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PREFACE

You have just received the first issue of the journal "European Studies. The Review of European Law, Economics and Politics". It is a peer reviewed periodical in the form of year-book of the Czech Association for European Studies, which intends to become an impact journal in the future.

In this respect it is worth recalling that the Czech Association for European Studies (Czech ECSA) is a scientific society (in the form of a civic association) which unites university scholars, researches, experts from the practice, students, and also academic institutions engaged in the studies of various aspects of the European integration.

In a relatively short period of its existence, the Czech Association gained a considerable respect and recognition thanks to a series of successful events performed in cooperation with our partner institutions abroad (for details see www.caes.upol.cz).

The Czech Association is a part of the ECSA World, a worldwide network of national associations for European studies, which exist not only in all EU Member states, but currently they are represented in almost all continents (61 national and regional associations in total).

The presented journal reflects the interdisciplinary character of the Association itself, therefore it does not limit to only one discipline within the European studies, but on the contrary, it pursues for a multi-disciplinary approach and analysis of various aspects of the European integration. That is why the concept of the journal accounts with the scientific articles and expertise not only from the field of European law but from European economy, European political science, EC/EU history and other relevant disciplines relating to supranational entities as well.

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

This multinational character of the concept of the journal is enhanced by the composition of the Editorial board itself, which involves leading experts from the different countries all over the world.

For the same reason was chosen also the language of the year-book (English as certain "lingua franca" nowadays) and its publication by the international publishing house Wolters Kluwer.

We firmly believe that the idea of the European integration, which was launched by the fathers-founders in 1950's, will be appropriately and in a due form reflected also at the scientific and the research level. This journal primary serves this objective.

The edition of the year-book "European Studies. The Review of European Law, Economics and the Politics" would not be possible without the financial support by the European Commission within the Jean Monnet grant titled "The increasing role of the Czech ECSA in the study of the European Integration Process", for which we express our warm and cordial gratitude.

Chief editor
Assoc. Prof. et Assoc. Prof. JUDr. Naděžda Šišková, Ph.D.

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President of the Czech Association for European studies

August 2014

ARTICLES

New Challenges for the EU in the Field of Human Rights (Focusing on the Mechanism of the Charter)

Naděžda Šišková*

Summary: This paper deals with issues of the application and interpretation of the Charter of Fundamental Rights of the EU as the first catalogue of human rights at the level of supranational entities. Author describes the the peculiarities of the application of the Charter, especially deals with the most problematic issues like legal status of the Explanations to the Charter, two categories of provisions = rights and principles and distinction between them. The article also focuses on the Protocol on the Application of the Charter of the Fundamental Rights of the EU to Poland and the United Kingdom and explains the reasons for non-accession of the Czech Republic to this instrument.

Keywords: Fundamental Rights, EU Chapter of Fundamental Rights of the EU, Application, Mechanism of the Protection, Protocol No 30

1. Introductory remarks

The Lisbon Treaty brought undoubtedly a number of cardinal changes in the field of human rights regulation at the level of the EU, nevertheless its contribution to this area is burdened by some reservations, clauses of restrictive character, unclear formulations and other facts, which prevents in a certain way the effective enforcement of the individual rights in all cases.

To the specifics of the Lisbon Treaty belongs also the fact, that the Reform Treaty is focusing not only on one mechanism, but accounts with the deepening of human rights regulation in several directions, including the envisaged accession of the EU to the European Convention of Human Rights and Fundamental Freedoms.

Due to the limited space of the contribution, the analysis will be done concerning only one of the mechanisms, which plays the key role in the protection

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of human rights at the level of the EU, particulary on the deepening of the mechanism of the Charter of the Fundamental Rights of the EU.

2. Charter of Fundamental rights of the EU and its character in the intention of Lisbon Treaty

First it must be pointed out that the Lisbon Treaty brought the change, which was expected for a long time, concerning the legal status of the Charter, which ensures its transformation from the merely political declaration into a legally binding document, which **"has the same legal value as the Treaties"**.

Nevertheless, concerning the form in which it was done, sets out the Reform Treaty in another way than in the case of the Constitutional treaty, which had incorporated the Charter into its own text (as part II of the Constitution for Europe). In other words, in the intentions of the Lisbon approach, the Charter is singled out from the text of the Treaty and repeatedly declared as an autonomous act on the 12th of December 2007 and gains its legal binding character due to the reference contained in the article 6 paragraph 1 of the European Union Treaty.

The chosen concept reflects 2 facts:

Firstly, the Charter does not become the integral part of the Foundation Treaties and as such was not the subject of the ratification process in the Member states.[1]

Secondly, despite the fact, that the Charter "has the same legal value as the Treaties", but it was upgraded to the level of the primary law by reference only.[2]

In other words, the authors of this concept tried not only to avoid the obstacles and uncertainty of the ratification process, but also decided **intentionally** to weaken and make different the status of the Charter in comparison with that it had under the Constitutional Treaty.

The chosen concept became the result of the complicated compromise between the states-opponents of the Charter (Great Britain and Ireland) and other Member states, for which the abandoning of the Charter was totally unacceptable.[3]

The mentioned solution, which enabled to remain a binding character of the Charter at the level of the primary law act, however without its incorporation

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[1] For more details, see Syllová, J., Pitrová, L., Paldusová, H. a kol. *Lisabonská smlouva, komentář*. C.H.Beck, Praha 2010. p. 40.

[2] Judgment of the Czech Constitutional Court from 26. 11. 2008, Pl. ÚS 19/08, 446/2008 Sb., point 190

[3] Piris, J.-C. The Lisbon Treaty – A Legal and Political Analysis, Cambridge University Press, Cambridge, 2010, p. 150.

into the framework of the Treaties, was "compensated" by the number of "warrants" which de facto weakened the impacts of this human rights catalogue of the European Union standard.

For understanding of the reasons why the Charter has met so great and long lasting obstacles during the obtaining of its legal binding character, the decisive role play the issues of its material scope. The creators of the Charter were seeking for the widest concept of human rights regulation in the form of one coherent act. That is why the catalogisation was done concerning not only the fundamental rights which create the mere core of human rights (which would be strictly corresponding to the title of this act), but also the economic and social rights, as well as the rights of the fourth generation (including bio-ethical provisions and other so-called modern rights).

This fact, by the way, refutes the wide spread, but not proved opinion, that the Charter does not create any new rights, but only does the catalogisation of those rights, which were already formulated by the Luxembourg Court in the framework of its judicial doctrine of fundamental rights.

In fact, it was not only the mechanical arrangement of the rights already found in the framework of the judicial doctrine of fundamental rights (which was not of course the main intention for the adoption of this act) and undoubtedly the Charter has its own very distinct and considerable "added value" and even great emotional and philosophical dimension as the document not only legal, but the political and ideological as well. It was of great importance for the authors of the Charter to create not only a very modern and pioneering document reflecting the actual scientific and technical progress, but also one containing the basic values of the Union.

So, it can be concluded, that on the contrary to the European Convention, which protects a relatively limited number of rights (the rights of a personal and a political character only), which are supported by a very effective control mechanism of the judicial type, and other rights are protected by means of other instruments (European Social Charter, for instance) with the control mechanism of the soft-law type, the **EU Charter regulates the rights of all four generations, including economic, social and so-called modern rights**.

Such an extensive concept of the human rights bill at the level of the EU has undoubtedly its own positive and negative sides. On one side it creates a coherent catalogue of all the rights of the European Union's standard and is very generous towards the individuals (not only the citizens of the EU). On the other side this extensive concept is very difficult for all Member states to accept, especially if we take into consideration the approach of some countries (first of all Great Britain and Ireland) to the issues of the protection of economic and social rights and the role of the state in guaranteeing them.

So, it can be summarised, that the Charter is shown to **be too ambitious, too broad-minded and too generous document**, which was very simply acceptable as the political declaration but caused great problems as the document legally binding, due to the extremely extensive articulation of rights and the potential burden for the Member states, especially in the economic and social field.

That is why brings the Lisbon Treaty in principle the old text of the Charter, but "dressed in a new coat" which was supplemented by "new accessories" in the form of three kinds of measures in order to weaken its possible effects.

They are**: Explanations, horizontal provisions and Protocol No 30 to the Treaty.**

3. Explanations to the Charter. Differentiation between the rights and principles.

One of the mentioned measures became the incorporation of the so-called **Explanations relating to the Charter**[4] into the text of the Charter itself (art. 52 para 7), as well as into the art 6 of the European Union Treaty. It is an instrument, which was elaborated by a group of experts under the authority of the Presidium of the Second Convention.

Despite the fact, that the Explanations do not have the status of the source of law, nevertheless its incorporation into the text of the Reform Treaty (even two times) rises the question about the reasons of it.

The answer could be found in the fact, that the Explanations once more provided the *expressis verbis* verification of the limited character of the obligations coming from the Charter. But first of all they had done the division of economic and social rights into 2 categories: ***rights*** and ***principles***.

In the case of **rights** speaks the Explanation about the **directly invokable rights** of individuals (for instance art. 23 – Equality between women and men), while the **principles** are considered to be merely the definitions of the objectives to be respected by EU legislature and which can be invoked only in the case they have been implemented through legislation (for example art. 25 – the rights of the elderly).

So private individuals are not able to bring a legal actions to enforce them, and they are judicially recognizable only in the interpretation of such acts when ruling on their legality.

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[4] Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, Official Journal, 14. 12. 2007.

So, it can be stated, that by means of this instrument a very considerable weakening of the impacts of the Charter were reached, although the fact, that it was not done in the form of the direct reduction of the number of rights declared by the Charter. In other words, the introduction of para 5 of art. 52 of the Charter in combination with para 1 art.6 of TEU and the text of Explanations enable to give away in a very elegant and simple form from the group of directly invokable rights a lot of entitlements, which some Member states considered to be as too great burden for them.

Another very important aspect consists in the fact that the weakening of the impacts of the Charter in the field of economic and social rights was realized concerning the territory of the whole Union, on the contrary to Protocol No 30, which relates to some states only.

4. Horizontal provisions of the Charter

The second measure which reduces the effects of this "European Union's Bill of Rights" consists in the introduction of the new so-called horizontal provisions, which prevent from the too extensive interpretation of the Charter.

They are para 4–7 to the art. 52 and the articles 53 and 54 of the Charter, which were added to the text of the original horizontal provisions of the art. 52 para 1–3 and para 5. As there is no place to analyse these provisions in details, it can be summarised briefly, that they are creating other guarantees in the relation to the anticipated burden on the Member states in the mentioned area. Besides this, they have to break up the fears of the Member states, that on the basis of the Charter the further transfer of competences from Member states to the Union would take place in the areas covered by this Bill.[5]

5. Charter and Protocol No 30

5.1. The Reasons and Preconditions for the Creation of Protocol No 30

Nevertheless, even this measure (new horizontal provisions) did not seem to be satisfactory enough for fitting the British attitude to the issues of social and economic rights. Especially, on the side of British businessman grew stronger the awareness from the fact, that art. 28 (Right of collective bargaining and

[5] Piris, J.-C., work cited, p. 158.

action) and art. 30 (Protection in the event of unjustified dismissal) are formulated as the *rights* and not as the *principles*, and their direct applicability thus cannot be excluded. It was the opinion which was expressed in the Report of the European Committee of the House of Lords of the British Parliament, 2007.[6] That is why Great Britain had used the refusal of the Constitutional Treaty as the appropriate opportunity for the revision of its position in this field. Especially during the negotiations on the Lisbon Treaty at the Berlin summit on 21 and 22 of July 2007 Great Britain succeeded in arranging the Protocol on Application of the Charter of the Fundamentals Rights of the EU in Poland and the United Kingdom (now it is Protocol No 30).[7]

The Protocol was at the beginning conceived to be applicable for Great Britain only. But Poland reserved its right to access it.[8] So, Poland did not participate in the negotiations on the Protocol, but accepted only the final text which was arranged by Great Britain, without the possibility to influence its content.[9] On the contrary to the motivations of the United Kingdom, which were connected with the issues of social rights, in the case of Poland they were the issues of public morality, family law, together with the protection of human dignity and adherence to the physical integrity of a person, that cannot be doubted while interpreting the Charter.[10]

5.2. Protocol No 30 and the "Czech saga"

In the case of the Czech Republic a very dramatic development took place. On the 9th of October 2009 the Czech President Václav Klaus declared the exclusion of the questionability of the Benes Decrees on the grounds of the Charter being the condition of his signature of the Ratification act.[11] Concerning the form, in which it would be done, demanded Václav Klaus the reference in the text of the Lisbon Treaty itself, which would lead to the re-opening of the whole ratification process.

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[6] EU Committee, 10th Report of Session 2007–2008, the Lisbon Treaty: An Impact Assessment, Publisher on 13 March 2008.

[7] The Protocol (No 30) on the Application of the Charter of the Fundamental Rights of the EU to Poland and the United Kingdom

[8] Schwarz, J.: Protokol o uplatňování Charty základních práv Evropské unie, Jurisprudence, No 2/2010, p. 17.

[9] Ibid.

[10] Pítrová, L. a kol.: Lisabonská smlouva. Co nového by měla přinést? Kancelář Poslanecké sněmovny Parlamentu ČR, Praha, 2007, p. 12.

[11] For more see Schwarz, J.: Charta základních práv Evropské unie, thesis, Fakulta sociálních věd UK, 2010, p. 107.

In the reaction to this, the Czech Government under the leadership of Jan Fisher in cooperation with Sweden as the Presiding country negotiated at the Brussells meeting of the European Council on the 29th of October 2009 the accession of the Czech Republic to the Protocol No 30 at the moment of the nearest Accession Treaty (in other words, not in the form of the special reference on non-questionability of Benes Decrees in the text of the Lisbon Treaty, which was already ratified by all other Member states).[12]

That is why the European Council agreed with the Czech accession to the Protocol at the moment of the conclusion of the nearest Accession Treaty (it was expected that it would be in the case of Croatia).

Nevertheless, it wasn't done in the envisaged form, even after the accession of Croatia into the Union in June 2013. The reason was that under the opinion of the Legal service of the Council, it is impossible to combine these two issues – the accession to the Union (in the case of Croatia) and the modification of the primary law (in the case of Protocol) due to the different legal basis (art. 49 and art. 48 of the EU Treaty).

That is why the connection between the Protocol and Accession Treaty with Croatia must be understood as the mere temporal synchronisation and the same timing, but not the organic connection of these different documents. The approval of the mentioned documents would to be done separately.

As the European Parliament gives its opinion to the European Council to all Treaty changes proposed, the issue was discussed first by the Committee on Constitutional Affairs of the European Parliament, which issued in February 2013 a very critical report. Besides others it pointed out that:

1) Klaus concerns were absent from the political debate until early 2009 and were not mentioned in submissions to the Czech Constitutional Court in either of its two Lisbon judgments;
2) it is far from certain that the Czech Parliament will ultimately ratify the new Protocol. Ratification of an international treaty which transfers competence in any direction requires a three-fifth majority in both Senate and Chamber of Deputies of the Czech Parliament;
3) two judgments of the Czech Constitutional Court (2008 and 2009) affirm that the Lisbon Treaty is fully in accordance with the Czech Constitution;
4) Pointed out the letter from the President of the Czech trade unions Jaroslav Zavadil to the President of the European Parliament Martin Schultz setting out his objections to the Draft Protocol.

[12] More Králová, J.: K vlivu tzv. britsko-polského protokolu a tzv. český „zásah" k Listině základních práv EU na uplatňování základních práv v těchto státech, Jurisprudence, No 3, 2010, p. 4.

5) At the end it is concluded that: **the Protocol has given rise to legal uncertainty and political confusion. In that respect, it affects adversely all Member states and not just the UK, Poland or, prospectively, the Czech Republic and would therefore undermine the efforts of the EU to reach and maintain a uniformly high level of protection of fundamental rights.**[13]

The Plenary session of the European Parliament in its resolution from 22nd of May 2013 called on the European Council not to examine the proposed amendments of the Treaty. As the resolution is not binding for the European Council, it was expected that the matter would be discussed at a future summit and in case of its approval it would be the subject of the ratification process in all Member states. This development has been interrupted by the recent decision "not to continue in the arrangements of the Protocol", which was adopted on 14th of February 2014 by the new Czech Government under the leadership of Bohuslav Sobotka. It means definite termination of the so-called "Czech saga".

6. A Character of the Protocol and the evaluation of its eventual impacts[14]

After reviewing the reasons for the adoption of the Protocol, the question about the impacts of this instrument is quite justified, especially finding out whether the Charter loses on the grounds of Protocol a part of its territorial scope or not. In other words, does it create an opt-out or rather interpretation instrument?

Despite the fact, that the media often present the Protocol as the opt-out, the representatives of the jurisprudence evaluate it mostly in the other way.[15]

In this respect let us remind, that the opt-outs create the diversion from the contract law in the benefit of a certain state, which is not entirely or partly to be a subject of obligations.[16] For instance, the transitional provisions which are realised in the connection with the enlargement of the EU, which suspended the application of EU law in new Member states. The opt-outs are permissible

[13] Third draft Report on the Draft Protocol on the Application of the Charter of Fundamental Rights of the EU to the Czech Republic, European Parliament, Committee on Contributional Affairs 11. 12. 2012, PR 922077XT. doc, p. 9–11

[14] This part of the contribution gathers from Šišková, N.: Charter of the Fundamental Rights of the EU in the Context of Protocol No. 30 to Lisbon Treaty, Danube: Law and Economics Review, 2011, issue 2, pages 55–61, No. 2, 2011.

[15] Schwartz, work cited, p. 19–20; Králová, work cited, s. 7; Piris, work cited, p. 163.

[16] Schwarz, work cited, p. 17.

only in others, but not in the main fields of the Union law.[17] They are not permissible in those aspects of the Treaties, which are principal. Besides, following the case-law of the Court of Justice of the EU, it is impossible to arrange an opt-out from the fundamentals rights[18], which were recognised as such by the Luxembourg Court in the framework of its doctrine of the general principles of law (the principle of the protection of fundamentals rights creates the integral part of this doctrine). The Protocol thus does not interfere in the judicial protection granted in the case of those rights, which the Court of Justice of the EU already incorporated among the protected rights in the framework of its developed doctrine of fundamentals rights. This fact is also proved by the case-law of the Luxembourg Court, which just before obtaining the binding character of the Charter declares: "Even when the Charter did not have legal force, the right to take collective actions, including the right to strike, has already been recognised by the Court of Justice as fundamental right which forms an integral part of the general principles of the Community law the observance of which the Court ensures."[19]

The fact is that it is not the opt-out, but the interpretation instrument, is also confirmed by the semantical interpretation, because the Protocol is named as "On the Application of the Charter" and does not contain any expressions, which indicate the diversion from the Charter, such as "opt-outs", "non-participation", "non-binding", "non-applicability"[20] etc.

That is why in jurisprudence prevails the opinion, that the Protocol thus in principle changes nothing in the binding character and the unity of the current system of the Union's protection of the fundamental rights in the Member states. It is an additional and unnecessary warrant which guarantees that the Charter does not extend the current possibility to claim the Member states for the infringement of fundamental rights.

Protocol thus will have the importance only in those hypothetical cases when in the framework of the interpretation made by the Court of Justice of the EU the duties of the Member states in the field of human rights would be extended beyond the existing obligations.[21]

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[17] Ibid, p. 19.

[18] Ibid.

[19] Judgment ECJ, 11.12.2007, No C-438/05 "Viking Line" SbSD I-10806, p. 43–44. More also Judgment ECJ, 18. 12. 2007 No C-341/05 "Laval" SbSD 2007, I-11845, p. 90–92. More also Piris, work cited, p. 157, 163.

[20] For more see Schwarz, work cited, p. 19.

[21] For more see Šišková, N.: Charter of the Fundamental Rights of the EU in the Context of Protocol No. 30 to Lisbon Treaty, Danube: Law and Economics Review, 2011, issue 2, pages 55–61, No. 2, 2011.

7. Conclusions

So it can be summarized that the chosen concept towards the Charter consists in the extreme generosity of its content. This fact became not only a brake in its legal binding character which has lasted for almost ten years, but even after obtaining of legal status it still leads to limitations by means of the Explanations and divisions into the rights and principles (without clear differentiation).

These measures together with the Protocol No 30 causes the difficulties in understanding of its provisions not only from the side of the general public, but even from the side of the practical lawyers and the representatives of the jurisprudence as well.

This fact collides with the main aim for the creation of the Charter, which was envisaged to be an instrument, which is clear, understandable and close to the citizens.

That is why the clarification and the simplification of the provision of the Charter, including the surrender of Protocol No 30, reducing of the restrictions given by the horizontal provisions as well as Explanations and the elaboration of its own effective control mechanism will create a great and complicated challenge for the European Union in the field of human rights in future several decades.

Smart Sanctions, Fundamental Rights and Extracontractual Liability for Damages

Pavel Svoboda*

Summary: This paper analyses the problem of the EU non-contractual liability for the damages caused by the counter-terrorism measures – so called smart sanctions in the form of freezing the assets of the individuals allegedly associated with the terrorism and the approach of the Court of Justice to this sanctions. It deals with the actual case-law, concretely the judgement in the case T-341/07 Sison III.

Keywords: EU counter-terrorism measures, smart sanctions, freezing of assets, legality, Court of Justice, non-contractual liability of the EU.

One of the well-established streams of current EU case law is a line of EU Court of Justice's ("CJEU") rulings on counter-terrorism measures – so-called smart sanctions, mainly consisting in freezing the assets of individuals associated with terrorism. Substantial part of this case law deals with legality of these EU sanctions in terms of (non) compliance with fundamental rights, eventually resulting in invalidation of such measures. Legality of these measures is subject to CJEU's judicial review. Should such a sanction be found illegal, civil consequences of such illegality, e.g. EU liability for damages caused by the asset freezing, may follow. Conditions of such non-contractual liability are elaborated in the CJEU judgment in Case T-341/07 Sison III.[1] Importance of the judgment lies in the fact that it upholds a very limited willingness of the CJEU to grant non-contractual EU liability even in quite obvious circumstances. We will first analyze the judgment and then re-think the relationship of the EU's liability and its values and objectives.

1. Facts of the case

Even though we are dealing with the ninth CJEU decision at the request of applicant Sison, at least two other judgments are of major significance in this

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[1] Judgment in Case T-341/07 Jose Maria Sison v Council of 23 November 2011.

context: judgment in Case T-47/03 Sison I and an interlocutory judgment in Case T-341/07 Sison II.[2] The General Court has so far repealed any and all EU sanctions against the applicant.[3] The reason for these cancellations is linked to the fact that the asset freezing was based on decisions of Dutch courts[4] related to the status of Mr. Sison as a refugee, not linked to any criminal prosecution for terrorism, a condition for imposition of smart sanctions. The EU Council while freezing assets of Mr. Sison by a sanctions regulation has been mislead by the Dutch court judgments in the sense that they mention Mr. Sison as a Filipino citizen with residence in the Netherlands, leader of the Communist Party of Philippines and its armed wing New People's Army, which has conducted a series in Philippines terrorist acts.

2. Condition of sufficiently serious breach of an EU rule

The General Court in paragraph 29 of the judgment points out that according to settled case law, three conditions of EU liability for damages are (1) unlawful conduct alleged against the EU institutions, (2) actual damage and (3) existence of a causal link between that conduct and the damage;[5] it also notes that these conditions are cumulative (para 29). It is not the purpose of this article to analyze all the conditions of EU liability for damages; we will deal with only one of them: the *sufficient seriousness of the EU rule breach*.

The General Court's ideological starting point while defending this additional condition is the difference between the action for annulment and action for damages. In connection with the afore mentioned condition the General Court stresses that the reason for existence of non-contractual liability claim for compensation is not any harm, but only that originating in a sufficiently

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[2] Judgment Sison II has the same ref. No. as the judgment examined in this article.

[3] Cf. Council decision 2007/445, Council Decision 2007/868 implementing Article 2, paragraph 3 of Regulation No 2580/2001 and repealing Decision 2007/445, Council Decision 2008/343, amending Decision 2007/868, Council decision 2008/583 implementing Article 2, paragraph 3 of Regulation No 2580/2001 and repealing Decision 2007/868, Council Decision 2009/62, implementing Article 2, paragraph 3 of Regulation No 2580/2001 and repealing Decision 2008/583 and Council Regulation 501/2009 implementing Article 2, paragraph 3 of Regulation No 2580/2001 and repealing Decision 2009/62, in so far as those acts relate to the plaintiff.

[4] Judgment of Raad van State (Council of State) of 17 December 1992 and the judgment of the Rechtbank (District Court) in the Hague of 11 September 1997.

[5] The General Court refers here to Case C 120/06 P and C 121/06 P FIAMM, para 106 and case law cited therein, and to CJEU judgments T 351/03 Schneider Electric, para 113, and T-47/03 Sison I, para 232.

serious breach of a rule "*intended to confer rights on individuals*" (para 33).[6] This is so because the majority of EU acts – including counterterrorism – has economic consequences, and should therefore "*avoid the risk of having to bear the losses claimed by the persons concerned obstructing the institution's ability to exercise to the full its powers in the general interest, whether that be in its legislative activity, or in that involving choices of economic policy or in the sphere of its administrative competence, without however thereby leaving individuals to bear the consequences of flagrant and inexcusable misconduct*" (para 34).[7]

The probability that a sufficiently serious breach is at stake is the greater the smaller the discretion of the institution and the more accurate formulation is carried out in the provision;[8] yet to meet this condition, not any breach of the rule is not enough even if there is no room for discretion by the respective institution, if the matter is complicated (paras 36–40):[9] CJEU must take into account the complexity of the case, so that EU liability can only be based on "*the finding of an irregularity that an administrative authority, exercising ordinary care and diligence, would not have committed in similar circumstances*" (T-429/05 Artegodan, paras 59–62). The General Court expressly states in this context that "*the case-law does not establish any automatic link between, on the one hand, the fact that the institution concerned has no discretion and, on the other, the classification of the infringement as a sufficiently serious breach"* (para 36). However, the vast majority of the previous case law is based on the exact opposite: a breach of EU law with a zero discretion left to the institution in question has a quasi-automatic consequence of extra-contractual liability.[10] Clarification of this condition for the case at stake is crucial: if the Council is to implement UN Security Council resolutions by a secondary act, thereby fulfilling the implementation duty instead of EU Member States (see especially

[6] Cf also 5/71 Zuckerfabrik Schoppenstedt, point 11; 9,11/71 Grands moulins de Paris; 43/72 Merkur; 83/76 Bayerische HNL; C-104/89 & C-37/90 Mulder, where in a dispute on milk quotas the CJEU has recognized liability of the Community.

