 predicting the crisis but unfortunately these economists were ignored and business went on as usual until the crash of 2008 which originated in the US but would soon sweep to Europe as well. Since the 1990s scholars have noticed the way in which European integration has become contested in the electorate and divisive within parties (e.g. Van der Eijk and Franklin, 1996; Hix and Lord, 1997; Aylott, 2002; Parsons and Weber, 2011). The issue became the "sleeping giant" of the European political space (Van der Eijk and Franklin, 2004). The Euro crisis that began in 2009 has given unprecedented attention to the topic. Public opinion, long generally supportive of the European Project, moved decisively in a negative direction, becoming sceptical of further integration.[6]

The Greek financial crisis arguably originated hand in hand with the global financial crisis, the major difference was that successive Greek governments had been mismanaging the Greek economy by borrowing and spending excessively so it was arguably in a very weak position. The fact that it is part of the Euro Zone made their situation much worse as they had no control of interest rates and there was no possibility to devalue their currency. The Greek financial crisis had two primary causes. First, Greece was undermined by government economic mismanagement, including widespread fraud and an absence of public accountability. Second, Greece's membership in the Eurozone imposed on it an economic straightjacket that was ill suited to and inconsistent with its political and financial goals.[7]

The Greek crisis and the possibility of Grexit caused a great deal of uneasiness within the EU as countries already struggling from the global financial crisis were not very sympathetic or keen on giving financial help to Greece. The unity of the EU was tested to its full. The rise of populist parties has also undermined the unity of the EU. Nationalist and populist political movements on both the left and the right, drawing strength from economic dislocation, are undermining support for European Unity[8] When the idea of using the European Financial Stability Fund to help bailout Greece British Chancellor George Osborne was very clear that it should not be. Britain's George Osborne and fellow finance

[6] De SIO, Lorenzo, et al. The risks and opportunities of Europe: How issue yield explains (non-) reactions to financial crisis. Electoral Studies. 2016, vol. 44, pp 483-491.

[7] KINDREICH, Adam. The Greek Financial Crisis. [online]. Available at: <https://www.econcrises.org/2017/07/20/the-greek-financial-crisis-2009-2016/ (2009-2016) 20/7/2017>

[8] IRWIN, Neil. How Germany Prevailed in the Greek Bailout. [online]. Available at: <https://mobile,nytimes.com/2015/07/30/world/europe/how-germany-prevailed-in-the-greek-bailout.html>

ministers from outside the Eurozone have expressed outrage that the blocs leaders were considering tapping an EU-wide rescue fund to save Greece from default next week. Britain is not in the euro, so the idea that British taxpayers are going to be on the line for this Greek deal is a complete non-starter.[9] So there seems to be a rift starting between the Eurozone members and those that are outside the Eurozone which was brought about directly by the Greek financial crisis. It is understandable that those outside the Eurozone would not want to use the money which was meant for the whole of the EU (not just the Eurozone) to bail out Greece. Especially as there was a feeling that the Greeks financial crisis was self-inflicted it was not a natural catastrophe or something that could not be foreseen. But at the same time it is not exactly fair as the UK had a vested interest in that Greece would not go bankrupt as many of its banks had leant heavily to Greece and the UK could certainly do without bailing more of its banks out. Initially the British banking exposure to Greek debt looked much worse but as of July 2015 things had improved. Overall the UK has £7.7bn tied up in loans to Greek banks, businesses and customers. The majority of that is in the form of exposure from UK banks, which stands at £5.3bn, according the Bank of International Settlements. That is down considerably from the £9bn exposure UK banks had in 2009.[10] Either way the Greek debt crisis has led to a more fragmented EU and has started to raise the question of the Eurozone's sustainability and the EU further continuance.

3.2. The Ukrainian crisis

Talks on a comprehensive association and free trade agreement had already been launched in 2007. After the 12th EU summit in September 2008, French President (and EU Council president at the time) Nicolas Sarkozy set the goal of striving for an association with Ukraine, using the military clash between Russia and Georgia as an opportunity to give more attention to Ukraine's desire to join the Union.[11] But in hindsight it is difficult to assess how wise it was of the EU to seek further links with the Ukraine as it was likely to have negative effects on EU-Russian relations. However the Ukrainian-Russian crisis has caused uncertainty over the EUs ability to deal with such situations with a unified front as there were

[9] SPIEGEL, Peter, CHASSANY, Anne-Sylvaine. *UK attacks EU emergency aid plan for Greece.* [online]. Available at: <https://www,google.cz/amp/s/amp.ft.com/content/190a906-2a3f-11e5-8613-e7aedbb7bdb7>

[10] BROAD, Mark. *What impact would Grexit have on the UK?* [online]. Available at: <http://www.bbc.com/news/business-33165580>

[11] BöHLKE, Ewald, et al.*The Failure of the EU's Ukraine Policy.*[online]. Available at: <https://dgap.org/en/article/getFullPDF/24624>

significant problems reaching a consensus within the EU and then sticking to it. On the margins of an EU summit aiming to show Europe's resolve in the face of Mr Putin's increasing aggression, Mr Fillon captured the growing lack of unity in the West's stance even as Russian-backed Syrian forces over-ran the stricken city of Aleppo. Echoing the rhetoric of Donald Trump, the US president-elect, Mr Fillon said: "I have, simply, a lot of respect for Russia." Mr Fillon was speaking moments after meeting Chancellor Angela Merkel of Germany, a strong advocate of the EU's sanctions-led policy against Moscow.[12] So this seems to emphasize the problem of coming to a consensus and then maintaining that consensus. Which leads to some countries questioning their continued membership to a bloc that cannot stick together in critical situations. It must also be a little worrisome for the Baltic states who fear Russia's expansionist agenda in the region too.

3.3. The Refugee Crisis

Between 2015 and 2016, the European Union experienced an unprecedented influx of refugees commonly described as the "European refugee crisis". More than 1.3 million refugees crossed the Mediterranean and Aegean Seas trying to reach Europe, as per the refugee agency of the United Nations, UNHCR. Thousands of refugees lost their lives, drowning on the treacherous sea passages. Germany has been a magnet for those who make it, absorbing more refugees than any other country in the EU. In 2015, the country famously adopted an "open border" policy. That year, it took in 890,000 refugees and received 476,649 formal applications for political asylum – the highest annual number of applications in the history of the Federal Republic.[13] But other countries were not so keen to welcome this new influx of refugees. Hungry notably took swift and draconian measures to secure its boarder erecting wire fencing. Hungary's Prime Minister Victor Orbán defended his actions. Orbán said the razor-wire fence erected on Hungary's southern border with Serbia was essential to defending the Schengen zone's external borders. He denied that the emergency was a refugee crisis, but one of mass migration.[14] So there seems to be a mixed message coming from the EU, on the one had Germany is welcoming (although later they changed their policy under internal pressure), refuges and on the other Hungary is trying

[12] BARKER, Alex, et al. *European consensus on tackling Putin under strain*. [online]. Available at: < www.ft.com/content/4f8b3c58-c2e0-11e6-9bca-2b93a6856354>

[13] TRINES, Stefan. *Lessons From Germany's Refugee Crisis: Integration, Costs, and Benefits*. [online] Available at: <http://wenr.wes.org/2017/05/lessons-germanys-refugee-crisis-integration-costs-benefits>

[14] TRAYNOR, Ian, *Migration crisis: Hungary PM says Europe in grip of madness.* [online] available at: https://www.theguardian.com/world/2015/sep/03/migration-crisis-hungary-pm-victor-orban-europe-response-madness

to keep them out. And other countries have had heated discussions over whose responsibility the refugees are. Big fault lines have opened up across the European Union – both east-west and north-south – because of the migrant crisis. Many migrants want to get asylum in Germany or Sweden, but those countries want their EU partners to show "solidarity" and share the burden… For months tensions have been escalating between Greece and some of its EU partners. They accuse Athens of deliberately waving through migrants who ought to be registered as soon as they enter the EU. The row with Austria got so bad in February that Greece withdrew its ambassador to Vienna.[15] Very much like the financial crisis the refugee crisis has a tendency to fuel populist and far right parties so that the homogeneity of the EU is at stake. The refugee crisis rather than leading to solidarity which was called for by Germany and Sweden has ended up dividing states some bitterly (in the case of Greece and Austria).

Another example that shows the lack of unity in the EU is the EUs policy to have quotas for member states. The idea was to share the burden equally among member states rather than see three or four states flooded with refugees. This was not a popular policy and one which the UK government refused to take part in although it did agree to take 20,000 Syrian refugees over the course of the parliament. This works out far less than other countries that are governed by the quota system. Some Eastern Bloc countries were also unhappy that they were forced into the quota system. Eastern European states opposed the scheme for two reasons: because they said refugee admissions should be a sovereign national decision; and because many of their voters are virulently opposed to Muslim immigration. Britain is exempt due to its historic opt-out on justice matters. The Commission has blamed national governments for failing to offer enough places for migrants.

But the statistics back up the testimony of aid workers and EU officials who say the scheme has flopped migrants have no desire to be "relocated" to poor eastern European states when they would rather go to Germany or Sweden. Indeed, under current offers of places, there are 5,989 spaces unused, including 40 in Slovenia, 480 in Romania, 1,298 in Bulgaria and 100 in Poland.[16] Again I think this demonstrates the lack of unity in the EU but these kind of policies tend to create friction as the countries that are forced to accept the measures (Hungary, Slovakia and the Czech Republic) feel bullied and those who have accepted the quota feel the other countries are not doing enough so it could cause some ill feeling. If you add to this that the policy is not really working because

[15] LEWIS, Linda. *How is the migrant crisis dividing EU countries?* [online]. Available at: <http://www.bbc.com/news/world-europe-34278886>

[16] HOLEHOUSE, Matthew. *EU to fine countries 'hundreds of millions of pounds' for refusing to take refugees.* [online]. Available at: <http://www.telegraph.co.uk/news/2016/05/03/eu-to-fine-countries-that-refuse-refugee-quota/>

of the above mentioned free spaces in Romania etc. it can cause frustration and alienation from the EU institutions. Although in this case the UK had an opt-out populist leaders like Nigel Farage use it as an example why the UK should leave the EU. UKIP leader Nigel Farage has said the EU was "mad" to accept so many refugees and claimed "Isis are using this route to put jihadists on European soil". Speaking in the European Parliament, he said the EU should stop boats arriving, as Australia did. He told European Commission President Jean-Claude Juncker that unless he gave back control of the UK borders, Britain would vote to leave the EU.[17] There is no doubt that the refugee crisis was a major contributing factor to why the British electorate chose to leave the EU. Populist politicians like Nigel Farage painted a picture that the UK would be forced to accept more refugees and this coupled with the free movement of labour in the EU would mean the UK would be flooded with refugees and immigrants.

3.4. Terror Attacks

It is true that the UK has had a lot of experience with terror attacks in its recent history. The IRA carried out a number of terrorist acts in the 1970, 80s, and 90s and even into the early 2000s ranging in ferocity but although the IRA did occasionally target mainland Britain with horrific effects (1974 12 army personnel and family members are killed, 1982 11 soldiers are killed by 2 bombs in London's royal parks, 1984 Brighten Hotel bombing which killed 5 people and came close to killing Margaret Thatcher the Prime Minister at the time) Despite these experiences it is fair to say that the British public is more alarmed by the more recent IS terrorist attacks. Perhaps the first major attack on the UK by the IS was the bombing of the London Underground and a bus on 7/7/2005 which killed 56 people and injured 700 was a massive shock to the British population. Populist politicians started to blame the UKs and the EUs immigration policy for allowing so many immigrants from Syria, Iraq, and Afghanistan into the country.

In 2017 there have been 4 serious terrorist events. 22nd March (Westminster attack 6 killed 49 injured) 22nd May (Manchester Arena bombing 22 killed 250 injured) 3rd June (London attack 8 killed) 25th August (3 policeman injured by a man carrying a 4 foot sword near Buckingham palace). All these have put further pressure on the UK to become more protectionist especially when populist leaders use these events for their own political purposes. Nigel Farage while giving interviews in America stated "the problem with multiculturalism is that it leads to divided communities. It's quite different to multi-racialism. That's fine

[17] THOMPSON, Theo. *Migrant crisis: Farage says EU 'mad' to accept so many.* [online]. Available at: <http://www.bbc.com/news/uk-politics-34197707>

that can work very happily and extremely well. But we've finished up with much divided communities. "I'm sorry to say that we have now a fifth column living inside these European countries."

Mr Farage attacked protesters in Fifth Avenue in New York and in wider America, saying: "Frankly, if you open your door to uncontrolled immigration from Middle Eastern countries, you are inviting in terrorism."[18] So as populism starts to spread the ideas that the terrorist attacks are the result of immigration policy it then leads people to question the role of the EU on immigration and as the EU seems to be determined to pursue its current open boarder policy this starts to alienate people to the EU. The following comments from Marine Le Pen and others support this. Marine Le Pen, the French far-right leader, has joined anti-immigration politicians in linking the London attack to migrant policy, despite the attacker being British. Poland's Prime Minister, Beata Szydło, also drew a link between the attack and the EU's migrant policy, saying it vindicated Warsaw's refusal to take in refugees under the EU's quota scheme. "I hear in Europe very often: do not connect the migration policy with terrorism, but it is impossible not to connect them," Szydło told private Polish broadcaster TVN24.[19] Again this contributes to the UK government and the UK electorate getting frustrated at the intransigence of the EU. If you combine this with all the other pressures discussed in this section it perhaps indicates the UKs strengthening resolve to exit the EU.

4. Consequences

Despite the leave campaigns arguments that the UK would be better off leaving the EU a more objective look would surely throw some doubt on their claims. On the other hand, they also exaggerated the positives, suggesting that the UK would retain the £350m it paid to Brussels each week, which was less than half of that, given the rebates the UK receives back from the EU. Nevertheless, their message was 'regain control', and be unencumbered by EU regulations and the EU courts as well.[20]

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[18] OPPENHEIM, Mary. *Nigel Farage blames multiculturalism for London terror attack.*[online]. Available at: <http://www.independent.co.uk/news/uk/home-news/nigel-farage-london-terror-attack-multiculturalism-blame-immigration-lbc-radio-ukip-mep-leader-a7645586.html>

[19] HENLEY, John, JAMIESON, Amber. *Anti-immigration politicians link London attack to migrant policy.* [online]. Available at: <https://www.theguardian.com/uk-news/2017/mar/23/anti-immigrant-politicians-link-london-attack-migrant-policy>

[20] COOPER, Carey. *Eight reasons Leave won the UK's referendum on the EU.* [online]. Available at: <http://www.bbc.com/news/uk-politics-eu-referendum-36574526>

4.1. The financial sector

London is one of the major financial centres in the world and is probably only second to New York in size and importance. It is thus not surprising that if you split the referendum vote down into regions that London was one of the regions that voted to remain in the EU. Because of its size and know how much of European finance passes through London and contributes to about 8% of the UKs total GDP. The British decision to leave the EU causes more uncertainty and speculation in this sector making it more volatile. The losses for banks and other financial service providers, however, were major: there have only been a few trading days in which the share price of some euro area banks plummeted by as much as it did following the Brexit referendum.[21] The uncertainty surrounding Brexit and any possible trade deals is not good for the banking sector. The UK should also remember that a significant amount of financial business is done with its European neighbours. According to Open Europe, around a fifth of the UK banking sectors annual revenue is estimated to be tied to the EU. And many EU banks are also highly reliant on the relationship: Deutsche Bank receives 19% of its revenue from the UK.[22] So although London relies on its European neighbours for business it is not a one way street the UKs European neighbours also benefit from the current arrangement. But no one knows what the post Brexit situation will be, will the UK be allowed to trade its financial services freely? Will there be any extra added costs? These questions cannot be answered at the moment.

There is also another important consequence of the UK leaving the EU. The UK has had quite a privileged position within the EU concerning the influence it has had on the financial sectors regulation and direction. The UK is one of the biggest promoters of the free market and due to its influence the more protectionist policies of France and other Southern European member states has been held back. In the long run, a Brexit would change the European Union's characteristics significantly, shifting power away from countries where liberal economic policy dominates. This change has institutional consequences as the liberal country bloc consisting of the United Kingdom, the Netherlands, as well as the Scandinavian and Eastern European countries loses its blocking minority in the EU Council. Germany would no longer represent the pivotal swing player. Economic policy would shift away from its market anchor.[23] So in effect the UK has excluded itself

[21] FICHTNER, Ferdinand, et al. Brexit decision puts strain on German economy. *DIW Economic Bulletin,* 2016, vol.6, no. 31, pp 359-362.

[22] BOWMAN, Louise.How Brexit killed CMU? *Euromoney.* 2016, vol. 47, no. 57, pp 58-63.

[23] SINN, Hans-Werner et al. Rrexit:The Unintended Consequences. *International Economy.*2016, vol. 30, no. 2, pp 6-28.

from being the major driving force behind EU policy in this area. It is possible that EU policy will start going in a direction which is not supported by the UK and may have negative effects on the UKs financial sector.

Another area where the UK has been using its influence to shape financial policy in the EU is with the EUs policy on the Capital Markets Union (CMU). The idea of the CMU was to stimulate the inter-EU investment and the UK would have been a major contributor to this and may leave the EU struggling to fill the gap. Brexit could create a transitional problem for CMU because so much buy-side capacity, liquidity and capital markets expertise is in London… UK negotiators were at the core of the CMU scheme.[24] So there are now serious Questions being raised about the viability of the CMU initiative which was originally intended to focus on member states. It is possible that the CMU will survive and change its scope to become a global initiative (which could possibly be good for the UK). But without the UK supporting it and driving it along will there be sufficient will and motivation from other member states to continue with the CMU this just adds to the number or uncertainties facing the UK and the EU following Brexit.

Another area of the finance sector that could be affected by the UKs decision to leave the EU is the trading of the euro. Despite not participating in the currency union, London is the most important trading place for euros. The value of euro/dollar trading in London is twice as high as that on the continent. It would be very difficult for the European Central Bank to tolerate that in case of Brexit.[25] On top of this many major banks have already made plans to relocate at least part of their operations to countries inside the EU. The biggest winner of the Brexit vote among European financial centres seems to be Frankfurt. Seven of the twelve largest investment banks with significant operations in London plan opening an office or moving their operations to Frankfurt … three of the remaining global banks look to expand to Dublin.[26] To what extent these banks will move from London and to what extent they are just preparing themselves for the worst case scenario is hard to tell. But any plans or actual moves from any major company from London is not good. So London could well lose its status as one of the major finance centres of the world.

[24] BOWMAN, Louise.How Brexit killed CMU? *Euromoney.* 2016, vol. 47, no. 57, pp 58-63.

[25] SINN, Hans-Werner et al. Rrexit:The Unintended Consequences. *International Economy.* 2016, vol. 30, no. 2, pp 6-28.

[26] DJANKOV, Simeon. *Investment banks are already leaving London. Other jobs will follow.* [online]. Available at: <www.blogs.lse.ac.uk/brexit/2017/06/07/investment-banks-are-already-leaving-london-other-jobs-will-follow/>

4.2. The Automotive Industry

Since Brexit the automotive industry has also been highlighted as a possible loser of the Brexit vote. The European Automobile Manufacturers Association (ACEA) has been pointing out future problems that could affect its members. Vehicle manufacturers currently operate some 300 assembly and production plants in Europe. They often manufacture engines or transmissions in one country and assemble the final vehicle in another. The European Single Market provides for a high level of economic and regulatory integration in this respect. This level of integration, ACEA says, reflected in how the automotive industry has strategically set up its business operations in terms of supply chains, production sites and distribution networks. The ACEA also points out that the EU is the UKs biggest trade partner. More than half of all cars and 90% of all commercial vehicles built in the UK last year were bought by customers in Europe.[27] So if the UK is unsuccessful in negotiating a trade deal with the EU then automobile manufacturers may see their costs rise as parts and complete vehicles could all be subject to taxation. So yet another area of doubt hangs over another industry. This could affect the company's decisions to invest further in the UK or may even motivate the companies to relocate their production lines outside the UK in a similar way that is happening with the finance sector.

4.3. Exchange Rate Fluctuations

Another more immediate result of Brexit has been the fall in the value of pound sterling. This makes it more expensive for UK consumers to buy products from abroad. The full effects of this have not filtered through yet but could put a big strain on the UKs economic performance. It is true that this may be offset initially by British products becoming significantly cheaper abroad and thus stimulating exports (for example Salmon exports have hit record levels since Brexit). Sales of British salmon helped the UK to export a record value of food and drink in the first half of the year, according to industry figures.

Exports of the fish jumped more than 53% by value to £408m, the Food and Drink Federation (FDF) said. UK food and drink exports rose 8.5% to £10.2bn, helped by the fall in the pound after last year's Brexit vote.[28] Another positive side effect is that the UK has seen a significant increase in tourism as it has suddenly become much cheaper to visit. Visitor numbers are up sharply, with tourists

[27] LEGGETT, Dave et al. ACEA and CLEPA warn of European Brexit damage. *Aroq – Just-Auto. com (Global News),* 2017, vol. 2017, no.3, 31

[28] SCOTT, Thomas. *Salmon sales surge as UK food exports hit record high*.[online]. Available at: <http://www.bbc.com/news/business-40963631>

coming to the UK and spending increasing amounts because sterling has fallen by more than 13pc since the Brexit vote last year. Overseas residents made 3.7m visits to the UK in April, a jump of 19pc compared with the same month of 2016.[29]

But a weaker currency isn't always good news for business and trade. Yet, despite a possible boost to manufacturing exports and some valuation gains, the depreciation of the pound since the Brexit vote must reflect expectations of slower growth for the U.K. economy in the next few years and beyond. While some groups may gain from Brexit, the message from the foreign exchange and asset markets is clear: The overall size of the economy will eventually shrink relative to what it could have been if the United Kingdom had voted to stay in the EU.[30]

5. The Current Situation with Brexit Negotiations

At the time of writing the current negotiations between the EU and the UK look far from promising. The EU is insisting that three conditions are met before negotiations on trade can begin. Firstly they want to agree on the rights of EU citizens living in the UK after Brexit and the rights of UK citizens living in EU member states. Secondly the UK and the EU have to agree the divorce bill and the third condition is the EU wants a decision on the Northern Ireland-Ireland boarder. After the third round of negotiations at the end of August 2017 the chief negotiator for the EU was still pessimistic about the progress being made. Michel Barnier said Thursday that the three-day talks in Brussels with his British counterpart David Davis, and their respective delegations, had secured "useful clarification on a number of points," but insisted that both sides remain far from agreeing a final deal ahead of the U.K.'s departure from the EU. "We did not get any decisive progress on any of the principal subjects," Barnier told reporters, referring to the key issues citizens' rights and the U.K.'s Brexit bill. He admitted, however, that talks on the Irish border – the third issue of contention in early stage discussions – had been "fruitful."[31]

It is true that the EU is taking a very strict position and they can as they are in the stronger position and can wait it out. But the UK government seems unable to

[29] WALLACE, Tim. *Tourists splurge in Britain to make the most of weak pound.* [online]. Available at: <http://www.telegraph.co.uk/business/2017/06/16/tourists-splurge-britain-make-weak-pound/>

[30] GOURINCHAS, Pierre-Olivier, et al. Brexit: Whither the Pound? *FRBSF Economic Letter.* 2017, vol. 2017, no. 11, pp 1-5.