[7] Cf. T-351/03 Schneider Electric, para 125; T-212/03 MyTravel Group, para 42, a Artegodan, para 55.

[8] Cf. C-282/05 P Holcim, para 47.

[9] Cf. C-312/00 P Commission v. Camar a Tico, para 54; T-198/95, 171/96, 230/97, 174/98, 225/99 Comafrica, para 34.

[10] This is important even for Member States non-contractual liability for breach of EU law in respect of which the case law is far more casuistic, but the conditions of which have to be consistent with the EU contractual liability: *„[…]conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances."* (C-352/98 P Bergaderm, para 41).

Article 25,[11] 103[12])[13], space for discretion within the conditions set in Article 2, paragraph 3 of Regulation No 2580/2001 in conjunction with Article 1, paragraph 4 of Common Position 2001/931 is indeed non-existent: otherwise, the proposal for inclusion in the so-called autonomous EU list is not adopted (para 57).[14]

When analyzing this argument we should not forget that the whole subject of anti-terrorist case law is an alleged violation of fundamental rights of individuals. Simplified logic of many readers would have assumed that almost any interference with a fundamental law should be conceptually sufficiently serious, otherwise it would not be a fundamental right. But with this the General Court disagrees: even in cases of interference with fundamental rights it is necessary to ascertain whether the breach is sufficiently serious (para 44). If – according to the General Court – all fundamental rights should be absolute, if any violation or, respectively, restriction thereof was sanctionable, if it was not possible eg to distinguish between the essence / existence of ownership rights on one hand side and restrictions on its exercise on the other (such as freezing assets), hardly any anti-terrorist sanction could be imposed at all.[15] However, reflection of the legal norms violation intensity – "sufficient seriousness" – should in our opinion aleready be a criterion for reviewing the validity of the rule, not only of its liability consequences.

The central question of judgment, therefore, is whether in this case was *"sufficiently serious breach of a fundamental rule of law protecting an individual."* In examining this question it is first necessary to determine whether

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[11] Art. 25 of the UN Charter: "*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter*"

[12] Art. 103 of the UN Charter: "*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."*

[13] The CJEU recognized this in para 293 of the cited judgment Kadi: "*Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations*."

[14] In the case of autonomous EU sanctions lists the Council acys on the basis of previous decision of a competent national authority of an EU Member State and can only assess whether (i) the relevant decision has been taken by a competent authority, and (ii) to verify its consequences, i.e., whether grounds for freezing the funds persist. If both conditions are met, the Council has no discretion to decide on inclusion of the individual on the EU sanctions list.

[15] Cf. C 402/05 P and C 415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission ("Kadi"). Violation and (legal) limitation of a fundamental right are two different things – breach is an illegal interference of public authorities, whereas on the contrary restrictions are permissible as long as they do not breach the respective legal conditions (see Sison III, para 50).

there is a " *fundamental rule of law protecting an individual*" before that there was possibly the *"sufficiently serious breach*."

Therefore, the General Court first notes that the issue really is *the "fundamental rule of law, protecting an individual"* – plaintiff Sison. The damages claim[16] concerns the infringement of Article 2/3 of Regulation No 2580/2001 in conjunction with Article 1/4 of Common Position 2001/931, allowing the Council to impose restrictions on the rights of individuals in the fight against terrorism, which governs the conditions under which such restrictions are allowed. Therefore, the basic object of these provisions is „*to protect the interests of the individuals concerned, by limiting the cases of application, and the extent or degree of the restrictive measures that may lawfully be imposed on those individuals*." (para 51).

Then the General Court approaches the question of whether there was possibly a "*sufficiently serious breach*" of such a rule. Here, the General Court pointed to the difficulty of interpretation of a vague provision of a penalty (paras 62–65 points), difficulty of aggravated concluded that the Council cannot be blamed for "*irregularity that an administrative authority, exercising ordinary care and diligence, would not have committed in similar circumstances, can render the Community liable*" (para 39).

After the General Court did not find sufficient seriousness of the breach of the Council sanctions regulation (para 74), it goes on to examine the alleged violation of EU fundamental rights.[17] Along with the General Court let us emphasize that the applicant did not attack the smart sanctions regime as a whole as this system in general has indeed been found compliant with fundamental rights by the CJEU several times previously (paras 76–77). The EU right to adopt smart sanctions itself is therefore not legally challenged by the applicant, and therefore the General Court continues to examine whether there has been a "*sufficiently serious breach*", it states that a sufficiently serious breach of fundamental rights would have to consist in the fact that smart sanctions were

[16] In this context it is significant that in paragraph 25 of Sison III, because of res judicata the General Court dismissed the action for damages as inadmissible in so far as it sought compensation for damage allegedly caused by the acts contested in a case in which judgment T-47 / 03 Sison v Council ("Sison I") was delivered. Thus, plea for an award of damages remained only non-compliance with statutory conditions set out in Article 2, paragraph 3 of Regulation No 2580/2001 and Article 1, paragraph 4 of Common Position 2001/931 as established by the General Court (see Sison II para 122). Pleas alleging infringement of the obligation to state reasons and manifest error of assessment of the facts, have been rejected by the General Court (para 71 and 89 of the Sison II judgment).

[17] The General Court did not rule on the pleas alleging infringement of the proportionality principle and breach of general principles of EU law and fundamental rights in its judgment Sison II (see para 43 of Sison III, referring to paras 123 and 138 of Sison II).

imposed on the plaintiff under conditions exceeding the limits specified in the Sanctions Regulation, i.e. „*in conditions not consistent with those laid down, specifically in order to limit the opportunities of interference by public authorities in the exercise of those rights*" (para 78). Any contractual liability of the EU depends therefore on the seriousness of the breach sufficient of the sanctions regulation, as „*the alleged breach of the applicant's fundamental rights being inseparable from that illegality and arising from it alone*" (para 80). Given that the said sufficient seriousness was refuted above, an EU non-contractual liability cannot be granted to the plaintiff in this case.

3. Objections to General Court's arguments

We disagree with the logic of General Court's arguments. We propose that the judicial reflection of EU law breach intensity (sufficient seriousness of the breach) be already part of the legality – validity review. We take this standpoint basicly for three reasons: plain logics, conflict with EU values and conflict with the protection of an individual as the basis of the entire EU law legitimacy.

3.1. Plain logic

If we follow the existing logic reasoning of the General Court, any violation of primary law (including fundamental rights, such as the right to effective judicial protection, para 81) is serious enough to cause annulment of a secondary act (regulation, directive or decision), although this may cause a breach of the EU Member States' commitments under the UN Charter (in particular Articles 25 and 103) for the implementation of security Council resolutions in the fight against terrorism, but some violations of fundamental rights may not be serious enough so that the victim be paid compensation. In our view, already this sole argument makes the entire approach of the General Court to this question inacceptable.

a. Conflict with EU values and objectives

The above raised question marks were perhaps also shared by the General Court which defends itself against them in para 81 of the Sison III judgment: „*neither the Charter of Fundamental Rights of the European Union nor the ECHR, which both guarantee the right to effective judicial protection, preclude that the Community's non-contractual liability be made subject, in circumstances such as those of this case, to the finding of a sufficiently serious breach of the fundamental rights invoked by the applicant. With more particular regard to*

the rights guaranteed by Protocol No 1 to the ECHR, the European Court of Human Rights has, furthermore, taken account of 'the various inherent limitations imposed by the elements of the action to be established'(Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, ECHR judgment of 30 June 2005, Reports of Judgments and Decisions, 2005-VI, §§ 88, 163 and 165)."[18]

As the current CJEU case-law stays, any violation of primary EU law (including fundamental rights, such as the right to effective judicial protection, cf. para 81) is serious enough for the EU to cancel a secondary act (regulation, directive or decision), even if the EU may cause a breach of Member States' obligations under the Charter of the United Nations (especially the above quoted Articles 25 and 103) to implement the Security Council resolutions on the fight against terrorism,[19] but some such fundamental rights violations may not be serious enough in order to award the victim due compensation.

However, under Article 2 TEU respect for human rights is one of the EU values and the first EU goal listed in Article 3 TEU is to promote peace, securing of which is a primary objective and competetnce entrusted by the UN members to the UN Security Council; Article 24 of the UN Charter leaves no doubt about it: *„In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."* Let us stress that the UN Charter is the pinnacle of international law and moreover under Article 21(1) TEU „[*t*]*he Union's action on the international scene shall be guided by … the respect for the principles of the United Nations Charter and international law."*

If we hereby accept that a fundamental rights' breach is serious enough to cause cancellation of EU secondary legislation (e.g. parts of sanction regulations), serious enough to cause the CJEU to ignore the obligation of EU Member States to comply with UN Security Council resolutions adopted under Chapter VII of the UN Charter (threat to international peace and security), thus disregarding absolute priority of such resolutions over other obligations under international law, but may NOT be serious enough to ensure that an individual received financial compensation, then we can with a slight exaggeration

[18] The General Court refers to the ECHR judgment of 30.06.2005 in the matter Bosphorus v Ireland, paras 88, 163 and 165.

[19] The entire above cited Kadi case law concerns this problem. The author is aware of intertemporal provisions in the decisions in question, taking recourse to Article 264(2) TFEU and temporarily maintaining a freeze of assets, thus giving the Council and the Commission time to issue a new proper sanction act; CJEU demands for meeting the burden of proof in this case, however, are so high they are not in our view realisticly achievable.

conclude that money is an EU objective and value of higher level of protection, because it is subjected to stricter criteria than the goal of maintaining international peace.

b. Conflict with the protection of an individual as the basis of the entire EU law legitimacy

Everything that gives legitimacy to quasi-constitutional EU standards, is based on the protection of fundamental rights or weaker position of the individual, not on sovereignty of Member States or the importance of the EU. E.g., the fact that EU law affects the status of persons more than international law, is the main reason for recognition of its direct effect and primacy over Member States' laws.[20] How should this primacy be rhymed with the fact that compensation based on non-contractual liability is easier in situations without application of EU law than with it? While in the procedure-law area so far an effort has prevailed to ensure that EU law-based claims are not discriminated against by national procedural law – i.e. that such claims be recoverable under the same procedural requirements as claims based on national law[21] (principle of equivalence[22]) and not to deprive individual rights, based on EU law, of efficiency (principle of effectiveness – effective judicial protection), the condition of sufficient seriousness turn the car upside down: the right to compensation under EU law is more difficult to obtain not because of national law but because of EU law itself.

It could be valuable to add the view of the ECtHR on the question as formulated in the cases of *Matthews[23] and the above mentioned Bosphorus* (a state cannot justify violation of the ECHR by arguing that it has in the respective area delegated its powers to an international organization), which could be more favorable for Mr. Sison than the approach of the General Court: one cannot exclude an ECtHR approach, whereby Member States may become liable for damage caused to Mr. Sison, when such a damage is not made good by the EU itself.

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[20] Cf. e.g. Art. 1 TEU: „*This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.*"; Art. 2 TEU: „*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*"; Art. 3(1) TEU: „*The Union's aim is to promote peace, its values and the well-being of its peoples.*" ect.

[21] Cf. C-261/95 Palmisani.

[22] Cf. 240/87 Deville, C-20/92 Hubbard.

[23] Case No. 24833/94 Matthews v. UK (1999).

4. Conclusion

The General Court in its judgment Sison III has made the conditions for non-contractual liability of the EU more detailed in relation to the so-called smart sanctions.

As to the condition of sufficient seriousness of a breach by EU institutions, the General Court confirmed its previous case law, so that even in cases with no room for discretion this lability does not occur quasi-automatically but only if the decision-making instituion fails to act as "*an administrative authority, exercising ordinary care and diligence"*: such administration may be due to the circumstances even wrong. The reason for this requirement is an effort not to discourage the EU institutions from taking smart sanctions by a threat of a duty to compensate eventual damages. The judgment confirmed that if awarding non-contractual liability of the EU is difficult in general, in international-law situations it is even harder to obtain it.[24]

However, some doubts remain: if we somewhat simplify the situation, by the general availability of an act's annulment because of violation of fundamental rights (while the freezing is maintained until a new sanction regulation is adopted) and by the unavailability of compensation for such damage, the General Court indicates that for the EU is not so difficult to admit violation of fundamental rights on the EU side, but the problem is to admit its obligation to pay damages: this comparison does not cast good light on the credibility of European incantations of human rights and the rule of law.

Thus, our conclusions are the following:

1) We consider the condition of "sufficient seriousness" illegitimate because of conflict with EU values and goals and because of conflict with protection of an individual as the basis of the entire EU law legitimacy; the General Court's ideological starting point – the difference between the action for annulment and action for damages [„*it is not the purpose of an action for damages to make good damage caused by all unlawfulness*" (para 32)] – seems to us purposeful and highly unconvincing.
2) Should the condition at stake be upheld as a criterion for judicial review, in our view it should already be made use of at the stage of legality review, not only in the stage of its liability consequences.

[24] Cf. in particural C-120/06 P a C-121/06 P FIAMM a FIAMM Technologies, where the reason fot not awarding of the non-contractual liability was a denial of direct effect of the General Agreement on Tariffs and Trade (GATT 1994).

Juridisation of Human Rights Protection from the Viewpoint of Slovakia, Russia and the Council of Europe

Ján Svák*

Summary: This article deals with the question of the so-called juridisation of human rights. The author describes and analyses the main related topics to this general theme, in concrete the right of judicial protection, binding effect of court decisions, enforceability of court decisions. He uses the ECtHR case law related particularly related to the Russia and Slovakia to prove the Court's approach to the main topic of the research.

Keywords: Human Rights, Juridisation, The right of Judicial Protection, Binding Effect of Court Decisions, Enforceability of Court Decisions, Russia, Slovakia, Council of Europe

1. Introduction

It took about 200 years for the human rights to proceed, in a revolutionary way, from academic articles into political (constitutional) documents and it lasted the same time until they got into real life through application thereof by the human rights protection bodies. In particular, the second part of that period is distinguished by evolution, universalisation and eventually by juridisation.

Evolution of human rights is a natural consequence of several factors, from globalisation (which weakens the sovereignty of the State, thus giving the option for e.g. supranational subjects to protect the human rights), to nationalisation, in reference with globalisation, paradoxically connected with the growth of the role of the State in various aspects of the life of the society, demonstrated by overregulation of human conduct, accompanied by the possibility of occurrence of e.g. various kinds of discrimination. On one hand, overregulation creates still larger room for the State to interfere, both negatively (e.g. as concerns the fight against terrorism), and positively (e.g. in the social sphere), but, on the other hand, it paradoxically makes room for privatisation of the State and law.

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Of course, this also brings the risk of less controlled or uncontrolled at all, respectively, infringement of human rights by private subjects. Most significant signs of that can be found in so-called cyberspace that is the ground for most serious encroachments into private human life with only limited options of protection, since responsibility is dissolved in the virtual reality. In this confused evolutionary development, human rights protection needs to search new forms. The most distinctive of them are the doctrines of "radiation" of human rights and the doctrine of the positive obligation of the State.

Both the doctrines have distinctively been supported by the European Court of Human Rights by the application of the Convention for the Protection of Human Rights and Fundamental Freedoms which, unlike typical international treaties, goes beyond the limits of a simple mutuality between the contracting States. It enriches the net of reciprocal synallagmatic obligations by objective obligations, which are, in the sense of the Preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, protected by collective guarantees. It was this very fact that enabled juridisation of human rights.

Juridisation of human rights derives from the commonly known notion of enforceability of law that contains:

a) the right of judicial protection,
b) binding effect of court decisions,
c) enforceability of court decisions.

2. The right of judicial protection

The right of judicial protection, the content of which is commonly known, is in decision-making activities of the European Court of Human rights distinguished by

- enlarging the scope of matters under judicial protection,
- improving the guarantees of judicial protection,
- processualisation of substantive-law provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms.

2.1. Enlarging the scope of matters under judicial protection

The way for enlarging the scope of matters under judicial protection is an extensive interpretation of the terms contained in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular of the term "civil rights and obligations" and "criminal offence". First, the European Court of Human Right's interpretation is primarily based on the casuistic

method, and, second, on the decisive criterion whether to judge if the subject of the particular proceeding is protected by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms is its subject-matter nature and not the legal branch within which it is classified by the respective domestic legal order, irrespectively of which (what) national body has the jurisdiction over the matter.

2.2. Improving the guarantees of judicial protection

Improving the guarantees of the right to a fair trial does not follow the methodology used by the European Court of Human Rights at determining the subject-matter jurisdiction of courts, but it is based on the complexity of attitude.[1] On the other hand, certain modalities of the complexity principle are adjusted, upon taking into account the exceptionality and individuality of the judged proceeding.[2]

2.3. Processualisation of substantive-law provisions

Processualisation of substantive-law provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms represents a specific way of extending the right of judicial protection. The right of judicial protection is guaranteed by Articles 5, 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in the form of the right to the access to court, and guarantees of a fair trial. The European Court of Human Rights in its largest case-law, referring to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which is the most frequent subject of complaints, has defined a certain minimum standard of guarantees for a fair trial, which, though, does not necessarily take into account certain specific distinctions of human rights, particularly protected by the Convention for the Protection of Human Rights and Fundamental Freedoms. Apparently, this was one of the reasons why the judges of the European Court of Human

[1] For example, as concerns decision-making of the Slovak Constitutional Court, one of the issues that the Court was criticised for by the European Court of Human Rights was that the Slovak Court did not view prolongations in court proceedings as the sum of the particular proceedings held at all levels of the courts that heard the case, but the Slovak Constitutional Court defines the length of a court proceeding by the individual stages of the proceeding.

[2] As an example, we may note that not every guarantee is weighed equally upon claiming thereof at various levels of court instance. For example, where a court of a higher level of the court system examines the heard case from the viewpoint of legal classification without being supplemented with evidence, then the rule of public hearing is applied only in a modified version, as compared with its application at courts of first instance. See e.g. decision in *De Cubber v. Belgium* case of 26 October 1984.

Rights decided to study also the procedural part of violation of substantive law. The other reason, highlighted by B. Repík[3], consists in the fact that the judges of the European Court of Human Rights would often take the role of investigators in cases initiated by a complaint, thereby substituting national investigative bodies, that failed to do their duties, in particular as concerns most extreme cases of violation of human rights, such as the right to life or prohibition of torture. It was exactly in reference with the pleaded violation of those human rights that the European Court of Human Rights has developed the basic criteria for assessing efficiency of national investigations of violation of fundamental human rights.

Of a different nature are procedural guarantees in cases that do not fall within criminal law, while it is interesting that it was family law (the right to respect for family life, protected by Article of the 8 Convention for the Protection of Human Rights and Fundamental Freedoms), with which the origins of the development of implicit procedural guarantees are connected. The differences are based on the facts that firstly, the State has a certain discretion (marge d'appréciation) at defining the rules of a court trial, where e.g. a judgement granting the custody of a child to foster parents is decided upon, and secondly, at determining the procedural rules, the restricting clauses, stated in the second sections of Articles 8 through 11, must be taken into account, and third, they have to go through a proportionality test, as usually applied at such proceedings. It is the last modality that may give the impression that the exponential growth in using implicit procedural guarantees is related to a lower interest (desire?) of judges of the European Court of Human Rights to investigate the substantive-law nature of violation of a human right, since that is unproportionally difficult as concerns deciding between two interests that are "in the game". Therefore, in the case of application of procedural relevance and consequent ascertainment of breach of procedural guarantees related to the protection of substantive law, they may feel satisfied with the pronouncement thereof, and they would consider the test of proportionality redundant. We may agree with B. Repík, who states that the actual objective of the still wider use of implicit procedural obligations of the State is not the effort to expand its own powers (the scope of investigation), but, on the contrary, it is the effort to shift the issue of resolving the problem onto national courts.[4]

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[3] Cf. REPÍK, B.: Implicitní procesní ochrana základních materiálních práv v judikatuře Evropského soudu pro lidská práva. Právník 9/2008, pp. 946–947.

[4] "Strengthening of the control over the procedural part of the protection of human rights is therefore merely one of the means to force the State to solve the issue at the national level already." REPÍK, B.: Implicitní ibid, footnote 3, pp. 964.

3. Binding effect of Court decisions

The right to judicial protection provide guarantees for the option to apply substantive law at court, within a fair trial. The right to the access to court, as well as general rules of a fair trial, adequately apply to the European Court of Human Rights that decides upon substantive law, i.e. upon breach of a human right. A valid resolution becomes binding upon the issuance thereof. However, what is the content of the term "valid resolution issued by the European Court of Human Rights at the protection of human rights"? The first answer is related to the content of the resolution. It is rather simple, as the Convention for the Protection of Human Rights and Fundamental Freedoms alone defines what may be a relief of the resolution. In the case of a confirmed violation of a human right, firstly concerned is *restitutio in integrum*, and secondly, it is a just satisfaction by virtue of Article 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Within the special part of its resolutions, the Court, under the term "just satisfaction", resolves three issues, as are the removal of negative consequences of confirmed violation of a human right, in particular compensation for proprietary loss, compensation for injury to reputation and compensation for court costs. Considering the fact that court decisions contain those items regularly, there is a large source ground for a case analysis.

The second issue is the reception of the binding effect of a decision of the European Court of Human Rights in the Council of Europe Member States, while this issue must be distinguished from enforceability of the resolution in a particular case. An important and inspiring element in the continental Europe is the attitude of the German Federal Constitutional Court, which was confirmed by the following of its example in the case of the attitude of national courts to the decisions of the Court of Justice of the European Communities (currently the Court of Justice of the European Union).

In the beginning, for more than ten years the Slovak Constitutional Court held the opinion that human rights that result from international conventions were not constitutional rights.[5] Later, the Court reconsidered that opinion, and by a court decision of the European Court of Human Rights, the Slovak court recognised application priority of human rights over the Slovak laws[6] and those decisions currently serve as a ground for binding rules of interpretation both at concrete and abstract guarding of constitutionality.

[5] Decision of the Constitutional Court of the Slovak Republic No. II. ÚS 91/99.
[6] Decision of the Constitutional Court of the Slovak Republic No. I. ÚS 100/04.

A similar conclusion was reached by the Russian Constitutional Court[7] that stated that the Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights based thereon, reflecting the generally recognised principles and standards of international law, constituted a part of the Russian legal order. This fact must be taken into consideration not only by legislators, but also by bodies of application of law. The Supreme Court of the Russian Federation took a similar attitude (Resolution on juridical precedent of 19 December 2003), under which general courts shall take into account the decisions of the European Court of Human Rights that interpret the parts of the Convention for the Protection of Human Rights and Fundamental Freedoms which are applicable in a particular case before a general court.

In Russian professional legal writing, there is a wide span as concerns the issue of bindingness of the decisions of the European Court of Human Rights. Major part of authors adhere to the traditional model of judicial precedents as an informal source of law (binding *de facto* and not *de jure*), and recognition of the decisions issued by the European Court of Human Rights is based on acceptance of the common European cultural values.[8]

4. Enforceability of Court decisions

Enforceability of decisions of the European Court of Human Rights in a particular case is derived from the fact that their character is declarative, which means that

- they are not an execution title within the national legal system,
- the means to secure the execution thereof are chosen by the particular affected Member State of the Council of Europe.

The manner of enforceability of decisions of the European Court of Human Rights follows from the cause of breach of the particular human right. In general, there may be two causes of violation of human rights:

- relating to the application, and
- normative.

In the first case the European Court of Human Rights does not question the national legal regulation, but either its incorrect application in the particular case or the incorrect application practice. The subject of criticism in the latter

[7] Decision No. 2-P of 5 February 2007.

[8] Cf. e.g. Kanaševskij, V. A.: Precedentnaja praktika Evropejskogo Suda po pravam čeloveka kak reguljator graždanskich otnošenij in RF. Žurnal rossijskogo prava, No. 4, 2003.

case is the national legal regulation that causes violation of human rights in the application practice.

Executability of the decisions that have proved violation of a particular human right by an incorrect application of national legal regulations is usually ensured by the means of extraordinary remedial measures, the legal title of application of which is the decision of the European Court of Human Rights.

Currently, there are three groups of the Member States of the Council of Europe that have been resolving, within their respective national legal regulations, the possibility to review a judicial trial on the basis of a decision by European Court of Human Rights. In the first group (for example Russia, Austria, Norway, Switzerland), review of a judicial trial is directly permitted. In the second group (for example Slovakia, Finland, France) the decision of the European Court of Human Rights is considered "a new fact" that may re-open the case and in the third group of states (for example the Netherlands, Germany, Spain) there is no such an option.[9]

For a long period, the European Court of Human Rights was reserved whether to determine if application of the institute of re-opening the case should be obligatory once a judgement in the particular case has been issued. As a rule and almost explicitly, the Court insisted that the Convention for the Protection of Human Rights and Fundamental Freedoms did not give any power to ECHR to request a State to re-open the case as a consequence of the Court's ruling.[10]

Important in his context was the judgement of the Grand Chamber in the *Verein Gegen Tierfabriken v. Schweiz* case,[11] where the Swiss Supreme Court for formal reasons did not permit a new trial that might have executed the decision of the European Court of Human Rights. The Committee of Ministers, that supervises the execution of the European Court of Human Rights judgements decisions, declared the judgment as executed. The applicant addressed the European Court of Human Rights with actually the same complaint, but the Court

[9] As a footnote, we may mention that in Russia the application or over-application (in the sense of jeopardising legal certainty) of extraordinary remedial measure (supervision) may cause problems, too. In contrary to the changed legislature that respected also decisions of the European Court of Human Rights, the European Court of Human Rights stated in its decision in *Kot v. Russian Federation* (application No. 20887/03 of 18 January 2007) that valid and executable court decisions may only be altered at exceptional cases, while the only purpose for them must not be merely the fact that the party to a court trial has received a new court decision. Resolution of the Committee of Ministers of 8 February 2007 states that the legal institute of supervision as regulated by the Rules of Court Proceedings was is in variance with the Convention for the Protection of Human Rights and Freedoms.

[10] Cf. e.g. decisions in *Lyons et al. v. United Kingdom* (2003), *Fische v. Austria* (2003), *Krčmář et al. v. Czech Republic* of 3 March 2000.

[11] Decision *Verein Gegen Tierfabriken Schweiz v. Switzerland of* 30 June 2009.

did not consider the issue *res iudicata,* but for the reason of rejection of a new trial the Court found a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, thus indirectly denying the power of the Committee of Ministers at the execution of its decisions.[12]

The growing number of complaints related to the execution of judicial decisions proves the complexity of the issue of enforceability of law. The European Court of Human Rights therefore gradually accepts general rules also in this field, which follow from the herein abovementioned precedent decisions. Some of them are the following:

- the right to execute final decisions is not absolute, which means that in civil law the State is not automatically responsible for unenforceability of any judgement, which does not apply for criminal law, though,[13]
- it is the positive obligation of the State to establish sufficient, adequate and efficient means to enable the execution of judicial decisions[14] and it is the role of the European Court of Human Rights to subsequently judge if the national bodies have duly used that means in the practice,
- delay in execution of judicial decision shall be violation of Article No. 6 section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as violation of the right to a fair and undelayed trial.[15]

Failure to execute juridical decisions, including decisions of the European Court of Human Rights, is one of the most serious and still lasting failures that the European Court of Human Rights has been criticising, despite the fact that the legal regulation explicitly provides mechanisms and periods to execute the judgement.[16] The European Court of Human Rights will not accept a defence

[12] Also earlier the European Court (e.g. in its decision in *Burdov v. Russia* of 7 May 2002) stated breach of human rights by failure to execute its decision, but those cases concerned failures to execute the part of the decision by which the applicant was entitled to financial compensation, and the State reasoned the failure to execute the decision by lack of finance.

[13] In the case of *Assanidzé v. Georgia* of 2004, the European Court of Human Rights stated that criminal conduct is a single unit and the protection of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms is not accomplished by the deliverance of acquittal. The Convention for the Protection of Human Rights and Fundamental Freedoms lost effect and its Article 6 was breached by the failure to execute the judgement of acquittal and by the failure to release the complainant from imprisonment.

[14] See e.g. the decision in the case of *Timbal v. Moldavia* of 14 September 2004.

[15] Cf. e.g. the decisions in the case of *Cvijetić v. Croatia* of 26 February 2004, *Prodan v. Moldavia* of 18 May 2004, *Romashov v. Ukraine of* 27 July 2004.

[16] For example, Article No. 415, section 5 of the Criminal Proceedings Rules provides that the Presidium of the Supreme Court shall conduct re-opening of a court proceeding within one month from issuance of the decision by the European Court of Human Rights which ruled that Russia has breached the Convention for the Protection of Human Rights and Fundamental

based on economic conditions of the concerned State. In the case of *Burdov (No. 2) v. Russia*[17] the Court stated that the failure to execute court decisions imposing performance by the State was a system-related and systematic problem of the Russian Federation.

More complicated circumstances may occur in the case that the reason of breach of a human right is not the applied practice, but the legal regulation. The European Court of Human Rights does not have the jurisdiction to directly order the State to alter its legal regulations.[18] In exceptional cases, when an insufficient legal regulation leads to repeated and mass filing of applications, the Court will express its opinions as concerns the national legal regulations in a more vigorous way.

A possible option to resolve the problem was suggested by the Slovak Republic at the execution of decision in the *Lauko* case,[19] wherein the cause of a human right violation was the Minor Offences Act under which certain sanctions could be imposed (e.g. a fee up to SK 2000) without the option of court review.

In this case it came to the use of the situation when the Constitutional Court has breached Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, since the Court failed to abrogate an unconstitutional act. Ironically, the Constitutional Court is not entitled to file a motion to review the constitutionality of a constitutional act. There the Attorney General was used, who at his own initiative filed a motion to the Constitutional Court, asking it to review the grounds of constitutionality of an act on the basis of the reasons stated in the decision of the European Court of Human Rights. The Constitutional Court allowed the application and abrogated the act.

In this context, we would like to mention cases where the complaints are not directed against the Slovak Republic, but the Slovak law is in contradiction with a decision of the European Court of Human Rights. Similarly, in such cases Attorney General usually files a motion to the Constitutional Court, which will then issue a judgement taking into account the decision of the European

Freedoms. In the case of *Baklanov v. Russia* (decision of 9 June 2005, considering the application No. 68433/01), the Russian Supreme Court, after three years from the issuance of the judgement of the European Court of Human Rights, has not started to act and it was proved that the misconduct was the absence of a legal period for the president of the Supreme Court to produce the judgement of the European Court of Human Rights to the Presidium of the Supreme Court of the Russian Federation.

[17] Judgement of 15 January 2009 relating to application No. 33509/04.

[18] For example, in the case of *Belilos v. Switzerland of* 29 April 1988, the European Court of Human Rights rejected the application that requested the Court to order the national bodies to adopt an amendment to an Act.

[19] Decision in the case *Laukov v. the Slovak Republic of* 2 September 1998.

Court of Human Rights that will usually declare the contested act unconstitutional. In case that the entitled person does not file the motion to the Constitutional Court, the Constitutional Court has developed a case-law stating that a general court is obliged to directly apply the decisions of the European Court of Human Rights, thereby actually forcing the judge to ignore law in this particular case. However, such cases are rather rare in practice.[20]

The binding effect of decisions of the European Court of Human Rights (together with decisions of the Court of Justice of the European Union, they constitute a *quasi* European *common law*) and enforceability of its decisions create the basis for enforceability of the Convention for the Protection of Human Rights and Fundamental Freedoms and their gradual growing in force of the present juridisation of human rights as one of the most distinctive features of the present protection of human rights in Europe.

[20] See the judgement of the Constitutional Court of the Slovak Republic, No. I. ÚS 100/2004.

The Path Towards European Integration: the Challenge of Globalization

Manuel Porto*

Summary: Following the responses to other challenges, the process of European integration has in the 21st century one main challenge with globalisation: with competition increasinly coming from previously less developed countries. The Strategy Europe 2020 is into a great extent purposed to correspond to this challenge, as well as to two other "long-term challenges": "pressure on resources" and "ageing population". To correspond to these and other challenges, the Strategy establishes three priorities which "are mutually reinforcing": "smart growth", sustainable growth" and "inclusive growth". In the first case, there is the purpose of "developing an economy based on knowledge and innovation"; in the second case, the purpose of "promoting a more efficient, greener and more competitive economy"; and in the third case the purpose of "fostering a high-employment economy delivering economic, social and territorial cohesion". In a realistic way, differently from the Lisbon Strategy, there is concentration in a small number of feasable targets; and a higher commitment of the instituions, in particular of the Council, in the EU, and of all levels of intervention in each country. Finally, it is a Strategy strongly based on the markets. It is specialy stressed that "a stronger, deeper, extended single market is vital for growth and job creation". And a protectionist strategy is excluded, being recognized that "global growth will open up new opportunities for Europe's exports and competitive access to vital markets". Having of course in mind also other countries, we have a difficult challenge: in a world which Europe can not ignore or avoid, with a protectionist attitude, "closing" the borders; on the contrary, in a world in which it is possible to see new and enlarged opportunities.

Keywords: integration; globalization; long-run challenges; openness; strategies

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1. Introduction

The history of the first 55 years of the European Communities (now, the European Union) has into a great extent been a response to different challenges: political and economic challenges, of course responding as well to other challenges (social, cultural, etc.).

The first purpose, in the fifties, was to remove reasons for a new conflict. In the 20th century, after having been the origin of two World Wars, the European countries could not be the origin of a third world conflict.

The times were however not prepared to have closer political integration: the example of the failure of the purposed European Community of Defence was quite clear. The creation of economic Communities was therefore the way followed, being clear that with economic growth and approximation of the economies reasons for conflict are removed (it was particularly so with the first Community, the ECSC, putting together the use of two basic goods: coal and steel).

The result was quite a success. Nowadays, we can have localized conflicts, as was the case in the Balcans (not among the founding members of the EU!), but in no case an European war.

One second challenge, in particular with the adhesion of countries with lower general levels of development and with internal disequilibria, has been the challenge of cohesion. We have had good initiatives, but it must be acknowledged that much is still left to be done: not only because of the adhesion of not so developed countries, disequilibria are high also in previous members.

In the seventies there was another challenge, the challenge of "Eurosclerosis" and "Europessimism". We can not forget that we had then a difficult time: when there were doubts even on the continuation of the process of European integration. It did coincide with the first oil crisis, causing worries mainly in the more industrialized countries. But it should be aknowledged that the difficulties to progress were connected with the institutional framework, mainly with the requirement of unanimity to take decisions.

One main step was therefore the Single European Act, introducing the possibility of majority voting in most of the decisions. In particular, this possibility was a prerequisite to have the approval of the acts required to have the "European Single Market" in 1993.

It was an ambitious agenda, fixed in the Chechini report (1988), estimating the gains obtained with the removal of physical, technical and tax barriers. And, despite the targets fixed having not been totally attained, it was estimated that there was an increase in the income of the Union between 1.1 and 1.3 percent, the creation of 300,000 to 900,000 new jobs, a reduction in the inflation rate between 1 and 1.5 percent and increased cohesion among the regions.

Following former "dreams" and steps, the purpose of instituting a single European currency was established by the Maastricht Treaty, fixing as well the steps to be taken (in this case following the analysis and the indications of the "Delors report" (1999), a report made by a commission chaired by President Jacques Delors).

With a single currency, it is possible: to avoid micro-economic costs (transaction costs, uncertainty costs and costs of information and calculation); to have macroeconomic gains, with lower prices (e.g. with lower interest rates) and less oscillations; to have less needs for reserves as basis of emission by the national central banks; and to give to Europe a more important role in the world.

We hope that the current crisis will be soon over, to have all the benefits of the euro.

2. Benefits for third countries

Particularly in the United States some authors were against the steps taken in Europe, thinking that they were harmful, e.g. for third countries.

When the initiative of the single market was taken, it was mentioned that we were forming a "fortress Europe".

It is however not so. When we have an open space, the lorries being not forced to stop in the borders, we have a benefit both for European entrepreneurs and for non-European entrepreneurs who have business in Europe; and when we have harmonized norms, both European and non-European entrepreneurs (and citizens in general) are benefited, benefited exactly into the same extent by the opportunities and cost reductions of the whole of the European market.

On the single currency, the best known critics were the critics of Martin Feldstein (1997 and 1998), speaking about the lack of common problems and objectives among the different countries (e.g with quite different levels of inflation or of unemployment): therefore on the risk of monetary conflicts (the risk of "trouble", of "international conflict" or even of "war", in the words of the author…).

The current crisis seems to give some reason to Feldstein. But the risk can also exist, being even greater, with national currencies, giving way to currency disputes, e.g. with currency devaluations. Nowadays we tend to forget previous difficulties

At the world level, it is good to have two or more important currencies. Feldstein was influenced by the previous world experience, for two centuries always only with one main currency: until the 20th century the British pound and more recently the US dollar.

But the experience shows exactly that with only one world currency the country of this currency can not follow a sensible policy, not much worried with the effects on the other countries. If there are more than one main currency the emitting countries must follow sensible policies, to avoid the risk of being penalised: the demand moving away from her currency to the competing currency or currencies.

This is a benefit even for the previously leading country, forced by the market to follow the right policies; with benefit also for her economy.

3. The present main challenge: the challenge of globalisation

The 21st century has new challenges, to which the European Union must give the right answers. In particular, we must have in mind a new map of the world, with globalisation and an increasing role of previously not so strong countries.

3.1

It is interesting to remember that in the 15th century countries of Asea, in particular China and India, were among the most developed countries of the world: with quite advanced cultural standards and strong and diversified economies[1]: producing not only primary products, also manufacturing with the highest quality at the time (for example, ceramics and textile)

It was of course the knowledge of these circumstances and of the quality of these products (not only spices, and in no case raw-materials) which attracted the interest of the Europeans, purposed to reach India (in one second moment China) either by the east (as Vasco da Gama did) or by the west (as Cristóvão Colombo attempted, thinking that the American territory was territory of India…).

Beginning with the Portuguese navigators[2], followed by the navigators of other European countries, for five centuries Europe had a leading role, shared only in the 20th century. Before the 15th century connections between the continents were dangerous and expensive, therefore scarce. The improvement in

[1] Recent descriptions of this situation can be seen in Sen (2005) and Baru (2006), showing as well the interrelationship and the good neighbourhood that for centuries did exist between China and India.

[2] The contribution of Portugal for the openness of the world economy is well expressed in the titles (and in the contents) of three books: Charles Vindt, *Globalisation, from Vasco da Gama to Bill Gates* (1999), Martin Page, *The First Global Village. How Portugal Changed the World* (2002), and Rodrigues and Devezas, *Portugal. O Pioneiro da Globalização* (2007).

the connections by sea was therefore the point of departure for globalisation, giving to the Europeans the opportunity to reach all the other continents in much better conditions, with the creation, for the first time, of permanent economic flows at the world level. But it remains difficult to explain how we could keep supremacy all over the world for four centuries: on territories that were not only much more populated, they were also richer than Europe[3].

3.2

In the 20th century there was already a different world, a bipolar or tri-polar world, with special relevance for the coming up of USA, both as a political and as an economic world power, since the beginning of the century.

In the political arena, mainly after the second world war there was a bipolar world, with the "cold war" between capitalism and communism: the capitalist "bloc" led by the United States and the communist "bloc" by the Soviet Union.

In the economic arena, disputing the world markets, we have had a tripolar world, with an overall supremacy of the "triade": Europe, the United States and Japan.

3.3

In the 21st century we will however have a multi-polar world: in which the "triade" will remain, but in which, together with new members, we will have again China and India as world powers[4] (see 6.2. below).

4. A clear approximation of the structures of the economies

The traditional pattern of international trade, in particular between countries of different degrees of development, was trade of different finished goods, all

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[3] Even having in mind the usual arguments of better technology, in particular in navigation, or better weapons: which of course could be imitated, without difficulty, by so advanced Asian countries.
We should remember that still in 1820 China had 28.7 percent of world GDP and India 13.4 percent (so, the two together 42.1 percent), when (in what were later on the territories of these countries) France had 5.5 percent, the United Kingdom 5.0, Japan 3.1, Germany 2.4, Spain 1.9 and the United States 1.8 percent (Maddison, 2006; see Dan, 2006, pp. 55–6).

[4] Into a great extent as an effect of the opening the economies of these countries, with Deng Xiao Ping in China and with Manhoban Singh in India.

the chain of production being in the same country (or only raw materials being imported).

The approximation of the countries, with their development, an easier access to technological improvements, a general qualification of the people (indeed, with important differences between the countries) and of course also better transports and communications, led in the last decades to a new pattern of comparative advantage and trade.

Many less developed countries are no more specialized only in the exports of raw materials and primary products; in several cases they have also developed diversified manufacturing products (in several cases, they are leaving the "cathegory" of less developed countries…).

With this evolution, we see an increasing number of countries exporting and importing products of the same sectors; leading to increased challenges to the previously more developed countries.

5. A foreseeable greater openness of the economies, despite difficulties in the WTO negotiations

Even with the acknowledgement of the better arguments in favour of free trade and of free economy, according to the theory and according to the experience[5] we should always expect that in periods of difficulties protectionist temptations arise again.

It is interesting to see nowadays a clear change of attitude in the more developed countries relatively to free trade in manufacturing and in services. Traditionally they have been protectionist for agricultural products, three main examples being the countries of the "triade": the European Union, with the Common Agricultural Policy, the United States, with enormous public subsidies (now – not during the Uruguai Round… – also contested by many less developed countries) and Japan, with extremely strong protectionist measures. Already in manufacturing and in the provision of services the industrialized countries were generally in favour of free trade.

A clear change of attitude can be noticed nowadays, e.g. with delocalisations to and outsourcing from less developed countries (see for example Belessiotis

[5] In this sense were clearly the results of large and deep researches made by prestigious institutions already some years ago: by the OECD (with a synthesis in Little, Scitowski and Scott, 1970), by the National Bureau of Economic Resarch (USA), NBER (synthesis in Bhagwati, 1978, and Krueger, 1978) or by the World Bank (synthesis in Papagiorgiou, Choksi and Michaely, 1990). More recently, see for exemple Van den Berg and Lewer (2007).

et al., 2006, Porto, 2007 and Mouhoud, 2008). But both in Europe and in the United States the institutions and most of the economists remain defending free trade, of course together with the required measures for the restructuring of the sectors, the promotion of competitive sectors and compensations for the people, sectors and regions harmed with globalisation.

Anyway, it is clear that the movement of openness will go on, despite delays and difficulties in the negotiations of the World Trade Organization.

Of course, each country or bloc (the case of the EU, necessarily with a common position, being a customs union) will always try to have the highest gains and the lowest losses, even if these are only short run losses, in many cases trying to postpone the effects. But the overall gains of trade finally lead the countries to accept the negotiations.

In particular, with realism, nobody can expect that the other countries accept without retaliation our protectionist measures. Some protectionist defenders seem to have a "dream" of no reaction: their home countries would establish or increase barriers, while the others, "friendly", would remain with full open borders…

This is something that Europe should have particularly in mind, having usually a surplus in the external accounts. For example, according to the most recent data (of 2013), the Euro area has a surplus in the balance of payments of 153.2 billion dollars (when the USA has a deficit of 475.0 billion dollars…).

Of course, a general retaliation of the other countries of the world would at the end have more costs than benefits for the Europeans.

It should finally be stressed that a revival of protectionism would perhaps be possible for commodities, with limitations (even prohibitions) in the borders of the countries. This is however a possibility not available for many services, in their immateriality, with new technologies of communication, without difficulties and very low costs of transmission: services being provided instantaneously in any point of the world.

6. The policies to be followed

Having well in mind the new challenges, a great effort is being made with the establishment of European strategies. One of them is already over, but it is worth considering it, specially to take some lessons, when we are in the way of approving and implementing a new startegy.

6.1. The Lisbon Strategy

For the beginning of the new century (and millenium), a strategy was aproved, during the Portuguese presidency, on the 24th March 2000, in the Lisbon Summit.

The initiative was into a great extent taken having in mind the loss of position of Europe relatively to the United States, in the rates of growth and employment, and in particular in the area of the so called "new economy" (based on technologies of information and communication).

As a target, it was stated that the European Union should be in 2010 "the world most competitve and dynamic knowledge based economy, being able to guarantee a durable economic growth, together with a quantitative and qualitative improvement in emplyment and greater social cohesion, respecting the environment".

It was however very critical an evaluation made in 2004, by a commission chaired by a former Dutch Prime Minister, Wim Kok. The Kok report (2004) criticizes the number and the dispersion of objectives and instruments, trying to intervene in too many areas: "Lisbon is about everything and therefore nothing".

Anyway, as Ardy (2007) has rightly stressed, the Lisbon Strategy has achieved to bring together previous policies "into a high-profile package which would demonstrate the Union's determination to embrace a radical and comprehensive reform agenda to meet challenges posed by globalization, the e-revolution and the demographic shift in Europe's population"; and it was a step forward, with the use of the procedure of the enhanced method of cooperation[6]

The Lisbon Strategy having given some contributions and having been an interesting experience (with positive and negative indications), it was clear that a new initiative should be taken.

6.2. The Strategy Europe 2020

A few years later, the challenges would not be much different. With special relevance, we have now the confirmation of the world role played by other countries, in particular by the BRIC's, and we have a crises, to which a quick and effective answer must be given.

It is a crisis which is strongly harming previously rich countries, but not the new emerging countries: in particular with China and India having since three

[6] Strenghtened with the Lisbon Treaty, according to article 20 of the European Union Treaty (see for example Freire, 2012).

decades (nowadays, despite the crisis) and without any break a sustainable yearly growth over 7 or 8 percent. In some cases China had a two digit growth; even in 2013 China having a rate of growth of 8.9 percent and India of 6.5 percent.[7]

With their enormous internal market, with more than one third of the world population, China and India could compensate some reduction in the exports to the previously industrialized countries with an increased internal demand, made by hundreds millions of people.

With the increasing role of these and other countries[8], it was in particular interesting to see whether the EU response would be a protectionist response.

It was therefore expected with curiosity the strategy to be defined: more concretly, by COM (2010) 2020, of the 3rd March 2010, with the title *Strategy for a smart, sustainable and inclusive growth*[9].

a) The long-run challenges

In the words of COM (2010)2020, after aknowledging that "the world is moving fast", "the EU must now take charge of its future", wih responses to the "long-term challenges": "globalisation, pressure on resources, ageing population".

With the 21st century a long time of Europe predominance all over the world is over. As mentioned before, in some periods, in the 20st century, it was a predominance shared with other powers (as mentioned, politicalay and militarly we had a bi-polar world, with the predominance of the USA and of the Soviet Union).

It is however clear that we will have in the 21st century a new world, a multipolar world, in which economically Europe will go on having an important role, but in which, together with the "tríade", there will be other important powers (the BRIC's and other emerging countries[10]).

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[7] Being the rates for the other two BRIC's of 3.2 percent for Brazil and of 2.8 percent for Russia.

[8] It is interesting to see the forecasts for the coming decades, untill 2050 (Pricewaterhouse Coopers, 2011; see Monteiro, 2011, pp. 139): with India having an yearly growth of 8.1 percent, higher than the Chinese growth, of 5.9 percente (but being still higher the expected growth of Vietnam, of 8.8 percent). It is foreseen that Nigeria will have in this period the third highest rate of growth (after the Indian rate, which does come in the second place, the Chinese rate coming in the fourth place), with 7.9 percent (China being followed by Indonesia, with 5.8 percent, Turkey, with 5.1, and South Africa, with 5.9 percent). According to the same forecasts, in 2050 China will have the biggest GDP of the world (59,475 bn dolars, at PPP), followed by India (43,180), USA (37,876), Brazil (9,762), Japan (7,664) and Russia (7, 559). Germany will come in the 9th position (5,707), followed immediatly by UK (5,628) and France (5,344), Italy coming in the 15th position (3,798) and Spain in the 18 th position (3,195). These five bigger EU economies will have then a GDP of 23,672 bn dolars.

[9] With a larger analysis of this document can be seen Porto(2012a).

[10] Remember the previous footnote, and on the foreseable role of other emerging countries see for exemple Khanna (2009) and Spence (2011).

In what natural resources are concerned, we have had an interesting evolution. The Malthusian pessimism, on the overall sufficiency of the world resources, is over (despite the enormous increase of the world popultion in the 20th century): with the hope that the world population will be stabilized at around 9 to 10 billion inhabitants (of course, with special worries about the sufficiency of oil[11] and of other natural resources).

Now, we are mainly worried with the environmental effects of growth, if the required precautions are not taken: in CO2 emmissions and also for example in forestry devastation.

Finally, there is a big problem with ageing population: for example in Europe, but increasingly also in other countries, as is the case of China.

In some cases, we have already a decrease in the overall number of inhabitants, in some rich countries avoided with the inflow of immigrants. And in general we have a high increase of aged people, with a high burden in the systems of social securuty, paid by a decreasing number of employed people.

b) Priorities

It is having in mind the worries just mentioned that the Strategy Europe 2020 establishes three "mutually reinforcing"priorities: smart growth, sustainable growth and inclusive growth.

In the first case there is the purpose of "developing an economy based on knowledge and innovation" (the comparative advantge of Europe can not be in other factors, as geographic localization or the price of capital, not to speak about the cost of labour…).

In the second case, there is the purpose of "promoting a more resource efficient, greener and more competitive economy"; of course, with an increasing attention given to the environmental conditions.

In the third case, there is the purpose of "fostering a high-employment economy delivering economic, social and territorial cohesion" (the "inclusion" of the citizens is both an opportunity for them to rightly fulfil their personal "dreams" and of having a fuller use of all the resources of the countries and of the regions).

c) Are there reasons for a realistic hope?

In another section, with the title "Europe can succed" (pp. 7), "many strengths of Europe are mentioned. These are strenghts mentioned also in the Preface, written by the President of the Commission, José Manuel Durão Barroso). It

[11] On this specific topic see for exemple Kunstler (2006), Rodrigues (2006), Gomes and Alves (2007) Leeb (2008), Velho (2011) or Heinberg (2011, chapters 3 and 4).

is the case of "a talented workforce", "a powerful technological and industrial base", of "an internal market and a single currency that have successfully helped us resist the worst" and "a tried and tested social market economy"[12].