[31] GILCHRIST, Karen, *No 'decisive progress' in third round of Brexit talks, top EU negotiator says*. [online.] Available at: <https://www.cnbc.com/2017/08/31/no-decisive-progress-in-third-round-of-brexit-talks-top-eu-negotiator-says.html>

accept the solution of the three fundamental conditions without discussing future trade agreements. The UK government seems to believe that the EU will give in at some point and start negotiating trade and the three fundamental issues at the same time, or that they might be able to by-pass negotiators somehow. Both Barnier and Juncker have been steadfast in their insistence that talks on future trade cannot begin until the divorce bill has been settled but the Times reports there may be sympathy for Britain among some member states. "Mr Juncker says it's 'crystal clear' that we can't talk about the future relationship before solving divorce issues, but this is a decision to be taken by the EU 27, not the commission," a government source claimed. "Some heads of state say it's 'common sense' to have a discussion about both." The belief within May's government is that it is impossible to make "sufficient progress" on preliminary issues like the divorce bill without at the same time addressing what the future UK-EU relationship will look like.[32]

There have been rumours that Teresa May has agreed to pay 46 billion euros as a divorce settlement but wants to keep it a secret from her own party as it may cause a back bench revolt, in any case she cannot afford to have divisions within her own party derailing any progress that might be made in Brexit negotiations. The Mail on Sunday understands that the Prime Minister has been advised that Britain is likely to have to fork out up to €50 billion – £46 billion at current exchange rates – as the only way to break the deadlock of the Brexit talks. But anticipating a backlash from her party's anti-EU wing, Mrs May hopes to wait for the Tories' Manchester conference to conclude on October 4 before announcing the details.[33] So it is very hard to predict what Teresa May really plans to do but obviously such speculation in the press is not helping the UKs or the Prime Ministers position. Things at this stage are still very uncertain and perhaps are in a confused state.

6. Possible Effects on the EU

According to the Office of National Statistics (ONS) Britain imports most from the following countries in the EU: Germany, the Netherlands, France, Spain, Belgium,

[32] PAYNE, Adam. *Theresa May set to defy the EU and negotiate directly with European leaders on Brexit.* [online]. Available at: <http://uk.businessinsider.com/may-set-to-defy-the-eu-and-talk-to-european-leaders-about-trade-negotiations-2017-8>

[33] OWEN, Glen. *PM's desperate bid to keep £46billion EU divorce bill secret as she fears fury at Tory conference if she reveals what No 10 expects to pay.* [online] Available at: <http://www.dailymail.co.uk/news/article-4847688/PM-s-desperate-bid-46bn-EU-divorce-bill-secret.html>

Italy and Ireland.[34] It is also true that the UK imports more from the EU than the EU imports from the UK. So you could argue that the trade relationship is more important to the EU than the UK. However you have to bear in mind the EU economy is much bigger and less reliant on the UK than the UK is on the EU. UK-EU exports are a bigger part of the UK's economy than the EU's. Although fewer of our exports are now going to other EU countries, these exports are still just as important to our economy. The £240 billion exports of goods and services to other EU countries were worth about 12% of the value of the British economy in 2016. It's been at around 12-15% over the past decade. Exports from the rest of the EU to the UK were worth about 3-4% of the size of the remaining EU's economy in 2015. The exact number depends on whether you use the £290 billion figure from UK data, or £390 billion from EU data.[35] But breaking down the figures by country (table1) helps to identify more clearly the EUs trading partners inside and outside the EU. The table excludes the UK from the EU data as if it had left the EU.

Chart 1: Trading partners

Excluding trade between EU countries	Including trade between EU countries
1. The US (17%)	1. Germany (13%)
2. The UK (16%)	2. France (8%)
3. China (8%)	3. The USA (7%)
4. Switzerland (7%)	4. The UK (7%)
5. Turkey (4%)	5. Itally (5%)

As is clear from the chart, the UK would be the EUs second biggest trading partner outside the EU and fourth biggest trading partner if other EU countries are included. So despite the fact that the UK imports more from the EU than the EU does from the UK strictly speaking the UK is more reliant on the EU trade than vice versa. But some countries will be affected more than others if in the EU if no trade agreement is reached. Germany would possibly be the biggest loser as it exports most to the UK out of the EU countries but some industries would be affected more than others. The German automotive industry, which counts the UK as a major export destination, will be the most affected: German producers of wood, paper, and leather goods, as well as those of pharmaceuticals and chemicals products will also feel the impact.[36] According to the German

[34] Further information available at: http://visual.ons.gov.uk/uk-trade-partners/

[35] For further information see: https://fullfact.org/europe/uk-eu-trade/

[36] FICHTNER, Ferdinand, et al. Brexit decision puts strain on German economy. *DIW Economic Bulletin,* 2016, vol.6, no. 31, 359-362

statistics office[37] (Statistisches Bundesamt) the UK was Germanys third biggest export market and ran a trade surplus with the UK of 50 billion euros. Showing that the UK is a very important partner to Germany.

Another country that may suffer more than Germany is Ireland. Ireland has built up trade with the UK over the decades and many businesses are tied up with the success of the UK and it would be difficult to unravel these links. Brexit, said Mr Bruton, might deal Ireland's economy an even heavier blow than Britain's. The first blow has already fallen, says Fergal O'Brien of IBEC, a business lobby group. As sterling has weakened, exports to Britain have become less competitive, and imports from Britain cheaper. Britain takes two-fifths of Irish-owned firms' exports, and a similar share of all agricultural exports. Beef and dairy farmers are struggling, and several of Ireland's mushroom farms, which export four-fifths of their produce to Britain, have already closed. The pain will worsen as sterling's fall and Brexit-induced business uncertainty hit demand in Britain, says Mr O'Brien.[38] So Ireland would be happier if a trade agreement was reached with the UK after Brexit as it would limit the damage to its own economy. But Ireland does not have much influence as it is one of the smaller members of the EU.

7. Conclusion

The UK has always been on the outer limits of European integration perhaps the history of the UK has made it more conservative and less willing to give up control to a supranational organisation. The UK never really shared the dream of its continental neighbours for closer political integration. The financial crisis, the refugee crisis and the recent terror attacks in the UK and those carried out on other member states have also given rise to far right and populist politics which has further eroded the British electorates confidence in the EU.

Although some EU member states may feel it will strengthen the EU not to have such a negative difficult state as a member there are many cons to the UK leaving. Politically it will leave a vacuum and may shift the balance of power in the EU to protectionist policies, this may be difficult for some states to swallow especially the Eastern European and Scandinavian states who have often sided with the UK to form a minority bloc to veto some policies or initiatives they did not agree with. This may cause other countries to question their membership to

[37] For further information see: https://fullfact.org/europe/uk-eu-trade/

[38] SWENSON, Adam. *Ireland may suffer the most from Brexit*. [online]. Available at: <https://www.economist.com/news/europe/21709354-making-it-one-few-european-countries-wants-be-kind-britain-ireland-may-suffer>

the EU or at the very least cause more fragmentation and uncertainty within the EU. Also generally we have seen a shift in the political landscape to far right extremism and populism as personified by UKIP in the UK and the National Front in France other EU countries have also seen the rise of such parties. The election of Donald Trump has also caused some fear that the US may become more protectionist cutting off the expansion of EU markets in this area. There is also a fear that this will cause the EU to become more protectionist as a result (not a good time for the UK to leave).

The economic consequences of the UK leaving may be dramatic mostly affecting the UK and may hit the financial sector hardest followed by the automobile manufacturing sector, but other countries like Ireland and to a lesser extent Germany will also feel the economic consequences. But it is impossible to accurately predict the benefits or the costs until the final agreement is worked out.

The negotiation over the UKs departure from the EU has already started alarm bells ringing as the EU seems unwilling to discuss trade with the UK until their three conditions are met. The UK seems unable to grasp this simple fact and is equally determined to try and negotiate trade and the three conditions at the same time which further strains EU relations and seems to indicate that an agreement is unlikely to be reached on time or at all as the third round of negotiations has already showed little progress. But again it is very difficult to predict what politicians will actually do and what goes on behind closed doors. If the press is to be believed some progress might have been made on the UKs divorce settlement. But this could trigger a further political melt down in the UK as Teresa May is likely to face stiff opposition from her own party if the divorce settlement is considered too high. The only thing we can be sure of at the moment is more uncertainty and uncertainty is not good for anyone.

EU-Israel Partnership: Future Economic Prospects in Light of the 2017 'White Paper'

Nellie Munin*

Summary: This article explores the implications each of the five alternative scenarios for the future of EU integration, suggested in the *White Paper on the Future of Europe: Reflections and Scenarios for the EU 27 by 2025*, published by EU Commission in March 2017, may have on the EU-Israel partnership and on the Israeli economy.

Keywords: Israel, EU, integration, association.

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1. Introduction

EU-Israel trade relations and political partnership date back to the early years of EEC establishment, in the 1950's.[1] Since 2000, an Association Agreement[2] in force between these partners forms a legal framework for their relations.

The EU is one of two Israel's major trade partners (the other is the United States). Geographic and cultural proximity reinforce this partnership. EU border (Cyprus) is only 300 KM from Israel. Out of 8.7 million citizens, more than 1 million Israelis hold an EU passport and many others are of European origin.

For Israel, a small economy surrounded by unfriendly neighbors, the huge EU market, encompassing more than 500 million citizens, is a desired trade

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1 PARDO, Sharon, PETERS, Joel. *Israel and the European Union: A Documentary History*. Lexington Books, Lanham MD, 2012, 2014 reprinted.

2 European Union – Israel Association Agreement, concluded in 1995, entered into force in 2000. [online]. Available at: http://eeas.europa.eu/archives/delegations/israel/documents/eu_israel/asso_agree_en.pdf

destination, offering Israeli industries opportunities to enjoy economies of scale advantages.[3] The EU is particularly interested in research and development (R&D) collaboration, where Israel enjoys a comparative advantage.[4] In total, trade between these two partners amounted in 2016 to more than 43 bn $.[5]

Israel thus follows very closely recent developments in the EU, including its financial, refugees and political crises, acknowledging that any future change in the nature of the EU as a whole may bear substantial implications for the Israeli economy.

The White Paper on the Future of Europe: Reflections and Scenarios for the EU 27 by 2025, published by the European Commission in March 2017 (Hereby: 'the White Paper'),[6] suggests a scale of five integration formulas the EU27 may choose to aim at by 2025, in light of current crises and their implications for the EU.

The European intensive discourse[7] on this White Paper naturally concentrates on the implications each scenario bears for the European Union, its member states and citizens.

This article depicts the implications each such choice may bear for the *Israeli economy*. After referring shortly to the circumstances underlining this White Paper, the following sections focus on the scenarios foreseen by this paper, describing their optional implications for the Israeli economy. Conclusion assesses what might be the best EU integration level choice from a trade partner's (i.e. Israel's) point of view, examining whether it correlates to the scenario the EU Commission perceives as serving best the European interests.

2. The EU at a Crossroads

Since 2008, the EU is struggling with an ongoing financial and economic crisis. Steps taken to pull out of the crisis forced a stricter monetary discipline on EU members. Their effect was particularly heavy on vulnerable member states such

[3] MUNIN, Nellie. *The European Union and Israel: State of the Play*. The Israeli Ministry of Finance [Hebrew], 2003.

[4] For information on Israeli participation in EU R&D programs see ISERD – Israel and Europe R&D Directorate, 2017. [online]. Available at: http://www.iserd.org.il/

[5] The Israeli Central Bureau of Statistics. *Israel's Foreign Trade According to Countries: EU*, 2017. [online]. Available at: http://www.cbs.gov.il/www/fr_trade/d4t2.pdf

[6] European Commission. *The White Paper on the Future of Europe: Reflections and Scenarios for the EU 27 by 2025*, 2017. [online]. Available at: https://ec.europa.eu/commission/white-paper-future-europe-reflections-and-scenarios-eu27_en

[7] According to Juncker's forward to the White Paper, ibid p. 3, since its publication the EU Commission initiated more than 2000 public events to discuss it.

as Greece, illuminating the huge interests gap between financially strong and weak member states.[8] This gap, in turn, inflames an ongoing controversy between these two groups regarding the right way out of the financial crisis. The fact that hitherto, the financially strong member states succeed to dictate the way forward[9] is a source of major frustration for financially weaker member states.[10]

The refugees' crisis hit the EU in 2015, on top of the economic and political vulnerability caused by the financial crisis.

Due to severe political crises in some Middle Eastern countries, growing numbers of refugees started fleeing to different EU countries, most of them illegally, through the Mediterranean Sea or through land borders, without documentation or prior consent of the destination countries. Most of these unauthorized migrants are Muslims.[11]

This huge wave of migrants includes many asylum seekers, but also economic migrants[12] and is suspected to also include hostile agents of extreme Muslim groups, disguised as refugees. Experts assess that this group is relatively small,[13] but their exact number is unknown. The EU assessed that 1.2 million refugees entered it in 2015.[14] In 2016 the numbers decreased substantially, but still, over

[8] MUNIN, Nellie. From Financial Deficit to Democratic Deficit? *Journal of Multidisciplinary Studies, St. Tomas University, Florida*, 2014, vol. 6 no. 1, p. 5; MUNIN, Nellie. European Monetary Union's Single Banking Supervision Mechanism: Another Brick in the Wall? *IUP Journal of International Relations,* 2016, vol. X no. 4, p. 7.

[9] See an example to one legal aspect of this controversy: HAMULAK, Ondrej, KOPAL, David., KERIMAE, Tanel. Walking a Tightrope – Looking Back on Risky Position of German Federal Constitutional Court in OMT Preliminary Question*. European Studies*, 2016, vol. 3, pp. 115-141.

[10] For the financial and economic aspect of this controversy see, e.g. RUBINI, Nouriel. Teaching PIIGS to fly. *Project Syndicate*, 2010. [online]. Available at http://relooney.fatcow.com/0_New_6765.pdf; KRUGMANN, Paul. *End This Depression Now*. New York, NY: W.W. Norton, 2012; HABERMAS, Jürgen. Democracy, Solidarity and the European Crisis. In: GROZELIER, Anne-Marie, HACKER, Bjoren, KOWALSKY, Wolfgang, MACHING, Jan, MEYER, Henning, UNGER, Brigitte (Eds.), *Roadmap to a Social Europe*. Social EuropeReport. 2013, pp. 4-13. [online]. Available at: http://www.abetterway.ie/download/pdf/roadmap_to_social_europe_sej_oct_2013.pdf#page=9

[11] The top three nationalities of entrants of the over one million Mediterranean Sea arrivals between January 2015 and March 2016 were Syrian (46.7%), Afghan (20.9%) and Iraqi (9.4%). From January 2017 to February 2018 the picture seems to have somewhat changed, as the top three nationalities of entrants were Syria (10.7%), Nigeria (10.2%), Guinea (7.7%), Côte d'Ivoire (7.5%), Morocco (6.5%): United Nations High Commissioner for Refugees. *Most Common Nationalities of Mediterranean Sea Arrivals from January 2017*. [online]. Available at: http://data2.unhcr.org/en/situations/mediterranean

[12] UNHCR VIEWPOINT. *'Refugee' or 'Migrant' – Which is Right?* 2016. [online]. Available at: http://www.unhcr.org/55df0e556.html

[13] REUTERS. *German Spy Agency Says ISIS Sending Fighters Disguised as Refugees*. 2016. [online]. Available at: http://www.reuters.com/article/us-germany-security-idUSKCN0VE0XL

[14] EUROPEAN COMMISSION, *the White Paper,* n. 6, p. 11.

350,000 refugees arrived by sea.[15] The huge numbers of arriving refugees turned this crisis into the most severe refugees' crisis since World War II.[16] These events became a major source of concern in the EU, implying the following threats:[17]

1. A potential security threat caused by extremists and terrorists disguised as refugees.[18]
2. A potential economic threat imposed by economic migrants, who may offer cheap labor, thus compete with EU laborers, already suffering high unemployment rates. [19]
3. A cultural threat of changing the social tissue of originally Christian communities in which these immigrants will settle, and in the long run – maybe even the overall Christian nature[20] of European society.[21]
4. Budget constraints caused by the need to handle the refugees and assimilate them into the society.[22]

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15 Respectively, a substantial decrease in asylum applications was recorded in 2016: EUROSTAT. *Asylum Quarterly Report,* 2017. [online]. Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report. In 2017, arrivals by sea seem to have decreased again, as only 136,925 were registered by end September. THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES. *Operational Portal Refugees Situation*, 2017. [online]. Available at: http://data2.unhcr.org/en/situations/mediterranean?page=1&view=grid&-Type%255B%255D=3&Search=%2523monthly%2523

16 BUSINESS STANDARD (BS). *Over 1 Million Arrivals in Europe by Sea: UNHCR*. 2015. [online]. Available at: http://www.business-standard.com/article/pti-stories/over-1-million-arrivals-in-europe-by-sea-unhcr-115123000668_1.html; EUROPEAN COMMISSION, *the White Paper,* n. 6, p. 11.

17 See how these threats are reflected in the observations of local communities, in: SITEK, Bronislaw. *Migration – The Threat or The Chance of development for the City?* International and Comparative Law Review, 2011, vol. 11, no. 1, pp. 87-96, 95.

18 YEHEZKELI, Zvi., DERYI, David. *Allah Islam – Documentary on the Muslims in Europe*. 2012. [online]. Available at: https://www.youtube.com/watch?v=hR7REARFFpQ; YEHEZKELI Zvi., DERYI, David. *Confessions From ISIS.* 2017. [online]. Available at: https://www.youtube.com/watch?v=DWKDRo6Q-ls (chapter 1); https://www.youtube.com/watch?v=ydahQXpd5DU (chapter 2); https://www.youtube.com/watch?v=W4wcSa7__YQ (chapter 3); https://www.youtube.com/watch?v=41UoH_aDQRs (chapter 4); https://www.youtube.com/watch?v=duzCYso-47Qk (chapter 5).

19 In 2015 3.8% of EU workers were foreign migrants: EUROSTAT. *Labor Market and Labor Force Survey (LFS) Statistics*. 2016. [online]. Available at: http://ec.europa.eu/eurostat/statistics-

20 WEILER, Joseph. *L'Europe Chrétienne: une Excursion*. Paris: Éditions du Cerf, 2007.

21 KONOPACKI, Stanislaw. Europe and its Problem with Identity in the Globalized World. *European Studies*, 2014, vol. 1, pp. 56-69.

22 Costs at EU level during 2016 are specified in: European Commission. *Refugee Crisis in Europe.* 2017. [online]. Available at: http://ec.europa.eu/echo/refugee-crisis_en. At the national level, see for example: DEARDEN, Lizzie. *Germany 'spent more than 20 bn Euro on refugees in 2016' as crisis outstrips states budgets.* Independent, 2017. [online]. Available at: http://www.independent.co.uk/news/world/europe/germany-refugees-spend-20-billion-euros-2016-angela-merkel-crisis-budgets-middle-east-north-africa-a7623466.html

These threats divide EU member states into two groups: one (lead by economically strong members such as Germany and France) striving to offer a shelter to the refugees, while the other (led by some Central and Eastern European countries) refusing to take part in this effort.[23]

These threats are perceived as major motivations for the UK's Brexit.[24]

These threats should also be seen in the context of EU's global challenges, including its shrinking and aging population (expected to be the eldest in the world by 2030), its decreasing share in global GDP, players gaining weight in the global financial arena, competing with the Euro, the prospects that defense expenditure would double by 2045, the fall of employment rates,[25] which is expected to escalate as robots replace many human professions,[26] and other challenges imposed by globalization.[27]

In 2015, the presidents of five leading EU institutions published the Five Presidents Report,[28] contending that the best way to pull out of the financial crisis would be by tightening EU integration, towards full fiscal, financial, and economic unions, hopefully followed by a political union.[29] In EU reality, the

[23] E.g. MORTIMER, Caroline. *Hungary Set to Reject EU Refugee Quotas in Referendum in Victory for Ruling Anti-Immigration Party*. Independent, 2016. [online]. Available at: http://www.independent.co.uk/news/world/europe/hungary-eu-referendum-refugee-quota-migrant-crisis-xenophobia-border-control-racism-a7341276.html; FREJ. Willa. *Here Are the European Countries that Want to Refuse Refugees*. Worldpost, 2017. [online]. Available at: http://www.huffingtonpost.com/entry/europe-refugees-not-welcome_us_55ef3dabe4b093be51bc8824. A recent poll by the UK's Royal Institute of International Affairs reflects that an average of 55% across 10 EU member states support stopping Muslim immigration to the EU: GOODWIN, Matthew., RAINES, Thomas, CUTTS, David. *What do Europeans Think about Muslim Immigration?* Chatham House, 2017. [online]. Available at: https://www.chathamhouse.org/expert/comment/what-do-europeans-think-about-muslim-immigration

[24] E.g. TILFORD, Simon. *Britain, Immigration and Brexit*. CER Bulletin, 2016. [online]. Available at: https://www.cer.org.uk/sites/default/files/bulletin_105_st_article1.pdf; THE MIGRATION OBSERVATORY. *Migration and Brexit*. 2018. [online]. Available at: http://www.migrationobservatory.ox.ac.uk/projects/migration-and-brexit/

[25] EUROPEAN COMMISSION, *the White Paper,* n. 6, pp. 8-10.

[26] E.g., VOA NEWS. *Will Robots Replace Human Drivers, Doctors and Other Workers?* 2017. [online]. Available at: https://www.voanews.com/a/will-robots-replace-human-drivers-doctors-workers/3810706.html; FORBES. *10 Million Self-Driving Cars Will Hit the Road by 2020*. 2017. [online]. Available at: https://www.forbes.com/forbes/welcome/?toURL=https://www.forbes.com/sites/oliviergarret/2017/03/03/10-million-self-driving-cars-will-hit-the-road-by-2020-heres-how-to-profit/&refURL=https://www.google.co.il/&referrer=https://www.google.co.il/

[27] PORTO, Manuel. The Path Towards European Integration: the Challenge of Globalization. *European Studies*, 2014, vol. 1, pp. 41-55.

[28] European Commission. *Completing Europe's Economic and Monetary Union.* 2015. [online]. Available at: https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf

[29] DE QUADROS. Fausto. Europe after the economic crisis: towards a Political Union. *European Studies,* 2015, vol. 2, pp. 226-231.

feasibility of this aim was questionable.[30] The escalation since then, described above, seems to have invoked second thoughts regarding this determinant position, or at least about the undemocratic way by which it was obtained. Criticism seems to have raised decision makers' awareness to the need for further and broader consultation at EU level. These circumstances gave birth to the White Paper, which has been published on the European Commission's website for the public's comments in March 2017.

3. The Five Scenarios for EU's Future

Unlike the Five Presidents Report, which has determined only one way forward, the White Paper opened a public discourse on the best way forward.[31] Unlike the Five Presidents Report, that has foreseen the obtainment of a very high degree of market integration, close to a federation, by 2025, the White Paper suggested a scale of five different integration formulas at which EU member states and citizens may aim, alternatively and by mutual decision.

The White Paper stresses the necessity to decide the desired level of integration relatively quickly, to allow decision makers form 'a plan, a vision and a way forward to present to the people by the time we hold European Parliament elections in June 2019.'[32]

3.1. Scenario 1: 'Carrying on'

Scenario 1[33] titled *'carrying on',* is sub-titled *'the European Union is delivering its positive reform agenda'*. This scenario describes an EU that 'sticks to its course', but at the same time 'implementing and upgrading its current reform agenda'. If this scenario is what the Commission sees as 'status quo',[34] this description is thus inaccurate, since upgrades (if member states succeed to decide on them) would eventually boil down to further integration.

If this scenario works, by 2025 the EU 27 would attempt to strengthen the single market economically, to obtain more jobs and growth, particularly for

[30] MUNIN, Nellie. The 'Five Presidents Report': Dogs Bark but the Caravan Moves on? *European Politics and the Society*, 2016, vol. 17 no. 3, pp. 401-420.

[31] Although this White Paper may be perceived as a rhetoric and political exercise by the Commission, where the result: choosing the highest degree of integration, is still aimed at: MATTHEE, Marielle, MUNIN, Nellie. *The Future of the EU: Rhetoric in Service of Commission's Agenda?* Journal of Jurisprudence and Legal Practice, Vol. 1, 2018, pp. 5-27.

[32] EUROPEAN COMMISSION, *the White Paper,* n. 6, p. 3.

[33] Ibid, p. 16.

[34] Ibid, p. 15.

youth, in the spirit of Bratislava declaration 2016[35] and to attract investments by stepping up investments in infrastructure (digital, transport and energy). Financial strength would improve by substantial improvement of the single currency (probably by continuing the implementation of the Five Presidents Report vision, which is nevertheless not explicitly mentioned in this scenario) and the functioning of the Euro area.

90% of all state aid measures will be in the hands of national, regional and local authorities. 'The renationalization of development aid makes it harder to build comprehensive partnerships with African countries, limiting economic opportunities in a growing market and failing to tackle the root causes of migration.'[36]

National authorities would share intelligence and deepen defense cooperation and even pool some military capabilities, enhancing financial solidarity for missions abroad. These steps imply enhancement towards a military union without saying so explicitly. The White Paper expresses a Commission's anticipation that terrorist and other defense threats would facilitate such steps, that were avoided hitherto. Another aspect which complements this picture is reinforced cooperation on borders management (with active assistance of the European Border and Coast Guard), although it is stressed that it will stay fully under national responsibility, and progress towards a common asylum system.

In terms of external relations, the EU27 would speak in one voice, striving towards closer cooperation on foreign affairs. The EU will continue to conclude trade agreements based on the Bratislava Declaration's balance of interests: 'to ensure a robust trade policy that reaps the benefits of open markets while taking into account concerns of citizens,' and manage to positively affect the global agenda on climate, financial stability and sustainable development.

3.2. Scenario 2: 'Nothing but the single market'

The *second scenario*[37] is titled *'Nothing but the single market'*. If the former scenario is perceived as 'status quo', this one may fit into the description of 'changing of scope and priorities'.[38] In essence, though, it implies withdrawal from EU's current course into gradual re-centering on the single market only, due to the EU27 inability to reach agreement on many issues. This scenario implies that the single market for goods and capital will be strengthened. However, common

[35] COUNCIL OF THE EUROPEAN UNION. *Bratislava Declaration and Road Map,* 2016. [online]. Available at: http://www.consilium.europa.eu/en/policies/future-eu/bratislava-declaration-and-roadmap/

[36] EUROPEAN COMMISSION, *the White Paper,* n. 6, p. 19.

[37] Ibid, p. 18.

[38] Ibid, p. 15.

action will be abandoned in many fields, of which the Commission deliberately chose to mention migration, security and defense, three issues now under deep controversies, as well as consumer, social and environmental standards, taxation (including fighting tax evasion),[39] the use of public subsidies, foreign policy. Consequently, standards would continue to differ, and cooperation in the Euro area would be limited.

Mobility of workers and the stability of the single currency would suffer, as well as the free movement of persons, due to intensified border checks. Crossing borders for business or tourism would become difficult due to regular checks (no single policy on migration, asylum, bilateral security coordination). For EU citizens, finding a job in another member state would be harder and the transfer of pension rights to another country would not be guaranteed. Businesses established in the EU would find it harder to relocate workers.

In the global arena, the EU would find it more difficult to agree the terms of trade agreements and would have less effect on issues such as climate change harnessing globalization, since it will not speak in one voice. Some foreign policy issues would increasingly be dealt with bilaterally.

3.3. Scenario 3: 'Those who want more do more'

The third scenario[40] is titled *'those who want more do more'*. It focuses on enhanced cooperation, which already exists in the EU, legally[41] and pragmatically.[42]

It describes a process where the majority of member states continues in the path described in scenario 1: The EU 27 continue to strengthen the single market and pursue progressive trade agreements. They continue to strengthen the

[39] Despite severe difficulties to treat taxation (particularly direct taxation) at EU level, due to constant resistance of the member states, fearing to lose control over this important source of income, Commission's suggestion to completely abandon EU treatment of this field seems to overlook the significant impact taxation seems to have on growth. See more on the link between the two in: BELLOVA, Jana. *Analysis of taxation and Economic Growth – Insights, Background and Findings.* International and Comparative Law Review, 2014, vol. 14, no. 1, pp. 69.

[40] EUROPEAN COMMISSION, *the White Paper,* n. 6, p. 20.

[41] Art. 20 Treaty on the European Union – TEU, Arts. 326-335 Treaty on the Functioning of the European Union – TFEU.

[42] European Commission. *Enhanced Cooperation.* 2017. [online]. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:xy0015; http://eur-lex.europa.eu/summary/glossary/enhanced_cooperation.html; CANTORE. Carlo Maria. We're one, but we're not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU. *Perspectives on Federalism*, 2011, vol. 3, no. 3. [online]. Available at: http://on-federalism.eu/attachments/103_download.pdf; MUNIN, Nellie. Tax in Troubled Time: is it the Time for A Common Corporate Tax Base in the EU? *EC Tax Review*, 2011, no. 3, pp. 121-133.

economic and monetary union and continue to cooperate on issues such as migration, Schengen, security and foreign policies.

Simultaneously, groups of member states deepen cooperation in chosen domains. As examples for such domains it mentions defense (focusing on military coordination and joint equipment), border procedures and criminal enforcement internal security and justice, taxation, currency (where this is in fact already the state of affairs), transportation (liability and standards for cars) and social standards.

If the use of enhanced cooperation becomes more and more common, it may gradually imply fragmentation of the 'single market' in the broad sense, due to different rules in different member states with regard to the issues under enhanced cooperation. Weaker countries may be left behind, as stronger countries would speed up towards enhanced integration. In the long run, this process may undermine the EU completely or change it substantially, leaving only strong countries in the race.

3.4. Scenario 4: 'Doing less more efficiently'

The fourth scenario[43] is titled *'doing less more efficiently'.* Like scenario 2, it may also fit into the description of 'changing of scope and priorities'.[44] It suggests that the EU would focus on certain priority areas, delivering more and faster in them, at the cost of returning other policy areas to national responsibility, or doing less at EU level. The Commission stresses that such a choice would serve as an opportunity for the EU27 'to better align promises, expectations and delivery',[45] to prevent scandals emanating from expectation that the EU take care of issues it does not have power or tools to handle.

Like scenario 2, this scenario also implies some revert from the current stage of integration, at least in terms of scope of issues handled by the EU.

The issues on which Commission suggest to focus EU efforts according to this scenario include innovation (R&D, EU-wide projects to support decarbonization and digitation, establish a new European Telecoms Authority, deepen cooperation on hi-tech and space projects, complete regional energy hubs), trade (to be exclusively dealt at EU level), security, migration, the management of borders and defense. (In scenario 3, the Commission suggested to *abandon* EU treatment of the four latter issues).

This scenario further suggests to continue taking steps to consolidate the Euro area.

[43] EUROPEAN COMMISSION, *the White Paper,* n. 6, p. 22.
[44] Ibid, p. 15.
[45] Ibid, p. 22.

It urges the development of 'stronger tools… to directly implement and enforce collective decisions, as it does today in competition and banking supervision'.[46] Thus, if chosen the Commission may perceive it as a feasible interim stage, serving the long-term vision of enhanced integration (although it is not presented as such). Other anticipated developments reinforce this assumption: cooperation between police and judicial authorities, mentioned in the context of counter-terrorism acts, may yield further cooperation between these authorities in the future; 'The European Border and Coast Guard fully takes over the management of external borders'[47] and a single asylum agency processes all asylum claims. Joint defense capacities will be established, towards the creation of a European Defense Union. Another suggestion is to establish a new European Counter-terrorism Agency. The EU will speak with one voice on all foreign policy issues.

While these integrative steps take place, this scenario foresees the abandonment of EU responsibility in other fields, such as: regional development, public health, parts of employment and social policy not directly related to the functioning of the single market, state aid control. In other areas, it suggests to determine only minimum standards at EU level: consumer protection, the environment, health and safety at work. The Commission justifies the choice of these fields as domains where the EU 'is perceived as having more limited added value, or as being unable to deliver.'[48]

3.5. Scenario 5: 'Doing much more together'

All proposed scenarios seem to lead to *Scenario 5,*[49] titled *'doing much more together'*. The choice to present it as the last option seems to signalize that this is the scenario which the EU Commission favors most.

It foresees enhancement of cooperation between all member states, in all domains, including the Euro. Economic, financial and fiscal Union would be achieved. Decision making would be more rapid and enforcement would improve. Consequently, the single market would be strengthened through harmonization of standards and stronger enforcement. Since the EU would speak in one voice it will gain more international effect in matters such as trade (exclusively dealt by the EU), climate change, development and humanitarian issues. A European defense union will be created.[50] Cooperation on border

[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid, p. 24.
[50] For constitutional aspects of creating an 'EU army' see: DOLEžAL, Radim. Common European Union Army Under the Constitutional Law of European Union. *European Studies*, 2016, vol. 3, pp. 223-238.

management, asylum policies and counter-terrorism matters will be systematic. Europe will develop a joint approach on migration and will increase investments in its neighborhood and beyond. Internally, it calls for completing the single market, creating a European 'Silicon Valley', fully integrated capital markets and greater coordination on fiscal, social and taxation matters.

4. Implications for Israel

4.1. Desired Level of Integration

In terms of trade, the highest level of market integration the EU can achieve is the best option for its trade partners, including Israel. Any enhancement in terms of integration level implies less trade barriers, a market which is more consolidated and uniform and thus easier to work with for its trade partners, who do not have to struggle with different tax laws and authorities, different rules, different currencies, different administrations and regulation. For its trade partners, a fully integrated EU market would imply a great saving of expenditure, time and effort.

From this aspect, Scenario 5 is the most preferable scenario for Israel, followed by scenario 1 that seems to strive towards the same end, only slower. Scenario 2, implying the abandonment of common action in fields such as security (where Israel has a comparative advantage) but also taxation, consumer standards (which may adversely affect Israeli consumers of imported EU goods and services), social standards and border management (which may adversely affect Israeli-European citizens enjoying such standards now, and Israeli firms operating in the EU, relying on such standards, which among other things facilitate relocation of their workers) and environmental standards (folding a potential for mutual collaboration due to geographic proximity) would be less favorable in Israeli eyes. Scenario 4, suggesting to set only minimum standards at EU level regarding consumer protection, the environment, health and safety at work, may raise similar – only more moderated – concerns for Israelis.

4.2. Negotiations and Conclusion of Trade Agreements

Full (or close to full) EU market integration also implies great savings in time and efforts regarding to negotiations on trade agreements with its trade partners. This is relevant for Israel, which is constantly negotiating with the EU to improve mutual trade terms in fields in which potential trade liberalization has not been

fully exhausted yet, such as agriculture, services[51] etc. To that extent, scenario 1, explicitly describing a situation whereby '[t]he ratification process (of international trade agreements – N.M.) is lengthy and often delayed by discussions and disagreements in some national and regional Parliaments',[52] is less desirable from the Israeli point of view. A situation whereby '[t]he EU27 fails to conclude new trade agreements as Member States are unable to agree on common priorities or some block ratification',[53] described in scenario 2, is even worse for Israel.

4.3. The Political Dimension and Trade

Scenario 5 (following the Five Presidents Report vision) seems to imply not only economic integration, but also full political integration.

EU-Israel association agreement subjects its trade provisions and benefits to political commitments, by providing for an ongoing political dialogue between the parties (Art. 3), and by subjecting the agreement to agreed political standards: democracy and human rights (Art. 2). In addition, according to Art. 31(1) of the Vienna Convention on the Law of Treaties,[54] any provision of the agreement should be interpreted in its context: this agreement is one in a series of association agreements the EU concluded with its Mediterranean neighbors, underlined by the Barcelona Process[55] vision of enhancing peace in the region through the use of a model similar to that of the EU. Since, according to this model economic collaboration in the region may enhance peace, to a great extent the EU subjects benefits potentially suggested by the agreement to political advancement in the region.

From the political aspect, the fact that the EU does not speak in one voice in international relations (scenarios 2, and to a certain extent 3) is sometimes an advantage for Israel, suffering EU measures imposed on it due to Palestinian or

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[51] HERMAN, Lior. *Two for Tango? European Union, Free Trade Areas in Services and Israel*, Hebrew University of Jerusalem, 2005. [online]. Available at: http://www.academia.edu/26319830/Two_for_Tango_European_Union_Free_Trade_Areas_in_Services_and_Israel

[52] EUROPEAN COMMISSION, *the White Paper,* n. 6, p. 17.

[53] Ibid, p. 19.

[54] United Nations. *Vienna Convention on the Law of Treaties*, 1969. [online]. Available at: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf

[55] *The Barcelona Process or Euro-Mediterranean Partnership.* [online]. *Available at:* http://www.barcelona.com/barcelona_news/the_barcelona_process_or_euro_mediterranean_partnership. For Israel, the regional context has been quite frustrating due to its substantially unique economic profile compared to its neighbors and its political isolation in the region, that prevents most options for regional cooperation. See, e.g. TOVIAS, Alfred. *Israel and the Barcelona Process.* EUROMESCO, 2006. [online]. Available at: http://www.euromesco.net/index.php?option=com_content&view=article&id=135%3Apaper-3-israel-and-the-barcelona-process&catid=102%3Aprevious-papers&Itemid=102&lang=en

BDS Movement's[56] pressures.[57] As long as the EU does not speak in one voice in this regard, Israel can hope to persuade at least some of its member states to support its positions. This may turn out to be a much greater diplomatic and political challenge if the EU speaks in one voice (as suggested in scenarios 1, 4 and 5), necessitating persuasion of all EU member states.

4.4. The Euro

For Israel (as for the rest of the world), the Euro has established itself as an alternative to the US Dollar. It is a strong global 'player' in financial markets[58] and an investment currency. Thus, its strength and stability bare global implications, including implications for Israeli investments in it.

Improvement of the single currency's functioning may strengthen it, implying good news for Israeli investors in the Euro.

For Israeli traders and businesses, as well as for Israeli tourists to EU countries, the ability to use one currency in all EU countries facilitates trade and is thus preferable.

A strong Euro is preferred by Israeli exporters, who would get better consideration for their exports to the Eurozone countries, but not for Israeli importers and consumers of imports from Eurozone countries (including Israeli tourists in these countries), who would have to pay more for the same products or services.

All five scenarios seem to rely on the assumption that the Euro would continue to exist. Scenarios 5 and, to a lesser extent, scenarios 1 and 4 pay particular attention to its strength (thus being preferable for Israeli investors and exporters). Unlike them, scenario 2[59] explicitly implies a lower degree of market integration, which may adversely affect the Euro's strength. Scenario 3 foresees continuous strive towards the Euro's development and strengthening, allegedly not depending on enhanced cooperation in other fields. However, to the extent

[56] BDS – *Boycott, Divestment and Sanctions Movement*. 2018. [online]. Available at: https://bdsmovement.net/

[57] E.g. HARPAZ Guy, RUBINSON Eyal. The Interface Between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita. *European Law Review*, 2010, vol. 35, no. 4, pp. 551-571; PUCCIO Laura. Understanding EU Practice in Bilateral Free-Trade Agreements: Brita and Preferential Rules of Origin in International Law. *European Law Review*, 2011, vol. 36, no. 1, pp. 124-134; PARDO Sharon, ZEMER Lior. Bilateralism and the Politics of European Judicial Desire. *Columbia Journal of European Law*, 2011, vol. 17, no. 2, pp. 263-305; MUNIN, Nellie. EU Measures Towards Israeli Activities in the Occupied Territories and the BDS: A Diplomatic Achievement or a Pyrrhic Victory? *Journal of Multidisciplinary Studies, St. Tomas University, Florida*, 2015, vol. 7, no.3, pp. 19-38.

[58] EUROPEAN COMMISSION, *the White Paper,* n. 6, p. 8.

[59] Ibid, p. 18.

such a scenario enhances EU fragmentation it may eventually adversely affect the Euro. These scenarios may thus be preferred by Israeli importers in terms of price, in the long run, if the fragmentation they may imply encourages Eurozone member states to revert to their own currencies. Withdrawals from the Euro may affect its strength, depending whether financially strong or weak countries decide to withdraw. Such withdrawals may further imply an extra administrative burden for Israeli traders, emanating from the need to work with a variety of currencies instead of one currency for many countries.

4.5. Trade in Goods

The EU-Israel association agreement establishes a functioning free trade area in goods between them. If higher growth is obtained in the EU, as foreseen particularly by scenarios 1, 2 and 5, it may give a substantial boost to this mutual trade in goods. In the other two scenarios, trade in goods may be expected to continue growing more modestly, or even decrease if traders' interest is diverted to other avenues of the economy (e.g. services). To the extent scenario 3 (enhanced cooperation) involves serious enhancement of integration in fields facilitating trade in goods, such as internal taxation or transportation, this may facilitate trade in goods with EU member states involved in these initiatives (maybe at the expense of EU member states that would not join them).

4.6. Trade in Services

The EU-Israel association agreement does not establish a free trade area in services between the parties, although trade in services accounts for more than 70% of their respective GDP. For many years, the EU refrained establishing a free trade area in services with Israel, justifying this position by other priorities and subjecting it to positive political developments in the Mediterranean region. The emergence of an initiative to establish a comprehensive international agreement on services that would complement WTO's General Agreement on Trade in Services (GATS) from 1995 – the TISA[60] – seemed to turn such a bilateral arrangement unnecessary. However, the failure to complete it re-focuses attention on bilateral arrangements. Scenarios 1,3 and 5 aiming at enhancing EU growth may imply advancement in this direction, towards a comprehensive bilateral agreement that would cover all, or most services sectors, including public services such as: aviation and maritime transport, telecommunication, water, transport and

[60] European Commission. Trade in Services Agreement (TISA). 2018. [online]. Available at: http://ec.europa.eu/trade/policy/in-focus/tisa/

energy infrastructure, as well as private services such as legal services, medical services, educational services, consulting, engineering. Such an agreement would abolish current barriers to trade in most or all services, allowing for free mutual flow of them between Israel and the EU.

Scenario 2, explicitly aiming at enhancing financial markets' integration, may open opportunities for further collaboration between the EU and Israel on financial services. Such collaboration could be facilitated if Israel approximates its financial regulation to that of the EU. However such a step may turn out to be counter-productive in terms of Israel's financial trade relations with other partners, such as the United States.

At the same time, scenario 2 explicitly implies for escalation in terms of personal mobility,[61] which is crucial for smooth flow of services and service suppliers, particularly in GATS Modes 2 (consumption abroad) 3 (commercial presence) and 4 (presence of natural persons).[62]

Scenario 4 suggests focusing on projects involving specific services sectors such as research expertise and consulting, particularly in decarbonization and digitation, telecoms, hi-tech, space, energy security, the management of borders and defense.

For Israel, holding a comparative advantage in many of these industries, choosing this scenario may imply an improvement compared to the current situation, but a choice of any scenario implying a more comprehensive approach towards the enhancement of all – or most – services sectors is nevertheless preferred, since it might trigger development of Israeli industries in other services sectors.

4.7. Research and Development

Research and development, as well as hi-tech industries and ventures in digital, transport, space and energy industries, in which Israel has a comparative advantage, are well known growth generators. Thus, EU's continuous strive towards enhancing growth and jobs (mentioned particularly in scenarios 1,3,5 with focus

[61] Recently, human mobility in the EU is already under the risk of erosion due to the Brexit: STEHLIK, Vaclav. Brexit, EEA and the Free Movement of Workers: Structural Considerations on Flexibility. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 145-156. Such erosion may grow if the Brexit is followed by other EU member states.

[62] The General Agreement on Trade in Services (GATS) is a World Trade Organization (WTO) agreement in force since 1995 (see full text at: www.wto.org). The EU and Israel are among its many signatories. In Art. 2 it defines four modes for supplying services globally. Mode 1 – cross border supply, does not involve crossing a border by service suppliers and thus would not be affected by such scenario, unlike the other three modes mentioned above.

on specific fields in scenario 4) is encouraging for these (and other) Israeli industries, as well as for Israeli researchers and entrepreneurs.

In 1996 Israel became the first non-European country to join the European Framework Programs. From the 4th Framework Program to the current Horizon 2020 Israel's participation continuously grows. Hitherto these programs financed 3120 projects Israel has been involved in (with the participation of 4700 Israeli researchers), valued at over 19 billion Euros.[63]

Participation in such European research programs implies opportunities for Israeli researchers from academia, industry, the public sector and government to establish scientific and professional collaboration with European excellent colleagues as well as funding, networking, and exposure to European markets. Thus, this collaboration is inevitable for Israeli research and development.

The mutual interest Israel and the EU have in this collaboration seems to overpower political differences between them. Consequently, the EU encourages it, despite the political stagnation in the Mediterranean region and constant Palestinian and BDS's pressures.

4.8. Security and Defense

In terms of trade, security industries and broad know-how regarding anti-terrorism, border management and control form other fields of Israeli expertise, which may reinforce European efforts specified particularly in scenarios 1, 4 and 5.

Scenario 2, foreseeing revert to full national responsibility over these issues, may still suggest cooperation between Israeli experts and national authorities in different EU countries, as internal border controls strive to be more systematic, but such opportunities would be more sporadic and distributive in nature. Personal movement difficulties described by this scenario may turn the supply of this service (like other services) more difficult in administrative terms.

Scenario 3, foreseeing a combination of common EU efforts and enhanced national efforts, may imply particular advantages to Israeli security and defense experts in the short and medium terms, allowing them to offer their services both at EU and national levels.

In global political terms, Israel has a security and defense interest in a stronger Europe, that has substantial weight in international security forums such as the UN security council[64] and NATO, and is capable of guaranteeing political

[63] ISERD. *20 Years of Israel-EU Cooperation.* 2018. [online]. Available at: http://www.iserd.org.il/

[64] See a recent example of the power of UN Security Council with regard to international criminal accusations in: LENTNER, Gabriel. The Role of the UN Security Council vis-à-vis the International Criminal Court-Resolution 1970 (2011) and its challenges to International Criminal Justice. *International and Comparative Law Review*, 2014, vol. 14, no. 2, pp. 7-23. This issue

stabilization of its Central and Eastern partners, as well as of neighbors such as Ukraine[65] and Balkan states, shielding them against possible Russian and other political threats.

4.9. Israel and the EEA Countries

The EEA (European Economic Area)[66] is an alliance between the EU and Norway, Iceland and Lichtenstein, three countries that committed themselves to automatic adoption of EU's economic law in order to enjoy the economic benefits of creating an economic area with EU countries, without joining the EU. Israel has a free trade area agreement with these countries.[67] The EEA countries have no say in the decision- making process taking place in the EU regarding its future design and functioning. Nevertheless, they will have to adjust their laws and practice to any change in EU's economic law emanating from the choice made by EU member states. Such adjustments may substantially change the nature of their economies, implying a respective, higher or lower degree of market integration between their economies and the EU market. Any such change may bear indirect implications for their trade relations with Israel. Thus, for example, if EU member states decide to opt for scenario 2 or 4, implying partial or complete withdrawal of EU responsibility from certain sectors, this would mean that EEA countries – like EU member states – would resume independent responsibility to regulate these sectors at the national level. Such changes may affect the terms of trade in these sectors between Israel and EEA countries, potentially undermining the synergy between EEA markets and the EU market in these sectors, that Israeli traders enjoyed before the change.

is of particular importance for Israel, where constant attempts are made as part of the Palestinian global campaign, to accuse Israeli soldiers and ex-soldiers for conducting war crimes in international tribunals.

65 E.g. PETROV, Roman. EU Association Agreements with Ukraine, Moldova and Georgia: New Instruments of Integration without Membership. *European Studies*, 2015, vol. 2, pp. 29-38; FIALKOVSKA, Anastasiia. Basic Aspects of Approximation of Ukrainian Insolvency and Restructuring Law with European Union Legislation. *European Studies*, 2015, vol. 2, pp. 197-211; KIKHAIA, Iuliana. Approximation of the Ukraine Competition Law with the EU Law. *European Studies*, 2015, vol. 2, pp. 212-224.

66 For details see: http://www.efta.int/eea

67 Israel's free trade area agreement is with EFTA, including the EEA countries and Switzerland, which did not join the EEA. The full text of the agreement is available at: http://www.efta.int/free-trade/free-trade-agreements/israel

5. Conclusion

In September 13 2017, six months after the initiation of the White Paper and 2000 events for discussing the scenarios it suggests, the President of the European Commission, Jean Claude Juncker, in the State of the Union Address, [68] pulls the rabbit out of his hat, presenting his view or 'scenario six'. Reiterating that 'the future cannot remain a scenario, a sketch, an idea among others' he strongly advocates for comprehensively strengthening integration, to include a stronger single market, a stronger economic and monetary union, a European minister of Economy and finance, a European intelligence unit and a European public prosecutor, a European defense union.

Although his message mentions the broad public discourse triggered by the White Paper, it does not refer at any point to any essential conclusions such discourse may have yielded.

Indeed, in the bottom line his message seems to ignore the opinion of many EU citizens, who may not like the fifth (and 'sixth') scenario, implying a gradually increasing sense of 'democratic deficit',[69] decreasing citizen's access to decision making processes, combined with erosion of state authorities, discretion and unique comparative advantages.