But even with the acknowledgement of these potentialities, can we be sure about the acomplishment of the purposes stated? Should we not fear something similar to waht happened with the Lisbon Strategy?

Benefiting with the experience of The Lisbon Strategy, three ways were established:

1. One first way is the concentration of attentions and means, avoiding the temptation of trying to intervene in all areas.

It is a concentration which has support in the principle of subsidiarity, according to which should go the European Union level only what can not be better made at a level closer to the citizesns: by the countries or even by the regions, the local authorities or other participants in the society, with their initiatives.

But nowadays also the short dimension of the EU budget leads us to the need of an incresing effort from the countries

2. One second way is a stronger institutional commitment, incluiding, in a realistic way, the compromise of the countries, through the European Council.

In the words of COM (2010) 2020 (pp. 4), "the European Council will have full ownership and be the focal point of the new strategy. The Commission will monitor progress towards the targets, facilitate policy exchange and make the necessary proposals to steer action and advance the EU flagship initiatives. The European Parliament will be a driving force to mobilize citizens and act as co-legislator on key initiatives. This partnership approach should extend to EU Committees, to national parliaments and national, local and regional authorities, to social partners and to stakeholders and civil society so that everyone is involved in delivering on the vision". And a greater concretization, for each institution (and other entities) of the European Union, as well on the participation of national, regional and local entities, is made in section 5.2, with the title "Who does what?".

So, COM (2010) 2020 is quite clear, calling the attention to the responsibilities of each European and national entity, in a process in which main responsibilities are attributed to the countrias, which can not avoid their responsabili-

[12] The COM speaks also about "a thriving, high quality agricultural sector" and about "a strong maritime tradition". It can however be asked why a high quality agriculture has been protected and whether in some cases – for example in Portugal – we are not corresponding to our maritime tradition.

ties. We can be in agreement or not, but in the European Union the countries rermain with great powers. As stressed in the document (pp. 27), "contrary to the present situation where the European Council is the last element in the decision-making process of the strategy, the European Council should steer the strategy as it is the body which ensures the integration of policies and manages the interdependence between Member States and the EU."

3. One third way is of course the use of the budget.

The EU budget is however a very small budget, which cannot be compared with a federal or confederal budget. And along the years it is not increasing, relativelly to the GNP of the Union, on the contrary, along the years it is loosing position. According to the more recent Council decision for the coming Financial Perspectives, for the period 2014–20, it will represent less than 1 percent of the EU GDP[13].

The issue open is on the edequation of the budget to the requirements of the coming times. It is a budget which of course cannot be used to promote counter-cyclical policies or income retistribution in the European space. With its limitation, it has mainly the aim of contributing to a better use of the potentialities of the Union, with an allocation purpose. But even this purpose can only be more relevant with an aditionality strategy, the European funds not covering the total of the expenditures promoted.

4. The reinforcement of the confidence in the markets (in the internal and in the external markets).

As mentioned before, with the present challenges, in particular with the challenge of globalization, we could fear from Europe a protectionist response.

Having in mind competition from countries not only with lower labour costs, also with important stocks of capital and improving technologies, this would be the way of preserving our firms and our jobs.

We could fear this strategy, notwithstanding the lessons of theory and of experience[14].

However, this was not the view of COM (2010)2020, underlining in section 3, with the title "Missing Links and Bottlenecks", that "the Commission intends to enhance key policies and instruments as the single martket, the budget and the EU's external economic agenda".

[13] It did represent between 1.24 percent and 1.27 percent in the "Delors time"…On the general role of the budget and on the Financial Perspectives for 2014–2020 see for example Porto (2012b and 2012c)

[14] Remember footnote 6.

a) A single market for the 21st century

This is exactly the title of section 3 of the COM that we are analysing. And the initial words of this section could not be clearer, stating that "a stronger, deeper, extended single market is vital for growth and job creation".

In this line, having well in mind the effects already obtained with the "1993 single market", other steps are being given. It was the case, in 1997, of an initiative of the Commission, "The Action Plan for the Single Market", in 2000 of the Lisbon Strategy and in 2010 of the Monti Report "A New Strategy for the Single Market" (2010); with President Barroso stating, in the letter through which this report was demanded, that "the single market is, and will go on being the 'angular ' stone for European integration and sustainable growth".

However, COM(2010) 2020 is welll aware that much is still left to be done. In section 3, after the first sentence, quoted above, reference is made to the risk arisen from the present crises: "the crisis has added temptations of economic nationalism". And having in mind this risk it is strongly underlined that "a new momentum – a genuine political commitment – is needed to re-launch the single market".[15]

It must be so with the acknowledgement that "often, businesses and citizens still need to deal with 27 different legal systems for one of the same transaction. Whilst our companies are still confronted with the day-to-day reality of fragmentation and diverging rules, their competitors from China, the USA or Japan can draw from their large home markets".

Are clearly in this line, acknowledging the need to maintain and even to reinforce the single market, not only the COM(2010)2020, also following documents of the Commission, strenghtening the same: it was the case of the document "The Economic Impact of a European Digital Market", of the 16.3.2010, and o COM(2010)608 final, of the 27. 10. 2010, "Towards a Single Market Act. For a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another".

Special attention is given to the new opportunities offered with "the arrival of internet", in particular to the need of being created "a services single market", based on the "Services Directive"; being added that "the full implementation of the Services Directive could increase trade in commercial services by 45 % and foreign direct investment by 25 %, bringing an increase of between 0.5 % and 1.5 % increase in GDP".

[15] In particular, it is added that "such political commitment will require a combination of measures to fill the gaps in the single market".

b) An external strategy

Section 3.3 of COM(2010)2020, with the title "Deploying our external policy instruments", is quite clear on the response of the European Union to the challenge of globalization[16].

We can remember again that world competition, mainly from the new emerging coutries, could lead to the protectionist temptation.

It is however totally different the response of Strategy Europe 2020, seeing globalisation, not as a threat, but as a way of having larger opportunities.

The beginning of the section (pp. 21) is quite clear, stating that "global growth will open up new opportunities for Europe's exporters and competitive access to vital imports".

Already before it had been stated, after mentionning the pressure of emerging countries (pp. 6), that "every threat is also an opportunity"; and it had been remembered (pp. 12) that "the EU has prospered through trade, exporting round the world and importing inputs as well as finished goods. Faced with intense pressure on export markets and for a growing range of inputs we must improve our competitiveness vis-à-vis our main trading partners through higher productivity".

Along this line, it is added in section 3.3 (pp. 21) that "all instruments of external economic policy need to be deployed to foster European growth through our participation in open and fair markets worldwide".

This is an idea reinforced three lines later, with the statement that "an open Europe, operating within a rules-based international framework, is the best route to exploit the benefits of globalisation that will boost growth and employment".

The text could not be clearer, seeing indeed globalisation much more than a threat, seeing it as an opportunity.

When very often we see in the growth of the emerging conomies only risks, with bad consequences for our firms, destroying our jobs, COM(2010)2020 stresses (still pp. 21) that as "a part of the growth that Europe needs to generate over the next decade will need to come from the emerging economies as their middle classes develop and import goods and services in which the European Union has a comparative advantage. As the biggest trading bloc in the world, the EU prospers by being open to the world and paying close sttention to what other developed economies are doing to anticipate or adapt to future trends".

[16] On the institutional steps given by the Lisbon Treaty on the external policy see for exemple Porto and Gojão-Henriques (2012); as well as the comments on articles 205 to 222 of the Treaty on the Fonctioning of the European Union in Porto and Anastácio, coord.(2012).

7. Conclusion

Nothing is said about avoiding the emerging markets. On the contrary, the need to participate in these markets is strongly stressed.

But the participation in world markets requires a clear definition and the fulfilment of the "rules of the game". "Free trade" must be "fair trade".

It must be so in particular with the participation in world organizations, with requirements on all areas (for example in the social and in the environmental areas) which can have implications on international trade. Again in the words of COM(2010)2020, action should be taken "within the WTO and bilaterally in order to secure better market access for EU business, including SMEs"; and attention must be given to "new areas such as climate and green growth", in the WTO and in other (specialized) organizations.

With these requirements, we are defending our workers and our entrepreneurs from unfair competition from countries which do not follow the same rules; but we are also defending the citizens, in particular the workers, of those countries: favoured with better social and environmental conditions that their authorities are in this way forced to adopt.

Europe and its Problem With Identity in the Globalized World

Stanisław Konopacki*

Summary: The article addresses the question whether Europe and the European Union and its Member states is ready to meet this challenge of encounter with the Other? Expression of doubts regarding this question is followed by the argument that the main reason of Europe's inability to face this challenge is rooted within this part of its identity which is based on the exclusion and fear of the Other. "The big closure" – as defined by Foucault – played not only a negative, excluding role, but first and foremost it had a profound impact on mobilisation and organisation. Thanks to the exclusion of others, the "unreasonable", the world was becoming more rational, orderly and uniform. The presence of the "asocial", the unuseful, allowed to organise the entire society as a whole in a more functional way. Final part of the article shows some indication how this weakness present in European identity might be overcome.

Key words: European identity, other, exclusion

1. Introduction

According to Ryszard Kapuściński, the main challenge of the XXI century is encounter with the Other (Kapuściński 2006: 65–76). It has its historical context, because during the second half of the XX century two thirds of the world population liberated itself from the colonial dependence and became the citizens of their independent states. Gradually, they have been discovering their own past, myths, roots and identity. They are becoming to feel themselves, to regain their dignity and to be the subjects of their own life and fate. They are against any domination, against any efforts to be treated as objects and victims.

Kapuściński argues that during the history there are three strategies of encounter with the Other: war, separation or dialogue. After years of wars and then separation, borders and exclusion, in the age of globalisation and rapid development of the means of transport and communication now there is a time for a dialogue with the Other.

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The aim of the article is to address the question whether Europe and the European Union and its Member states is ready to meet this challenge of encounter with the Other? Expression of doubts regarding this question is followed by the argument that the main reason of Europe's inability to face this challenge is rooted within this part of its identity which is based on the exclusion and fear of the Other. Finally, an indication how to overcome this weakness is presented.

2. Europe in the second decade of the new century

According to the survey made by Interdisciplinary Institute for Research of Conflicts and Violence of the Bielefeld University hatred towards groups defined as the others is very common in Europe. Xenofobia is not only characteristics of lower classes, but it is also present in higher and well educated sectors of the society (Buras 2011: 7). A good example of this phenomenon might be a book published by Theo Sarazin in Germany in 2010. According to the German banker "Muslim immigrants have contributed nothing to German prosperity; the high fertility rates among the country's Muslim community have resulted in the reduction of Germany's collective IQ; Muslim immigrants would prefer to be on welfare than to work; Jews share a specific gene" (Hawley 2010).

The research made in eight European countries (Germany, Great Britain, France, Italy, Portugal, Poland, Hungary, Holland) revealed that the success of populist parties are rooted in public opinion. These days media again say on "flood of immigrants" from North Africa. However, the negative attitude towards immigrants have nothing to do with their number. In Germany where they made of 12 per cent of the whole population, half of Germans think that there are too many of them. In Italy respectively they make of 4 per cent, but 62 per cent of Italians argue that immigrants are too great burden for the country.

There are many examples of racist declarations and almost half of population of the countries surveyed think that there is a "natural hierarchy between blacks and whites". The Poles and Hungarians have the most negative attitude towards women and homosexuals. In many countries people think that the "locals" should have priority over foreigners on the labour market and that Islam by nature is intolerant. In 2011 an anti-Polish campaign is visible in the Dutch internet where slogans might be found: "all Poles are bastards" and "all Poles should go back home". Similar hostility is being expressed against Jews, Muslims, immigrants, different football clubs, etc.

Another example is deportation of Bulgarian Roma from France in 2010 which was a violation of free movement of people – a fundamental right of

Union citizens. These examples are paralled by a rising popularity of Freedom Party of Geert Wilders in Holland, „Real Finns Party" of Timo Soini, Jobbik Party in Hungary, etc. It is an opinion that Anders Breivik's confused worldview, which he describes in a 1,500-word manifesto, was influenced by European right-wing populists.

3. Annus horribilis – 2005

It is being argued that the main reason for rejection of the constitution treaty in France and the Netherlands is associated with the Union's eastern enlargement in 2004. The accession of the countries of Central and Eastern Europe was badly prepared by the old Member states which failed to explain advantages of the enlargements to their citizens. Hence the predominant fear of the new members, of workers pouring in from the East ("Polish plumber", "Hungarian nurse", "Latvian builder"), of competitive cheap goods from abroad ("Polish cauliflower"). According to the German writer Michael Krüger, at the time of the European Union enlargement eastwards "the West started looking for the new sources of fear. The French "non" to the EU constitution reflects that fear. It does not mean they want to leave the Community or do not feel a part of it anymore, but in this way they showed they were afraid of that new Europe. Their anxiety is that they are certainly not going to be the Europe's centre anymore – as in the era of Louis XIV or the Great French Revolution. The fear of the new Europe is stronger than that of Islam, which they had managed to tame over the years" (Krüger 2005, 7).

Another reason for rejecting the constitution was the growing aversion towards foreigners, mainly immigrants from outside of Europe. It is predominantly the Dutch who feel endangered in their own country by the newcomers from Turkey and Morocco. A wave of xenophobia against Muslims, Roma and other minority groups is growing across Europe, which shows the end of myth of the European multi-cultural society. The fear of the external world is quite clear. In his comment on the results of the European referendum in his country, a French philosopher Andre Glucksman said that "the French crisis is neither economic nor social by nature – it is predominantly a mental one. All taboos keep falling down one after the other. The brakes constraining the hatred against another human being and particularly against foreigners are not so strong any more. The moral standards have evaporated. I heard socialist leaders during a campaign, saying oppressive words about workers from other European countries in a way so far reserved for the extreme rightists (…) I participated in meetings where demented peans were delivered in the honour of

the French land, with echoes sounding much like from our worst history. (…) The success of the French "no" results from the mental and moral fall of the leaders. France which used to be called the homeland of human rights, today so unstable and frightened – is curling itself up. And the previous slogans: liberty, equality, fraternity, not much in use in France these days, only decorate entrances to the voting venues" (Glucksmann 2005, 8). The explosions and racial riots in the suburbs of large French cities in the fall of 2005 clearly showed how scarce the fraternity really was. Equality is practically non-existent, either, and anyone with an Arab name looking for a job can just as well give up trying. After the attacks of 11 September 2001 there is also less liberty, which can be evidenced by the frequent street checks of people displaying certain facial features.

Europe is facing the division into wealthy, ready to stand up for the *status quo*, and the newcomers who wish to make up for the age-long delays. According to Dominique Moisi, it is a division into a "Europe of fear and a Europe of hope". "That is – into one that is afraid to stop being what it once used to be and one that hopes to become what it has not yet come to be" (Moisi 2006: 11). Indeed, fear characterises societies of the contemporary Europe. It is a fear of the Other, a fear which each time assumes a different shape – new members, an immigrant etc. In other words, the identity of today's Europe is marked by fear of the Other.

4. Modern roots of exclusion in Europe

Roots of this diseases are in the myth of Europe and then in ancient Greece. Greeks called foreigners barbarous – i.e. those who speak indistinctly and who should be kept at distance and in humiliation. The Romans on the other hand erected reinforced borderline walls – limes – against Others. However, in the social dimension of the modern times, the attitude towards the otherness (including insanity and madness) manifested in mass internment – that is (in the classical meaning) in applying a series of measures which enabled and imposed the duty of work on all those who were unable to earn their living. According to Foucault, internment – postulating closure of any otherness – derives from the imperative of work (Foucault: 68). The aim was to solve the problem of "beggary and laziness as the sources of confusion". Therefore the establishment of shelters, asylum houses, hospitals or reformatories as means of elimination, exclusion of the "inconvenient" and the "non-conforming" was clearly backed by the economic rationale. This practice provided tools for controlling wages in the case of any demands for any rise thereof, and it additionally enabled

liquidation of unemployment or concealing its negative consequences. "The economic and moral postulate of internment – writes Foucault – was formulated as a result of certain working experience. In the classical world, the demarcation line between work and idleness was running along the great exclusion of lepers. Instead of leper colonies shelters were built (…) Reference was made to the old rite of excommunication but in the field of production and trade" (Ibidem: 83). By means of segregation the modern world wanted to do away with, eliminate all those who turned out to be "asocial", in this way or another, in relation to the entire social order. The author of "Discipline and punish" notes that there is a similarity between the eighteenth-century internees and the today's mass of non-conforming individuals – for the former and the latter were created in the original act of segregation. Since the mid-seventeenth century any person banished from the society becomes a good candidate for a future dweller and inmate of all kinds of prisons, hospitals, shelters and asylums. He is the object of the same gesture of dismissal which was once used to get rid of lepers. Moreover, that gesture created the "asocial" and the non-conforming – it "produced the Stranger where he could hardly be sensed; tore the thread apart, broke the familiarity link (…) In one word, that gesture was the cause of alienation" (Ibidem: 85).

"The big closure" – as defined by Foucault – played not only a negative, excluding role, but first and foremost it had a profound impact on mobilisation and organisation. Thanks to the exclusion of others, the "unreasonable", the world was becoming more rational, orderly and uniform. The presence of the "asocial", the unuseful, allowed to organise the entire society as a whole in a more functional way. Just as for Descartes the presence of the unreasonable sphere of madness, dreams, delusions allowed to reinforce the clarity of the Truth itself, similarly the existence of the other, strangers in the social sphere constituted an excellent reservoir of sense. This truth was no stranger already to the nineteenth century capitalism, for which the armies of the unemployed – thrown outside the margin of the society – were one of the sources of coherence and efficiency of the production process. The presence of the unemployed was a perfect factor that mobilised to work all those who did not want to find themselves in a similar situation.

The Foucault's philosophy attempts to unveil the history of reason – assuming in the modern times the shape of scientific knowledge, technology, production, political organisation (Foucault 1988: 25). The rationality, its logos, involves the unceasing act of self-confirmation through exclusion, self-limitation, drawing a borderline between oneself and the other. According to Bauman, at a certain point in history the Other meant Jews, whose exclusion was a part of the Christian identity. "The concept of a Jew- says the author of *Modernity*

and the Holocaust – provided an important lesson that the alternative for the existing order was not another order but only chaos and destruction" (Bauman 1992: 69). At the end of the seventeenth century the segregation of Jews was a manifestation of fear of contaminating Europe; repressions against them and against other minorities became the major factor of the European modern times. In the opinion of Delanty, it is likely that the Reformation-driven split within the Christianity's bosom was planned in order to find scapegoats – with Jews and women constituting a perfect fit. The author of *Inventing Europe* claims that this could "explain the great exodus of Jews from the Central Europe and the growing witch-hunts" which accompanied the Reformation and Counter-Reformation. After the ultimate retreat of the Muslims from the Iberian Peninsula, Europe was liberated from its external enemy, therefore the role of the victim – the European "Other" – was assigned to an internal enemy -Jews" (Delanty 1999: 60–61).

The holocaust, bringing the ultimate solution to the Jewish issue, represents an extreme approach towards the Other, manifesting itself with various intensity during the late modernity. The division into "ours" and "others" is additionally reinforced and supported by the philosophy of a nation-state as the dominant political structure of the modern epoque. That is why the national socialist state placed Jews beyond its "own borders" leaving no room for a stateless nation. However, it is not only about placing "beyond" understood as the transportation to the East. It is more about the exclusion from fundamental human and civil rights, henceforth reserved as the privilege of the pure and thus "true" race. For Jews were perfectly in line with the philosophy of a state that saw in every foreigner a masked individual "tamed and gagged, as he was, but ready to break loose with the vigilance of the guard fading away" (Bauman 1995: 42).

By making the state the sole disposer of the means of violence, the modern times made them a morally sanctified coercion – when applied for that state's purposes, whereas if used by "strangers" – they turned to be outrageous and required determined resistance. The modern nation-state manipulated the existing moral impulses, and by dividing the human community into "ours" and "others" it employed the altruistic inclination to serve the group egoism" (Bauman 1993: 123).

The East, brought to life by the Western reason, perceived as the borderline and baseline of the West, also became the "Other". Foucault writes that "the East constitutes one of the divisions within the universality of the Western ratio: The East thought to be the origin, the bewildering source of nostalgias and promises of return. The East, given away to the colonizing reason of the West and at the same time somehow forbidding -as it will always be the borderline,

the night of beginnings that gave rise to the West – the West which drew a demarcation line within it. The East will be everything which the West is not, although it still has to search for its primary truth there" (Foucault 1987: 137).

According to Delanty, the historical awareness of the Western Europe was shaped under the influence of three types of threats: Muslims, Jews and Slavs. Similarly as in the case of Muslims and Jews, Slavs were considered to be Asians or semi-Asians. They formed an important bargaining counter in the trade with the Islamic world. Europe was selling Slavs as slaves, hence the origin of the name Slavs, as noted by Lewis (Lewis 1993: 22–23). At the outset of the modern times, the grain trade led to a split between the West and the East. In consequence Europe witnessed two independent stages of feudalism: in the Western Europe between the ninth and fourteenth century and in the East between the fifteenth and eighteenth century. With the development of the Western Europe its eastern part was becoming slavishly subjected to the West. Consequently, the concept of Europe was associated with the institution of West European nation-states, and adopted somewhat a normative character. It was not perceived as an alternative to a nation-state. Quite to the contrary: the Europe's concept was being subjected to the national interests. Contrary to the United States, in Europe the idea of statehood and often the national idea were ahead of and defining the international norms and institutions. During the Enlightenment era the term Europe, being the alternative to the nation-state, was present only among intellectual elites, bearing no meaning for the ordinary people, since the conflicts between the nation-states were too severe. According to de Rougement, the idea of Europe was essentially devised by France, which pleaded "superiority of the European religion, the white race and the French language" (Rougemont 1966: 157). At the turn of the sixteenth and seventeenth century, one of the early concepts of the European political governance was "the great project of Henry IV, prepared by Prince Sully, for whom Europe was supposed to be in fact the extension of France. Establishing an alliance of the Western states against Turks was to be an essential element of that plan".

Since the beginning of the nineteenth century the European idea was clearly being subordinated to the rule of nationality, while the concept of the citizen of the world, rooted in the Enlightenment era, was forced out by national citizenship. Nationalism became an extremely strong and effective cultural factor that unified the European states against Muslims. In this sense – says Delanty – nationalism was not a negation of the European nature but an essential condition for its realisation (Delanty 1999: 106). Nationalism should be understood as a specific form of ethnocentrism, in which the collective "Us" of any group, tribe, culture or nation not only regards its way of life as different from any other but also as a more appropriate one. Anybody who is a stranger – notes

Waldenfels – "is perceived as an economic competitor, political opponent and a threat for the global culture". (…) The human passions mentioned by Kant, dwelling in human beings, such as the striving for recognition, power and possession – make any stranger stigmatized as a potential foe as a result of the absolutization of ownership, own will and own importance" (Waldenfels 2002: 162). That is why, on the verge of the First World War, due to their nationalism, the nation-states sacrificed the European idea on the altar of their particular interests. Thus all the universal plans of building Europe free from national roots became impossible for a long time.

Thus the idea and identity of Europe were being constituted in opposition to and out of fear of what was different, with the Orient being of the fundamental importance. The Orient, being the "substitute of the otherness of others", played the role of a distorting mirror of the West. Europe needed the other in opposition to whom it could build its identity. Therefore the European nature was being established around the West – East antagonism. The previous opposition of Christianity against Islam was substituted by the opposition of the civilisation against barbarism. The nineteenth century carried a conviction that Europe represented the civilisation ideal and that its mission was to civilize the world. The non-European world was being perceived as the reflection of what Europe used to be and what should at the present time be referred to the Western values treated as universal principles. The Darwin's theory of evolution, applied to the reflections over the society, delivered scientific justification for the social and racial inequality, which were treated as a manifestation of natural selection. The "colonial" and "primitive" people were allocated to the category of biological inferiority. The category of race, rather than language or religion, became the uniting factor for the nineteenth-century Europe. It was a period of development of anthropology – the study on "primitive folks", which was supposed to provide the scientific explanation to the Europe's spiritual and intellectual superiority over extra – European communities.

After the fall of the Ottoman Empire during the First World War, the role of Islam was taken over by the Communism. The October Revolution transformed the final stage of Wold War One into a battle between capitalist and communist countries.

5. The period of Cold War and after

The Cold War was a continuation of that process, during which the Europe's identity would form in opposition to the Soviet block. In this sense the Berlin wall, erected in 1961, became a symbol of the Europe's internal division and

an incarnation of the age-long conflict between the West and the East. Delanty notes that "this profound division was visible even in the attitude of Western Jews towards Jews from the East, whom they often disregarded and discriminated. (…) The mutual hostility between the East and the West would always focus on certain groups that were compelled to carry the historical burden. It should be strongly emphasised that the cultural representations of the reality crystallised in the form of regressive identities based on the category of race, xenophobic concepts of nationalism and on obscure irrationalism" (Delanty 1999: 274).

It should be pointed out that the term "cold war", rooted in the medieval conflict between Christianity and Islam – was rediscovered by Walter Lipmann just after the Second World War. It was to provide the ideological foundation for Europe's defence against the potential danger from the Soviet Union, and also against any potential rebirth of the Third Reich. For a long time were the Western mentality and the framework of political discussion shaped by the conflict between liberal democracy and the Communism. The European identity built during the Cold War was surmounted by the establishment of West Germany as the Federal Republic of Germany and of East Germany i.e. the German Democratic Republic – set up in the Soviet occupation zone.