Unlike many EU citizens sharing this feeling, trade partners such as Israel may find the scenarios aiming at enhanced European integration appealing in terms of trade, since their exporters, importers and firms established in the EU may reap the benefits of a full 'single market', including uniform rules, administrative measures and enforcement, while their negotiators may find it easier to negotiate with a large partner speaking in one voice.

The picture is less clear, however, from the political aspect. While Israel may profit from global and regional political stabilization, it sometimes suffers adverse effects caused by EU reaction to Palestinian and BDS political pressure. To that extent, variety of opinions and positions by different EU countries serves Israel better than a uniform position surrendering these pressures.

In the near future, the EU is expected to continue the political search for an agreed way forward. Israel, like other EU trade and strategic partners that have no say in this discourse, should observe this process with great interest, calculating carefully its strategy for any optional future development.

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[68] JUNCKER, Jean-Claude. *State of the Union Address, 2017*. [online]. Available at: https://ec.europa.eu/commission/state-union-2017_en; http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm

[69] BIFALLI, Claudia. "Democratic Deficit" in the European Union –Supranational Bodies and Democratic Legitimacy. Ideas for a Reflection. *European Studies*, 2016, vol. 3, pp. 239-260.

YOUNG RESEARCHERS PAPERS

European Union and coercive isomorphism: case study parental leave in post-communist countries versus founding members

Michaela Dénešová*

Summary: European Union has played significant role within the changes of national legislation of its member states. There are a lot of areas where we can find the huge influence of the European Union. This position could be interpreted as position of dominant institution, which has power to coerce other entities to be more and more similar. The main aim of this article is to study how much the European Union has played role of institution which influence coercive isomorphism between its member states in concrete area. One of the important issue of the agenda of the European Union is gender equality. To study gender equality as a concept is hard because of huge amount of issues and tasks it includes. Because of that I have decided to look on the one issue, which correct setting could play important role in achieving gender equality – parental leave. This article is focusing on the role of the of the European Union in creation of parental leave legislation within the selected member states and is trying to identify whether the European Union has played role of institution which has created coercive isomorphism in the selected area.

Keywords: parental leave, European Union, isomorphism, coercive isomorphism, Slovakia, Germany, Poland, Netherlands, Czech Republic, Italy

1. Introduction

The aim of this paper is to focus on development of the concrete legislation within the selected member states of the European Union in context of institutional isomorphism and institutional isomorphic change. The European Union is in this case perceived as an institution, which has played significant role within the creation and development of a lot of national policies and legislation in its member states. This process has called the Europeanization. The European Union has created basic standards, which need to be achieved, but member states usually have possibility to

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decide, how they will deal with these issues. The final form of for example policies or laws within the member states of the European Union should not be similar necessary within the full range of concrete area. 'States and other organisations follow and imitate each other but that there is room for domestic interpretation, editing and translation. Institutional isomorphism does not necessarily result in similarity in every aspect of policy, legal, organisational changes etc.'[1]

The concepts of institutional isomorphism or institutional isomorphic changes was introduced by DiMaggio and Powell (1983) to bring other explanation for homogeneity of institutions. There are three mechanisms of institutional isomorphic change, coercive, mimetic and normative isomorphism.

This article will deal with the coercive one. Coercive isomorphism, or isomorphism achieved through power relationship (there is an entity, which has kind of power over other entity) is 'the result of more subtle and indirect processes, such as the extension of the legal regulations that a state is obliged to follow.'[2] The example for this is 'the expansion of lawmaking competence from the level of nation states to that of the European Union.'[3] When we are talking about the European Union and its power to influence member states or potential member states, we are dealing with coercive isomorphism. From the legal point of view, the European Union has several options how to achieve similarity between member states in a concrete area. To achieved full homogeneity in an area, there is possibility of the Council of the European Union or/and the European Parliament to adopt a regulation. The content of a regulation must be applied across the whole European Union without any options to decide about its implementation.[4] Better for study of the isomorphism are directives. The main goal of the directives is to achieve similar or the same results in an area. A directive consists of concrete goals, which need to be achieved and the way how to achieve this is upon a decision of concrete member state.[5]

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1 MŐRTH, Ulrike, BRITZ, Malena. *European Integration as Organising – Alternative Approaches to the Study of European Politics*. Stockholm Center for Organizational Research, 2002, p. 25. [online] available at: http://www.score.su.se/polopoly_fs/1.26591.1320939800!/20021.pdf

2 DIMAGGIO, Paul, POWELL, Walter. The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields. 1983. In: BECKERT, Jens. Institutional Isomorphism Revisited: Convergence and Divergence in Institutional Change. *Sociological Theory,* 2010, vol. 28, no. 2, American Sociological Association, p. 153. [online] Available at: http://www.mpi-fg-koeln.mpg.de/pu/mpifg_ja/ST_28_2010_Beckert.pdf

3 BECKERT, Jens. Institutional Isomorphism Revisited: Convergence and Divergence in Institutional Change. *Sociological Theory,* 2010, vol. 28, no. 2, American Sociological Association, p. 153. [online] Available at: http://www.mpi-fg-koeln.mpg.de/pu/mpifg_ja/ST_28_2010_Beckert.pdf

4 EUROPEN UNION. Regulations, Directives and other acts. europa.eu. [online] available at: https://europa.eu/european-union/eu-law/legal-acts_en#regulations

5 NOVÁČKOVÁ, Daniela, (et.al). *Európske právo: materiály a texty*. Bratislava, Slovenská republika: Euroinion, 1997.

Gender equality has been one of the key value within the structures of the European Union. The most important aspect of this area of equality has been the economic one and strongly interconnected with market. The first mention about gender equality is from the Treaty of Rome (1957), which introduced the equal payment for equal work without focus on gender.[6] However, dominant position of this issue in the values of the European Union has not brought huge progress in the area.[7] To study gender equality whole as a policy is hard. The reason why it is so is because 'gender equality is a concept with transformative connotations, covering women's empowerment, nondiscrimination and equal rights regardless of gender. It embraces a multi-dimensional and intersectional view on inequalities between women and men, girls and boys. It points towards change of gender-based power relations in all sectors of society, private as well as public. '[8] With respect to that I have decided to deal with one aspect, which development and proper implementation contribute to the achieving of gender equality within the European Union – the parental leave and more inclusive role of men within the childcare. This more inclusive role of men within the childcare can bring a lot of advantages and support progress within the gender equality especially through reducing of job market inequalities as well as gender pay gap; can contribute to better pensions of women and better division between unpaid work at home and paid work in employment.[9]

This paper will focus on how concrete member states have dealt with selected legal measure and how and when they implemented it in to their national legislations. The aim is to find reasons for the implementation within the nation states and whether the European Union and its legislation have played significant role within the change of the national legislation. The hypothesis is, that legal changes in selected post-communist states, which became members of the European Union in 2004, and their legal system, were more influenced by the Directive 2010/18/EU in comparison to selected countries from the group of founding countries of the European Union. The legal system of founding countries should be similar to the selected Directive and they were not coerced to change it so much or they did not change it at all. The purpose of the paper is to

6 EUROPEAN COMMISSION: Gender Equality. Justice. [online] available at: http://ec.europa.eu/justice/gender-equality/

7 MAYCOCK, Joanna. *Gender equality is a founding value of the EU, so why the lack of progress?*. The Guardian, 2015. [online] available at: https://www.theguardian.com/global-development/2015/jun/27/gender-equality-founding-value-eu-so-why-lack-of-progress

8 SIDA. Hot issue: Gender Equality and Gender Equity. 2016. [online] available at: http://www.sida.se/contentassets/3a820dbd152f4fca98bacde8a8101e15/brief-hot-issue-equity-equality.pdf

9 VAN BELLE, Janna. *Paternity and parental leave policies across the European Union*. Santa Monica, CA: RAND Corporation, 2016. [online] available at: http://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1666/RAND_RR1666.pdf

find out how much the European Union coerced states to change their legislation within concrete area.

The first part of the article deals with the theory of isomorphism with direct focus on coercive isomorphism. The following part will bring up content of selected legal measure and the last part will consist of information about concrete member states and will show whether the European Union is responsible for change within the legislation dealing with parental leave in each country. For the purposes of this paper I decided to use three countries of Visegrad group – Slovak republic, Czech Republic and Poland as post-communist countries which all became members in 2004, and Germany, Italy and Netherlands as three of founding counties of the European Union.

2. Isomorphic change and coercive isomorphism

As has been already mentioned, the institutional isomorphism and institutional isomorphic change have been introduced by DiMaggio and Powell in 1983.[10] The whole concept of isomorphism is dealing with the institutions and their acting in relations to other institutions, how much and because of what they are, more or less, similar to each other. There are different reasons behind, their similarity is influenced by the environment they exist, requirements for the technical efficiency as well as expectations of society. [11]

This behaviour of institution and this isomorphism not only change them but also could be limited with respect to development of their ' […] structures, processes, culture, norms, and, in the long run, its organizational goals […] change its course or develop new structures in the future. '[12] Isomorphic change is a process, when organizations are influenced by different elements, which has possibility to somehow modify the organization in order to for example make them more successful. DiMaggio and Powell identified also three kinds of isomorphism to identify reasons for isomorphic change.

The first one is mimetic, where one institution represents model for the other institutions. This process is usually influenced by negative development in an

[10] DIMAGGIO, Paul, POWELL, Walter. The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields. *American Sociological Review*, 1983, Vol. 48, No. 2, pp. 147-160.

[11] BOXENBAUM, Eva, JONSSON, Stefan. *Isomorphism, Diffsion and Decoupling.* In: GREENWOOD, Royston, OLIVER, Christine, SAHLIN, Kerstin, SUDDABY, Roy (eds.) *The SAGE Book of Organizational Institutionalism.* Sage Publications, 2008, pp. 78

[12] CARAVELLA, Kristi. *Mimetic, Coercive, and Normative Influences in Institutionalization of Organizational Practices: The Case of Distance Learning in the Higher Education.* A Dissertation, 2011, p. 3.

organization, which try to find solution in the success of the other organization (use more successful organization as an inspiration).[13] Problem of this could arise at the moment when there will be so high level of homogeneity between organizations, that there will be no more space for inspiration.

The second one, normative isomorphism is caused by professionals, who working within the same area. There are limited generators (schools or other educational institutions which) of those, who are skilled within a profession. These generators or sources of professionals educate these people in the same way and insert concrete norms and way of acting in to their students. Students become professionals and they are hired by organizations. It leads to fact, that in several organizations are professionals with the same education, similar way of thinking and acting. The second reason for isomorphism is networking of professionals as well as their moving between organizations, how they socialized in between and it once again lead towards homogeneity within nor only the behaviour of them as individuals, but also how they act within organization and at the end it causes homogeneity of organizations in general.[14]

The last kind of isomorphic process is the most important for the purpose of this paper. Coercive isomorphism is "a game" where somebody or something more powerful decide about the less one and shape its structures, behaviour and functioning. State or government is in the position with power, and have right to set the rules of the game. If organizations want to play, they will respect the rules. Not only state but also dominant organizations, which have power over others (for example they are in position of donors) have right to set the rules. This acceptance of general rules leads towards homogeneity of organizations with respect to same aspects of their specifications.[15] How much the European Union was in the role of institution, which influenced coercive isomorphism within the area of parental leave will be examined in further parts of this article.

[13] KOURTIKAKIS, Konstantinos. *SOMORPHIC PRESSURES AND THE EUROPEAN UNION The Transfer of Public Accountability Organizations to the Supranational Level.* Dissertation, 2007, p.11. [online] available at: http://d-scholarship.pitt.edu/7288/1/Kourtikakis_Konstantinos_April_2007.pdf

[14] Ibid. p. 12

[15] DIMAGGIO, Paul, POWELL, Walter. The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields. *American Sociological Review*, 1983, Vol. 48, No. 2, pp. 146-160.

3. Content of the selected legal measures

The parental leave regulation and its settings, according to the European Union, can be find in the Council Directive 2010/18/EU[16], through which was implemented and achieved legal effect the Revised Agreement between European social partners on parental leave. This new directive follows Directive 96/34/EC, entered in to force on 07.04. 2010 and states had to incorporated its goals in to national legislation till 08.03.2012. 'It represents a means of better reconciling workers' professional and parental responsibilities and of promoting equal treatment between men and women. '[17] I decided to deal with this Directive and not the previous one (Directive 96/34/EC), because at the time of its adoption, selected post-communist states were not members of the European Union. At the time of the selected Directive, all countries have been members for more than five years.

The key points are that this Directive 2010/18/EU has brought right for both, mother and father of a child, to get parental leave at least for four months (up to 8 years of a child) for each and should be based on non-transferable basis. The European Union encourages states to create at least one month on this non-transferable basis to achieve more equality between both parents (Clause no. 2, point. 1-2 of the Council Directive 2010/18/EU). The incorporation of this Directive should be through law as well as by Collective agreements, which could include possibility of parental leave for any kind of employment contract (part-time, full-time…). This law could also include justifiable reasons for rejecting of the parental leave by an employer (Clause 3, point 1 of the Council Directive 2010/18/EU), 'shall establish notice periods to be given by the worker to the employer when exercising the right to parental leave, specifying the beginning and the end of the period of leave. Member States and/or social partners shall have regard to the interests of workers and of employers in specifying the length of such notice. ' (Clause 3, point 2 of the Council Directive 2010/18/EU) as well as possibility of changes with respect to standards of parental leave in case of special needs – for example disability or health conditions of a child (Clause 3, point 3 of the Council Directive 2010/18/EU). This legislation about parental leave is applied also in case of adoption of a child and these cases should also be assessed in the light of the specifications, with which they are connected (Clause 4, point 1 of the

[16] Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [online] available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32010L0018

[17] European Union, http://eur-lex.europa.eu/. Parental leave. 1998–2017. [online] available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Aem0031

Council Directive 2010/18/EU). The Clauses no. 5 and 6 focus on the situation connected with return to the work after parental leave. First of all, this process must be without any kind of discrimination, member state should create that kind of conditions, which will protect workers against less beneficial treatment from the side of employer or dismissal from work because of the willing of workers to apply their right for the parental leave. Workers should have right to get back to the same work position as before and if it is not possible, then to a position which is in accordance to their employment contract (should be similar or equivalent to previous one), they have right for the same conditions or rights as before the start of the parental leave as well as for any kind of rights or benefits, which have been created during the time of their parental leave within the law or internal collective agreements. There should be possibility to adjust the working time of a worker in case of his/her ask for it for the purpose of better work-life family-life balance. This measure should be in favour of both, employer as well as employee (Clause 5, points 1-5, Clause 6, points 1-2 of the Council Directive 2010/18/EU). There should be right for workers to get special 'time off from work, [...] on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable' and there should be stated the limitation as well for this right of a worker (Clause 7, point 1-2 of the Council Directive 2010/18/EU).

4. Selected states and their interpretation of the Council Directive 2010/18/EU

Within this part of the paper I would like to look on the concrete interpretation of selected member states of the European Union with respect to the Council Directive 2010/18/EU. The selected states are Slovak Republic, Czech Republic, Germany and the Netherlands. Through their comparison with minimal standards, which were created by the European Union in this Council Directive 2010/18/EU, I would like to check whether selected countries and their legal system were influenced by the coercive isomorphic change. I will look on the changes, which these countries need to make to fulfil criteria set by the Directive 2010/18/EU. As Beckert claimed, and I have already mentioned, the fact that the European Union has right to influence the law of member states at national level is form of coercive institutional isomorphism[18]. Question about how much had to

[18] BECKERT, Jens. Institutional Isomorphism Revisited: Convergence and Divergence in Institutional Change. *Sociological Theory,* 2010, vol. 28, no. 2, American Sociological Association, p. 153. [online] Available at: http://www.mpi-fg-koeln.mpg.de/pu/mpifg_ja/ST_28_2010_Beckert.pdf

change selected countries their legal system in this area with respect to selected Directive, and whether homogeneity in this case is result of coerced changes will be answer in following parts of the article.

4.1. Slovak Republic

Slovakia is one of those countries, which had to change the whole legislation about the parental leave to transpose the Council Directive 2010/18/EU.[19] This Directive was implemented mostly through amendment of the Labour Code. There was transposition of the Directive 2010/18/EU with respect to its clauses in to a lot of further legislative acts in Slovakia such as Act on Social Insurance and several additional acts dealing with work in public services, police, in fire departments, in army, Act on Custom Officers or Act on Parental Allowance.[20] All together there was amendment of ten legal acts.[21] Within the Labour Code there was big amendment especially with respect to possibility of an employee to get the same workplace or similar to that before the parental leave and was created the obligation for an employee to let know to employer in writing about the date, when he/she starts the parental leave as well as the expected end day.[22]

The changes were done in similar way with respect to majority of changed acts, mostly in order to fulfil minimal criteria created by the Directive. Basically, all of the clauses of the Directive 2010/18/EU we can find in aforementioned acts and as an example what kind of changes there were I choose the Act No. 346/2005 Coll. on the state service of professional soldiers in the Armed Forces of the Slovak Republic. Within the Reasoning Report about the changes in a legislation (*Dôvodová správa*) Slovakia referring directly to the Directive 2010/18/EU

[19] PRPIC, Martina. Maternity, paternity and parental leave in the EU. Briefing, European Parliament. 2017 [online] available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599323/EPRS_BRI(2017)599323_EN.pdf

[20] EPI.SK. Smernica Rady 2010/18/EÚ z 8. marca 2010, ktorou sa vykonáva revidovaná Rámcová dohoda o rodičovskej dovolenke uzavretá medzi BUSINESSEUROPE, UEAPME, CEEP a ETUC a zrušuje smernica 96/34/ES – Implementácia v predpisoch Zbierky zákonov. [online] available at: http://www.epi.sk/eurlex-rule/32010L0018.htm

[21] MAGUROVÁ, Zuzana. Slovakia. In: PALMA RAMAHLO, Maria, FOUBERT, Peter, BURRI, Susanne. *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries. The European Commission*. Luxembourg: Publications Office of the European Union, 2014. [online] available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/parental_leave_report_final_en.pdf

[22] NAJPRAVO.SK (n.d.): Dôvodová správa k novele Zákonníka práce z 8.2.2011. [pdf], [online] available at: https://www.google.sk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwj8oJ7m29jUAhVHQJoKHYZWAEoQFggnMAE&url=http%3A%2F%2Fwww.najpravo.sk%2Fcms%2FcmsLink.php%3FID%3D2188&usg=AFQjCNFiVj365svQvWTJCheqRhIqh10bw

as a reason for these changes. One of important change was, that soldier after parental leave will not be part of military backup for temporary unclassified professional soldiers, but has right to go back to his/her previous position. A soldier during parental leave will have right to get financial contribution for housing as well.[23] There was no financial contribution for housing during parental leave of a soldier, because this soldier was moved to unpaid military backup.[24] It is visible, that the Directive 2010/18/EU had significant influence on the changes in legislation in the area of parental leave and change the way of functioning in different aspects. These changes were not voluntary, they were coerced.

4.2. Czech Republic

Czech Republic is between those countries, which did not have to change their legislation because of the Directive 2010/18/EU.[25] According to the *Country report: Gender equality – How are EU rules transposed into national law?* prepared by Kristina Koldiská[26], there were no explicit changes because of the Directive. The Labour Code no. 262/2006 and Act No. 117/1995 Coll. on state social support included at that time at least minimal standards, which were created by the Directive. For example, right to get back the same work position or similar one after the end of parental leave has been part of the Labour Code since the year 2007. The same version of the Labour Code (valid since the year 2007) include protection of an employee against dismissal during the parental leave as well.[27] (Act no. 262/2006)

There is no evidence, that changes with respect to parental leave within the Czech Republic, are results of the Directive 2010/18/EU. In this case, it is not possible to say, that the legislation of Czech Republic on the parental leave has been changed coercively, and these changes are not result of coercive isomorphism from the side of the European Union and the Directive 2010/18/EU.

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[23] RADIČOVÁ, Iveta, GALKO, Ľubomír. Dôvodová správa. 2011[online] available at: http://www.rokovania.sk/html/m_Mater-Dokum-133730.html

[24] TASR. Vojaci na rodičovskej dovolenke dostanú príspevok na bývanie. Spravy.pravda, 2011. [online] available at: https://spravy.pravda.sk/domace/clanok/171756-vojaci-na-rodicovskej-dovolenke-dostanu-prispevok-na-byvanie/

[25] PRPIC, Martina. Maternity, paternity and parental leave in the EU. Briefing, European Parliament. 2017 [online] available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599323/EPRS_BRI(2017)599323_EN.pdf

[26] KOLDISKÁ, Kristina. Country report Gender equality – How are EU rules transposed into national law? – Czech Republic. European Commission, 2015. [online] available at: http://ec.europa.eu/justice/gender-equality/files/ge_country_reports_d1/2015-cz-country_report_ge_final.pdf

[27] Act no. 262/2006 – The Labour Code of Czech Republic (2006, valid since 2007). [online] available at: https://www.zakonyprolidi.cz/cs/2006-262/zneni-0

4.3. Poland

With respect to Poland, they amended labour code regarding maternal or paternal leave in year 2013. [28] This period is after the adoption of the Directive but the important information is, that parental leave Directive was major reason for these changes when we are talking about Poland. These changes were mostly about better position of fathers and to achieve lower dominance of women within the issue of rights of parents. There were few amendments also before, but major changes have been introduced by the amendment in 2013. [29] Even though we are talking about the most important changes, these changes were not in the scale of full change of national law. Within the table with comparison of the Directive and amendments within the national law, there are a lot of parts of the Directive, which have already been part of national legislation of Poland or provisions of the Directive were on the voluntarily base and there was no obligation to implement it. There was not necessity to implement sixteen of thirty-two articles or clauses.[30] This fact includes Poland between those countries, which needed to make only partial changes and not implement Directive through completely new law.

4.4. Germany

Germany, as well as Czech Republic, is in the group of those states, which did not have to change their legislation to be in line with the Council Directive 2010/18/EU. There was no formal transposition, because the legislation in Germany was recognized in accordance with the Directive.[31] This position of the country was caused by the adoption of the new legislation relatively short period before the adoption of the Directive 2010/18/EU. 'In January 2007, the Federal Law on Parental Allowance and Parental Leave entered into force. The Law was amended in 2012 and 2014, but although it covers the core requirements of the directive, it

[28] European Network of legal experts in the field of labour law. ANNUAL FLASH REPORT – VC/2012/1232 – SI2.641178. pp. 32-33. [online] available at: http://www.labourlawnetwork.eu/frontend/file.php?id=681

[29] SKUPIEŃ, Dagmara, ŁAGA, Maciej, PISARCZYK, Łukasz. Polish labour law: the impact of the economic crisis and demographic problems. *Hungarian Labour Law E-Journal,* 2016, Vol. 1. [online] available at: http://hllj.hu/letolt/2016_1_a/A_01_Skupien_Laga_Pysarczyk_hllj_2016_1.pdf

[30] SEJM RZECZYPOSPOLITEJ POLSKIEJ. Druk nr. 909 – Tabela Zbieżności. 2012, pp. 1-17. [online] available at: http://orka.sejm.gov.pl/Druki7ka.nsf/0/46B9AEDDC6193074C1257ABD005294AF/%24File/909.pdf

[31] PRPIC, Martina.: Maternity, paternity and parental leave in the EU. Briefing, European Parliament. 2017 [online] available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599323/EPRS_BRI(2017)599323_EN.pdf

does not provide for a direct reference to the EU acquis. '[32] This law has brought for example moths of parental leave exclusively for fathers and this step has brought also increase interest of fathers in to childcare.[33] The provisions of this Federal law are not possible to limit by for example collective agreements within the employment. There have been complaints about the incomplete transposition of the Directive 2010/18/EU in to national legislation but the government of Germany at that time stated, that the newly introduced national legislation is not only fully in line with the Directive, but it exceeded the minimal standards created by it.[34]

In the case of Germany, it is not possible to say, that changes within the selected legislation was influenced by the European Union and the Council Directive 2010/18/EU. Legislative in Germany, which were in accordance to provisions of the Directive was accepted years before the European legislation.