In this sense, the Europe's integration was a continuation of the history of the Western rationality, and therefore the very incarnation of the logic of exclusion – bringing to life yet another Other – the mad, the sick, offender, woman, Jew, Slav or finally – the non-European, who, where necessary, could give evidence of the Western rationality, fitness, righteousness, purity, superiority, etc. The continent's integration was somewhat a materialisation of the Europe's heritage to date, Europe which according to Waldenfels considered itself "the incarnation and warden of the real faith, the right reason, true advancement, civilised humanity, universal discussion… The name Europa allows to speak "in the name of…", and the speaker becomes a self-declared spokesman. One does not judge some civilisation anymore, one makes judgements "in the name of the civilisation" (Ibidem).

The Europe's post-war unification process was being materialised since its very origin as an integration against non-Europeans, who – being the Others – found themselves on the other side of the Iron Curtain. Yalta was the complementary element and concurrently a beginning of the history that – driven by its own logic – split Europe in two and established its own Other, against whom the West could successfully unite. The Cold War era and especially the fifties and the sixties are in principle the best years of the unification process, a round of the greatest successes. The fear of the Soviet threat – the Other – functioned perfectly as one of the driving forces of the integration machine.

The European idea growing after World War Two was largely "tailor-made" to the needs and in the interest of the nation-states, which was reflected in a de Gaulle's concept of "Europe of fatherlands". This idea was accompanied by a specific economic nationalism manifesting in the project of establishing a single internal market, which gave the post-war Europe a materialistic and consumer-like profile. For the Europe's integration was realised from its very beginning predominantly through the economic sphere. Although some "political dimension", aiming at ensuring peace and safety, did accompany the continent's unification, still, the major emphasis was put on building the foundations under the economic cooperation between the states about to accede to the community.

The European unification debate was largely deprived of any cultural aspect – generally understood as a certain system of values, norms and patterns adding the ultimate sanction and sense to the human life. Culture was perceived as a "foreign creation" illegitimately intruding on the realm reserved for rationality and objective truth. The scientific economy wished to do away with reflections representing no major meaning in the rational and objective understanding of economic processes. Purity of the scientific truth could be maintained at a price of rejecting the "untrue" culture. Both culture and morality were replaced by efficiency and rationality. The dominant techno-economic reason created a specific universe of a one-dimensional human being who was confined to the role of homo oeconomicus. In other words it can be said that the human became predominantly a consumption subject, his behaviour determined by demand, supply and competition. He became an object of the forces driving the single European market. At the same time, claims Eric Hobsbawm, author of the famous "Age of Extremes", the free market is not rooted in a legal, political or social base. First of all it exists for itself. According to Maria Janion, the free market, apart from its reference to political, national, cultural, social or ideological spheres, can lead to losing something that should be saved in democracy, i.e. the "soul". In a democracy that is identified with free market, the "soul" can be wasted away, devoured. Everything seems to indicate that such devouring or exclusion of the "soul" is well in line with the very logic of the capitalist development – with capitalism being the essential element of the entire machine supporting the Europe's unification. Those capitalist contradictions, excluding others from the benefits of the modern-day civilisation, have been complemented by the globalisation process, in which Europe has been engulfed for several years.

Thus the idea and identity of Europe were being shaped in opposition to and out of fear what was different, with the Orient being of fundamental importance. However, after the fall of the Ottoman Empire during the First World

War, the role of Islam was taken over by the Communism. The October Revolution transformed the final stage of World War One into the battle between capitalist and communist countries.

The Cold War was a continuation of that process, during which the Europe's identity would form in opposition to the Soviet bloc. In this sense the Berlin wall became a symbol of the Europe's internal division and an incarnation of the age-long conflict between the West and the East. That is why the Europe's integration was a continuation of the history of the Western modernity and therefore the very embodiment of the logic of exclusion – bringing to life yet another Other: the mad, the sick, woman, Muslim, Jew, Slav and finally the non-European, who could give evidence of the Western rationality, fitness, superiority, etc. The Europe's post-war integration was unification against non-Europeans, who found themselves on the other side of the "iron curtain". Yalta was only a completion of the whole process that driven by its own logic split Europe in two and established its own Other, against whom the West could successfully unite. The fear of the Soviet threat – of the Other – perfectly functioned as a one of the driving forces of the integration machine.

The collapse of the Communism and the end of the Cold War in 1989 turned out to be a big "shock" for the West and a source of chaos and destabilisation. The world almost fell apart depriving Europe of its foundations that had been so vital for its development. On the other hand the victory of "Solidarity" followed by the fall of the Berlin Wall roused hopes for permanent abolition of barriers that divided the Old Continent. After a short period of euphoria, the Western states started fencing off from their Eastern neighbours with a new, less visible wall – that of fear. The liberation of the Central and Eastern European countries entailed huge opportunities but also a danger for the Western part of the continent. Jerzy Łukaszewski notes that "one of the major integration catalysts i.e. the threat of the East disappeared" (Łukaszewski 1998: 91). The striving of the countries, liberated after several dozen years of the Soviet dependence, to become the EU members, started to be treated as a dangerous "dilution" of the Communities. In this context the declaration of the former French president François Mitterand of June 1991 was meaningful. He stated that "dozens and dozens of years will past before the accession of those countries to the EU could be possible" (Ibidem: 93).

After 2005 referenda and present financial and institutional crisis, there still is a fear of the Central and Eastern Europe that draws a comprehensive picture of today's Europe. It is an expression of still present the fear of the Other. In 2002 the former French minister for foreign affairs Dominique de Villepin expressed and opinion that vividly reflected the nature of the problem. He said that "there is a fear of the other in the heart of Europe, of the other culture, of

the neighbouring state" (Villepin de 2002). In this sense Europe has always been sick from the Other, and the symptoms of that sickness keep exacerbating with the modern period of the European identity building and are visibly present even now.

The question arises how Europe can overcome its fear of the Other?

6. Conclusion – Towards a new European identity

According to Theodora Kostakopoulou, an excessive emphasis put on the Greek, Roman or Christian heritage may become a kernel of European racism and xenophobia. Europe must overcome its previous limitations and start building its identity towards the Other rather than against the Other (Kostakopoulou 2001: 26).

The intellectual premises for a new approach to the problem of the "Other" have been expressed in the most comprehensive way in the thought of Emmanuel Levinas and the so-called philosophy of dialogue, having also such prominent representatives as Martin Buber, Franz Rosenzweig, Gabriel Marcel. According to Levinas, meeting the Other is a "fundamental event" in a contact of the human being with the world. The Other is the only one and unique being in the philosophy of dialogue and is considered to be the highest value, which concept was supposed to protect the individual against the danger posed to the human identity by masses and the great totalitarian systems of the twentieth century. The indifference towards the Other can, under specific circumstances, lead to Auschwitz.

In his philosophy Levinas leads us to the pre-community sources of morality, seeing the meeting with the Other as the original experience. Such a meeting is the greatest experience and basis for all later relations between people, and also a way of approaching God. Keeping with Others, as the basic attribute of the human existence, means responsibility in the first place. According to Levinas, if the Other is looking at me, I am responsible for him. My responsibility for the Other is unconditional; it is not dependent on any previous knowledge about the Other but is rather ahead of that knowledge. The author of "Totality and Infinity" says: "I analyse human inner-relations which – in the nearness of the Other – apart from the impression which I myself make on another human – his face, expression of the Other, is decisive for me to serve him (…) The face is commanding and deciding. Its meaning involves command. Precisely speaking, if the face means command in my imagination, it is not the way an ordinary sign manifests its meaning; this command makes up the entire meaning of the face" (Bauman 1992: 252). In other words, in Levinas's

opinion the responsibility for the Other is the original element of subjectivity. It is not stimulated by any primary force, ethical or legal code or fear of penalty. Only when I become responsible, do I become a subject. It would be sufficient to break through the curtain of everyday life to be able to arrive at the sources of our existence.

In this sense this is a postulating philosophy, and also ethical to the core – philosophy that requires certain heroism and going beyond our ordinary experience and habits in being in touch with other people. Yet today Europe also needs this heroism and going beyond the traditional approach to Otherness.

The "new thinking" about the European problem found its specific continuation in the thought of Jacques Derrida. In one of his books *The Other Heading* Derrida discloses a somewhat different, more political face of deconstructionism, of which he was the most well-known representative. The ambiguous title of his book, which could be understood as "the other headland, direction, course", is an indication of a specific intellectual journey of its author. It is a manifestation of search for a new definition of the European identity, or rather a different thinking on the identity itself. According to Derrida, the traditional understanding of the Europe's identity is a closure in "our own", leaving out the "foreign", the "other" behind. However, "it is a culture's attribute not to be identical with itself. To think about Europe in a different way means to think about the European identity in terms of "otherness", "difference", "pluralism", "apory". Therefore, the other course (*the Other Heading*) is not so much a suggestion of a new "goal", "vision" but rather a transformation of thinking. Europe must begin to think of itself in terms of the "other". "We need to become guards of a certain idea of Europe, a certain otherness of Europe – yet Europe that is not closing the door of its own identity and which is exemplifying the striving for what it is not, towards the opposite side or towards the other. We need to devise and imagine the new style of thinking in which the identity comes from the otherness and not vice versa" (Derrida 1992: 29). It will be difficult to do without paradox here, with responsibility being its ethical and political dimension. If responsibility is to be free from Eurocentrism – in other words – from replacing the Europe's integration with West European integration – Europe must be reflected upon in a new way. This new way means that Europe will not only be responsible for the "other" but its own identity will be constituted by the "other". Moreover, that responsibility should be realised – according to the French philosopher – through respect for diversity, otherness, but at the same time for the common values. Thus rejecting the easy and luring solution of either a full unification or a total dispersion, Derrida speaks for the necessary action to be taken within the framework of the enlightenment values of liberal democracy, emphasising at the same time that those values are not

sufficient themselves in order to ensure respect for the "other". What we need is such a definition of the European identity, or such kind of thinking about it, which would combine the universalism of values and the "diversity". For Europe "must not get dispersed into thousand provinces, separate views, idiosyncrasies or small nationalisms, but on the other hand it is must not submit to the tyranny of centralised power" (Ibidem).

At the turning point of the integration process, when a more adequate "vision" of the unification seemed necessary, the reflection represented by Jacques Derrida may be the answer to the urging challenge of the contemporary times. One thing is certain, Europe – facing qualitatively new problems and encounter with the Other – is in need of a thorough revision (deconstruction) of the fundamental categories on which its identity is built. It should be instantly emphasised that Derrida does not offer ready solutions, plans or overall projects. He only indicates the direction (*the Other Heading*) where the answers and solutions should be sought to the ever new problems and challenges. The signs on that road include the new identity determined by the "other" and responsibility for the "other". What is common for them is the respect for diversity but at the same time also for the universal values.

The New Developments in Family Law – Green Paper „Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effect of Civil Status Records", its Applicability in Marriage on the Example of Estonia

Kristi Joamets, Tanel Kerikmäe*

Summary: The article gives the in-deep analyses of the European Commissions Green Paper – Less bureaucracy for citizens, particularly in connection with the harmonisation of certain aspects of Member States family law. It deals with the main means proposed in the Green Paper e.g. the abolition of administrative formalities for the authentication of public documents, cooperation between the competent national authorities, limiting translations of public documents, the European civil status certificate, mutual recognition of the effect of civil status records.

Keywords: free movement, marriage capacity, public administration, administrative capacity, subsidiarity, Europeanisation, co-operation between Member states, recognition of family documents, primary and secondary law of EU, conflict-of-law

1. Introduction

In 2010 European Commission (EC) prepared a Green Paper – Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records to work out the measures within the framework of Stockholm Programme[1] to guarantee full exercise of the right of freedom of movement by free movement of documents by eliminating legalisation formalities between Member states and recognising of the effects of

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[1] COM (2004) 401 final.

certain civil status records, so that legal status granted in one Member state can be recognised and have the same legal consequences in another.[3]

European Union (EU) and its Member states have long struggled with crossborder family matters because of their special character – on the one hand it is widely emphasized that family law belongs to the jurisdiction of every Member state and is characterised as a cultural-national law[3] and EU has no power to interfere into it, on the other hand EU policy more and more tries to involve with it and that exactly because of prevailing crossborder cases.

Meeusen explains it all: "Whereas family rights protection was at first constrained by the EC's economic objectives, the protection of family life became more important under the free movement project and the broader EU project. Family provisions have been resistant to the human rights discourse for some time, in spite of the EU's longstanding commitment to human rights in other areas of EU law and the human rights protection in the Council of Europe and the Hague Conference. Three important constitutional developments have led to the endorsement of family rights at EU level. First, the extensive interpretation of restrictions to economic free movement has resulted in a European recognition of family rights. The same approach has been endorsed with regard to economically inactive persons through the concept of EU citizenship[4]. Second, the Charter of Fundamental Rights, though dependent on the fate of the Treaty establishing a Constitution, is already serving as a bluebrint for human rights protection. Finally, a commitment to human rights has accompanied the communitarisation of family law activities in the Treaty of Amsterdam."[5]

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[2] European Commission. Green Paper. COM(2010) 747 final, 14. December 2010. Modification of this article is published in 2013 in a Korea University Law Review, 13. The Korea University Legal Research Institute, 25–42: "The New Developments in EU Family law – Its Applicability to Estonian Law."

[3] Meeusen J., Pertegás M., Straetmans G., Swennen F. (eds.), General Report. International Family Law for the European Union. Intersentia. 2007. pp. 4.

[4] Dani (2012) sees European citizenship as a vehicle for the amplifiaction of very social practices it was expected to reform. He writes „Through European citizenship, indeed, European individuals have not learned to organise themselves and voice in supranational politics their apirations for social justice". (Dani M. Rehabilitating Social Conflicts in European Public Law. European Public Law Journal, Vol. 18, No. 5, Sept 2012, pp. 621–643, pp. 634. As Habermas described „as a result, the European economic citizen have become EU citizens" (Habermas J. Bringing the Integration of citizens into the Line with the Integration of States. Europen Law Journal, Vol. 18, No 4, July 2012, pp. 485–488, pp. 485.

[5] Meeusen J., Pertegás M., Straetmans G., Swennen F. (eds.), General Report. International Family Law for the European Union. Intersentia.2007. pp. 5. According to the Art. 13. Allowing so called "two speed Europe". Member state that desired to further deepen European integration should not be slowed down by Member state who were not yet ready. (Kuipers J.-J. the Law Applicable to Divorce as Test Ground for Enhanced Cooperation. European Law Journal. Vol. 18. No 2, March 2012, pp. 201–229, pp. 202).

According to Stalford (2007) "the profileration of EU legislation in the family law arena has been a particularly controversial and suprising feature of the EU post-Amsterdam era[6]. The cultivation of the Brussels II Convention from an intergovernmental code or practice into binding, uniform legislation has attracted particularly heated debate among academics and practitioners alike. These debates have revolved around the ideological and practical implications of procedural harmonisation of matrimonial and parental responsibility laws: ideological in respect of the potential threat harmonisation poses to the cultural sanctity of domestic family law regimes or the absence of any specific legal bases from which the EU institutions can derive competence to legislate on family law issues; and practical in respect of the considerable demands these developments have imposed on the family law practitioner and private litigants who continue to grapple with the new procedural requirements set out in the Brussels II legislation."[7]

In 2001 the Commission on European Family Law (CEFL), as a purely scientific initiative, which is totally independent of any organisation of institutions[8], was established in order to elaborate upon non-binding Principles of European Family Law[9], that could serve as a model for national and supranational legislators, but as the family laws of the different European countries are embedded in their unique national culture and history[10], they cannot be harmonised deliberatedly.[11] In 2005 the Green Paper of applicable law and jurisdiction in divorce matters was presented by the Commission, who "identified the lack of legal certainty and predictability for the spouses. The insufficient party autonomy, the risk of results that do not correspond to the legitimate expectations of the citizens and the risk of forum shopping as shortcomings of the present situation."[12]

New policy was needed to solve the problems caused by the free movement of persons. According to Ninatti (2010) by Treaty of Lisbon a new article (197) was

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[6] Hence according to Borras (2007) there were difficulties with family law issues already at a time when there were only six Member states with more closely related legal systems than at present. (Borrás, A., Institutional Framework: Adequate Instruments and External Dimension. Meeusen J., Pertegás M., Straetmans G., Swennen F. (eds.), International Family Law for the European Union. Intersentia.2007. pp. 147).

[7] Stalford, H. EU Family law: A Human Rights Perspective. Meeusen J., Pertegás M., Straetmans G., Swennen F. (eds.), International Family Law for the European Union. Intersentia.2007. pp. 101.

[8] Boele-Woelki K. The principles of European family law: its aims and prospects. Utrecht Law Review. Vol. 1, Issue 2 (Dec) 2005. http://www.utrechtlawreview.org/ pp. 160–168, pp. 160.

[9] Today there are from 15 members 12 members as EU Member states.

[10] EU itself is not a national state, but relies on the geographical, historical and cultural features of Member state (Laffranque J. Euroopa Liidu õigussüsteem ja Eesti õiguse koht selles. 2006. Kirjastus Juura. Tallinn. pp. 148).

[11] Masha Antokolskaia, Objectives and Values of Substantive Family Law, Meeusen Johan, Pertegás Marta, Straetmans Gert, Swennen Frederik (eds.), International Family Law for the European Union. Intersentia.2007., pp. 50.

[12] Kuipers J.-J. The Law Applicable to Divorce as Test Ground for Enhanced Cooperation. European Law Journal. Vol. 18. No 2, March 2012, pp. 201–229, pp. 207.

included to the Treaty providing that effective implementation of Union law by the Member states, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest. So Treaty of Lisbon "remarking this slow but relentless change, asking for a new stage in the process of creating ever closer union among people of Europe, thus suggesting an ambitious project of legal and political unification." Family law represents one of the inalienable competence of the national level of government.[13]

Green Paper consists of new development in EU administrative and legal space in harmonizing or converging family laws in EU Member states as well as public administration and co-operation between themselves. It is a new start for the purpose of CEFL not yet reached to. Green Paper is a document that will play an important role in family law developments for many years in EU. According to Green Paper since 2004 EC has emphasized the importance to facilitate the recognition of different types of documents and mutual recognition of civil status. To this end two studies were published by the Commission – in 2007 and 2008 on the problems encountered by citizens as a result of the requirements to legalise the documents between the Member states and on the problems relating to civil records. Within the framework of the Stockholm Programme the Council has asked the Commission to pursue the work on the follow-up to be given to these studies in order to ensure full exercise of the right to freedom of movement. In this connection, two legislative proposals are envisaged in the Stockholm Programme action plan, scheduled for 2013. The European Parliament has already stated on several occasions that it is in favour of the recognition of public documents and civil status records, the last time being in November 2010.[14]

Measures proposed in Green Paper are tensely related to the applicability of EU primary law, of principle of subsidiarity[15], co-operation between Member states as well as the public administration of Member states. So called cross-border marriage capacity is one of the questions directly related to the means proposed in Green Paper, EU primary law and independence of Member states substantial family law.

What kind of new developments of family law in EU can be concluded from Green Paper? How does Green Paper develop Family Law of legal space

[13] Ninatti, Stefania, Adjusting Differences and Accomodating competences: Family Matters in the European Union. Jean Monnet Working Paper 06/10, pp. 3.

[14] European Commission. Green Paper Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records Brussels, 14.12.2010 COM(2010) 747 final, pp. 3.

[15] About the principle of subsidiarity see Kerikmäe T. Euroopa Liit ja õigus. 2000. Õiguskirjastus. pp. 52.

of EU and Estonia? To answer the question the primary and secondary law of EU regulating public administration as well as family law is analysed in this article by using the legal-political, sociological and historical method. Special attention has been turned to the mutual impact of principles of subsidiarity and harmonisation of public andministration and family law[16]. As an example Estonian legal space related to these questions is analysed.

In Estonian context marriage impediment certificate[17] has caused and causes probably the most problems in the process of marriage for public administration, who on the one hand has to follow the primary law of EU and on the other hand according to the subsidiarity principle domestic law. This causes many legal gaps, conflicts between EU primary law and domestic law as well as in a horisontal level between the domestic laws of Member states.

First part of the article explains the general principles of EU related to public administration – showing how the EU policy has developed the convergence of the administrative spaces of Member states despite subsidiary principle. It seems natural to use co-operation also by facilitating the free movement of documents as an important tool in Green Paper related also to other means suggested. Second chapter introduces the means proposed in Green Paper and analyses their applicability related to marriage.

2. Administrative capacity, Europeanisation and harmonisation of public administrations of Member states

From the late 1970s through 2000 there have been fundamental changes in the theory and practice of public administration. Michalopoulous explains it all: "The major transformation that the reform agenda has brought is a consideration of public administration from citizen point of view. The New Public Management gave the customer a special position in the assessment and evaluation of the newly emerging systems of public services. In the EU almost all Member states were doing considerable work in the policy area of improving service quality."[18]

Usually administrative capacity of single Member state has been assessed by the ability to follow the *aqui*, EU law and objectives as one of the domestic

[16] In this article the family relations related to third states are not discussed.

[17] See the essence of marriage capacity Joamets K. Marriage Capacity, social Values and Law-Making Process. International and Comparative Law Review. 2012, Vol. 12, No. 1 pp. 97–115.

[18] Michalopoulos N., Trends of Administrative Reform in Europe: Towards Administrative Convergence? Paper at First Regional International Conference of the International Institute of Administrative Sciences, University of Bologna, 19–22 June 2000. www.imp.unisg.ch, pp. 41–42.

facilitating factors.[19] As refered by Bauer, Knill and Pitchel (2007) implementation capacity of EU rules is largely dependent on the bureaucratic effectiveness of domestic administration (Hille, Knill, 2006).[20]

Kellermann states: "The Member states must be able to ensure the effective participation of its state in the EU Decision-making process, be able to ensure timely implementation of Regulations, Directives and Decisions etc."[21]

Already in 2000 Commission identified the reform of European Governance as one of its four strategic objectives in early 2000. European integration has achieved results which would not have been possible by individual Member states acting their own. These results have been achieved by democratic means. According to the White Paper – European Governance „The Commission alone cannot improve European governance, change requires concerted action by all the European Institutions, present and future Member states, regional and local authorities, and civil society."[22] In 2001 five principles underpin „good governance" and the changes proposed in this White Paper: openness, participation, accountability, effectiveness and coherence. The application of these five principles reinforces those of proportionality and subsidiarity.[23]

Already in 2004 it was emphasized that Union action cannot be effective, if it is not backed up in the Member states, by a declared political determination to ensure that European decisions have effect in reality. It is up to the experts in the Member states to use the opportunities for co-operation that European integration offers.[24]

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[19] See Sedelmeier U. Europeanisation in new member and candidate states. Living Reviews in European Governance, Vol. 6, 2011, No 1, pp. 13 and 22, refered to Hille, P. & Knill, C (2006) „It's the Bureacracy, Stupid": The Implementation of the Acquis Communautaire in EU Candidate Countries 1999–2003, European Union Politics, 7(4), pp. 531–552.

[20] Bauer M. W, Knill C., Pitschel D., Differential Europeanization in Eastern Europe: the impact of Diverse EU Regulatory Governance Patterns. Journal of European Integration 29 (2007), 4, pp. 405–423, pp. 410, refered to Hille, P. & Knill, C (2006) „It's the Bureaucracy, Stupid": The Implementation of the Acquis Communautaire in EU Candidate Countries 1999–2003, European Union Politics, 7(4), pp. 531–552.

[21] Kellermann A.E. The Impact of EU Accession on the Development of Administrative capacities in the States of Central and Eastern Europe. Similar Developments in Russia? Romanian Journal of European Affairs. Vol. 6, No. 3, 2006, pp. 46–51, pp. 47.

[22] Commission of the European Communities, European Governance, A White Paper, Brussels, 25.7.2001, COM(2001)428 final, pp. 3, 7, 9.

[23] European Commission (2001) European Governance: A White Paper, COM(2002) 428 final, 25 July.

[24] European integration involves the management of chance on a grand scale. The effectiveness of the European policy process as a whole depends on designing and developing networks of organizations capable of working together in the formulation and implementation of European policies. See Metcalfe L. building Capacities for Integration: The Future Role of the Commission. Eipascope 1996/2. www.eipa.eu/files/repository/eipascope/Scope/Scop96_2_1.pdf.

The development of the European judicial area has neither the object nor the effect of challenging the legal and judicial traditions of the Member states. This approach, based on the proportionality and subsidiarity principles, is stated by the draft Constitutional Treaty. The principle of mutual recognition has been placed at the heart of European Integration in this field. However, mutual recognition requires a common bases of shared principles and minimum standards, in particular in order to strenghten mutual confidence. One of the first priorities will have to be to continue an increase work provided for by mutual recognition programme. Efforts should concentrate on fields where there are as yet no community rules on mutual recognition. In addition, new mutual recognition instruments not appearing in the initial programme might be necessary. For example facilitating the recognition of various types of documents will become increasingly important. In addition, it might prove useful to facilitate mutual recognition in new fields such as the civil status of individuals. Family or civil relations between individuals (partnership) or paternity.[25]

According to Ninatti (2010) the Lisbon Treaty suggests an ambitious project of legal and political unification. It asserts also very distictly that „the process of creating an ever closer union" (art. 1 TEU) will proceed hand by hand together with pluralism; nonetheless it fails to say how this process will actually respect diversity. As refered by Ninatti (2010) „Constituting an extraordinary laboratory, from this point of view Europe „illustrates, even sometimes caricatures, the disorder caused by the interactions within the legal order and changes in organisational levels and time" (Delmas, 2009).[26]

Cărăuşan (2004) raises a question if there is a European administration, are we witnessing a new order in administration, or only mechanism aiming at ensuring co-operation between national administrations? He explains that the direct impact of the EU on administrative systems of Member states is guite limited. In fact, EU does not have any direct competence in this field. Administrative organisation of Member states is a matter that falls under the competence of Member state. Anyhow, there are numerous ways of indirect influence upon Member states and those states that desire the integration.[27]

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[25] In the Communication from the Commission to the council and the European Parliament – Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations SEC(2004)680 et SEC(2004)693.

[26] Delmas M. M. Ordering Pluralism. A conceptual Framework for Understanding the Transnational Legal World, Hart Publishing, Oxford, 2009, pp. 151.

[27] Cărăuşan M., Administrative Reform or the Strengthen of the Administrative Capacity to Govern in the EU Context, Paper presented at the Annual Conference NISPAcee, Vilnius, Lithuania, May 13–15, 2004. http://ssrn.com/abstract=1987021. 20.05.2012. pp. 1.

Michalopoulos (2000) states that "an individual administrative systems, at least in the dimension of the relationship between citizens and public services, are looking to resemble one another. But this cross-system similarity does not mean that we are witnessing a harmonisation in European administrative systems".[28] Schout and Jordan suggest (2008) that EU needs to take administrative capacity building much more seriously in order to govern in a less hierarchical manner.[29]

Concept of Europeanisation[30] has been introduced to explain the changes in domestic policy related to integration to EU[31]. Trondal (2007) refers that the literature mainly concludes that we are not witnessing a profound transformation of administrative structures[32] and styles, legal rules, cultures, and collective identities (Olsen, 2007).[33] Most studies suggest that adaption towards Europe is considerably mediated through and conditioned by existing domestic institutions, practices, cultures and traditions, thus contributing to a differentiated Europeanisation of domestic public administration (e.g. Kassim et al. 2000; Spanou 1998).[34] Similar conclusions are drawn in the study of the new member and candidate states (Sedelmeier 2006)[35] According to Bauer, Knill and Pitschel (2007) national administration acts "as key players in the implementation process of compliance, competition and communication, tend to react towards these distinct stimuli according to certain logics, which, in turn, impact

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[28] Michalopoulos N., Trends of Administrative Reform in Europe: Towards Administrative Convergence? Paper at First Regional International Conference of the International Institute of Administrative Sciences, University of Bologna, 19–22 June 2000. www.imp.unisg.ch, pp. 45.

[29] Schout A., Jordan A., The European Union's governance ambitions and its administrative capacities, Journal of European Public Policy 15:7, October, 2008: 957–974, pp. 957.

[30] See also about horisontal Europeanisation (Ninatti, S., Adjusting Differences and Accomodating competences: Family Matters in the European Union. Jean Monnet Working Paper 06/10, pp. 6.

[31] See also Trondal J., The Public Administration turn in integration Research, Center for European Studies, University of Oslo, Working Paper no 07 May, 2007, www.arena.uio.no, pp. 11.

[32] See about organisations in the process of Europeanisation (Jacobsson B. Europeanisation and organisation theory. The European Union and the Baltic States. Changing forms of governance. 2010. Routledge. London. pp. 24.

[33] Olsen J.P. (2007) Europe in Search of Political Order. An Institutional perspective on unity/diversity, citizens/their helpers, democratic design/historical drift, and the co-existence of orders, Oxford: Oxford University Press.

[34] Kassim H., Peters B.G and Wright V. (eds) (2000) The National Co-ordination of EU Policy. The Domestic Level, Oxford:Oxford University Press (Spanou, C. (1998) European integration in administrative terms: a framework for analysis and the Greek case, Journal of European Public Policy 5(3): 467–484).

[35] Sedelmeier U. (2006), „Europeanisation in new member and candidate states", Living Rev. Euro.Gov., Vol. 1, (2006), No. 3: cited [24.11], www.livingreviews.org/lreg-2006-3. (Trondal J., The Public Administration turn in Integration Research, Center for European Studies, University of Oslo, Working Paper no 07 May, 2007, www.arena.uio.no, pp. 12).

on the occurence and the scope of domestic institutional change".[36] As the same European policy might cause fundamental reforms in one country while having no impact at all in others[37], it is understandable, that it is difficult to find a common language. It is normal that every Member state is not interested to be the one who should change its system or practice. Lisbon amendments have not created any new horisontal administrative principles. The classic administrative principle of transparency still remains with some notable repositoring.[38]

However, todays administrative space of every single Member state can be described by convergence – even in the questions of administrative process more and more approaching can be felt. According to Michalopoulos (2000) "convergence is characterised as policy transfer, as the process, in which ideas, knowledge and institutions developed in one time or place are used in the development of policies, programs and institutions in another time or place… At root, the meaning of convergence is that countries at a similar stage of economic growth appear to be convergent".[39] Ninatti (2010) claims that "diversity is gently fading away in the land of Europe. For good or bad, the European legal scenario is rapidly changing and what was once firmly rooted in one system, and not acceptable to another, has to be seriously reconsidered nowadays".[40]

Popescu (2011) explains that "in the law of persons and family law, the Community legislation had at first only an indirect and subsidiary role, its influence being perceived as an effect of the play of fundamental freedoms asserted by the Treaties; as the unification of the legislations of Member states in areas that reflect national particularities is neither convenient nor particularly necessary, the Community law currently steps in by ensuring their coordination, through certain uniform choice of law rules. Community law is oriented towards the integration of markets and the construction of an area without interior borders".[41]

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[36] Knill C. & Lenschow, A. (2005), Coercion, Competition and Communication: Different Approaches of European Governance and their Impact on National Institutions, Journal of Common Market Studies, 43 (3), pp. 581–604, pp. 408.

[37] Knill C., European Integration, Administration and Implementation. Patterns of Institutional Change and Persistence. Cambridge University Press, 2001. www.catdir.loc.gov. 8.08.2012.

[38] See more detailed Smith M., Developing Administrative Principles in the EU: A Foundational Model of Legitimacy? European Law Journal, Vol. 18, No. 2, March 2012, pp. 269–288, pp. 281.

[39] Michalopoulos N., Trends of Administrative Reform in Europe: Towards Administrative Convergence? Paper at First Regional International Conference of the International Institute of Administrative Sciences, University of Bologna, 19–22 June 2000. www.imp.unisg.ch, pp. 44.

[40] Ninatti, S, Adjusting Differences and Accomodating Competences: Family matters in the European Union. Jean Monnet Working Paper 06/10. pp. 3.

[41] Popescu D. A., The European Space of Free Movement of Persons, Goods, Capitals and Services – a Space of Free Movement of Authentic Instruments as well? Transylvanian Review of

As the Green Paper itself is too superficial and raises only the questions on certain area in a wide scope, the opinions of Member states are also too surface. They consist the statements, but no profound reasoning or arguments. As stated earlier applying family law in EU is a complicated figure, because here the principle of subsidiary based on the cultural and traditional aspects, the general principles of EU, administrative organisation and rationality encounter. Though in general Member states support the idea that something should be done related to the crossborder family cases, it is very difficult to bring out statements and solutions similar to all Member states.

Empirical research in this chapter shows that even if it is as if obligatory to emphasize the principle of subsidiarity, which can be described as controversial attempts to protect local interests[42], convergence of administrative spaces of Member states can be reached without breaching the principle of subsidiarity. Trend to convergence of Member states plays an important role in applying the means of Green Paper as the main promoter of them in public administration.

3. Proposed Instruments in Green Paper

According to the Green Paper the mobility of European citizens is a practical reality, evidenced in particular by the fact that some 12 million people study, work or live in a Member state of which they are not nationals (further proof in this fact is the number of marriages and divorces recorded in the EU: by way of example, out of a total of roughly 122 million marriages, some 16 million (13 %) have a crossborder dimension). The Eurobarometer results on civil justice dating from October 2010 show that three-quarters of EU citizens (73 %) consider that measures should be taken to facilitate the movement of public documents between Member states. European citizens who move to a Member state other than the one origin or returning to their Member state of origin are faced with all kinds of buraucracy involving requests that public documents be presented.[43] This mobility is facilitated by the rights attached to citizenship of the EU: in particular the right to freedom of movement and, more generally, the right to be treated like nationals in the Member state of residence. These

Administrative Sciences, no 32 E/2011, pp. 207–234, pp. 213. www.rtsa.ro/en/files/TRAS-32E-2011-14Popescu-pfd

[42] Kerikmäe T. Euroopa Liit ja õigus. 2000. Õiguskirjastus, pp. 54.

[43] European Commission. Green Paper Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records. Brussels, 14.12.2010 COM(2010) 747 final, pp. 3.

rights are enshrined in primary EU law and implemented by means of secondary legislation.

Civil status records used by a Member state's authorities to record the main events governing peoples status do not necessarily have an effect in another Member state. Each Member state applies its own rules in this respect and they vary from one state to another.

The traditional way of authenticating public documents designed for use abroad – legalisation is replaced by the apostillé, but nowadays also this seems too much in the context of free movement. Article 21 of Brussels II quarantees the free movement of judgements.[44] Actually there are a lot of conventions between Member states simplifing the recognition of the family documents, but evidently this is not enough. All kinds of formalities make freedom of movement less attractive for European citizens and can even prevent them from exercising their rights fully[45].

The following means are proposed in Green Paper:

1. The abolition of administrative formalities for the authentification of public documents.
2. Cooperation between the competent national authorities.[46]
3. Limiting translations of public documents.
4. The European civil status certificate.[47]
5. Mutual recognition of the effect of civil status records[48].

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[44] See Kuipers J.-J. the Law Applicable to Divorce as Test Ground for Enhanced Cooperation. European Law Journal. Vol. 18. No 2, March 2012, pp. 201–229, pp. 04. However, this covers only positive decisions. A judgement not granting divorce, is not liable for recognition.

[45] European Commission. Green Paper Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records. Brussels, 14.12.2010 COM(2010) 747 final, pp. 3.

[46] This means that in case there arises a question related to the document presented, official contacts with the official in another state and exchanges the neccessary information and find appropriate solution. Co-operation means also exchange of information between different states about the new record made in certain state. Such application could be implemented by using suitable electronic means.

[47] At the moment, the information given on civil status certificates differ considerably from one Member state to another. The variety of forms causes problems in understanding and identifying documents, for both authorities and citizens, in particular when the language is not known.

[48] Civil status, for which each Member state has developed its own concept, based on its history, culture and legal system is followed by the rule, that EU has no competence to intervene in the substantive family law of Member state. The Treaty on the Functioning of the European Union does not provide any legal base for applying such a solution. Against this background, several practical problems arising in the daily lives of citizens in cross-border situations could be solved by facilitating recognition of the effects of civil status records legally established in other EU Member states.

As noticable, these means are related to each other. First four are more related and can be handled together. The last (fifth) is more complicated to apply as it intervenes the field of subsidiarity. In this article the first four are treated together and the fifth separatedly.

4. The abolition of administrative formalities for the authentification of public documents and marriage capacity

In EU the rules related to administrative formalities are much easier comparing those rules to the rules for the third countries, but still it is described as a lack of clarity and regulations, which does not provide the legal certainty European citizens need to cope with matters that have a direct impact on their everyday lives. Considerable difference of national laws, a number of international multilateral and bilateral conventions which have been ratified by a varied and limited number of countries and which are unsuitable when it comes to provide the solutions needed to ensure the free movement of Europeans and fragmented EU law, which deals only with certain limited aspects of the matters raised, are the main problems presented in Green Paper. EU treaties do not provide an authentic instruments for the free movement of public documents, the principle to „promote" is a derivative of the fundamental freedoms of the internal market and citizenship of the union[49].

In Estonian practice suggesting a citizen, which kind of vital statistic document to take for another state usually begins with the question if citizen knows what are the needs of this certain official the document is presented. The practice shows that even in one Member state the demands are different depending on the dictrict of certain state. Too often citizens need additional documents or official explanations about Estonian substantial family law and extracts Estonia issues on family events. Instability in this area can be exemplified also by the cases, where vital statistic official of another state has issued a certificate to Estonian citizen under the convention, Estonia is not a member. Every single crossborder case seems to be different and can be solved as an individual case finding the applicable rule through legal gaps and trying to outmatch conflicts between the laws of Member states, ensuring legality of the decision simultaneously.

[49] European Commission. Green Paper Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records. Brussels, 14.12.2010 COM(2010) 747 final.

Estonia has consolidated many European conventions related to the facilitation of family document movements – Estonia is a member of 1961 Hague Convention[50], 1968 Council of Europe Convention[51], 1976 Convention on the issue of multilingual extracts from civil status records[52] and is preparing the consolidation of 1987 Brussels convention abolishing the legalisation of public documents between Member states. In 2012 bilateral agreement between Estonia and Finland[53] has been enforced which establishes automatic recognition of certain family event documents. As there are many international legal acts regulating the same issue and they are applicable to the same case, in every single case there should be decided, which document issued by which convention or legal act is most suitable for a citizen in certain relation. Fee of issuing a document, translation costs as well as the state document should be presented to, is considered. For example, some Member states do not accept extracts from the Population Register in English, but demand a copy of original act in initial language with translation though in an extract are the same data and such extract has legal effect. For many Member states it is still difficult to understand that an extract of Population Register can have the same legal effect as certificate or act itsself, even more – that in some state the act is electronic, which means that the only „paper" certifing the deed or fact is an extract printed out after the electronic deed.

According to Green Paper it is time to consider abolishing the apostillé and legalisation for all public documents in order to ensure that they can circulate freely throughout the EU.

In the case of abolishing the apostillé, it should be figured out, how public authorities can ascertain the authenticity and validity of a document of foreign origin. After that comes the question about the effect of the document. In general most Member states and committees in their opinions for Green Paper support the idea of abolishing the apostille, but add that in such case there should be clear system how in the event of serious doubt about the authenticity of a document or if a document does not exist in a Member state, to control it. And here the difficulties emerge. European Economic and Social Committee suggest that in the event of serious doubt about the authenticity of a document or if document does not exist in a Member state, the competent national authorities could

[50] HCCH Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

[51] 1968 European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers (Legal Acts of Estonia II, 24.03.2011). www.riigiteataja.ee.

[52] CIEC Convention on the issue of Multilingual extracts from civil status records (signed in Vienna on 8 September 1976. Legal Acts of Estonia II, 02.05.2011, 1.

[53] Legal Acts of Estonia II, 22.06.2012, 3. www.riigiteataja.ee.

exchange the necessary information and find an appropriate solution. Also the Committee of the Regions emphasizes that administrative co-operation between the vital statistic officials in local level plays most important role.[54]

EU institutions and Member states must work together to set out an overall policy strategy. They should refocus the Union' policies and adopt the way they work. Change requires concerted action by all the European Institutions, present and future Member states, regional and local authorities, and civil society.[55] The EU's pursuit of these objectives has given its governance projects an even stronger horisontal (or policy co-ordination) dimension.[56] Co-ordination is not only about informal relations or bureaucratic politics, but also about creating the right administrative capacities to find common values and objectives.[57]

According to Stockholm Programme Training of and co-operation between public professionals should also be improved, and resources should be mobilised to eliminate barriers to the recognition of legal decisions in other Member states. ***Mutual trust*** between authorities and services in the different Member states and decision-makers is the basis for efficient co-operation in this area. Ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different legal systems in the Member states will thus be one of the main challenges for the future.[58]

Co-operation is also mentioned in the opinions of Member states as the main instrument to facilitate free movement of persons through less bureaucracy related to family event documents and certainly this is a mean to control the authenticy of document. But talking about co-operation, there should not be forgotten that there are about 125000 registrars in the EU on the civil status systems and about 80000 local vital statistics offices[59]. As Ninatti (2010) characterises „Europe has extended its frontiers to cover the significant number of 27 states (and almost 500 millions inhabitants), and has incorporated political,

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[54] Regioonide Komitee 9. koosolek. 6. juuni 2011. Kodakondsuse, valitsemisasjade, institutsioonide küsimuste ja välisasjade komisjoni töödokument "vähem bürokraatiat kodanike jaoks: avalike dokumentide vaba ringluse edendamine ja perekonnaseisuaktide õigusjõu tunnustamine. CIVEX-V-021.

[55] European Commission (2001) European Governance: A White Paper, COM(2002) 428 final, 25 July.

[56] Schout A, Jordan A, The European Unions governance ambitions and its administrative capacities. Journal of European Public policy 15:7 October 2008:957–974, pp. 961.

[57] Ibid, pp. 965.

[58] Stockholm Programme „An Open and Secure Europe Serving and Protecting citizens". Official Journal of the European Union (2010/C 115/01) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF, pp. 4, 5.

[59] Opinion of the Committee of the Regions on „Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil status records.2012/C 54/05. http://eur-lex.europa.eu 06.08.2012.

economic and juridical systems that cannot be entirely ascribed to the history and development of European integration."[60] Kuipers (2011) states, that enhanced co-operation has never been applied in practice. Enhanced co-operation can only take place in areas where the Union does not have exclusive competence.[61] In Green Paper co-operation plays the main role in facilitating the free movement of civil status documents.

To think about marriage in the context of free movement of family documents there are many documents moving from one Member state to another. According to Estonian law a person who lives abroad and wants to marry in Estonia, has to present his/her birth certificate, document proving the end of previous marriage and marriage impediment certificate. There are often problems with those documents – most often with the marriage impediment certificate. Usual problem is that a state of residence does not issue such document, because the resident is not the citizen of the state he/she lives.

Similarly to any other document co-operation between Member state can solve difficulties arising related to the authenticity of a document in case there is no *apostillé* on it. Co-operation as a mean has also described as „informal" international regulation of law making.[62]

In Estonian administrative organisation family matters are divided between four ministries [Ministry of Justice, Ministry of Interior (Minister of Regional Affairs), Ministry of Social Affairs][63] and Ministry of Foreign Affairs. All these ministries make policy related to family matters but on different scope. In local level vital statistics procedure is carried out by the county governments and rural municipality or city governments. Marriages are contracted only by the county governments[64]. Notaries have limited authority to deal with family events as vital statistics official – since 2010 they have a right to contract and divorse the marriages. Estonian representations abroad issue extracts of family

[60] Ninatti S., Adjusting Differences and Accomodating competences: Family Matters in the European Union. Jean Monnet Working Paper 06/10, pp. 11.

[61] Kuipers J.-J., the Law Applicable to Divorce as Test Ground for Enhanced Cooperation. European Law Journal. Vol. 18. No 2, March 2012, pp. 201–229, pp. 211. Author of this article still sees increasing co-operation of Member states also in the matters of family events. This co-operation unfortunatedly does not solve the question of conflict-of -law.

[62] Chowdhury N., Wessel R.A., Conceptualising Multilevel Regulations in the EU: A Legal Translation of Multilevel Governance? European Law Journal, Vol. 18, No. 3, May 2012, pp. 335–357, pp. 338.

[63] Social workers apply family law as well, but they are not vital statistic officials.

[64] There are 15 county governments in Estonia. Alderman is appointed by the Minister of Regional Affairs and represents state interests in the county. There is no special department of vital statistics in the county government, vital statistics officials work usually under the county secretary.

events and certificate of marriage capacity. Clergymen contract the marriages as vital statistics officials since 2001.[65]

Such division of powers of ministries causes different interpretation of legal norms and often a question, whose authority it is to solve a certain question, to work out the policy and be responsible in its application. Co-operation between the ministries is poor and leading to different practice and influences the relations between the administrative bodies. As in a horisontal level there are problems between the ministries, also in relations with citizens often a question arises if a person should turn directly to the Estonian consulate, to some ministry or to the foreign consulate or vital statistics office abroad. This means that there is a lot of information all around about the different administrative bodies, when the similar case occures, it can be solved differently from the previous one. Also a question, how much one ministry can intervene into the sphere of other ministry can be raised.

In Estonian example there could be problems related to administrative capacity solving crossborder cases. Poor legal knowledge among vital statistics officials does not help in interpreting or explaining legally certain rule – its would be questionable if co-operation would act in local level between the vital statics officials of other Member states because of the poor foreign language skills[66]. Probably the only solution in Estonian example would be the cross-border co-operation on the level of Ministry. However, raising administrative capacity needs new policy and additional expenditures.

So, even if co-operation as such is a mean, that does not need guidelines from the EU institutions – and can work without any agreements or rules – needs only tolerance and wish to cooperate and trust, needs still certain changes in public administration in every Member state to ensure suitable administrative capacity.

Another solution, which does not need any guidelines and definitely promotes free movement of documents, is certain website giving useful information

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[65] Today 125 clergymen have such right. Clergymen have special status related to this certain authority. On the one hand they are in the jurisdiction of church, and related to the certain religion, but have to accept and apply the legal regulation of marriage, they get their right from the Ministry of Interior, they are under the supervision of county governments, who also advice them and control their deeds.

[66] Also Committee of Regions accepts in its opinion (Opinion of the Committee of the Regions on „Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil status records“ 2012/C 54/05), that current incomplete and ad hoc contacts between registrars of Member states may arise from legal, procedural, logistical and above all language difficulties. In Estonian context some speak German, some English, some French and some Russian as a foreign language. Could there be a consensus on this that which language should it be, all registrars in EU must speak?

about family law, certificates and other useful info of Member state to explain the law and administrative process of certain family deed. This information should be at least in three languages and contemporary[67]. Link to the homepages of domestic registrars office or official webpage of legal acts is not enough, because these are usually in the language of this state. Even when Member states have a central office of registrars it is not realistic to have there officials who speak all the languages of Member states.

Limiting translations as a mean offered in Green Paper is tensely related to the mean of uniform forms of family events. The European civil status certificate is proposed to take in use. This mean is highly supported by the opinions of Member states. This is also a mean, which does not interefere into the domestic substantial law. Form, which consists the fields of data common to all Member states and fields of data which are used only in certain Member state, is not difficult to establish. Even if such form consists too many data, it is easier to read and understand the form if there are certain uniform fields. Such form should be compulsory for all Member states and should consist the field of remarks, where every Member state can add some data or explain the data special for this state or event or person. According to Green Paper, that as there are different data in the certificates issued by Member states, civil registrars can be faced with details that are unknown in their legal systems and have to request additional information and citizens face additional problems, such as loss of time. In case civil registrar can get information from the website about the law and certificates or has possibility to contact the civil registrar issuing the document, there is no need to run a citizen to bring additional information.

Also uniform compulsory form can be treated separatedly from the recognition of data in it – uniform form does not obligate to recognise certain facts in it.

In most European states where prevails monogamy and which have from history the impacts of canonical law, marriage impediment certificate is obligatory to present in the process of marriage to ensure marriage capacity and hence the validity of the new marriage. Marriage impediment certificate is demanded in case a person wants to marry in a Member state, which is his/her state of citizenship or residence[68]. The problems arise when a person needs according to the law of Member state he/she wants to marry the certificate from the state of residence, but this state issues according to its law such certificate only to its

[67] Unfortunatedly also CEFL has not translated all materials in its webpage in English and German, only some of them.

[68] Some Member states wants the marriage impediment certificate from the state of citizenship, while the others from the state of residence.

citizen. Such problems arise especially related to the practice of common law states. For example, if Estonian citizen living in Great Britain, wants to marry in Estonia, he or she must present marriage impediment certificate issued by the Great Britain, because according to Estonian Private International Law the impediments of marriage are determined by the law of the state person is resident. Great Britain does not issue such document to Estonian citizen. Citizen has to turn to Estonian court to grant a permission to marry. In a proceedings court demands the document from the state of persons residence which proves that this state does not issue the marriage impediment certificate to this person. In the end also court makes its decision on the affirmation of the person. In such case continental law does not differ from common law, only has more steps to tread. This is an obvious example of bureaucracy. If Estonian vital statistics official knows that certain state does not issue marriage impediment certificate, there should be regulation that the vital statistics official takes the confirmation from the person who wants to marry about the fact, that he or she does not have marriage impediments instead of sending a person to court. On the other hand, in case the law of the state the marriage takes place provides for marriage impediments the principle of residence law, it is easy to cheat a state by registering his or her residence to the state of marriage and after marriage back to the real state a person actually lives. There is not legal bases to interfere into such performance of person as it is very difficult to prove that person actually did not live in state he or she is a resident. At least it is so in Estonian law. In such case formally the obstacles are controlled legally, but in essence the control is „empty".

If person has been living in a state which issues marriage impediment certificate for a very short time, the aim of marrriage impediments control is not performed as well. Not all states have the right to ask additional documents in case marriage impediment certificate is already presented. Again a question of hindering the free movement of person can be raised. In case state does not recognise same-sex marriages a person who has same-sex marriage[69] in another state, can marry in a state which does not recognise same-sex marriages as a fact of valid same-sex marriage is legally invalid- it does not exist.

In the Member states of common law tradition marriage impediment certificate is issued as an affidavit – a person him/herself affirms that he or she has no impediments to marry. In the Member states of continental law system administrative body contracting the marriage does not have authority to take such affirmation from the person getting married.

[69] Article 9 of the Charter of Fundamental rights of the European Union leaves the decision whether or not allow same-sex marriages to the Member state.

In Estonian practice there has been no problems related to sex in the birth certificate. Differently from some other states[70] where sex of the person has been taken from the birth certificate and not from the register (as the last data), in Estonia sex of the person is taken from the identity document or Estonian Register, from the birth certificate only kinship as an possible obstacle to the marriage, is controlled.