4.5. The Netherlands

The Netherlands had to change its legislation but there were necessary only small amendments. In this case once again it was necessary to amend the Act on Labour and Care, which 'implement the recast Parental Leave Directive (2010/18/EU). The main modification concerns the inclusion of a new provision, Article 4 (1) (b), which implements Clause 6 (1) Return to Work of the Framework Agreement that is given erga omnes effect by the Directive. ' [35] Except this amendment (right to ask for change in working hours through Working Time Act) there was one more major amendment. There was created prohibition to dismissed

[32] LEMBKE, Ulrike. *Country report Gender Equality How are EU rules transposed into national law? – Germany*. European Commission, 2016. [online] available at: http://ec.europa.eu/information_society/newsroom/image/document/2017-3/2016-de-country_report-ge_final_en_41876.pdf

[33] ALBRECHT, Clara, FICHTL, Anita, REDLER, Peter. Fathers in Charge? Parental Leave Policies for Fathers in Europe. *ifo DICE Report*, 2017, vol. 15, pp.49-51. [online] available at: https://www.cesifo-group.de/ifoHome/facts/DICE/Social-Policy/Family/Work-Family-Balance/DR-2017-1-alb-fi-red--par-leave-pol/fileBinary/DR-2017-1-alb-fi-red--par-leave.pol.pdf

[34] LEMBKE, Ulrike. Germany. In: PALMA RAMAHLO, Maria, FOUBERT, Peter., BURRI, Susanne. *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries. The European Commission*. Luxembourg: Publications Office of the European Union, 2014. [online] available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/parental_leave_report_final_en.pdf

[35] EUROPEAN LABOUR LAW NETWORK. Implementation of Parental Leave Directive (2010/18/EU) (05-12-2011). 2008–2017. [online] available at: http://www.labourlawnetwork.eu/national%3Cbr%3Elabour_law/national_legislation/legislative_developments/prm/109/v__detail/id__1689/category__25/index.html

a person because he or she ask for parental leave. There is also prohibition of less favourable behaviour of an employer based on the ground that somebody asks for parental leave or decides to go on parental leave.[36]

It was the government of the Netherlands at that time, which claimed that the legislation in the Netherlands is in line with the Directive 2010/18/EU, and that was true. A lot of minimal standards have already been in the Netherlands at the time of adoption of the Directive 2010/18/EU. For example, The Netherlands created right for employee to ask for more flexible work time in year 2000.[37] Work and Care Act on 2001 has already included leave on grounds of force majeure such as death in family or poor health conditions of a child as well as provisions about parents who take care of their adoptive child.[38] However, there are few parts of legislation, which should not be in line with the Directive 2010/18/EU. According to Rikki Holtmaat, Independent Legal Consultant Expert in the Netherlands, '[t]here is no explicit legal right to return to the same or a comparable job after having taken parental leave...'[39] Government argued, that this protection of an employee is part of the right to not be discriminate or not to deal in less favourable way with an employee by the employer.[40]

The Netherlands were not coerced so much to change their legislative settings within the selected area. Even though those small amendments within the legislation are still results of the influence of the European Union as more powerful entity. This changes in the Netherlands are therefore still result of coercive mechanism of isomorphism.

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[36] PALMA RAMAHLO, Maria, FOUBERT, Peter., BURRI, Susanne. *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries. The European Commission*. Luxembourg: Publications Office of the European Union, 2014. [online] available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/parental_leave_report_final_en.pdf

[37] MOSS, Peter (eds). International Review of Leave Policies and Related Research 2011. *The international network on leave policies and research,* 2011. [online] available at: http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2011_annual_review.pdf

[38] PLANTENGA, Janneke, REMERY, Chantal. Parental leave in the Netherlands. *Reform Models. CESifo DICE Report*, 2009, Vol. 2, pp. 47-51 [online] available at: https://www.cesifo-group.de/pls/guestci/download/CESifo%20DICE%20Report%202009/CESifo%20DICE%20Report%202/2009/dicereport209-rm2.pdf

[39] HOLTMAAT, Rikki. The Netherlands. In: PALMA RAMAHLO, Maria, FOUBERT, Peter, BURRI, Susanne. *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries. The European Commission*. Luxembourg: Publications Office of the European Union, 2014, p. 167. [online] available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/parental_leave_report_final_en.pdf

[40] Ibid. pp.163-169.

4.6. Italy

Italy, as third of the selected founding member states of the European Union, has had a lot of provisions of national law in accordance to the Directive and system of parental leave within the Italy have provided more than the provisions of the Directive and law of the European Union.[41] Even though there was influence of the Directive on national law. The main, but still small, changes were made within the Decree No. 151/2001 through Act No. 228/2012. Direct influence of the Directive we can see within the rule, that there is necessity to provide concrete information from employee to employer about the exact start and the end of the parental leave.[42]

Italy has introduced only small changes to implement the Directive. There was a petition by Dario Messineo about insufficient implementation of the Directive. 'The petition claims that Italian Law No 92 of 28 June 2012 does not appropriately preserve the right to parental leave, in violation of Council Directive 2010/18/EU. In particular, the above legislation allegedly does not apply to civil servants, and is furthermore only a transitional framework.'[43] The European Commission declared this petition as admissible but at the end concluded there was no violation of the legislation of the European Union.[44] These circumstances of changes and implementation of the Directive include Italy between those member states of the European Union, which were not coerced to change whole national legislation to be in harmony with the provisions of the Directive. Italy made only few amendments and a big part of national legislation dealing with the parental leave has already exceeded the legislation of the European Union.

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41 RENGA, Simonetta. Italy. In: PALMA RAMAHLO, Maria, FOUBERT, Peter, BURRI, Susanne. *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries. The European Commission*. Luxembourg: Publications Office of the European Union, 2014, pp. 128-133. [online] available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/parental_leave_report_final_en.pdf

42 RENGA, Simonetta. Country report Gender equality How are EU rules transposed into national law?. *Luxembourg: Publications Office of the European Union,* 2016. [online] available at: http://ec.europa.eu/justice/gender-equality/files/ge_country_reports_d1/2015-it-country_report_ge_final.pdf

43 European Parliament – Committee on Petition. Notice to Members – Subject: Petition No 1997/2014 by Dario Messineo (Italian) on parental leave in Italy. 2015, p. 1. [online] available at: http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-571.565&format=PDF&language=EN&secondRef=01

44 Ibid. p. 3

5. Conclusion

As Beckert claimed, the possibility of the European Union to influence the legislation at national level is example for the coercive isomorphism.[45] There are no doubts, that the European Union is full of homogeneity between its member states especially within the national legislation of member states. It was one of the condition for becoming of a member of the European Union, to accept *acquis communautaire* and created the most similar conditions for all citizens of the European Union across the member states. However, the existence of homogeneity in an area does not necessary means that it has been created by coercive mechanisms. The legislation about parental leave is good example to prove it.

The hypothesis was, that post-communist states were coerced to change much more in their legislation in comparison to states, which are founding countries of the European Union. This hypothesis is not valid. It seems, that it does not matter, whether states are in the European Union since the beginning or only little bit more than five years[46]. As I showed, Czech Republic as post-communist country and Germany as one of the founding country were not coerced to change their legislation, because has already been in line with the Directive 2010/18/EU. The Netherlands were coerced to make just small changes, to fully transpose the Directive, as well as Poland – post-communist country and Italy – founding member of the European Union. Slovakia was coerced to change a lot and in several cases to create new form of legislation or change standards, which were used for a long time. Huge change within the Slovakia is example for coercive change, and partly also small changes in the Netherlands, Poland and Italy. None of these countries would change their legislation at that time, without pressure from the side of the European Union. However, as has been already mentioned, system of parental leave and legislation in Italy in several cases exceeded the minimum standards created by the Directive. Germany, as well as Czech Republic, introduced new legislation not long time before the Directive (2007 in Germany and 2006 in Czech Republic), but still without pressure from the side of the European Union.

The fact that in this case it does not matter, whether states is founding member or member, which entered the European Union later is proved also by following table by Martina Prpic. [47]

[45] BECKERT, Jens. Institutional Isomorphism Revisited: Convergence and Divergence in Institutional Change. *Sociological Theory,* 2010, vol. 28, no. 2, American Sociological Association, p. 153. [online] Available at: http://www.mpi-fg-koeln.mpg.de/pu/mpifg_ja/ST_28_2010_Beckert.pdf

[46] At the time of the approval of the Council Directive 2010/18/EU states which entered the European Union in 2004 have been members for more than 5 years.

[47] PRPIC, Martina.: Maternity, paternity and parental leave in the EU. Briefing, European Parliament. 2017 [online] available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599323/EPRS_BRI(2017)599323_EN.pdf

Transposition of Parental Leave Directive in Member States

Not formally transposed because legislation considered already compatible	Austria, Czech Republic, Finland, Germany, Latvia, Lithuania, Portugal, Spain, and Sweden
Formally transposed	Bulgaria, Cyprus, Estonia, Greece, Hungary, Ireland, Slovakia, and Slovenia
Small amendments necessary	Belgium, Croatia, Luxembourg, Malta, Romania, United Kingdom, Denmark, Italy, the Netherlands, France, and Poland

Source: PRPIC, Martina.: Maternity, paternity and parental leave in the EU. Briefing, European Parliament. 2017, p. 6.

It is possible to find post-communist countries in all three groups. First one, which did not have to change the legislation at all, second which had to change a lot and last which did just small changes. Interesting could be fact, that none of founding members is in the group, which had to change the legislation a lot but majority of them is in group with small amendments. However, these small amendments were coerced from the side of the European Union and therefore the homogeneity within these amendments is also result of mechanism of coercive isomorphism. It would be interesting to find out, what caused homogeneity within the first group of states, but now is possible to say that it was not caused by mechanism of coercive isomorphism. Even though not all changes in the area within all member states have been coerced by the European Union, there is significant role of the Directive, through which the member states 'achieved parental leave systems to which fathers are entitled'[48], what could increase level of gender equality in the member states of the European Union.

[48] EUROFOUND. *Promoting uptake of parental and paternity leave among fathers in the European Union*, Luxembourg: Publications Office of the European Union, 2015.p.10. [online] available at: https://www.ucm.es/data/cont/docs/85-2016-04-20-Promoting%20uptake%20of%20parental%20and%20paternity%20leave.pdf

General Issues of Post-Brexit EU Law

Lilla Nóra Kiss*

Summary: The issue of the United Kingdom's (hereinafter referred to as: UK) exit from the European Union (the so-called Brexit) means a turning point both in the history of the European integration and also of the United Kingdom. Moreover, Brexit results in the changes of both legal systems. As European Union (hereinafter referred to as: EU, Union) affects national legal systems of the member states via its legal acts, and the rest of the member states have continental legal systems, the withdrawal of the United Kingdom from this supranational international organization necessarily causes some changes of British law. British legal system − based on common law traditions − also took impacts on legal institutions and Union legal acts which may change after the exit of the UK. The paper highlights the UK's general impact on EU policies, having a regard to some special fields of harmonization as well.

Keywords: Brexit, withdrawal of a member state, Article 50 TEU, British impact on EU law

1. Introduction

United Kingdom has always fitted uneasily into the EU's framework. In the very beginning, shortly after the European Economic Community (hereinafter referred to as: EEC) was established in 1957, the United Kingdom applied to join it in 1962. However, France vetoed its application. In 1968, British prime minister, *Harold Wilson*[1] submitted a new application for accession, but this also failed due to *Charles de Gaulle*'s[2] political ambitions[3]. After a government change in

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1 James Harold Wilson was the prime minister (from Labour Party) between 1964-70 and 1974-76.

2 Charles de Gaulle was the French prime minister until 1969. The the first two British application was denied on behalf of the EEC, because of his veto.

3 For more information about relationship of De Gaulle and the United Kingdom, see: CHOCHIA, Archil; KERIKMÄE, Tanel and RAMIRO TROITIÑO, David. De Gaulle and the British Membership in the European Communities. In RAMIRO TROITIÑO, David; KERIKMÄE, Tanel; CHOCHIA, Archil (eds). *Brexit, History, Reasoning and Perspectives*, Springer, 2018, pp. 83-98.

the UK, *Edward Heath*[4] conservative prime minister renegotiated the accession at the beginning of the 1970's. Finally, after two denials, the third attempt of accession to the EEC was successful, and the UK became a member state of the EEC from 1 January 1973. Shortly before the accession, a *"clear position was taken in the United Kingdom, assuming that the United Kingdom could withdraw from the EC after a new referendum"*[5].

At this point, it is important to mention that the UK became a member state not just after it was rejected twice, but 16 years after the integration was founded. Thus the UK could join to fix framework, ready conditions and it's emphasis – in theory – was less than of the founding members. This became the part of the UK's mentality and attitude in the whole integration, sealed the British commitment in the process. Moreover, the support of the accession in the UK was never overwhelming. The oil crisis of the 1970's, the economic relapse strengthened the isolation rather than the integration. In 1974, Labour Party *Harold Wilson* became the prime minister again. The manifesto of the Labour Party included a referendum on EEC membership in case of winning the national elections. Thus, in 1975, the British hold the first Brexit-referendum, in which those, who wanted to remain in the EEC, won.[6]

From then, until the second Brexit-referendum in 2016, the question of the membership did not raise again. However, the British attitude towards the integration project was different from the continental one.[7] On the background of this process – among other reasons such as the abovementioned "hard-accession" – the different legal culture and thinking, lack of mutual trust in legal institutions may hide. During the decades of the British membership, *"population and political elites were more skeptical about whether a stronger or more centralized Europe was desirable"*[8]. Strong euro-skepticism, isolation and politics

[4] Sir Edward Richard George Heath British prime minister from Conservatives, between 1970-74. He was the leader of the Party between 1965-75.

[5] HARHOFF, Frederik. Greenland's withdrawal from the European Communities. *Common Market Law Review*, 1983, Vol. 20, p. 28.

[6] On 5 June, 1975, the turnout was 64,62%, where the 67,23% voted in favor of remaining in the EEC.

[7] That attitude could be understood also in relation to the British engagement in the process of introducing the right to withdraw as they supported the first version of the mechanism which ensured the complete freedom of withdrawal for the member state. For further information on the process and interpretation of the right to withdraw, see: CIRCOLO, Andrea; HAMUĽÁK, Ondrej; BLAŽO, Ondrej. Article 50 of the Treaty on European Union: How to Understand the 'Right' of the Member State to Withdraw the European Union? In RAMIRO TROITIÑO, David; KERIKMÄE, Tanel; CHOCHIA, Archil (eds). *Brexit, History, Reasoning and Perspectives*, Springer, 2018, p. 207.

[8] GELTER, Martin. Introduction, EU Law with the UK – EU Law without the UK. *Fordham International Law Journal,* 2017, vol. 40, issue 5, p. 1328

were supporting factors of Brexit, complemented with the specialties of the legal culture and economic system all together could lead to the current situation. The UK is unique in every aspect compared to other member states. Its uniqueness could be defined with a wide range of features from cars with the steering wheel on the right side; or constitutional monarchy as a form of government in a Unitarian state; market-making economic attitude; or to precedent-law traditions, etc. All of these could be hardly understood from a truly continental perspective.

The United Kingdom – therefore – kept its specialties within the EU as well. Due to their "thinking advanced" politics, they could link opt-outs to policies, such as Schengen-zone or criminal law cooperation instruments, Euro-zone, etc., which also took role in differentiating the levels of cooperation within Europe[9]. On the other hand, in other areas of integration, the United Kingdom was a driving force, influenced EU policies and participated in shaping EU law. These areas are mainly: financial law, insolvency law, company law, competition law, privacy law, equality law (broadly: anti-discrimination law), etc. Besides these areas, the UK was a force in cross-border environmental issues, and its special common law legal system affected the Luxembourg judicial style. This impact could remain after Brexit as the judicial system is already developed, and secondly, due to the remaining common law countries of the EU, such as Ireland and the mixed common-continental law Malta will still have their professionals in Luxembourg. In the following, I attempt to highlight the UK's general impact on EU policies first. Then, I summarize three special fields of EU Law, which evolved upon British (more broadly on common law) legal traditions.

2. The UK's influence on EU Law

The British impact on Union law could be separated into general and special issues. Common law and the continental law could affect each other back and forth. That is the general part of the British influence on integration law. Some areas of European cooperation, common policies or strategies could be affected by the British way of thinking, these are the special issues. As European Law is valid in all of the twenty-eight member states in general, member states had to introduce an opt-out system to avoid the accession to integration fields to what they did not find acceptable – without preventing the other member

[9] For further information about the differentiation and multi-level integration paradigm, see: KEEDUS, Liisi; CHOCHIA, Archil; KERIKMÄE, Tanel and RAMIRO TROITIÑO, David. The British Role in the Emergence of Multi-Speed Europe and Enhanced Cooperation. In RAMIRO TROITIÑO, David; KERIKMÄE, Tanel; CHOCHIA, Archil (eds). *Brexit, History, Reasoning and Perspectives*, Springer, 2018, pp. 187-198.

states to cooperate if they find it acceptable. Thus, occasionally, member states may negotiate certain opt-outs from legislation or treaties, meaning that they do not have to participate in certain policy areas. Currently, only four states have such opt-outs. Among that states, the UK has the most opt-outs, numerically, four. Denmark – involving Greenland, which country was the first exited member[10] of the European Communities in 1985 − has three opt-outs. Ireland has two opt-outs, and Poland has one opt-out. The system of opt-outs in an integration area could be understood as a way of isolation, or rather a lack of trust towards common policies.

The opt-outs for the UK could serve as a bastion of sovereignty against integration, and due to different legal traditions and legal thinking, the continental member states accepted the unique British way during the decades. Cardinal issues of criminal cooperation, such as Schengen Agreement, the Area of Freedom, Security and Justice miss the UK as a party, such as Economic and Monetary Union, or the EU Charter of Fundamental Rights. Integration process in those fields to which the UK did not accede may fasten after the withdrawal. Due to the opt-outs of the UK, British legal traditions could not affect the conditions and framework of cooperation on these areas. However, creating an extraordinary situation with an opt-out, keeping the member state far away from the integration base an attitude which could impact the area(s) indirectly. The message of opting-out might have strong political consequences – especially in cross-border criminal cooperation. Deciding to which common policy does the member state join may encourage other member states to select among desirable and less desirable policies which – in the long-run – may impact the future of the whole integration project. Therefore, opt-outs able to have an indirect effect on EU integration, while opt-ins are direct tools in shaping EU policies.

Common law traditions, precedent law, legal institutions, values, and interpretation necessarily complemented the continental ones which together structured the European legal thinking and its results: the EU Law. The UK linked opt-outs to the abovementioned cooperations on the field of public law, while it participates in many civil law cooperation instruments[11]. This highlights the British political attitude towards the common European public laws which necessarily decrease national powers – such as public prosecution, police forces and indirectly, the sovereignty and autonomy of national legislation. Private law cooperation is and was more acceptable than public law, as mainly private persons were and are involved in the relationships, and not the state institutions themselves.

[10] Greenland was the member of the EC ont he right of Denmark and not on its own right.

[11] Eg. Brussels I and II regulations

2.1. Post-Brexit EU company law

British voice in EU legislation might be sorely missed post-Brexit in some areas. According to *M. Gelter* and *A. Reif "legal harmonization on company law has possibly been the area of private law most affected by the EEC/EC/EU"* [12]. Shortly after the British accession, the UK behaved as a brake on company law harmonization. This time, German law was more influential. During the 1990s and 2000s EU company law became more focused on capital markets and in this process, the "*UK law became a model*"[13] for harmonization, especially on the fields of the board of directors and the issue of legal capital. However, according to *Gelter* and *Reif*, UK membership was irrelevant in this process as the UK did not take any measures to export its model in Continental Europe. Thus, post-Brexit capital markets will remain the same as it is now. The question is that the process would have been the same without the membership of the UK. Possibly not, as development on EU company laws needed a good example and the UK served it. On the other hand, the company law in the UK[14], especially that regulates the corporate citizenship may change post-Brexit, depending on the mode of being "divorced" from the EU (hard or soft), with an agreement or without an agreement, and in case of having a withdrawal treaty, depending on its content. Assuming a hard Brexit, the freedom of establishment as a governing principle will not operate, thus the "*UK loses its attraction as a destination for cross-border restructurings*"[15]. This seems to affect only the British internal situation. However, the economic consequences may reach the member states remaining in the EU, due to the spillover-effect. Therefore, it is worth to take into account the future of EU corporate law without the UK when it comes to the drafting of the withdrawal treaty.

2.2. European financial market without the UK

Due to a London-centered financial market, the United Kingdom became one of the main characters in shaping the European regulatory architecture. The

[12] GELTER, Martin, REIF M., Alexandra. What is Dead May Never Die: The UK's Influence on EU Company Law. *Fordham International Law Journal,* 2017, Vol. 40, No. 5, Available at: https://ssrn.com/abstract=3042828, p.1414.

[13] GELTER, M. Introduction, EU Law with the UK – EU Law without the UK. ibid. ab., p. 1330

[14] See ARMOUR John, FLEISCHER Holger, KNAPP Vanessa, WINNER Martin. Brexit and Corporate Citizenship. *ECGI Working Paper Series in Law*. European Corporate Governance Institute. Working Paper n. 340/2017, 2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897419

[15] SCHILLIG Michael. Corporate Law after Brexit. *King's Law Journal*, 2016, vol. 27., no. 3., pp. 431-441.

UK is a "*liberal market economy*", whereas continental European countries are classified as "*coordinated market economies*".[16] Besides this difference in economic approaches among the member states, discrepancies in the legal traditions were also main factors in the transformation of the financial market in the EU. The United Kingdom represented the "*liberal, market-orientation coalition that generally opposed a prescriptive, one-size-fits-all approach advocated by other member states – such as France, Spain, Italy, whereas Germany wavered between both positions*"[17]. This liberal approach lost its leading role after the financial crisis, but some effects of the British aspect could be realized, especially because of the practical reasons for having the City as a center for finances. According to *Niamh Moloney* "*After Brexit, UK financial regulation can be expected to become ever-more standardized and to bend more sharply toward uniformity […] and become less liberal, […] but radical changes are unlikely. […] The most uncertainty attaches to the EU's third country arrangements for access to the EU market. "*[18] Post-Brexit, the UK becomes a third country, and in case of a no-agreement on this issue, the link between the EU financial market and the UK could cease in theory. If we consider that "*between 2009 and 2014, financial services accounted for 44% of the total value of transactional work amongst the Top 50 City law firms in the UK"*[19] it can be stated that it is vital from the perspective of the UK to maintain this situation, after the Brexit, too. Therefore, during the transitional period, a supplementary agreement shall be made in this field.

2.3. Common law impact on the judicial style of the Court of Justice

The combination of common law and continental law style in the judicial process of the European Court of Justice (hereinafter referred to as: ECJ, Court) made the Court develop a very influential institution of the EU. The ECJ – during the decades – using its interpretative power strengthen its own position. On the one hand, it is a Court, on the other hand, its an authority, and on the third, it is like a legislator (via interpretation and the consequent follow-up its decisions).

[16] HALL Peter A., SOSKICE David. *An introduction to Varieties of Capitalism*. In: Varieties of Capitalism 1., (ed.: HALL Peter A., SOSKICE David), 2001, p. 16., available at: http://www.people.fas.harvard.edu/~phall/VofCIntro.pdf

[17] GELTER, M. Introduction, EU Law with the UK – EU Law without the UK. ibid. ab., p. 1329

[18] MOLONEY, Niamh. 'Bending to Uniformity': EU Financial Regulation With and Without the UK. *Fordham International Law Journal,* 2017, Vol. 40, No. 5, Article 2., p. 1371

[19] The Law Society. *Brexit and the Laws*, available at: https://www.lawsociety.org.uk/support-services/research-trends/documents/brexit-and-the-law

The common law impact is maybe the most important on this field. Initially, the Court was influenced by French impulses, but after the British accession in 1973, precedent law (with the principle of *stare decisis*) had an impact on the judicial style of it. By now, the ECJ could become – maybe – the most influential institution as it can touch legislation, execution, and decision in one body. The only institution which is exclusively entitled to interpret Union law, that decides on omission or annulment, − after the initiative of the European Commission – it decides on infringement procedure, etc… As each case decision is binding both on the referring court and on all courts in EU countries, the impact of the ECJ is cannot be ignored. Thus, the most unique part of the common law tradition, the precedent law itself became generally accepted all over the EU without changing the national systems unintentionally. Moreover, British style complemented the continental legal thinking and this, in my view, led the ECJ's jurisdiction to be the most interesting structure that court is able to produce. Mixing features of both of process and substance gained a style, that is called *"Luxembourg Judicial Style"*[20]. The unique interpretation and the binding force of them *"allowed the Court to make policy while giving relatively few*[21] *justifications"*. The process affected back and forth the legal traditions, thus the British law and jurisdiction could also developed due to the EU.

Fernanda G. Nicola highlights that *"after forty years of relationship between London and Luxembourg, it remains unclear how much the inner workings of the ECJ will change by losing their UK members, including three judges and an advocate general"*[22]. Due to the systems' effects on each other, the absence of the British may change somehow the inner workings of the ECJ, but – as the impacts were already taken during the evolution of the Court – maybe not. Those British members of the ECJ shall leave whose position is depending on EU citizenship. However, the advocate general's position is not like that. Thus, in my view, entitles her to remain after the withdrawal, too. Except for the judges, all British cabinet members at Luxembourg could stay in theory. In this case, the continuous British impact may remain as well. If not, the most important changes and developments of ECJ's judicial style were already made during the last forty years, so Brexit is unlikely to change the Court's jurisdiction radically.

In addition to the abovementioned issues related to interpretation and impulses, there is a question mark above the future of jurisdiction, its scope (having

[20] NICOLA, G. Fernanda. Luxembourg Judicial Style with or without the UK. *Fordham International Law Journal,* 2017, Vol. 40, No. 5, Article 7, pp. 1505-1534.

[21] See EDWARD, Sir David A.O.. The Role and Relevance of the Civil Law Tradition in the Work of the European Court of Justice. In: D.L. Carey MILLER et. al., eds. The civilian tradition and scots law: Aberdeen Quincentenary Essays at 14, 1997, pp. 309-320.

[22] Ibid.above p. 1534

special regard to the ongoing cases) and another is above the dispute settlement in the future. British politicians often declare that the "UK does not ask for the ECJ's jurisdiction" in the future. In my view, it is hardly avoidable – at least in one case: where it comes to interpret the withdrawal agreement. That is going to belong under the scope of EU law on the one hand, and on the other, it is going to be categorized as a product of international law. In this sense, the ECJ's jurisdiction has to be approved by the UK as well.

It is obvious that the current mechanisms of the ECJ's jurisdiction and judicial style involve common law traditions. That may not change after the Brexit due to that is already evolved, and to that Malta and Ireland remain in the EU.

3. Conclusion

Firstly, European Union law is deeply influenced by common law values which impacts improved not just the judicial style of the European Court of Justice, but the whole EU legal system. British sometimes behaved strictly in a conservative way, other times very liberally, which attitude stimulated the economy on the one hand, and the legislation and jurisdiction on the other.

Post-Brexit – as a significant liberal economy is exiting – changes in the economic governance are expected. Due to the spillover-effect, changes arrive at other sectors of the economy – like finance, capital market, etc. – then finally it reaches different spheres. Thus, Brexit means a loss not just for the UK, but for the remaining EU27 as well. In order to avoid dramatic and quick changes, a well-used transitional period is needed, with a balanced withdrawal treaty collecting the most important points (besides citizens rights, financial settlement, and border issues).

All in all, British impacts on the legal system of the European Union cannot be abolished from day to day. In my view, small changes in legal harmonization could be expected – especially on those fields where the UK was a break of harmonization – but nothing radical.

INFORMATIONS, COMMENTARIES AND NOTES

The realization of the resolutions of the association institutions in the associated states

Viktor Muraviov*

Summary: The article is devoted to the analysis of the mechanisms of the realization of the resolutions of the Association Institutions created within the framework of the Association Treaties. Association agreements between the European Union and the third countries provide for legal mechanisms for their implementation. The agreements empower the association institutions with competence to endorse resolutions, some of which are binding for the parties. The institutional mechanism of the association reflects to some extent the supranational character of the EU. Special attention is paid to the resolutions of the association institutions serve as legal tools for the realization and amendments to the treaties. It is underlined that the binding resolutions of the association institutions may have direct effect in the EU internal legal order. Each of the associated states determines the ways and means of the realization of the resolutions of the associations institutions. The prerequisites for the implementation of the resolutions of the association institutions are enshrined in the constitutions and other legal acts of the associated states. In Ukraine the legal mechanism for the implementation of the resolution of the association institutions is in the process of its formation. The ways of the improvement of the legal mechanism of the realization of the EU law in the internal legal order of Ukraine are considered.

Keywords: Association Treaties, Constitutions, EU law, implementation, legal mechanism, resolution, decision, acquis, supranational character, Association Council.

One of the main forms of the European Union's (EU) co-operation with third countries and international organizations is an association. The Eastern Partnership Policy proclaimed by the European Union in 2008 foresees a substantial upgrading of the level of political engagement with eastern partners, including the prospect of a new generation of Association agreements, far-reaching integration

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into the EU economy, easier travel to the EU for citizens providing that security requirements are met, enhanced energy security arrangements benefiting all concerned, and increased financial assistance[1]. By means of concluding association agreements the EU is going to form around it the area of stability and economic, political and legal cooperation[2]. The association with the EU becomes one of the most powerful legal instruments for the creation of such an area.

Association agreements of the European Union are mainly framework treaties many provisions of which are to be realized by other legal acts. Association agreements may appear to differ from partnership agreements, and agreements on trade and co-operation in that the formers, firstly, appear to incorporate a great volume of the EU acquis[3] and, secondly, the association institutions created on the basis of their provisions are empowered to adopt various legal acts including binding decisions for the parties. Such agreements reflect to a large extent the legal policy of the EU and contribute to the expansion of the EU law in the legal orders of the associated countries.

The Treaty on Functioning of the European Union (TFEU) does not mention the requirement to establish some institutional structure for the Association agreements. It states only that agreements establishing associations are involving reciprocal rights and obligations, common action and special procedure (article 217)[4]. However, all the association agreements provide for the formation of an institutional structure. By concluding association agreements, the Union and third countries or international organizations form an institutional mechanism of the association that is the association institutions, specify their competence and the legal acts, which they are supposed to approve. The supranational nature of the Union is transferred to some extent to treaty and institutional mechanisms of associations.

The institutional mechanism created on the basis of the association agreements with the aim to ensure that the provisions of the agreement and the EU legislative acts are properly implemented by the parties is quite complex. The most often institutional structure established by the association agreements includes a Council, a Committee and a Parliamentary Committee. A Council and

[1] Communication from the Commission to the European Parliament and the Council (Eastern Partnership), Brussels, 3.12.2008, COM. [online]. Available at: <http://www.euronest.europarl.europa.eu/euronest/webdav/shared/general_documents/COM (2008) 823.pdf>

[2] European Neighbourhood and Partnership Instrument. Ukraine. Country Strategy. Paper 2007 – 2013. [online]. Available at: <enpi_csp_ukraine_en.pdf>

[3] GIALDINO, Carlo. Some Reflection on the Acquis Communautaires. *Common Market Law Review,* 1995, vol.32, no. 3, pp.1089-1121.

[4] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. [online]. Available at: < http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>

a Committee may approve the binding legal acts and a Parliamentary Committee may approve recommendations[5].

As a rule, the institutions of an association are formed on the bilateral platform. The functioning of such mechanism is largely based on the agreement's provisions and at the top of it is the Association Council composed of the representatives of the EU Council and the EU Commission, on the one hand, and representatives of the associated country on the ministerial level, on the other.

One of the Association Council's objectives is to exercise permanent control over the realization of Association Agreement. The Association Council may consider the issues of bilateral and international relations. It may serve as a forum for the exchange of information concerning the internal legal acts of both parties which are in force and those which are prepared as well as their implementation measures, their enforcement and their realization.

The Association Council approves by mutual consent the decisions which are binding to the parties and recommendations.

What is important is that the Association Council can amend the annexes to the association agreements that contain the lists of the EU legal acts with which the national legislation of the associated state is to be harmonized taking into account the standards in force fixed in international legal instruments and in the EU legislation.

The Association Council may settle any dispute between the parties concerning interpretation, implementation or execution in good faith of the association agreement. The Association Council may settle the dispute by taking the binding decisions.

The Association Committee assists to the Association Council and consists of the representatives of the members of the EU Council and the representatives of the members of the EU Commission, on the one hand, and representatives of the associated country on the level of state civil servants – on the other.

The Association Council may delegate to the Association Committee any powers including the power to adopt binding decisions. The decisions of the Association Committee delivered on the bases of the delegated powers are taken by mutual consent and are binding for the parties (Art. 465).

The Parliamentary Committee composed of the members of the European Parliament and the national parliaments. It has no say in the decision-making. The Parliamentary Committee may only make requests to the Association Council and the Association Committee concerning the implementation of the Association Agreements. It also is to be informed about the decision of the Association Council and may pass recommendations (Art. 468).

[5] Association Agreement between the European Union and its Member States, of the one Part, and Ukraine, of the other Part. [online]. Available at: <http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission europeenne/com /2013/0290/COM(2013)0290(PAR2)_EN.pdf>

The supranationality of the institutional mechanism of the Associations with the third states reflects to a large extent the supranational character of the institutions of the European Union. The powers to decision-making are vested to a large extent to the executive authorities of the parties and the representative bodies, like parliaments, exercise foremost consultative functions only. On the other hand, vesting the Association Council and the Association Committee with the powers to pass binding decisions may be justified by the necessity to provide the efficient implementation of the association agreement. The experience of functioning of the EU association agreements only confirms this[6].

The legal nature of the decisions approved by the association`s institutions is rather difficult to define. The problem is that an association between EU and third countries or international organizations as such is neither international organizations nor a kind of interstate unions. It is rather a kind of an alliance based on international treaty and having its own institutions.

This explains to a large extent the fact why the associated states after the conclusion of the association agreements have to define the status of the decisions of the association bodies in their internal legal orders and the legal instruments of their implementation.

The status of decisions may be quite different in the legal order of the EU and associated states. In the EU they may have direct effect in the EU legal order[7]. In the associated states each country defines their status in the national legal order by itself.

National constitutions vary rarely mention the decisions of international organizations or international institutions among the international legal acts[8]. The same applies to the decisions of the association institutions. Therefore, all the time the states define this status ad hoc. This may create the problems for the realization of the acts of the association institutions in the internal legal order of the associated states.

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[6] MURAVIOV, Viktor. The Supranational Character of the European Union Associations with Third Countries. *Limitations of National Sovereignty through European Integration.* Dordrecht: Springer, 2016, pp.197-206.

[7] Judgment of the Court of 20 September 1990. – S. Z. Sevince v Staatssecretaris van Justitie. – Reference for a preliminary ruling: Raad van State – Netherlands. – EEC-Turkey Association Agreement – Decisions of the Association Council – Direct effect. – Case C-192/89. [online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:1990:322>

[8] Decision 94/1/CE of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, 3.1.1994. [online]. Available at: <http://europa.eu/legislation_summaries/internal_market/living_and_working_in_the_internal_market/em0024_en.htm>

In our opinion, the roots of this problem lie in the uncertainty of the positions of States as a whole concerning the implementation of resolutions of international organizations. As a rule, the national Constitutions of the associate countries do not contain provisions regarding the validity of resolutions of the Association institutions in the national legal orders. In particular, among all the associated countries which had European Agreement with the EU, only the Constitution of the Slovak Republic, even before the entry into force of the European Agreement contained art. 120, which provides the Government with the authority to make regulations to implement the provisions of the European Agreement with the EU[9]. In other associated countries all changes and amendments to national Constitutions, related to cooperation with the EU have been taken only on the eve of EU accession. They concerned mainly the issues of the transfer of the powers to the Institutions of the Union, the primacy and direct effect of the EU law in the national legal orders, i.e. dealt with the acts of the EU Institutions and not with the acts of the association bodies.

In the association agreements there are also no provisions on the effect of the resolutions of the association institutions in the national legal orders of the associated countries, since they do not presuppose the transfer of powers from the associate countries to the association bodies. The questions of validity of resolutions of the association organs in the internal legal orders of the associated countries are to be solved by the associated countries. Each associated state resolves this problem by its own legal means.

As a rule, the resolutions of the association institutions are made in the form of decisions, which are binding, and recommendations. In particular, the Agreement on the European Economic Area between the EU and Norway, Iceland and Liechtenstein (EEA) states that the decision of the Joint Committee of the Association is mandatory for the parties to the agreement (article 104). The association agreement between the EU and Ukraine, states that the Association Council has the authority to make decisions. The decision is binding on the parties which shall take the measures for the implementation of decisions (article 463). It is important to emphasize that the Association Agreement provides for the adoption of binding decisions by the Council to achieve the goals of the agreement within its sphere of action in the cases stipulated by it (Article 463).

One can identify a few spheres in which decisions are made in the framework of the Association. In particular, the adoption of decisions by the Council or a Committee of the Association is provided for:

[9] Constitution of the Slovak Republic, 01.10.1992. [online]. Available at: <https://www.prezident.sk/upload-files/46422.pdf>

- Updating and amending Annexes to the association agreements, which contain the list of acts of the European Union, which are to be implemented in the associated countries;
- Implementation of the provisions of the association agreements;
- Formation of the organizational mechanism of the association.

In practice, there are several similar mechanisms to implement the resolutions of the Association institutions. In the EEA countries, in particular, when it is necessary to introduce changes in the annexes to the Association agreement, the Joint Committee makes a decision for each case of the changes. Thereafter, such a decision is to be ratified by the parties of the agreement in accordance with their constitutional requirements (Article 103).

In countries that have had with the EU European Agreement, the practice of implementing the decisions of the Association bodies varies. To some extent it is affected by the doctrinal approaches to the issue of the relationship between the norms of international and domestic law. In particular, in Poland the decisions of the association institutions could be recognized as having direct effect when such possibility was provided in the European agreement with the country. In Czech Republic in accordance with the doctrine the same criteria for recognition of them as having direct effect should be applied both to the provisions of the European Agreement and the decisions of the Association bodies. In Estonia and Latvia, the publication of decisions of the association institutions was sufficient to ensure their application. In Hungary, Malta and Slovakia, the decisions of the Association had to be necessarily ratified with the purpose of their transformation into national law. The same practice had existed in Bulgaria, Slovenia and Cyprus[10].

However, it is important to mention that the effect of the decisions of the Association bodies in the countries with which the EU has had European Agreements largely was alleviated by the fact that the Association institutions practically did not take the decisions aiming at amending the protocols to those agreements, since the White Paper for these countries had been adopted with a list of acts of the European Union, with which these countries were to harmonize its legislation[11]. The White Paper to a large extent had replaced those protocols to the agreements.

In Ukraine, where the Association Agreement came into force only on 1 September 2017, there is no any practice of applying the decisions of the Association institutions. As any other association agreements, the Association Agreement with Ukraine provides for the institutions that are to take the decisions mandatory

[10] OTT, Andrea; INGLIS, Kirstin. *Handbook on European enlargement. A Commentary on the Enlargement Process*. Asser press, 2002, pp. 1116-1131.

[11] TATAM A. *The Law of the European Union*. K., Abris, 1998, pp. 354-362.

for the parties to the agreement and the spheres in which those decisions are taken.

On the other hand, Ukraine has no such White Paper as the Associated countries that had European agreements, therefore the institutions dealing with harmonization of legislation should be guided by the provisions of the annexes to the Association Agreement. Since, unlike in the EEA Agreement, the Association Council, in practice, is lagging behind in time to make changes to the annexes to the Agreement, taking into account the provisions of art. 474 on the harmonization of national legislation with EU legislation, it might be sensible to exercise harmonization of legislation, where appropriate, without waiting for the amendments to the annexes to the Association Agreement and harmonize Ukrainian legislation in case of entry into force of new EU legislation, although there may be a danger of misunderstanding between the legislative and the executive branches. For the Association Agreement with Ukraine it is also characteristic that the resolutions of the Association institutions are to be adopted mostly by the committees, formed on the bases of the Agreement. In particular, the Committee on Trade, which is functioning as an Association Committee in special composition to address all issues related to Part IV (trade and trade-related issues), approves the decision concerning the review of threshold values for the public contracts for works (149.3), the amendments to the chapter 14 (settlement of disputes), rules of arbitration procedure defined in Annex XXIV and to the Code of Conduct of members of the arbitration commissions and intermediaries included in Annex XXV of those chapter (article 326). The Subcommittee on management of sanitary and fito-sanitary measures of the Committee on Trade has the authority to take binding decisions for the parties concerning the amendments to the Appendix X (Verification) (art. 71.3) Annex XI part V (import inspection and inspection costs) (article 72), Appendixes V – XIV (Subcommittee on management of sanitary and fito-sanitary measures (SFSM) (74.2). Subcommittee on Customs cooperation according to article 83 of the Agreement may take decision concerning the implementation of Chapter 5 and Protocols 1 and 2 to the Agreement.

As for the Association Council, the Agreement stipulates the adoption of its mandatory decisions on opening markets (475.5), in cases of dispute settlements between the parties (article 476.3).

The decisions of the Association institutions, containing amendments to the annexes to the Association Agreement shall be registered in the Ministry of Justice. The appropriate changes are brought afterwards to the Plan of measures for the implementation of the Association Agreement between Ukraine and the European Union. The appropriate decision was taken by the Cabinet of Ministers in October 25, 2017.

With the entry into force in 2016 r. of the temporary provisions of Part IV of the Association Agreement (FTA) the new institutional mechanism for harmonization of legislation began to operate. The draft laws and by-laws shall be subjected to preliminary expertise in the Government Office for Coordination of European and Euro-Atlantic Integration as regards their compliance with the international legal obligations of Ukraine and the law of the EU. Upon their legal examination on compliance carried out by the experts of the Government Office, the draft laws are passed to the Verkhovna Rada, which approves the relevant legislative act, and by-laws – to the Cabinet of Ministers for their adoption.

However, this mechanism does not alleviate the danger of introducing changes to the draft laws and by-laws after their legal expertise in the Government Office for Coordination of European and Euro-Atlantic Integration, in particular, in the course of readings of the draft laws in the Verkhovna Rada, which in the end may not correspond to the EU acquis.

One more material shortcoming in the Ukrainian legislation, including the Constitution, is the lack of a solution to the question of the status of the acts of international organizations in the national legal order of Ukraine.

The mechanism for monitoring the implementation of the harmonized legislation is also missing.

Translation quality of the acquis into the Ukrainian language is another big problem.

However, the further development of integration of Ukraine in the European Union will necessarily require making appropriate provisions in the national legislation in order to create the preconditions for the validity of secondary legislation of the European Union in the national law of the country since that application is provided by the AA (articles 56, 96, 153).

Thus, by concluding the Association Agreement with third countries the EU makes extensive use of the practice of inclusion in those agreements of the provisions of primary and secondary law of the European Union. In order to realize the provisions of those agreements the association institutions are empowered to take resolutions which may be binding for the EU and the associated states. The by-lateral character of functioning of the association institutions makes more democratic the process of the penetration of the EU acquis into the internal order of the associated states thus precipitating the process of European integration. The associated countries form their own legal mechanisms for the realization of the resolutions of the association institutions which take into account the legal traditions of each of the country.

Legal Framework of Free-Visa Regime for the "Eastern Partnership" Countries

Nataliia Mushak*

Summary: The article is devoted to the analyses of legal frameworks of free-visa regime for the "Eastern Partnership" countries. The special attention is paid to the adaptation of six partner countries – Ukraine, Azerbaijan, Belarus, Armenia, Georgia and Moldova to the European Union acquis. The research provides the definition and main features of free visa regime. The research also studies the fulfillment by Moldova, Georgia and Ukraine of the requirements of action plans on visa liberalization. The certain focus also is paid to the policy of the European Union in this area taking into account the peculiarities and intentions of Eastern countries in regard of their European integration.

Keywords: free-visa regime, Eastern Partnership, partner country, Association Agreement, rule of law, fundamental principles, sectoral cooperation, third-country nationals.

One of the important goals and purposes of the Eastern Partnership is the increase of cross-border mobility and the liberalization of the visa regime. The Initiative of Eastern Partnership (hereinafter – EP) is aimed to the adaptation of six neighboring countries – Ukraine, Azerbaijan, Belarus, Armenia, Georgia and Moldova to the EU both politically and economically[1]. The liberalization of the visa regime with the European Union is one of the important steps towards this approximation.

The initiative covers both bilateral and multilateral formats of relations between the EU and its partner countries. The bilateral format involves the negotiations between the partner country and the EU on the implementation of tasks in the areas of political association and economic integration with the EU within the framework of the Association Agreement and the establishment of an Free Trade Area (hereinafter – FTA), sectoral cooperation in the areas of energy security,

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[1] Joint declaration of the Prague Eastern Partnership Summit. 7 May 2009, Prague. – [online]. Available at: <http://ukraine-eu.mfa.gov.ua/mediafiles/files/prague_declaration_of_the_eastern_partnership_summit.pdf>

agricultural field, social policy, mobility of the population in the context of visa liberalization regime, etc.

The multilateral format is operating as forum for discussion of common interests' issues for the EU institutions, interested EU member states and six EU partner countries.

In particular, on November 24, 2017, the Vth Eastern Partnership Summit was held in Brussels. According to the results of the Summit, the Joint Declaration of the Eastern Partnership was adopted[2]. Besides the confirmation of the cooperation in different spheres, as well as both parties' commitments to strengthen democracy, rule of law and fundamental values, the participants of the summit also welcomed the full entry into force of the Association Agreements with Georgia, Moldova and Ukraine. Moreover, the introduction of the visa-free regime for Ukraine was also positively highlighted.

Due to the ambiguous understanding of the peculiarities of the visa-free regime by the third-country nationals, we consider to interpret its concept and main features. In particular, the visa-free regime is a legal regime that is granted by the European Union to third countries and provides the free movement of third-country nationals who obtain the biometric passports within the territory of 22 EU Member States and 4 Schengen States – Iceland, Liechtenstein, Norway and Switzerland. The free-visa regime concerns, as a rule, the short-term visits to 90 days within 180 days for the purpose of tourism, business meetings, training visits, cultural events, visits of relatives on the short-term basis (up to 90 days), etc. At the same time, the free-visa regime does not provide the permission for the employment and work in the European Union. In regard of this it is necessary to obtain the permission to work from the host state. Moreover, third-country nationals who would like to be employed in most of the EU countries, still need a national visa, even if they plan to work for no more than three months.

The development of the cooperation between the Eastern Partnership countries with the EU demonstrates that the process of obtaining by a third-country of a free-visa regime with the European Union is long and systematic. In particular, before the adoption by the EU of the final decision on granting of visa-free travel to the countries is preceded by the procedure for the parties to adopt special documents – action plans for visa liberalization. Such documents cover almost 40 systemic reforms that should be implemented by third countries that are interested in obtaining a free-visa regime. In accordance with the action plans for visa liberalization the joint committees of the EU Commission and the

[2] Joint Declaration of the Eastern Partnership on November 24, 2017. [online]. Available at: <https://eeas.europa.eu/headquarters/headquarters-homepage/36220/%D1%81%D0%BF%D1%96%D0%BB%D1%8C%D0%BD%D0%B0_uk>

administrative authorities of the relevant third country should regularly evaluate the progress in the implementation of the proper legislation.

Moldova was one of the first countries of the Eastern Partnership that received free visa regime with the EU on April 28, 2014. It should be noted that the visa dialogue between the parties was initiated in June 15, 2010. In January 2011, the Action Plan for Visa Liberalization was adopted. Based on the results of five reports on progress in the implementation of the Plan (September 2011, February 2012, June 2012, June 2013 and November 2013), on November 27, 2013, the EU Commission issued recommendations to Moldova on the introduction of a free visa travel regime for Moldovan citizens with biometric passports. Accordingly, since April 28, 2014, the citizens of Moldova, in comparison with citizens of other five Eastern Partnership countries, were able to enjoy free visa travel with the EU. It should be noted that for this purpose about 35 system reforms have been carried out in Moldova in order to ensure the proper control of migration and borders. Among such reforms was the introduction of the biometric passports, the strengthening of the fight against corruption, money laundering, etc.