In Green Paper related to co-operation the following important idea is mentioned – the exchange of information allows the civil registrar of the Member state of origin of a person to be informed of the fact that a record concerning this person has been made in another Member state. This would also be useful in terms of updating civil status records (There is CIEC conventions also regulating the same questions, but the European Council is convinced that the technological developments not only present new challenges to the protection of personal data, but also offer new possibilities to better protect personal data.[71]

Green Paper proposes also the Member state to think about establishing central registries. In Estonia there is a central register (Population Register) already from the 1990s, since 2010 it has been innovated and all the vital statistics deeds are made electronically in this register. Such central register is very comfortable and gives quick, updated and legally effective data to police, registrars, tax officials as well as to the judges, notaries and Estonian consulates all over the world. One common register in one state is justified, but over-European can be another problem, because as mentioned earlier, there are already too many registrars, not mentioning other public servants who should have an access to the register. Too widely used register could jeopardize the protection of personal data. Better solution would be the exchange of data by certain secured channels from one state to another.

Questionable would be the Committee's of Regions opinion, that the fundamental diversity of civil status systems (event-based, person-based and population register) and varying procedures in effect across the EU reflects the constitutional and legislative arrangements of their public authorities and represents their differing societal values[72], because registering is just collecting the data, so it does not make any difference if such data is collected by paper or electronically. This could be questionable if registering system carries so important

[70] See Case of Schalk and Kopf versus Austria (application no 30141) Judgement of European Court of Human Rights. Strasbourg.24.June 2010. Final 22/11/2010.

[71] Stockholm Programm „An Open and Secure Europe Serving and Protecting citizens" Official Journal of the European Union (2010/C 115/01) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF, pp. 10.

[72] Opinion of the Committee of the Regions on „Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil status records" 2012/C 54/05.

social value that it cannot be changed (in this context a word „change“ should be understood as „development“?

In this chapter the means related to administrative formalities were analysed. Apostillé corresponds to the procedure ensuring the authenticity of the document, which means co-operation between the public administration of Member states. There is no clear solution as co-operation model. It is obvious that co-operation cannot be only „one-sided“ activity. Before EU works out certain principles or models for co-operation in this field, must Member states show initiative and update their homepages.

5. Mutual recognition of the effects of civil status records

Mutual recognition of civil status records is a complicated question, which should be handled separatedly from other means, because this causes more misunderstandings, debates and takes probably much more time to reach in some kind of agreement if at all.

Mutual recognition is directly related to the substantial law of every Member state and is therefore based on its history, culture and legal system. When in public administration changes can be made more easily, not splitting the so called values of the state and these changes can be described as innovation or updating, substantial law is more related to the sovereignty of a state and therefore more complicated to develop. Hurrell (2002) and Goldsmith (2000) argue, that states tend to lose control over norms when the international legal system, in which they are functioning, becomes denser and more complex.[73]

In crossborder situation, the main question is whether a legal situation recorded in a civil status record in one Member state will be recognised in another. It should be possible to guarantee the continuity and permanence of civil status situation to all European citizens exercising their right of freedom of movement[74]. In deciding to cross the border of a Member state to go and live, work or study in another Member state, the legal status acquired by the citizen in the first Member state should not be questioned by the authorities of the second Member state since this would constitute a hindrance and source of objective problems hampering the exercise of citizens' rights. As private international

[73] Van Kersbergen K., Verbeek B., The Politics of International Norms: Subsidiarity and the Imperfect Competence Regime of the European Union. European Journal of International Relations. 2007. http://ejt.sagepub.com/content/13/2/217.refs.html pp. 217–238, pp. 223.

[74] One of the basic features of European citizenship is the right to move and reside freely within the territory of other EU Member state (art 20 TFEU).

law is different in Member states (connecting factor can, in principle, be citizenship or habitual residence), the unavoidable consequence of such diversity is that civil status situation created in one Member state is not automatically recognised in another, because the result of the applicable law differs depending on the Member state in question.[75]

In 2001 a research to identify the possible problems that result from the differences in national choice of law rules with respect to divorce and other forms of dissolution of marriage was carried out. In this reseach profound problems were described related to the free movement of persons in family questions.[76]

EU power to action is limited as EU has no competence to intervene in the substantial family law of Member states, since the Treaty on the Functioning of the EU does not provide any legal bases for applying such a solution. Institutions and bodies of the EU must only enable the citizens of its Member states and all individuals in general to exercise as far as possible the rights and freedoms of which they are the beneficiaries, within the scope of the treaties and the current legal framework[77]. In an international field many international conventions have been contracted, but not all EU Member states have been active to consolidate them, including Estonia. Only in the last years Estonia has become active in consolidating the conventions facilitating the free movement of vital statistics documents. From the primary and secondary law of EU often is mentioned Regulation (EC) No 2201/2003[78] as an important step towards simplifying the recognition of crossborder documents. Related to the recognition of other documents than court decisions it is important to notice that Brussel II Regulation sets out a number of grounds for refusing to recognise a judgement. These grounds of non-recognition are meant to protect the public interests of Member state. The same model should be applied to other family event documents – to give an official a right to decide if the document is legally (by its effect) acceptable or not.

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[75] European Commission. Green Paper Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records. Brussels, 14.12.2010 COM(2010) 747 final.

[76] See Practical Problems from the Non-Harmonisation of choice of Law Rules in divorce Matters (JAI/A3/2001/04) Final Report. T.M.C. Asser Institute. The Hague, the Netherlands, December. 2002. pp. 22.

[77] Community provisions which impose a duty on Member states may be interpreted so as to create a right for individuals to have that duty performed (ECJ Judgement of 05/02/1963, C-26/62, Van Gend en Loos (Rec. 1963, 3). Itzcovich G. Legal Order, Legal Pluralism, Fundamental Principles, Europe and Its Law in Three Concepts. European Law Journal, Vol. 18, No. 3, May 2012, pp. 358–384, pp. 367).

[78] Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition an enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

Divorce of the previous marriage is an important aspect of marriage. In free movement of judgements has triggered an apparent need for uniform conflict of laws rules[79] European Council requested already in 1988 to investigate the possibility of drawing up legal instrument on the law applicable to divorce.[80]

Because of the prohibition to intervene suggests Green Paper the following means to recognise the effects of civil status records – assisting national authorities in the guest for practical solutions; automatic recognition and recognition based on the harmonisation of conflict-of-law rules. All these solutions are splitting the principle of subsidiarity and hence will not work many years. As a general rule, community law must be interpreted on the basis of its own criteria, which differ sharply from those familiar to international law. The assumption that Community law constitutes a legal order, has important implications in determining how conflicts between Community law and domestic law are to be resolved. These conflicts do not give rise to contradictions in a technical sense and, from the perspective of the Community legal order, the Community provisions must always prevail.[81]

If EU gives reccommendations, these must be very clear and not in contradiction with any Member states domestic family law, which probably is not possible and they are not legally binding anyway.

Hence, even according to the Court of Human Rights the institution of marriage has undergone major social changes since the adoption of the convention. Automatic recognition would mean that Member state abandons its own legal order and values and is not possible for that reason. Immediately arises a question of same-sex marriages and possibility to adapt a child by such spouses. Also harmonisation of conflict-of-law rules does not work, because giving a citizen to choose which states' law to apply on him/her would cause a general mess and misunderstanding, also fraud.

In case of marriage impediment certificate there can arise also a question related to the concept of European citizenship. Dani (2012) states, that "in a more or less distant future union would become the dominant site of political identification for the individuals living in Europe"[82] convinces that despite the differences of the family laws of Member states there should be some kind of common network to change the information and Member state should honestly

[79] Kuipers J.-J. the Law Applicable to Divorce as Test Ground for Enhanced Cooperation. European Law Journal. Vol. 18. No 2, March 2012, pp. 201–229, pp. 206.

[80] OJ C19, 23 January 1999, 1.

[81] Itzcovich G. Legal Order, Legal Pluralism, Fundamental Principles, Europe and Its Law in Three Concepts. European Law Journal, Vol. 18, No. 3, May 2012, pp. 358–384, pp. 368.

[82] Dani M, 2012, Rehabilitating Social Conflicts in European Public Law, European Law Journal, Vol 18, No 5, 2012, pp. 621–643, pp. 634.

analyse which rules are those protecting their sovereignty and cannot be harmonised, and which ones are haphazard ones and can be „developed". It is not bureaucracy that causes problems, but differences in substancial family law of Member states.

6. Conclusion

Family law in EU is in an important stage of developments. As free movement with attention to work has been changed to the family-oriented question as the EU citizenship has been tided more securely to the person. Pushing the place of family law more clearly to the scope of EU regulations and strong influence of convergence of Member states by Lisbon Treaty has reached to the era, where the questions of family law are again in the great interests of EU institutions. Crossborder family events are in tendency of raising and no Member state will be untouched by this. It is obvious that Member states are on the one hand interested in convergence in family matters, on the other hand no Member state declares to be the one who will change its practise and law.

However, by Green Paper a strong influence has began towards harmonisation of family laws of Member state. Means proposed in Green Paper are based on the co-operation of Member states and on the principle that EU has the power to intervene into the laws of Member states where it is useful for granting the general aims deriving from the treaties. As free movement is one of such general principles of EU, there is possible to demand from Member states' actions ensuring this principle.

Instead of used reference to the principle of subsidiarity, EU has competence regarding the unification of private international issues in family matters. In order to guarantee the free movement of persons in Europe a new policy is worked out – Green Paper consists of means to harmonise step by step EU family law.[83]

It is generally accepted that family law is changing and it is not justified from Member state only protest every development, instead should states declare what they can do to solve current situation, because every Member state has problems with crossborder cases. But in proposing the possible solutions they are very modest. Current situation can be improved by some of the means in Green Paper without any interference to the culture and traditions of Member states and also there is no need to change EU primary or secondary law.

[83] Itzcovich G.: Legal Order, Legal Pluralism, Fundamental Principles, Europe and Its Law in Three Concepts. European Law Journal, Vol. 18, No. 3, May 2012, pp. 358–384, pp. 367.

EEAS in the EU External Action Architecture

Oleksandr Davydenko*

Summary: The article analyses the question of the introduction and building of the one of the newest institutional "agencies" of the European Union – the External Action Service. It offers the detailed elaborate of the historical and normative background of the introduction of the EEAS, the competences and instruments of this service and its role within the foreign policy of the EU.

Keywords: European Union, External Relations, Foreign Policy, European External Actions Service.

1. Introduction

Shaping of the EU as a foreign policy actor resulted from the durable evolution of its political and legal system, as well as gradual expansion of the scope of the EU's external competences leading to strengthening of its position in global economic and political relations. Dynamics of the EU's external action in the beginning of XXI century were underpinned with the necessity of the establishment of a new legal and institutional framework able to ensure conduct of the coherent EU foreign policy aimed at securing the EU's leading position in the modern system of international relations. Establishment of such mechanism became one of the main goals of the Treaty of Lisbon which introduced important amendments and changes to the EU's legal and institutional framework, namely in the external action area. The most important actors in the new legal and institutional framework of the EU foreign policy formulation and conduct are, inter alia, the High Representative of the Union for Foreign Affairs and Security Policy (High Representative) and the European External Action Service (EEAS) placed under the authority of the latter.

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2. A once-in a generation opportunity

Principal agreement on the establishment of the EEAS was reached between the Member states as soon as in 2002 within the framework of the Convention on the Future of Europe, which elaborated the Draft Treaty establishing a Constitution for Europe presented in July 2003[1]. Novels contained in the Treaty establishing a Constitution for Europe which hadn't entered into force though preserves historical importance witnessed the vital importance of the establishment of a new institutional mechanism for coordination of all the aspects of the EU external action[2]. The merger of former posts of the High Representative for Common Foreign and Security Policy, placed under the direct authority of the "intergovernmental" Council of the European Union (Council), and the European Commissioner for External Relations, made it possible to merge departments of the European Commission (Commission) and the General Secretariat of the Council responsible for external relations into a new single body.

Prior to the Treaty of Lisbon the EU foreign policy apparatus existed in the form of the General Directorate for the External Relations (DG RELEX) within the Commission organisational structure. During the negotiations on the Treaty establishing a Constitution for Europe and those on the Treaty of Lisbon, the Member states strived to secure intergovernmental model of decision-making within the Common Foreign and Security Policy (CFSP) area, which led to the establishment of the *sui generis* EEAS instead of strengthening the Commission's external competences. In her speech before the European Parliament Catherine Ashton stressed that the creation of the EEAS should be regarded as "a once-in a generation opportunity" to enhance the EU foreign affairs coherence, namely in the area of security and defence, with the aim of securing the EU's common values and goals defined by the Treaty of Lisbon[3]. The legal basis for the creation of the EEAS can be found in Article 27 Treaty on European Union (TEU), which contains only general provision on its structure and functioning. The organisation, functioning and competences of the EEAS shall be established by a Council decision, acting on a proposal from the High Representative after consulting the European Parliament and obtaining the consent of the Commission.

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[1] Final report of Working Group VII on External Action. The European Convention. The Secretariat, CONV 459/02. Brussels, 16 December 2002

[2] Piris Jean-Claude. The Constitution for Europe: A Legal Analysis. Cambridge: Cambridge University Press, 2006, P. 145–154

[3] Ashton Catherine, High Representative/Vice President. Speech to the European Parliamnet's foreign affairs committee. European Parliament, Brussels, 23 March 2010.

3. The High Representative

The High Representative is one of the Commission's vice-presidents, besides she takes part in the work of the European Council and chairs the Foreign Affairs Council. The High Representative is appointed by the European Council acting by qualified majority with the agreement of the President of the Commission and consent of the European Parliament. She acts according to the mandate obtained from the European Council and is responsible for coordination of the EU external action. The High Representative is responsible before three institutions at once, namely the Commission, the Council and the European Parliament. Pursuant to the TEU the President of the Commission may request that the High Representative reside in line with the procedure laid down in Article 18 TEU without consulting the rest of the commissioners. The European Parliament may carry vote on a motion of censure of the Commission leading to the resign of the whole Commission including the High Representative, who will still preserve her post in the Council, namely the Foreign Affairs Council, until the new Commission is appointed. As a Vice-President of the Commission the High Representative carries the responsibilities incumbent on it in external relations area and ensures coordination between other aspects of the EU external action. In exercising the responsibilities within the Commission the High Representative is bound by the Commission procedures without prejudice to her responsibilities as the High Representative and those within the Council.

4. Negotiating the EEAS

In January 2010 the High Representative Catherine Ashton formed a High Level Group for coordinating the negotiations on the creation of the EEAS consisting of the representatives of the Commission, the General Secretariat of the Council, the Spanish Presidency and several other Member states. Propositions of the High Level Group were discussed during the meetings of the COREPER, meetings of the ministers for foreign affairs of the member countries held in Cordoba in March 2010, as well as within the Commission and during sessions of the Foreign Affairs Committee of the European Parliament in February-March 2010.

The negotiations on the creation of the EEAS faced some technical difficulties, but most of all they were complicated by the issues of the structure and mandate of the EEAS. The United Kingdom, France and Germany concentrated on securing the subtle balance between strengthening the EU's dip-

lomatic role and preserving the influence of their national diplomatic services. These states promoted the adoption of a decision providing for delegating the High Representative and the EEAS certain powers and competitions, while simultaneously limiting their scope by placing the High Representative and the EEAS under the authority of the Council. Less influential Member states expressed their own view of the structure and competence of the EEAS and criticized the dominant position on the United Kingdom, France and Germany in the negotiations process on the establishment of the EEAS. These states lead by the Visegrad Group states didn't attempt to block this process thought lobbied the presence of their representatives on the highest level within the newly created structures.

The President of the Commission Jose-Manuel Barroso made efforts during the negotiations to secure considerable influence of the Commission on the EEAS, insisting namely on ensuring close cooperation between the High Representative and the commissioner responsible for the European Neighbourhood policy with the aim of enhancing the overall coherence in EU external action[4]. Jose-Manuel Barroso also advocated for securing the Commission's pivotal role in formulation and conduct of the European Neighbourhood Policy and development policy as these areas are extremely important for the EU external action.

Catherine Ashton presented "Proposal for a Council Decision establishing the organisation and functioning of the European External Action Service" on 25 March 2010, reflecting mainly German and French stance on the issue than that of the Commission[5]. The Foreign Affairs Council expressed its agreement on the Proposal, but the European Parliament rejected it with a view that the Proposal would have made the EEAS responsible neither before the European Parliament nor before national parliaments of the Member states. Besides, the European Parliament pointed that the Executive Secretary General of the EEAS would have concentrated too much powers and that the proposed model of functioning and organisation of the EAAS would be insufficient for ensuring the coherence of the EU external action. Though the Treaty of Lisbon provided for the European Parliament only to be consulted on the EEAS establishment issues, it had to approve the necessary amendments to EU budget and to the EU Staff Regulation for the EEAS to be established.

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[4] Lefebvre M., Hillion C. The European External Action Service: towards a common diplomacy? European Policy Analysis, Stockholm, SIEPS,Issue 2010: 6epa, P. 3

[5] Proposal for a Council Decision of establishing the organisation and functioning of the European External Action Service, 25 March 2010. Available at: http://eeas.europa.eu/docs/eeas_draft_decision_250310_en.pdf

During the negotiations within the Foreign Affairs Committee of the European Parliament the new package of proposals on the EEAS was elaborated and presented on 21 June 2010. The major difference from the Catherine Ashton's initial proposal was the introduction of administrative position of the Director-General placed under the authority of the High Representative as the Commission vice-president. Besides, it was agreed that the EEAS budget should be approved yearly by the European Parliament within the same procedure as the Commission budget. The said compromise satisfied the European Parliament and it approved the adoption of the Council Decision of 26 July 2010 establishing the organization and functioning of the EEAS (2010/427/EU).

5. Legal nature of the EEAS

Article 1 of the Council Decision 2010/427/EU stipulates that the EEAS is a functionally autonomous body of the EU, separate from the General Secretariat of the Council and from the Commission, placed under the authority of the High Representative[6]. The term functionally autonomous as suggested by B. Van Vooren implies that in supporting the High Representative the EEAS should take instruction only from her, but not from the Council or the Commission[7]. Due to its functionally autonomous status the EEAS doesn't enjoy the level of independence typical for EU institutions, meanwhile it has much more autonomy than COREPER, European Defence Agency and other EU bodies. As stressed by Benita Ferrero-Waldner, former EU commissioner for external relations, the EEAS has no model to follow, thus it should neither be intergovernmental, nor purely based on the Community method, but should embody a genuinely European approach[8]. Pursuant to Article 27 TEU the EEAS at the moment of its creation comprised officials from the relevant departments of the General Secretariat of the Council and of the Commission as well as staff from national diplomatic services of the Member states. Thus for, the relevant departments and functions were transferred from the Commission and the General Secretariat of the Council to the newly created EEAS together with the

[6] Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU)

[7] Bart Van Vooren. A legal-institutional perspective on the European External Action Service. CLEER Working Papers, The Hague, The Netherlands, CLEER T.M.C. Asser Institute, 2010, No.7, p. 20

[8] Quoted in Euractiv, 'The EU's new diplomatic service, published 09 March 2010, updated 08 February 2011. Available at: http://www.euractiv.com/future-eu/eus-new-diplomatic-service-linksdossier-309484?display=normal

staff and temporary personnel holding post in these departments. From 1 July 2013 all officials and other servants of the EU can apply for vacant posts in the EEAS. The EEAS is not vested with delegated powers and is neither an intra-institutional body nor an auxiliary one, besides it is not an institution proper either. Therefore, it is an interinstitutional preparatory body and partially an organ of the EU responsible for its international representation[9]. The merger of different institutional working practices and methods within the EAAS organisational structure can contribute to formulation and conduct of a consistent and coherent EU foreign policy aimed at reaching the unified complex of political objective. Thus, the EEAS is an interinstitutional body responsible for ensuring coordination between the EU institutions in the area of external action.

Unlike the majority of the EU bodies, namely the European Defence Agency (EDA), the EEAS was not explicitly granted the legal personality. Council Joint Action 2004/551/CFSP on the establishment of the European Defence Agency in Article 6 clearly states that the EDA has legal personality necessary to perform its functions and attain its objectives[10]. Meanwhile in Article 1 of the Council Decision 2010/427/EU the EEAS is only granted the legal capacity necessary to perform its tasks and attain objectives. The EEAS may enter into service-level arrangements with the relevant services of the General Secretariat of the Council, the Commission, or other offices or interinstitutional bodies of the EU. The legal status of the EEAS resembles that of the entire EU prior to the Treaty of Lisbon, which was not given an explicit international legal personality, but was empowered to conclude international agreements in the CFSP area.

6. The EEAS organisational structure

The EEAS is comprised of the central administration placed in Brussels and EU delegations to third states and international organisations. The EEAS is managed by the Executive Secretary General (P. Vimont), operating under the authority of the High Representative. He is responsible for ensuring smooth functioning of the EEAS, including its administrative and budgetary management. The Executive Secretary General is assisted by two deputies: Deputy Secretary General for Political Director and Deputy Secretary Gen-

[9] Bart Van Vooren. A legal-institutional perspective on the European External Action Service. CLEER Working Papers, The Hague, The Netherlands, CLEER T.M.C. Asser Institute, 2010, No.7, P. 31

[10] Council Joint Action 2004/551/CFSP of July 2004 on the establishment of the European Defence Agency. Official Journal of the European Union, L 245, 17.7.2004, pp. 17–28

eral for Interinstitutional Affairs. The High Representative, Executive Secretary General, his deputies and Chief Operating Officer comprise Corporate board responsible for ensuring internal coherence and coordination within the EEAS. The central administration of the EEAS is comprised of a number of geographical departments covering all countries and regions of the world, and department dealing with global and multilateral issues. These departments should coordinate their activities with the relevant departments of the General Secretariat of the Council and the Commission. Managing Directorate-general on administration and finance is placed under the authority of the Chief Operating officer. Department responsible for crisis response and operational coordination, EU Intelligence Analysis Centre (INTCEN), Security Policy and CSDP Structures, EU Military Staff, as well as Foreign Policy Instrument Service, which is the Commission service, are placed under direct authority of the High Representative. The EEAS organisational structure also includes departments on strategic planning, policy coordination, strategic communication, as well as political and security committee placed under the authority of the Deputy Secretary General Political Director. The EEAS legal affairs department works in close cooperation with Legal Services of the Commission and the Council.

The EEAS should be treated as an institution of the Union for the purposes of the Staff Regulation of Officials and the Conditions of Employment of Other Servants of the European Union. The High Representative acts as appointing authority and authority to conclude contracts for the staff of the EEAS, with the possibility of delegating the said powers within the EEAS. If necessary, the EEAS may have recourse to a limited number of specialised seconded national experts. The general number of the EEAS staff is determined within the annual budgetary procedure. The staff of the EEAS shall act and carry out their duties solely with the interests of the EU in mind, they should not seek or take instructions from any government, authority, organisation or person outside the EEAS or from any body or person other than the High Representative. Recruitment policy within the EEAS should ensure adequate geographical and gender balance, as well as meaningful presence of nationals from all the EU Member states. The staff of the EEAS and the EU delegation fall within the scope of the Protocol on the privileges and immunities of the EU annexed to the Treaty of Lisbon and should enjoy privileges and immunities equivalent to those referred to in the Vienna Convention on Diplomatic Relations of 18 April 1961.

7. The EEAS tasks and duties

The mandate of the EEAS entails two main dimensions: coordination of the EU external action at the level of decision-shaping and implementation[11]. The main task of the EEAS is supporting the High Representative in fulfilling her mandate to conduct CFSP, including CSDP, and to ensure the consistency of the EU external action. The High Representative is supported by the EEAS while acting in her capacity as the President of the Foreign Affairs Council, without prejudice to the normal tasks of the General Secretariat of the Council. The tasks of the EEAS also include supporting the High Representative in her capacity as the Vice-President of the Commission for fulfilling within the Commission the responsibilities incumbent on it in external relations, and coordinating other aspects of the EU external action, without prejudice to the normal tasks of the Commission services. Besides, the EEAS assists the President of the European Council, the President of the Commission, and the Commission in the exercise of their functions in the area of external action.

In order to ensure consistency between the different areas of the EU external action and between those areas and its other policies the EEAS is obliged to work in cooperation with the national diplomatic services of the Member states, the General Secretariat of the Council and the services of the Commission. The services of the Commission and the EEAS shall consult each other on matters relating to the EU external action in the exercise of their respective functions, except matters covered by the CSDP. Besides, the EEAS shall be fully involved in the preparatory work and procedures relating to acts prepared by the Commission in the area of the EU external action.

The EEAS should support the High Representative in ensuring full-fledged involvement of the European Parliament in the conduct of the EU's external relations, namely through the functioning of an effective system of political control. Members of the European Parliament should be given the right of access to all the relevant documents and information in the area of CFSP. The High Representative should also exercise her duties arising from the founding acts of the European Defence Agency, European Union Satellite Centre, European Union Institute for Security Studies and European Security and Defence College. Therefore, the EEAS should provide these bodies with the necessary support, as previously did the General Secretariat of the Council.