During the first year after liberalization of the visa regime more than 460000 Moldovans were able to visit the EU without a visa[3].

Taking into consideration the practice of free visa regime for Moldova, in the end of 2016, only 0.5% of cases of Moldovan citizens returned to their homeland or refused to enter the territory of the European Union because of violation of their rules of stay. Such cases of violations of the visa regime by the Moldovan citizens are not so popular. In whole, the citizens of Moldova within 4 years from the date of receiving of a free-visa regime have shown themselves to be law-abiding citizens without violation of the EU's residence regime and adhering to all visa requirements and procedures established by the European Union.

In our opinion, such low rates of violations were the result of a high-quality informational and, at the same time, communicative campaign conducted by the government of the state, which was mainly implemented by the media and, to a certain extent, by civil society. This campaign was launched in early 2014. According to the campaign the citizens of Moldova were informed of the minimum list of documents that should be available for the smooth crossing of the border with the European Union. The minimum package of documents covers the medical insurance, confirmation of accommodation, availability of a return ticket etc.

Moldova, in comparison with other Eastern Partnership countries, has its own peculiarities. In particular, there are two categories of citizens of Moldova – with

[3] BENEDYCHAK, Yakub, LITRA, Leonid, MAZZEK, Krzysztof. Moldova: a year without a visa. Positive experience for Ukraine, May 27, 2015. [online]. Available at: < https://glavcom.ua/publications/129834-moldova-rik-bez-viz.-pozitivnij-dosvid-dlja-ukrajini.html>

national citizenship and dual citizenship. In other words, even before the country received a free-visa regime, the overwhelming majority of Moldovan citizens had the opportunity to exercise their right to freedom of movement through the territory of the EU without difficulties. This is primarily those Moldovan citizens who hold the Romanian passports. Their share is about 330 000, which makes up about one-third of the population of the country.

Another feature of Moldova's free visa regime is its application by those citizens who live in Transnistria. It is important to note that action plans for visa liberalization concluded by the European Union with third countries do not contain references to frozen conflicts. This issue is regulated exclusively at the state level. Taking into account that Moldova considers the occupied territory of Transnistria as part of its territory and its inhabitants as the Moldovan citizens, such persons were able to receive the Moldovan documents and passports, providing to state authorities certificates to be issued in Transnistria.

In order to make it impossible to obtain a Moldovan passport on the basis of false documents, the Moldovan parliament adopted the law that provides the special identification procedure. The obtained information is checked with the data of the constitutional bodies – the data register owned by Moldova. Such register covers the data of the Transnistrian region to 1994. Taking into consideration the total number of available Moldovan biometric passports – 1169017 – about 77,000 belongs to citizens who are living in Transnistria. Almost about 28,000 of these documents were received during 2016.

Also, among the positive but indirect consequences of the introduction of a free visa regime in Moldova, is the access of low-flying air carriers in the country – Wizz Air and Volotea. They, in its turn, provide the opportunities for citizens of Moldova for the appropriate price of tickets to take advantages of low-cost air carriers to the European countries.

In respect of Georgia, on February 27, 2017, the EU Council finally approved the free visa regime for the citizens of Georgia. On March 1, 2017, in Brussels, the decision was signed on the abolition of visas by the European Union for citizens of Georgia. On March 08, 2017 the Regulation (EC) 2017/372 of the European Parliament and of the Council of the EU of March 1, 2017 amending Regulation (EC) No. 539/2001, which lists third countries, whose citizens should be in possession of visas when crossing the EU's external borders, and those countries whose citizens are exempted from this requirement was published in the EU Official Journal[4]. In accordance with Article 1 of the Regulation, Georgia

[4] Regulation (EU) 2017/372 of the European Parliament and of the Council of 1 March 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Georgia) 8.3.2017 L 61/7. [online]. Available at: <http://eur-lex.

is referred to the list of third countries whose citizens are exempted from the requirement to have a visa when crossing the EU's external borders. According to the procedure, the document came into force in 20 days. Therefore, in practice the free visa regime for the citizens of Georgia was applied on March 28, 2017.

As well as in Moldova, the practice of communicative campaign carried out by the government of the state was widespread in Georgia too. In particular, the Ministry of Internal Affairs of Georgia issued a decree according to which the officials of all border checkpoints had to conduct the detailed interviews with Georgian citizens traveling to the EU. Thus, the main functions of consulting of citizens and checking their documents for compliance with visa rules and procedures were carried out precisely by border guards.

The free visa regime granted to Georgia by the EU does not differ from the mentioned free visa regime with Moldova. In particular, this is the right of Georgian citizens with biometric passports to enter the EU territory up to 90 days within 180 days. In the case when this rule is violated, such persons may be transferred to the Schengen Information System (SIS). Also they are prohibited to enter the territory of the European Union for the next 5 years. In addition, the violators of the free visa regime will have to pay a fine of 3 thousand euros.

Crossing the borders of the Schengen States, it is desirable for the citizens of Georgia to take with them virtually all the documents that are usually submitted for a visa. Usually, it is enough to have only one biometric passport. However, the migrant workers, in accordance with the provisions of the Schengen Border Code, reserve the right to confirm the purpose and conditions of travel, to prove the availability of sufficient funds for staying in the territory of the EU and the subsequent return.

Thus, in order to prove the solvency, the person shall provide, in particular, the traveler's checks, reservation of accommodation, cash currency and even a credit card to check the limit. The required amount directly depends on the duration of the trip and the country of destination. The necessary limits of the state, as a rule, indicate in their own requirements for the travelers.

In accordance with the renewed EU Commission's Annex XVIII to the EU Visa Code, Latvia requires only 14 euro per day per person, Estonia – 86 euros, Germany – 45 euros, Spain – 66.5 euros, and the Czech Republic – 41 euros[5].

europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.061.01.0007.01.ENG&toc=OJ:L:2017:061:TOC>

[5] Reference amounts required for the crossing of the external border fixed by national authorities 24/04/2017, Annex 18 of the Visa Code Handbook. [online]. Available at: <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/borders-and-visas/schengen/docs/handbook-annex_25_en.pdf>

In case of visits of relatives or acquaintances, it is necessary to have the invitation and information about the party that is inviting, including the address and the phone. Accordingly, if the purpose is to participate in a business or scientific conference, it is desirable to have an invitation to it. And if the purpose of the trip is the training, then the confirmation of enrollment for the courses may be required.

The health insurance is not required, but the European Service of External Relations recommends it to be formed. The similar recommendations are applied to the return ticket as well.

In particular, during the first month since the introduction of a free visa regime, about 11,700 of Georgian citizens have benefited from a free visa regime. Only 26 people were denied to entry due to the objective circumstances, in particular, the absence of a biometric passport and the inability to justify the purpose of their visit to the EU Member States.

The important feature of obtaining of a free visa regime by Georgia is the extension of free visa regime not only to those citizens of Georgia who live under the controlled part of the country, but also to those citizens who are living within the territories of the Southern Ossetia and Abkhazia and who have the Georgian passports. However, there are not so many people. These issues, as well in the case of Moldova, are regulated at the national level.

Ukraine is one of the countries that recently, on June 11, 2017, obtained the free visa regime with the EU. The dialogue on visa liberalization between the parties was launched on November 22, 2010 at the EU-Ukraine summit in Brussels. In the result of the summit the Action Plan for Visa Liberalization 2010 (hereinafter – APVL) was adopted[6]. The APVL contained four main blocks of tasks that Ukraine had to perform in order to join the states whose citizens did not need visas for entry into the territory of the European Union Member States. The first block covered the security of documents, including the introduction of biometric data; the second concerned the migration management, in particular, measures of illegal migration and readmission; the third involved the public order and security, and the fourth covered the provisions of fundamental human rights and freedoms.

The final decision on Ukraine's compliance with all the criteria of the Action Plan for Visa Liberalization was adopted by the EU Commission on December 18, 2015. The document stated that Ukraine fulfilled all the criteria set out in the four blocks of the APVL. On November 17, 2016, the Committee of Permanent

[6] Action Plan on EU Visa Liberalization for Ukraine of November 22, 2010. [online]. Available at: <http://www.kmu.gov.ua/kmu/control/uk/publish/article?showHidden=1&art_id=244813273&cat_id=223280190&ctime=1324569897648>

Representatives of the EU Member States (COREPER), on behalf of the Council of the European Union, delivered the decision to grant Ukraine a free visa regime. The decision refers to free visa entry for the Ukrainian citizens during their travel to the territory of the EU Member States for a term up to 90 days during 180 days. The Committee also noted that Ukraine fulfilled fully all the criteria foreseen by the APVL. Finally, on June 11, 2017, the decision of the EU Council on the introduction of a free visa regime for Ukraine came into force.

In other words, since June 11, 2017, the citizens of Ukraine with the biometric passports were able to move through the territory of the European Union without visas. It means that Ukrainians have the right to enter the territory of any of the Schengen area Member States, except the Great Britain and Northern Ireland.

It should be noted that the free visa regime does not provide for Ukrainians the right to permanent employment. In order to get this opportunity the person should get a special permission for work. In addition, for employment in most European countries, citizens of Ukraine still need a visa, even if they will work for no more than three months.

At the same time, it is possible to distinguish the main advantages of Ukraine's free visa regime. Firstly, the citizens of Ukraine, in addition to the EU Member States, also got access to a set of other countries. Due to the liberalization of the visa regime with the EU, Ukraine is referred to the "white list" of the third countries of the Schengen area, and Ukrainians have been able to travel without visas to other countries identified by the European Union in the abovementioned list. For example, the citizens of Ukraine got the right to enter the territory of such countries as South Korea, Mexico, Uruguay, UAE and others without a visa.

In addition, the abolition of short-term visas will also help create the new economic opportunities, taking into consideration that the process of application of the trade chapter of the Association Agreement has already begun.

At the same time, despite the number of advantages for the granting by the EU of a free visa regime for Ukraine, at the European Union level, it is emphasized the importance of establishing in the future of a monitoring mechanism for the observing of the criteria foreseen by the APVL. In particular, the report of the European Parliament on the expediency of canceling visas for Ukraine, published on the website of the European Parliament on July 20, 2016, stipulates that all the criteria, achieved in the framework of visa liberalization, should remain the subject of monitoring mechanism by the European Union[7].

Such monitoring will take place within the existing bilateral bodies established under the Association Agreement. In our opinion, the introduction of such

[7] European Parliament proposes visa-free travel for citizens of Ukraine, Brussels, 20 July 2016. [online]. Available at: <http://europa.eu/rapid/press-release_IP-16-1490_en.htm >

monitoring mechanism will be effective as it ensures that the EU has levers to monitor the continuity of the implementation of anti-corruption legislation, respect for the rule of law, human rights and fundamental freedoms, and will further promote the process of reform in Ukraine.

Besides the Action Plan on Visa Liberalization, the significant and, at the same time, effective legal instrument for the introduction of a free visa regime for the Ukrainian citizens has become the Association Agreement between Ukraine, on the one hand, and the European Union and its member states, on the other hand (hereinafter – AA)[8], signed on June 27, 2014 in Brussels.

The preamble of the AA recognizes Ukraine as the European country with a common history and common values with the European Union Member States. This provision is important because it opens the door for Ukraine to join the European Union in the future, as any European country that respects values (such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, etc.), specified in Art.2 of TEU, and committed to embody all of them. Accordingly, the principle of respect for human rights and fundamental freedoms, along with the rule of law, is embodied in the preamble and Article 14 of AA under Chapter III "Justice, Freedom and Security"[9]. Within the limits of the mentioned chapter, it means, first of all, the legal regulation of the freedom of movement of citizens of Ukraine through the territory of the EU Member States, cooperation in the field of migration, asylum, border management; protection of personal data; mobility of workers; treatment of employees, etc.

In conformity with Article 19 of the document, the movement of persons between the EU and Ukraine is regulated by the current readmission agreement of 2007, the simplification of issuance of visas in 2007 and 2012.

Chapter III also includes the provisions on the status of Ukrainian citizens-workers in the EU (Article 17). Thus, it is emphasized that workers from Ukraine do not fully apply the freedom of movement of persons within the EU. Ukraine should regulate access to work for its citizens in the EU market on the basis of bilateral treaties with each member state of the Union (Article 18). At the same time, the AA assumes that the attitude towards Ukrainian citizens who legally work in the territory of the Union should exclude discrimination on the basis of nationality in relation to working conditions, wages or dismissals

[8] Association Agreement between the European Union and its Member States, of the one Part, and Ukraine, of the other Part. [online]. Available at: <http://glavcom.ua/pub/2012_11_19_EU_Ukraine_Association_Agreement_English.pdf>

[9] Association Agreement between the European Union and its Member States, of the one Part, and Ukraine, of the other Part. [online]. Available at: <http://glavcom.ua/pub/2012_11_19_EU_Ukraine_Association_Agreement_English.pdf>

compared to the EU citizens. In its own turn, Ukraine should provide the same status to the citizens of the Union.

In regard of Armenia, only in March 2017 in Yerevan the new Agreement on Comprehensive and Deep Partnership with the European Union was initiated. According to the document, Armenia plans to intensify the dialogue with the European Union on visa liberalization.

Therefore, the initiative "Eastern Partnership" involves the approximation of Eastern European partner countries of the European Union, to share common values and principles with the EU, that demonstrate steady and effective progress in implementing reforms. In addition, the Eastern Partnership is a common tool for the EU and six partner countries to implement the Association Agreements.

The first documents that predicted the free visa regime were the action plans on visa liberalization concluded by the EU with the EU partner countries. Only three of the six Eastern Partnership participants – Moldova, Georgia and Ukraine – became the first countries that successfully fulfilled the requirements of the action plans. For other countries – Belarus, Armenia and Azerbaijan – free visa regime is not foreseen in the coming days. The policy of the European Union in this area takes into account the peculiarities and intentions of these countries in regard of their European integration.

The future of Europe: a commitment for You(th) – the main outcomes of the Jean Monnet Seminar held in Rome in March 2017

The Rome event

The Jean Monnet Seminar **"The future of Europe: a commitment for You(th)"** was held in Rome on 23-24 March on the occasion of the 60th anniversary of the Rome treaties. The seminar debated the future of the EU in the light of the current challenges (migration crisis, Brexit, recent and forthcoming elections in Member States, etc.) and the need to further involve young generations in the construction of the European project.

The theme of communication was central in the discussion, notably the role of media in portraying Europe, as well as the contribution of academia in teaching and explaining Europe. The focus was on the challenge of **reaching the most difficult-to-reach citizens**, and helping them make sense of the EU in a balanced and objective way. Speakers and participants expressed views on the way forward for Europe, taking into account the recent release of the **Commission's White Book** and its five scenarios, with particular focus on the "Those who want more do more" option. Possible methods for the reform of the EU were debated and proposals formulated.

127 participants attended the Jean Monnet Geo-Thematic Seminar, including 94 Jean Monnet professors and 33 international and national level policy makers, journalists, civil society and youth association representatives and students. 40 different nationalities were represented (24 EU + 5 Western Balkans, Turkey, 3 Neighbours and 7 from rest of the world).

Web-stream (with over 300 daily viewers) and twitter (117 mentions of the #EU60JeanMonnet hashtag on social media) allowed for broader and active distance participation. European youth original tweets were seen by 23096 with 332 engagements. The European youth Facebook post on the event reached 5273.

The Jean Monnet Seminar featured high in the list of the 60-year events held in Rome in the anniversary week, next to the Digital Day organised by DG Connect and the Citizens Dialogue organised by DG Communication. The success of the Jean Monnet Seminar was due also to the positive cooperation with DG Communication, the support and information dissemination by the European Commission Representation in Rome and the direct link with the Citizens Dialogue. Useful was also the cooperation with the Italian and French

European Movements, which secured participation of institutional high level representatives and professional moderators. Inter-institutional presence was assured by participation of representatives from the European Parliament and the European Council. Youth was represented by the Erasmus+ Student and Alumni Association (ESAA), the European Voluntary Service and a Jean Monnet project run by a group of international students. Culture was represented by the President of Europe Nostra and an internationally renowned novelist. Presence from non-EU countries' speakers was assured by an American keynote speaker and a Japanese Professor. Overall the seminar offered a very varied panorama that ensured a multiplicity of views and perspectives.

Immediately after the Jean Monnet Seminar, all participants moved to the **Citizens Dialogue** where High Representative Vice-President Federiga Mogherini and Prime Minister of Malta Joseph Muscat met with an audience composed of some 300 people (Erasmus students and *6* Jean Monnet professors) and replied to their questions for one hour and half. Most questions came from young people, concerned about their future perspectives in a critical time for Europe. This event represented the link between the 60-year anniversary and the 30-year anniversary of the Erasmus programme.

Some of the Jean Monnet Seminar participants also attended other events on 24 March, such as the big kermesse "Changing course to Europe" at Sapienza University, where policy-makers (Romano Prodi among many others), European Institution representatives (President of Committee of Regions Markku Markkula, Parliament Member Jo Leinen, etc.), cultural actors and youth representatives met together to discuss and celebrate Europe. On 25 March (in parallel to the holding of the EU27 Summit where the Rome declaration was signed) a pro-Europe march (organised by European and Federalist movements) took place with some 5000 participants, among which President Mario Monti, Parliament Member Sylvie Goulard and some Jean Monnet professors. At the same time other anti-European marches also took place.

Main messages and conclusions from sessions

Welcome remarks

Marcella Zaccagnino, representing the Italian Ministry of Foreign Affairs, opened the seminar presenting the main features of the Rome Declaration, highlighting its main goals (to support a safe and secure Europe, a prosperous and sustainable Europe, a social Europe and a stronger Europe on the global scene), as well as the shared political will to relaunch the European integration project, even in a complex and uncertain situation.

Mikel Landabaso Alvarez, Director of Directorate Strategy and Corporate Communication at the European Commission, DG Communication, focussed his intervention on the scenarios sketched in the White Paper on the Future of Europe. He recalled that the Commission did not dictate or try to persuade, but launched a debate, engaging to listen to citizens and will take it from there to offer an alternative for a way forward united at 27. Furthermore, he highlighted the crucial role of youth and academia, recalling that surveys say that these categories want more Europe.

Pier Virgilio Dastoli, President of the Italian Council of the European Movement, stated that a reform of the EU system would require extensive preparatory work and continuous, genuine and open-ended dialogue with citizens, associations representing civil society and European political forces (also engaging in debate with Eurosceptic and other critics of the European project). Universities might make an ideal setting for this debate. He expressed the view that the goal of reform must be the creation of a European federation that isn't a super-State but rather a federal Community. To do that a new Treaty is required.

Round table discussion "The future of Europe"

Participants in the Round table were **Renaud Dehousse**, President of the European University Institute, **Sneška Quaedvlieg-Mihailović**, Secretary-General of Europa Nostra, and **Stefano Maullu**, Vice-Chair of the Committee on Culture and Education at the European Parliament. The session was moderated by **Eric Jozsef**, Italian correspondent for Libération and Swiss Le Temps.

Stefano Maullu underlined the crucial role of education, training and culture to overcome the political and identity crisis of the EU. There is a need to work together to achieve shared priorities under the Europe 2020 Strategy for Education and Training and contribute to the fight against radicalism. He highlighted the role of the European Parliament to strengthen the Erasmus+ program (but there is still much to be done to extend it to the largest possible number of recipients), to support the "Learning Europe at School" project and introduce civic education into school curricula, and to foster intercultural dialogue. He also expressed disappointment vis-à-vis the lack of ambition of the White Paper and the complete lack of references to culture and education therein, whereas they should be considered as catalysts for growth and development.

According to **Renaud Dehousse** the 60th anniversary should not only be an occasion for the celebration of a glorious past, but an opportunity to reflect on what should be the way forward. Ongoing crises have accentuated the differences and disagreements between states, but the EU has not yet been able to provide common responses (notably to the migration issue). The challenge for the EU is now to ensure that the voice of people count more. The rise of

populist movements shows us that there is a strong criticism to the "government by elites" model. More attention should therefore be paid to the concrete concerns of citizens.

Sneška Quaedvlieg-Mihailović stated that culture plays an essential role in society, and that cultural dialogue between the citizens of Europe is a key element to continued support of the European project. She advocated and supported policies and programmes that aim to preserve cultural heritage and that foster the understanding of other people's cultures. Europa Nostra closely cooperate with the UN and UNESCO, the EU and the Council of Europe.

Keynote speech "Communicating Europe: Observations from an American Believer"

In his keynote speech **Anthony L. Gardner,** outgoing US Ambassador to the EU, focussed on how the EU institutions should communicate their contribution to improving the lives of ordinary citizens and gave very concrete examples of key messages to be disseminated.

Europe cannot inspire a sense of solidarity with a defensive narrative; it needs to offer a vision that can inspire, because visions are essential to justify sacrifice for the greater good.

If Member State leaders perpetually denigrate the European project in the eyes of European citizens, the feeling of solidarity – the essential glue that keeps the project together – is at risk of evaporating.

Communicating Europe, even to its own citizens, requires a sense of shared identity. Even in the US it was necessary to invent a sense of solidarity, not based on race or religion, but rather on the ideas and ideals embodied in the Declaration of Independence and the Constitution. It has taken time for the US to build common institutions.

Europe can make a stronger case to Europe's youth that may take peace for granted. The case should focus on what youth cares about: choice (including how they communicate and what content they watch or listen to), opportunities to study and travel, and pride in Europe's regional and international role.

The 60th anniversary of the Treaty of Rome should be an opportunity to reflect as to why Europe has a hard time communicating its role and importance to citizens. The White Paper on the Future of Europe identifies the problem that the EU's positive role in daily life is not well publicized enough.

There are several key messages about the EU's contribution that should resonate widely, notably: (1) the single market has resulted in wider choice and higher quality for goods and services; (2) the EU has made possible free movement of people for work, leisure and study, including passport free travel and an extremely successful Erasmus program; (3) the EU has been a leading actor on

climate change and environmental policies; (4) the EU has improved food safety and consumer protection. It has liberalized EU telecom markets, leading to higher quality services; (5) in many areas the EU acts as a "force multiplier" – enhancing the ability of individual Member States to achieve important goals (in global trade, In development assistance and humanitarian aid, n energy security). All these, and many others, are powerful and valuable messages that deserve a wide audience.

In Summary, there has never been a more urgent time for the EU institutions to reinforce positive messages about the EU's contributions. The EU institutions should not expect the Member States to be active partners in this objective. Therefore, they should continue to refine the messages that the public will find most relevant to their lives, and to identify new ways of delivering those messages.

Introduction to "day 2 working groups"

Eva Giovannini, Italian RAI journalist, moderated three inter-generational mini-dialogues, each of them devoted to one of the themes of day 2 working groups.

Working Group 1 "What method for the reform of the European Union?" was moderated by **Yves Bertoncini**, President of the French Council of the European Movement and Director of Delors Institute. Working Group 2 "Role of citizens, academia and young people in constructing the future EU" was moderated by **Brian Holmes**, Director at Education, Audiovisual and Culture Executive Agency (EACEA). **Maria Stoicheva**, Jean Monnet Professor and Deputy Rector of Sofia University, reported the conclusions of the group back to the plenary. Working Group 3 "Communicating Europe: how to reach the 'hard-to–reach'" was moderated by **Paul Reiderman**, Director for Media and Communication at Council of the European Union. **Deborah Reed-Danahay**, Jean Monnet Professor reported the conclusions of the group back to the plenary.

Some highlights from the seminar's conclusions

- EU institutions should reinforce positive messages about the EU's achievements and the advantages/benefits of being a EU citizen through traditional media, social media and the digital environment
- Even crises should be turned into opportunities (e.g. communicate Brexit in a positive to EU citizens)
- Code of conduct is necessary in online journalism to tackle spreading misinformation that has the potential to influence elections. In response we must promote communication style that is authentic, open and honest
- Work with trusted third parties as multipliers/mediators, recognising that humans are wired for storytelling and craft messages that resonate on an emotional level

- Systematically liaise with (young) Eurosceptics and reflect upon the validity of their criticisms without the isolationist touch often associated with the EU debate
- Academia should share its expertise and extend its involvement to civil society and local communities, particularly children, pupils and young people.
- Act at both nursery and primary school level to include a European complement in the national identity formation
- Empower international students and alumni to get involved in a range of social causes (environment, social justice, diversity) even outside their university context
- Raise visibility of youth movements, volunteering and NGO services, which daily engage with groups that are deemed 'hard to reach'
- Reflect on how (at least some) MEPs could be elected on a European basis and how to create fully European constituencies, to reach electors across and beyond national boundaries

Vito Borrelli[10]

[10] Head of Sector Jean Monnet & China Desk at European Commission – DG EAC.

Information about International Jean Monnet Conference

„The EU in time of multicrisis and its greatest challenges: up-to-date solutions, future visions and prospects“

Prague May 22nd – 23rd 2017

Brilliant International Scientific Forum Looked at Actual Challenges of the European Union

An exclusive multi-branch conference organized by Jean Monnet Centre of Excellence in EU Law[1], Faculty of Law, Palacký University and the Czech Association for European Studies in cooperation with the Czech Ministry of Foreign Affairs intituled "The EU in time of multicrisis and its greatest challenges: up-to-date solutions, future visions and prospects" took place on May 22nd – 23rd 2017 in the Czernin Palace in Prague.

The two-day symposium featured more than 120 prominent experts. The invitation was accepted by scholars, representatives of the Czech ministries, ambassadors of the United Kingdom of Great Britain and Northern Ireland and Austria, as well as other representatives of diplomatic corps of EU member states, judges, attorneys-at-law, lawyers, representatives of non-governmental organizations and last but not least students.

The well-developed and balanced symposium programme was thematically divided into six sessions in which 21 respected experts presented their contributions.

The introductory word of the plenary session of the conference was pronounced by its key-organizer, **Naděžda Šišková**, Head of Jean Monnet Centre of Excellence in EU Law, Faculty of Law, Palacký University; the key note

[1] Jean Monnet Centre of Excellence in EU, Palacký University in Olomouc founded in 2015 is an institution specialized in EU legislation.

speech was given by **Věra Jourová**, the European Commissioner, within its contribution called "Achievements and Challenges of the EU, possible paths for the future".

The first section of the conference focused on democratic foundations of the European Union in time of multi-crisis, the question of the effective ways of European governance as well as on the reform of the EU institutions. A vivid debate was held over the contribution by **Miguel Poiares Maduro**, the former advocate general of the Court of Justice of the European Union who suggested i.e. a new concept of European government inspired by the "South African constitutional model". According to this vision, the EU decisions should be taken, this point on, by an intergovernmental method only in fundamental questions; other topics should be decided by the qualified majority.

One of the most followed speakers was the EU law specialist **Peter-Christian Müller-Graff** from the Heidelberg University and his contribution concerning the authority of European Union law in rough political times. The speaker articulated the necessity of depolarization of conflicts and stressed the role of law as an active subject of integration.

The second session of the conference was dedicated to the up-to-date topic of Brexit and its implications. **Rainer Arnold** from the Regensburg University and Jean Monnet Chair *ad personam* expressed criticism about the impact of Brexit from the point of view of constitutional aspects of the United Kingdom. The discussion was held about the possibilities of the membership of Scotland and the Northern Ireland in the European Union. The topic of the discussion became also the question of the "acquired rights" of the Great Britain citizens and the incidence of Brexit on these rights. Possible institutional changed from the Czech perspective were taken into consideration in the contribution by **Lenka Pítrová** from the Charles University in Prague.

Actual challenges in the EU area of freedom, security and justice were the central theme of the third session of the scientific meeting. It did not omit the discussion about the migration and integration issues including the action for infringement of EU law to be brought before the Court of Justice of the European Union against the Czech Republic, Hungary and Poland.

The subsequent forth session of the conference revealed reflections on current challenges for the EU in the field of the external relations. The legal framework of the relationships of the EU and Turkey was taken into account in the contribution of **Marc Maresceau** from the Ghent University and the College of Europe in Bruges. The connections between the EU and China were neither missed out. The conception of the "cooperation reinforcée" from the point of view of the public international law was analysed by **Vladimír Týč** from the Masaryk University.

The challenges of the Eurozone, especially in the light of restoring the economic growth and the real convergence as well as the "OMT programme" became the topic of the fifth's conference session.

The last part of the conference was dedicated to the future visions and prospects how to change the EU. In particular, the Czech perspective was examined in this session. Criticisms were expressed at the fact that actually the character and content of a directive tends to change into a regulation in which case the unification does not contribute to the diversity of national states. The idea of reinforcement of the model of intergovernmental cooperation as the response of ongoing changes in the EU was repeatedly mentioned.

The conference programme was closed by the Czech Association for European Studies Awards ceremony. Each year, CAES honors the contribution in European Studies and development of European integration. This year laureates were Vladimír Týč from the Masaryk University, Lenka Pítrová from the Charles University and Peter-Christian Müller-Graff from the Heidelberg University that were awarded the prize for their significant contribution the field of European legal studies and European Commissioner Věra Jourová, who was awarded the prize for her merit for European cooperation and integration.

The content of the conference with a supranational overlap can be indisputably evaluated, in the words of Naděžda Šišková, as "a unique forum held in a unique time".

Kateřina Štěpánová[2]

[2] Post-graduate student, Department of International and European Law, Palacký University Olomouc, Faculty of Law.

REVIEWS

KERIKMÄE, Tanel and CHOCHIA, Archil (eds.). *Political and Legal Perspectives of the EU Eastern Partnership Policy*. Cham: Springer International Publishing AG, 2016, 279 p. ISBN 978-3-319-27383-9.

Estonian colleagues from the Tallinn Law School at the Tallinn University of Technology presented unique collection of works written by international renowned authors who offers detailed insight into varius areas within EU Eastern Partnership (EaP). It is not suprising that this important achievment has been developed under the leadership of prof. Tanel Kerikmäe, an internationally recognized expert in the field of Euroeapn integration studies and co-edited by Archil Chochia, a rising star among Estoninan researchers in European studies. Togheter with other authors they offer in total 17 contributions representing case studies within relevant EaP policies or the attitude of EaP non-EU partners to various issues.

Their contribution is important for at least two reasons. First, once EaP was launched under the umbrella of EU neighbourhood policy it provoked more disappointment than encouragement on the side of eastern partners. The reason is that so far until EaP the EU Neighbourhood Policy (NEP) was driven by the prospect of enlargement and EaP invoked feeling that EU is offering an alternative without future prospect of EU membership. The iniatiative to create "ring of friends" at the EU borders in the form of EaP was not fully understood and resulted in doubts on the side of EU partners and provoked cautious approach of Russia. In relation to this reason presented volume offers some kind of correction and deeper insight helping to understand EaP as a framework for activiteas and its impact on various areas of cooperation.

Second, at the time when volume was published EaP was operating already for 6 years which from the perspective of policy life cycle is enough to allow relevant evaluation of its effectiveness, impacts, successes and failures which may help to deeper understanding of the policy and lead to adjustments within policy settings. This is especially important due to increasing divergence among EaP members (not only EaP non EU partners but also within the EU itself) and changes of the continuously developing environment in which EaP operates,

especially in relation to the war in Ukraine and tensions with Russia. The evaluation and possible adjustment of the policy will be important to increase EaP effectiveness and strengthen the stability in the EU neighbourhood as almost all authors of the volume concludes, there are significant limits within EaP.

Very benefitial interpretative contribution on the limted outcomes of Eastern Parntership Programme (EPP) has been provided by Vlad Bernygora, David Ramiro Troitiño and Sigrid Västra who claims that limits of EPP are inherently given and comes out from the clash between functional nature of EPP and EU's aspiration to build political empire. This clash cause frequent revisions and results in cticisim as the EU is hesistant to recognise its imperial stance on one hand but has greater aspirations than just being functionally driven entity, which has implications for relations with other actors (p. 19). Despite initial scepticism authors believes that EU will play important rele in redefinition of the systemic design of EPP visá-vis new challenges. Their theoretically inrepretative study stimulates the debate about the ability of *sui generis* entity to culativate relations with its neighbours and opens new view which might be in the further reaserach challenged for example by constructivist approach of the international relations theory.

The emphasis on better understading "what is EU" is visible also in the second contribution written by Tatjana Muravska and Alexandre Berlin who discuss benefits of the Deep and Comprehensive Free Trade Agreements for shared prosperity and security from the political economy perspective. Authors claim that ENP has become inevitably important especially due to change in the borders of the EU and establishment of the Euroasian Economic Union. From the contribution is evident emphasis on the civil society which plays critical role for understanding conditionality, reform process and mutual benefits of cooperation (p. 35). They also stress that EU shall treat EPP partnes as equal which again raises quations about EU perception as an actor which may sometimes act as supranational entity and contribute to misunderstandings.

The non-Estonian reader will be probably surprised that trhee contributions in the volume deal with ICT, e-governance and digital agenda in general. Due to increasing importance of the agenda and pioneering role of Estonia in this issue presented contributions offers unique insight to the issue. For example Olga Batura and Tatjana Evas identified several stages leading to development of the ICT within EaP and describe process how ICT becomes mainstream policy area in the increasing number of EaP domains. However, despite great progress the development within the EaP regarding ICT does not match the scope, depth and intensity of the Digital Single Market straetegy of the EU member states (p. 54) This is something which is stressed also by Yuri Misnikov in his contribution dedicated to democratisation. Misnikov asks whether the democratization protential of the ICTs is taken into the cout and leads to greater democracy among EaP

partners (p. 59). His findings are not very positive as current scope of democratization programme is rather based on tranditional tools (human rights, rule of law, civil society) and does not benefit grom "digital democracy" despite Association Agreement urgues for deeper democratization. His contribution thus reveals space for new tools incoportaion and further research in relation to e-democracy.

Similar limits may be found also in the contribution dedicated to e-governance presented by Katrin Nyman-Metcalf and Taras Repytskyi. Both authors assessed Estonian role in helping Moldova and Ukraine to develop e-governance. However, authors stresss that due to background similarities based on post-Soviet experience e-governance had so far limited results due to concentration on technical side while avoiding incentives improving democratic participaton or better governance (p. 97). Contribution helps to understand futher limits in cooperation among EaP members derived from different perception, popularity and sometimes patchy process.

The edited volume focuses also on other specific issues withn EaP. For example Kristi Joaments deals with Family Law within Eastern Pathernship. She introduced European Family Law within Concept of Culture and then assessed "family life" and "marriage" in the EaP in order to reveal whether EaP states are progressive and incorporates EU features into national legal systems or are rather of the conservative attitude. Her study shows that the second approach is more relevant and EaP partners in Ukraine or Moldova are very slow in accepting legally gender-based and gender-neutral cohabitation and marriage and problems related to gender equality remains. Moreover, in some areas old traditions preserves and national law in respect to family and marriage is oudtadted (p. 114). In this sense we can claim, that EaP represents the driver for modernity and change which meets resistance caused by predominantly cultural difference.

Very important and one of the most problematic issues within EaP is that of migration. Despite cooperation in this area slowly develops there are substantial problems which are assessed by Lehte Roots. The author stress that Ukraine, Belarus and Moldova are countries of origin, destination and transit which has some implications for migration regime. At the same time EU follows the attitude of stabilizating situations in these countries without evident prospect of future membership which may lead to disapontmet (p. 119) and reduce the incentive to proceed with reform. Author stress that EaP countries are bound by the Copenhagen criteria, which shall be implemented also in the approaches related to immigration policy, but still, without prospect of future membership the motivation is weak. However, there are issues also at the side of the EU as migration and asylum policy is linked not only to justice, security and home affairs but has important extension to neignbourhood. Too many dimensions and actors involved means that EU often fails to speak with one voice (p. 134). The contribution of

Lehte Roots helps to understand problemac complexity of the migration policy from the both sides of the EU border.

Slightly similar approach to different area has been presented by Hamad Alavi who assessed EU's initiatives promoting environmental standards in the third countries under the umbrella of EaP and especially the Deep and Comprehensive Free Trade Area. Despite slight structural fragmentation of the chapter the author offers comprehensive view within issues and challenges ahead. As pointed out, this means to continue with emphasis of higher level of environmental protection, improving environmental governance and especially capacity building which is key factor influencing effective implementation of environmental policies and smooth approximation process (p. 150). Despite some shortcoming we can claim, that environmental cooperation is one of the areas with gretest and most visible added value within cooperation and represent good example how EU may utilize its "soft power" as environmental leader.

Very interesting chapter written by Roman Petrov is dedicated to the implementation of Association Agreements bwettween EU and three states: Ukraine, Moldova and Georgia. Petrov focuesess mainly on legal and constitutional constraints and concentrates on two major challenges within the implementation process: how to ensure effective implmementation and application of the Association Agreemetns and how to solve potential conflicts between Assocation Agreements and national constitutions. Author is relatively positive about future legal development of these countries and believes that Association Agreements may trigger important reforms and serve as stimul for higher legislative quality due to external monitoring from the side of the EU institutions (p. 164). Yet, as author points out, there is long journey for these countries to create implementation laws which might be modelled on the experience of other coutries which had to join the EU, undertake constitutional review and create conditions for Constitutional Courts to rule about the relation between EU and national law.

Another three contributions deal with Ukraine. Evhen Tsybulenko and Serjey Pakhomenko writes about Ukranian Crises and its implications for the EaP within the wider context: they focus on the expectations of the actors, the Russian factors and the future prospect to reform EaP. Authors stress that EaP is evaluated primarily in geopolitical terms. In this sense author touch the clash between functional nature of EaP and Imperial paradign of the EU discussed already in the first chapter. Authors claim that Ukraine had unjustified expectations from the EaP and better shall understand the cooperation "as an additional opportunity to enhance the process of internal reforms in line with Europeanization" (p. 178). In other words crises in Ukraine highlighted the limits of the EU capabilities to shape future relations and discovered unrealistic expectations of the Ukraine which remains in the shadow of Russia. Despite this contribution offers somehow

"standard" interpreational of EU-Ukraine-Russia relations it has its important place within the volume as it helps to understand geo-political limitations of the EaP and thus the grounds for re-formulation of the initiative.

Another interesting perspective is offerd by Thomas Hoffmann who analysed the level of europeanization in the area of private law in Ukraine. Hoffmann offered ten very typical situations in the field of law of obligaitons and compared how the situation would be solved according to Ukrainian law and from Eruopean continental perspective. His exploratory contribution finds out that Ukrainian law is to the greater degree Europeanized, however with considerable exceptions (p. 196). This has implications for contractual law, consumer protection, liability for damages and other areas important for ever closer economic relations with the EU.

After Ukraine three contributions are devoted to Georgia a country in the Russia's closest neighbourhood which opted for pro-European future. Archil Chochia and Hohanna Popjanevski discuss political development in the country and its consequences for the Georgia-EU relations. The study discovers increasing tensions within Georgian society caused by the rise of anti-Western forces invoked by Europeanization and fuelled by Russia directly by infiltration or by providing alternative in Eurasian Economic Union (p. 207). However, similarly to Ukraine Georgian commitment is also weakend by the hesistant attitude of the EU Member States which tries to avoid problems similar to development in Ukraine. Due to long way towards full EU membership second contribution written by Dali Gabelaia discuss Georgian experience with Visa Liberalization Action Plans which also required implementation of anti-discrimination and personal data protection laws. Despite great progress within implementation and changes Gabalaila concludes that every small success leads to inflated expectations which might be exploited by anti-EU forces as discussed by Chochia and Popjanevski.

The third contribution about Georgia analyses self-regulation mechanism in the Georgian medial landscape. Mamuka Andguladze discovers relatively important deficiencies in establishing effective self-regulatory bodies to gurarantee professionalism and independence of Georgian media and discusses vulnerabilities and differences in comparison to European regulatory standard (p. 236-240). With medial landscape delas also contribution of Onoriu Colăcel who concentrates on Moldovan private JurnalTV Chanel in the context of ethnic and cultural background or better between Romanian and Russian speaking medial culture (p. 247). Despite his contribution is shorter than others and lacks explicit conclusion it represents unique probe into Moldovan medial landscape and the issue of country position between Russia and the West.

The last contribution of the volume provides insight into area of innovation and possibilities in Baltic-Russia cooperation. Eunice Omolola Olaniyi and Gunnar Klaus Prause provides complex understanding ot the activites leading

to regional development and innovation in the Baltic countries and present EU-Russian platform for cooperation including analysis of the similatiries and differences within each country. Their contribution has added value especially in addressing policy considerations for innovation opportunities (p. 273-276). This is important as many Central and Eastern European economies share similar environment to that of Baltic countries and policy considerations may help them to increase attractiveness and incentives leading to innovations.

The presented volume offers unique insight in various areas of EaP and represents evidence that EaP has impacts beyond its formal scope. Great variability of contributions and thus partial inconsistency is well compensated by logical placement of individual contributions. Despite almost all contributions have conclusions reader might miss some final conclusion of the volume discussing prospects of the future cooperation and proposals for EaP modifications or highlight of new lines for further research. Most of the contributions are very empirical or interpratitive in nature which may leave impression that theoretical potential of some contributions was not fully filled.

Despite several contributons deals with the concept of Europeanization there is no feedback for the concept. However, this was not the aim of the issue which represents very important contribution evaluating EaP and fills the gap among other leading book titles. Neverhteless, readers might have feeling that volume lacks contributions dealing with Russian perspective and label the volume as "Western" or "EU-centric" which is inherently given by the topics and the researcher's attitude. In fact the book perfectly develops previous works of Elena Korosteleva dealing with EaP, Anna-Sophie Maass who writes about EU-Russian Relations or Roger E. Kanet's volume about Russian foreign policy.[1] For this reasons publication will be appreciated not only by students and academia in general, but also by decision-makers, journalists, security experts or anyone searching for deepening the knowledge about EU's eastern neighbourhood.

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[1] KOROSTELEVA, Elena. *The European Union and its Eastern Neighbours. Towards a More Ambitious Partnership?* New York: Routledge, 2014, 228 pp. ISBN 978-0-415-61261-6; MAASS, Sophie-Anna. *EU-Russia Relations, 1999–2015: From Courtship to Confrontation*. New York: Routledge, 2016, 216 pp. ISBN: 113894369X.; KANED, Roger E. (ed). *Russian Foreing Policy in the 21st Century*. Dordrecht: Springer, 2011, 289 pp. ISBN: 978-0-230-29316-8

SEHNÁLEK, David. *Vnější činnost Evropské unie perspektivou práva unijního a mezinárodního* (External Action of the European Union from the Perspective of Union and International Law). Brno: Masaryk University, Faculty of Law, 2016, 242 p. ISBN 978-80-210-8340-0

The new book written by David Sehnálek focuses on legal issues of EU external relations and it may be considered as exceptional from at least two perspectives. First of all, even though there is a solid base of political science books on EU external relations, there is a strong lack of legal literature focusing on EU external relations written in Czech. Thus, due to its perspective the reviewed book complements the book of Pavel Svoboda from Charles University in Prague[1] or a series of studies on various aspects of EU external relations law regularly published at the Faculty of Law in Olomouc.[2] Except the EU common commercial policy or EU external economic law[3] it is hard to find any other comprehensive resources on the legal issues of EU external action in Czech.

More importantly, the book is exceptional also with regard to its structure and actually the content. It does not cover the whole systematics of EU constitutional and institutional external relations, nor "substantive" EU external law, but it takes a specific perspective focusing on the cohabitation between EU law and international law. This requires a profound knowledge of both branches of law.

In the introduction the author explains the concept of the book and the research perspective thereof. He primarily intended to focus on the question how the international law influences functioning of the European Union externally, that is especially *vis-à-vis* third countries. By this focus the author intends to overbridge the common practice of books shaping the EU as a specific and

[1] SVOBODA, Pavel. *Právo vnějších vztahů EU* (EU External Relations Law), C.H.Beck, Prague, 2010.

[2] F.e. STEHLÍK, Václav. *Studie z práva vnějších vztahů Evropské unie* (Studies in EU External Relations Law), Palacký University in Olomouc, Olomouc 2016.

[3] ROZEHNALOVÁ, Naděžda. *Právo mezinárodního obchodu* (International Trade Law), 3rd ed., Wolters Kluwer, Praha 2010.

unique entity with dominance over law of Member States without a sufficient accent on what it is (or appears to be) viewed from the "outside". Admittedly this third-country perspective is more evident in research of the authors who have an international law background.

Based on this perspective the main issues which are accentuated in the book concern the dilemma whether it will be the EU or its Member States who will have the competence to act in external relations in individual issues, how decisions will be reached, which legal acts will be employed and who will bear the responsibility therefore. To fulfil these aims the author focuses on the definition of external action and systematics of regulation in EU primary law. He introduces the principles of EU external action and traces how they penetrate into various EU policies. In that regard he criticises the regulatory fragmentation of EU external activities. This can be demonstrated, among others, by the regulation of Common Foreign and Security Policy (CFSP) which is covered not only in the EU Treaty, but also, unsystematically, in the TFEU (art. 2, para 4). The author also analyses various duplicities of lay-out of EU external action (f.e. definition of aims and values which must be respected in external action).

A special attention is paid to the institutional background linked to the external action and evaluation of balances among various institutions in the context of external activities. One of the issues discussed is the limitation of the competences of European Parliament in some external activities. In this stanza the author discusses the democratic legitimacy of these activities with the view of limited powers of directly elected Parliament. A similar discussion is led in relation to the powers of the European Court of Justice, among others, in relation to its competences to *apriori* control of their compliance of envisaged EU external treaties with EU primary law. A special attention is paid to the correlation of TEU and TFEU in the process of adoption of restrictive measures to other international actors. These measures very often relate to the common commercial policy covered by the TFEU, but their roots are in the ambit of Common Foreign and Security Policy (CFSP) which are regulated in TEU. The author then analyses how this nature is reflected in the competences of various EU institutions, especially the European Parliament and Commission. Actually CFSP is in detailed covered in a separate subchapter, including characteristics of EU competences (intergovernmental versus "Community" methods of regulation). The author depicts legal instruments of CFSP and compares the nature of decisions adopted within CFSP and in other EU policies.

A separate chapter is devoted to the Common Security and Defence Policy (CSDP) which deals, among others, with the relations between EU and NATO where he actually preceded a currently intensified debate on common EU

defence system (recently especially European Defence Fund and a proposal of EU Commission of Regulation for a European Defence Industrial Development Programme[4]). The chapter also categorises and exemplifies treaties concluded within CSDP and the institutional background.

An interesting chapter is devoted to the Common Commercial Policy (CCP) which defines individual categories covered by the CCP, such as the goods, services, intellectual property rights, direct investments, customs duties, and analyses in general the various measures available in the area of CCP. In detailed he describes individual aims of CCP, legal regulation, competences, role of EU institutions and especially links to national regulation, namely its reflection in the Czech legal order. The chapter also covers other areas of EU external action, namely cooperation of EU with the third countries and humanitarian aid.

A concise analysis is devoted to the various legal tools used in EU external action with a special emphasis put on EU external agreements, including mixed agreements and the problem of parallelism between EU internal and external competences. The author calls for the use of the term "complementarity" instead of "parallelism" in this regard as this term more precisely fits the relation of EU implicit external competence to the explicit internal competence. The chapter covers also other problems linked to EU mixed agreements, including their interpretation, conclusion and application. A special attention was paid to the parallel agreements in contrast to classic mixed agreements.

Last but not least, independent chapters are devoted to the binding character of EU external treaties for the EU as well as its Member States and to international and EU responsibility. A distinct attention is paid to the relationship between EU law and public international law. This includes especially direct effect of international customary law and EU external treaties. A subchapter is devoted to direct effect of decisions of international organisations where the author touches, among others, the character of decisions of Association Councils or Dispute Resolution Bodies set up by external agreements.

In the final and overall evaluation of the book the following closing considerations may be made. As is evident from the outline made above the book is quite inclusive, but still selective as far as the topics which are covered. The book is not only a very fine complement to the few Czech books on this topic, but in some aspects it goes beyond and brings in the debate the topics frequented in the international academia. All conclusions made in the book are based on a very

[4] Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovative capacity of the EU defence industry, COM(2017)294.

solid analysis of national and international resources both in the EU and international law. It is highly appreciated that these topics were gathered under one hat and for sure they will be useful both for the Czech researchers and students.

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INSTRUCTIONS FOR AUTHORS

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