[11] Blockmans S., Laatsit M.-L. The European External Action Service: Enhancing Coherence in EU External Action? In: EU External Relations Law and Policy in the Post Lisbon Era, ed. by P.J. Cardwell. The Hague, T.M.C. Asser press, 2012, pp. 141

8. EU delegations

Pursuant to the Treaty of Lisbon Commission delegations to third states and international organisations were transformed into the Delegations of the EU representing the entire Union and all of its policies instead of solely the Commission, whose key priorities are trade and development aid[12]. The place of the Union delegations within the EU institutional framework was defined by the Council Decision 2010/427/EU, which incorporated them into the EEAS organisational structure. The High Representative can decide to open or close a Union delegation in agreement with the Council and the Commission. Each Union delegation is placed under the authority of a Head of Delegation, who is responsible before the High Representative for the overall management of the work of the delegation and for ensuring the coordination of all actions of the EU. EU delegations staff comprises EEAS staff and, where appropriate for the implementation of the EU budget and its policies other that those falling within the EAAS mandate, Commission staff. The Head of Delegation takes instructions from the High Representative and the EEAS and is personally responsible for their implementation. Besides, the Head of Delegation is empowered to represent the EU in the country where the delegation is accredited, in particular for the conclusion of contracts, and as a party to legal proceedings. The Commission may also issue instructions to delegations in the areas falling within its mandate. The operation of each delegation is periodically evaluated by the Executive Secretary General of the EEAS. The High Representative should take the necessary measures to ensure that the Union delegations, their staff and their property be granted privileges and immunities equivalent to those referred to in the Vienna Convention on Diplomatic relations of 18 April 1962. The Union delegations should respond to the needs of the EU institutions, namely the European Parliament, in their contacts with international organisations or third states to which the delegations are accredited. Besides, the Union delegations work in close cooperation and share information with the diplomatic services of the Member states. Upon request by the Member states the Union delegations shall support them in their diplomatic relations and their role of providing consular protection to the EU citizens in third countries.

[12] Wouters J., Duquet S. The EU, EEAS and Union Delegations and International Diplomatic Law: new horizons? Leuven Centre for Global Governance Studies Working Paper, No. 62, May 2011, pp. 7–8.

9. Conclusions

The EEAS is the *sui generis* body of the EU, placed under the authority of the High Representative, granted with functional autonomy and legal capacity necessary to perform its tasks and attain objectives. The overall goal of the functioning of the EEAS is ensuring consistency, coherence and effectiveness of the EU external action. The EEAS should function smoothly within the EU's legal and institutional framework and minimise the duplication of functions and duties within the EU external action institutional mechanism. Human resources policy and professional training of the EU diplomatic corps shall contribute to increasing the added value of the EEAS to the EU's foreign policy. The EEAS should also strive to increase the coherence in the EU external action: the EU's CFSP and its external economic policies should be coordinated, or at least one of them should not create obstacles for the successful implementation of the others. It is also vitally important for the EEAS to prove its status of a legitimate actor in the EU's foreign policy by contributing to reaching the consensus among the Member states and enlisting the active support of the EU Member states and third states in performing its tasks, which would create the necessary prerequisites for the EEAS attaining strong political position within the EU and among its partners all over the globe.

Modern Approaches to the Extraterritorial Application of the EU Law

Liudmyla Falalieieva*

Summary: This article offers the analyses of the problem of Extraterritorial Application of the EU Law on the example of the application of the EU competition law rules. It deals subsequently by the main theories of the Extraterritorial Application of the EU Law in particular the Single economic entity doctrine, Implementation doctrine, EU and the effects doctrine.

Keywords: EU, EU law, Extraterritorial Application of the EU Law, Competition Law.

1. Introduction

Due to the development of bilateral relations between the EU and third states the EU law in certain cases began to influence on such third states, and on natural and legal persons under their jurisdiction. The described situation was invoked by the fact that the activities of the third states' natural and legal persons could effect, namely in a negative way, the EU Internal Market and its entire legal order. The issues arising from the extraterritorial application of the EU law are considerable as establishment and functioning of the EU's harmonised legal order including extraterritorial application of its law, appears to be impossible in case extraterritorial jurisdiction of the EU Member states is excluded from the scope of the EU law. Extraterritorial application of the EU law should be understood as extension of the territorial scope of separate provisions of the EU law, usually those relating to its exclusive competences, beyond the EU's borders (i.e. territories of its Member states) to the territory of a third state, as well as natural or legal persons under its jurisdiction and relations, mainly economic, between them effecting the EU's legal order. Noteworthy, it is based directly on extraterritorial jurisdiction of its Member states. Extraterritorial application of the EU law often results in "a situation when the same relations fall under two concurring jurisdictions: on the one hand such

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relations are governed by the EU law and on the other hand they are governed by the national law of a third state. In such cases the extraterritorial application of the EU law can result in a negative impact on the functioning of economic relations within such a third state and relations between the latter and the EU"[1].

Unlike the USA, which usually introduces explicit provisions on extraterritorial application of the national legislation into the acts of the Congress, the concept of the extraterritorial application of the EU law is developed mainly by means of the Court of Justice of the European Union (ECJ) case-law. Legal position of the ECJ provides that grounding on the EU's international personality the latter can determine the geographical scope of its law on its own discretion, being limited only by prohibitions existing in modern international law. For example, in Case 214/94 Boukhala the ECJ stated that as a general rule the geographical scope of the EU founding treaties and its secondary legislation is limited to territories of its Member states, though EU primary and secondary law do not preclude EU rules from having effects outside the territory of the EU[2].

2. EU competition law

The EU has the most developed practice of the extraterritorial application of the EU law in the area of competition law governed by Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU) and acts of secondary legislation regulating various aspects of this branch of the EU law. The possibility for the extraterritorial application of the EU competition law is explicitly provided for by the EU Merger Regulation No 139/2004 of 20 January 2004[3]. Articles 101 and 102 TFEU contain geographical limitations for their application, namely that any infringement of the EU law should affect trade between its Member states. Besides, Article 101 TFEU stipulates that anticompetitive effect from agreements or practices should be caused within the EU Internal Market. Professor Ivo Van Bael states that the term "agreement" in Article 101 TFEU should be "interpreted broadly so as to encompass any kind of consensus or understanding between parties as to their future behaviour"[4].

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[1] Муравйов В.І. Правові засади регулювання економічних відносин Європейського Союзу з третіми країнами (теорія і практика). Київ, 2002, С. 262

[2] Judgment of the ECJ of 30 April 1996. Case 214/94, Ingrid Boukhalfa v. Bundesrepublic Deutschland. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994J0214:EN:HTML

[3] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). Official Journal of the European Union, L 24, 29.01.2004, pp. 1–22

[4] Ivo Van Bael. Due Process in EU Competition Proceedings. Alphen van den Rijn, 2011, pp. 19

Article 101 TFEU enumerates criteria necessary for it to be applied. *First*, there should exist an agreement between undertakings, decisions by associations of undertakings or concerted practices. *Second*, such agreements or practices should affect trade between Member States. *Third*, such agreements should have as their object or effect the prevention, restriction or distortion of competition within the EU Internal Market. Article 101 TFEU is applied not only to actual competition, but also to the potential competition; the possibility of its existence is established on the basis of the structure of the market, economic and legal context within which the agreement functions[5].

For Article 102 TFEU to be applied there should exist a dominant position within the internal market its a substantial part. Though limitation of competition or other prohibited practices affecting the trade between Member states could have foreign origin, i.e. undertakings from third countries might apply agreed prices or market-sharing agreements. Moreover, foreign undertakings may have a dominant position within the EU Internal Market or its substantial part and apply practices violating Article 102 TFEU. Merger of foreign enterprises may also affect the competition within the EU Internal Market.

The European Commission (Commission) ensures the application of the principles laid down in Articles 101 and 102 TFEU and shall investigate cases of suspected infringement on application by a Member state or on its own initiative in cooperation with the competent authorities in the Member states. The Commission may propose appropriate measures to bring an infringement to an end. If such measures appear to be ineffective the Commission may publish its reasoned decision and authorise Member states to take the measures needed to remedy the situation. As a rule the Commission deals with a complaint in the following cases: when more than three Member states have been seriously affected by an agreement or practices; when the application is closely connected with the other provisions of the EU law, which may be more effectively or exclusively applied by the Commission or when the EU interest requires the adoption of a Commission decision to develop EU's competition policy. Enforcement of the Commission's decisions concerning foreign undertakings outside the EU territory is rather challenging, especially when such undertakings are not willing to cooperate or are protected by their States[6]. In order to avoid the conflicts arising from such situations the Commission strives to foster cooperation with the competent authorities of third states. In order to establish the existence of jurisdiction of the Commission or Member state's competent authority over the relationships originating from outside the EU territory, three

[5] Ivo Van Bael. Op. cit. pp. 23

[6] Alina Kaczorowska. Public International Law. 4th ed., London, 2010, pp. 342–343

principal doctrines are applied: single economic entity doctrine, effects doctrine and implementation doctrine.

3. Single economic entity doctrine

Historically the first instrument applied by the EU in the context of the extraterritorial application of its competition law was the single economic entity doctrine. This doctrine originated from the ECJ decision in Case 48/69 Dyestuffs which concerned the parent company from the United Kingdom than not being a Member state of the European Economic Community (EEC)[7]. The applicant registered in non-EEC country alleged that the Commission had no right to impose fines grounding only on the fact that the applicant's activities beyond the EEC Member states' territories had had negative influence on the EEC common market. Thus the ECJ had to establish whether the applicant's conduct constitute concerted practices and in chain whether these concerted practices affected the EEC common market. The applicant claimed that the conduct constituting concerted practices was to be imputed to its subsidiaries but not to it. Meanwhile the ECJ stated that the fact that a subsidiary had separate legal personality was not sufficient to exclude the possibility of imputing its conduct to the parent company, especially as the subsidiary didn't possess real autonomy in determining its course of action in the EEC common market. This way the ECJ authorized the extraterritorial application of the EU law. The ECJ's conclusions in Case 48/69 Dyestuffs may be applied to any concerted practices irrespective of whether such practices were applied by a single corporation consisting of several parent companies or by separate undertakings operated by different legal entities. In its judgement in case 6/72 Continental Can the ECJ concluded that conduct of a subsidiary registered in one of the EEC Member states might be attributed to the parent company registered in a third state[8]. Thus the fact that the parent company does not have its registered office within the EU territory is not sufficient to exclude such parent company from the application of the EU law. In practice it's a rather challenging task to establish the extent of parent company's control over the subsidiary, especially

[7] Judgement of the Court of 14 July 1972. Imperial Chemical Industries Ltd. V. Commission of the European Communities. Case 48/69. Available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61969J0048&lg=en

[8] Judgement of the Court of 21 February 1973. Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities. Case 6/72. Available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61972J0006&lg=en

when their relations are governed by a contract of franchise, a license agreement or a patent agreement.

4. Implementation doctrine

The main approach to the extraterritorial application of the EU was formulated in the ECJ judgement in the Case 129/85 Wood Pulp. The case dealt with concerted practices aimed at fixing the prices on wood pulp applied by 41 undertakings from third states and trade associations from Finland and the USA. The Commission established that these concerted practices violated Article 85 of the Treaty establishing European Economic Community (at present Article 101 TFEU) and relying on the effects doctrine concluded that the effect on consumer prices within the EEC caused by agreements between these undertakings and practices applied by them was substantial, intended and in general and directly resulting from the said agreements and practices. However the ECJ avoided the effects doctrine in its grounding and decided to apply the principle of objective territorial jurisdiction, i.e. implementation doctrine. Agreements and concerted practices may infringe the EU competition law irrespectively of the place where they were formed and the decisive factor is therefore the place where they are implemented and their effect on the trade between the EU Member states. Besides, in its judgement of 27 September 1988 the ECJ concluded that the infringement of the EU competition law, namely concluding an agreement affecting the competition within the EEC common market, consists of conduct made up of two elements: the formation of the agreement, decision or concerted practice and the implementation thereof. As in this case the producers implemented their pricing agreement within the EEC common market, it was immaterial whether or not they acted through their subsidiaries, agents, sub-agents or branches situated in the EEC while contacting with purchasers from the EEC. Hereby the ECJ used "a fiction that there was some quasi-territorial basis for jurisdiction"[9]. The Wood Pulp judgement substantially broadened the EU competition law scope as to the conduct and obligations originating from third states. Theoretically taking into account the size and importance of the EU internal market nearly every pricing scheme may be challenged by the EU as it will certainly affect competition rules functioning within the EU territory.

[9] Dieter G.F. Lange, John Byron Sandage, The Wood Pulp Decision and its Implications for the Scope of EC Competition Law, Common Market Law Review (Issue 26, 1989), pp. 157

5. EU and the effects doctrine

In modern globalized world there is a constant interplay between national legal systems, which sometimes provokes conflicts of jurisdiction especially in the economic area where every state tries to strengthen its position in global economic system. Some states, namely the USA, strive to influence on global economic system by means of the extraterritorial application of national law in the area of competition, corporative relations, merger etc. Meanwhile it's not always possible to clearly distinguish between the implementation doctrine applied by the EU and the effects doctrine used by the USA as the effects of agreements and practices obtain the same characteristics while being implemented i.e. such effects are substantial and aimed at infringement of existing competition rules. While the extraterritorial application of national legislation based on territoriality or nationality is not as a rule opposed by states, recourse to effects doctrine provokes serious criticism. The ECJ decided to apply the principle of objective territorial jurisdiction taking into account the negative consequences of application of the effects doctrine by the USA.

In certain cases agreements violating the EU competition law may be implemented beyond the EU internal market. According to the ECJ case-law the effects doctrine implies that the state may recourse to the extraterritorial application of its national competition law when agreements and practices have direct, substantial and foreseeable effect on the national market. Scholars in majority express negative attitude to the effects doctrine and state that the objective territorial jurisdiction principle allows the ECJ to protect the EU internal market without the application of the controversial effects doctrine.

6. Broadening the scope of the extraterritorial application of the EU law

The extraterritorial application of the EU law is not limited to the competition law. According to the established ECJ case-law the EU law on free movement of workers applies to "all legal relationships in so far as those relationships, by reason of either place where they were entered into or the place where they took effect could be located within the territory of the Community"[10]. Besides, professional activities pursued partially or temporarily outside the EU territory

[10] Judgement of the Court of 12 July 1984. SARL Prodest v. Caisse Primaire d'Assurance Maladie de Paris. Case 237/83, para. 6. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61983CJ0237:EN:HTML

are not excluded from the scope of the EU law in case such activities retain sufficiently close legal link with one of the EU Member state's legal order. The most important criteria for establishing a sufficiently close link is the existence of a link between employment relationships and the legal order of one of the Member states and, thus, the EU. For example, the ECJ has applied such criteria for establishing a sufficiently close link in Case 9/88 Mário Lopes da Veiga: the person worked on board a vessel registered in the Netherlands; a shipping company was incorporated under the law of the Netherlands and established in that State; the relevant employment relationship between him and his employer was subject to Netherlands law; he was insured under the social security system of the Netherlands and paid income tax in the Netherlands. Finally the ECJ concluded that the scope of the EU law on the free movement of workers should be expanded on the applicant who was a Portuguese national even though the disputed relationship were entered to by the parties prior to Portugal accession to the EU.

The EU also attempts to recourse to the extraterritorial application of its law in the area of environmental protection[11]. Thus in 2008 international flights were included into the European Emissions Trading System (EETS). Pursuant to Directive 2008/101/EC from the 1st January 2012 all international flights arriving at and departing from the EU airports are included into the EETS irrespectively of the plane's state of registration[12]. Aircraft emission is calculated for the whole length of flight including extraterritorial emission over the high seas and over territory of third states. The described attempt to broaden the scope of the extraterritorial application of the EU law faced strong opposition on the international arena and as a result 21 states including the USA, Japan, China, India and the Russian Federation issued a Joint Resolution of September 2011, stating that the EU's plans to include extraterritorial emission in the EETS are inconsistent with international law. The ECJ dealt with this dispute and stated its position in the Judgement of 21 December 2001 in Case 366/10 Air Transport Association of America[13]. The ECJ concluded that as soon as the

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[11] Медведєва М.О. Теоретичні та практичні аспекти реалізації міжнародно-правових норм у галузі охорони навколишнього середовища / За наук. ред. проф. О.В. Задорожнього. – К.: Фенікс, 2012. – С.349.

[12] Directive 2008/101/EC of the European Parliament and the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community. Official Journal of the European Union, L8, 13.1.2009, pp. 3–21

[13] Judgement of the Court of 21 December 2011. The Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change. Case 366/10.
Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=117193&pageIndex=0&doclang=EN& mode=lst&dir=&occ=first&part=1&cid=106658

aircraft is in the territory of one of the Member states and, more specifically, on an aerodrome situated in such territory, the aircraft is subject to the unlimited jurisdiction of that Member state and the EU. Therefore Directive 2008/10/EC does not infringe the principle of territoriality and sovereignty of third states, as well as, the principle of freedom to fly over the high seas. The EU legal regulation is extended only to those operators willing to operate a commercial air route arriving at or departing from an aerodrome situated in the territory of a Member state. The ECJ stressed that the EU, in principle, may choose to permit commercial activities, in casu air transport, to be carried out in the EU territory only if such activities comply with certain criteria established by the EU. Furthermore, the fact that a certain extent of emission occurs partly outside the EU territory is not such as to call into question the full applicability of the EU law to the whole length of flight.

7. Conclusions

The legal basis for the extraterritorial application of certain norms of the EU law in legal orders of states is provided for in the EU founding treaties and secondary legislation, namely in the area of competition, finances, transport, application of financial and economic sanctions by the EU. The ECJ gradually extends the scope of the extraterritorial application of the EU law to the other new areas of the EU legislation in order to maintain the proper functioning of the EU legal order, namely effective implementation of its founding treaties and secondary legislation. Meanwhile, third states sometimes object to the extraterritorial application of the EU law, which might potentially lead to conflicts and disputes. In order to avoid such disputes and minimize their possible negative consequences the EU, its Member states and third states recourse to international law peaceful means of jurisdictional disputes settlement, namely concluding agreements on cooperation in the relevant areas, reciprocal notification on the possible conduct of an investigation of an infringement of the relevant national legislation, consultations on the necessary convergence of the relevant legal regulation and administrative practices.

European Union and Reforms and Transformations of the Social – Welfare State

Josef Blahož*

Summary: This article is focused on the concept, definiton and typology of the Social (Welfare) State in the framework of the European Union. The idea of Social (Welfare) State developed in political, social, politological, legal and constitutional thougt. According to the author there are no fundamental difference betwen the concepts and terms of Welfare State and Social State.

The article defines political, constitutional, legal and socioeconomical targets of Social (Welfare) State.

In the center of attention are changes, reforms and transformations of the Social (Welfare) State in the framework of the states – members of the European Union, namely the new Member states from central Europe.

According to the author it is realistic to consider regional types of Welfare State or Social State corresponding with the social systems which have been accepted for a long time by civic consensus in the individual regions of the European Union and particularly in their significant states. I suppose that in the framework of the European Union it will be the mixed systems of conservative, corporate, liberal and social democratic types of welfare state, with the strong influence of neoliberal tendencies – compare the impact of the policy of the World Bank and the International Monetary Fund.

Keywords: Social state, Welfare state, European Union and Social (Welfare) state, concept of the Social (Welfare) state, definition of Social (Welfare) state, typology of Social (Welfare)

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1. The concept

The reasons for the modest development of European Union solidarity are inseparably political, legal and cultural. Until now European political elites discovered, with varying degrees of support from their electorates, that it was in their interest to help social protection confined within national boundaries.[1]

We suppose it correct to consider the Welfare State and Social State with reference to their goals, as the assurance of dignified life and general standard of living of the citizens of the given state,[2] i.e., not only as the assurance of social benefits for the needy (the minimum of the generally recognized standard of living), but also in the field of public health (standard medical care on the basis of health insurance and security codified by the state),[3] in the fields of ecology and culture.[4] Moreover, it is not only the terms of Welfare State and Social State that we encounter in historical development. Less frequented were also the terms of societal state, social service state, social security state, welfare capitalism, or social Welfare State.

According to Franz-Xaver Kaufmann „After World War II social policy expanded in an unprecedented way, connected to two new formulas designed to denote the place of social policy in post – war society. The first formula, Social Market Economy aimed to integrate the economic and the social. The second formula social state, the german version of welfare state, was contained in the post – war constitution of the Federal Republic of Germany 1949, the Grundgesetz (1949). (The year before, 1948, had witnessed the creation of the British welfare state). The year 1949 marked a double state building … which reflected the link between social policy and nation building. … the West German Constitution of 1949 was the first to establish the social state as constitutive principle of the German policy, not to be changed even by a majority in Parliament".[5]

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[1] Barbier, J.-C., The Road to Social Europe, Abingdon, New York 2013, p. 135.

[2] Esping-Andersen, G., The Three Worlds of Welfare Capitalism, Oxford, Cambridge 1991, p. 3 ff.

[3] Barr, N., The Economics of the Welfare State, Oxford 2004, p. 7; Večeřa, M., Sociální stát, východiska a přístupy, Praha 1996, pp. 25–29, 86–100; Kotous, J., Munková, G., Štefko, M., Obecné otázky sociální politiky, Ústav státu a práva Akademie věd České republiky, Praha 2013, pp. 59–71.

[4] Fujii, T., Ecology and Development, IFSSO (International Federation of Social Science Organizations) Newsletter No. 31–32, 1993, pp. 33–58.

[5] Kaufmann, F., X., Variations of the Welfare State, Heidelberg, New York 2013, p. 3; According to Article 20 (1) of the Basic Law The Federal Republic of Germany is a democratic and social federal state. Cf. KOMMERS, D.P., The Constitutional Jurisprudence of the Federal Republic of Germany, Durham and London 1997, pp. 35–36, 510.

We should like to emphasize that we see no fundamental difference between the concepts and terms of Welfare State and Social State. Rather it is possible to say that in some countries the Social State with the quality of its services to the citizens approaches the concept of Welfare State, while in other countries it merely affords the basic social and health care required for the sustenance of life.[6]

The political, constitutional and legal targets of Welfare State or Social State activities include, in our opinion: 1. to secure man so that he could implement all fundamental qualities of the right to life[7] contained in the internationally recognized codes of human and civil rights (including the EU Charter of Fundamental Rights – the Lisbon Treaty which incorporated the EU Charter into EU primary law); 2. to reduce inequality and to create the feeling of security;[8] 3. to prevent undesirable social tension in society[9] contributing substantially: a) to the increase of criminality, b) to the increase of extremist and terroristic movements, whether of extreme left or extreme right character, c) to the possibility of origin of new social revolutions. Particularly in the last mentioned case (sub c) it would be erroneous to believe that with the exit of communism from the historical stage the possibilities of social revolutions have also disappeared forever. These revolutions may manifest themselves under the most diverse ideological labels including religious fundamentalism.

The socio-economical targets of Welfare State include in our opinion: 1. to ensure manpower reproduction[10] (through universal health care[11] and preparation for employment) in accordance with the needs of national economy and social standard; 2. to organize active employment policy[12] and 3. to increase the purchasing power of the population and so enhance the development and stability of economy.[13]

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[6] Kaufmann, F., X., note 5, pp. 33–34.

[7] Kersbergen Van, K. and VIS, B. Comparative Welfare State Politics, Cambridge University Press, New York 2014, pp. 78–102; Yerkes, M., A., Peper, B., Baxter, J., Welfare states and the life course (in Greve, B., ed., The Routledge Handbook of the Welfare State, London and New York 2013, pp. 105–113.

[8] Barbier, J., C., note 1, pp. 36–61.

[9] Pojman, L., Terrorism, Human Rights and the Case for World Government, Lanham 2006, pp. 75 ff., 80; Blahož, J., Human Rights and the Fight Against Terrorism (in Blahož, J., Balaš, V., Klíma, K., Mrázek, J., Večeř, J., et al., Democracy and issues of Legal Policy in Fighting Terrorism: A Comparison, Praha 2009, pp. 256–261. Kersbergen Van K. and Vis, B., note 6, p. 40.

[10] Kersbergen Van K. and Vis, B., note 7, pp. 48–50.

[11] Wendt, C., Healthcare (in Greve, B., ed., note 7), pp. 347–357.

[12] Nordlund, M., Active labour market policies (in Greve, B., ed., note 7), pp. 115–124.

[13] Kersbergen Van K. and Vis, B., note 7, p. 185 ff.

Therefore the concept of Welfare State must be considered not only as a concept of a humanitarian state protecting the really needy human beings (particularly the intention to ensure that social assistance be addressed to individuals requires the continuous improvement of this concept), but simultaneously also as a means of protection of the whole society and global community against increasing social as well as ecological tension the consequences of which could threaten seriously the stability of human coexistence on the world scale.[14]

To simplify the analysis which follows we shall use the uniform term of Welfare State with the aforementioned reservations. There are many typologies of the welfare state but the most important is the commonly accepted typology presented by Esping-Andersen: The Liberal welfare state, the Conservative Corporate welfare state and the Social democratic welfare state.[15]

If we consider the existing works on Welfare State and particularly the classification of Welfare State types defined in writings, we shall observe the classification given in the work by Gosta Esping Andersen which is still valid, although with some significant modifications.

We conclude that it is important to remember that Esping-Andersen's story of the three worlds of welfare capitalism is for all intents and purposes, a typological classification that effectively grouped together empirically the many worlds of welfare capitalism and rearanged them into three distinct types. To a considerable degree this seminal typology, so the data tell us, is still relevant for understanding the various worlds of welfare capitalism today.[16]

2. Changes, Reforms and Transformations

However, not only the concept of the Welfare State proper, but even its implementation, will represent a very serious problem. Both problems can be expected to undergo substantial changes and transformations in the process of Welfare State regionalization in the framework of the European Union.

[14] Blahož, J., On the Concept of Fundamental Human Right to Favourable Environment. The Lawyer Quarterly, Volume 1, No. 3/2011, pp. 170–180.

[15] Esping-Andersen, G., ed., Welfare States in Transitions, London 2007, p. 121 ff.; Kersbergen Van K. and Vis, B., note 6, pp. 64–65; Kersbergen Van K., What are welfare state typologies and how are they useful, if at all? (in Greve, B., ed., note 7), p. 143; Donnely, C., M., Delegation of Governmental Power to Private Parties, a comparative Perspective, Oxford 2009, p. 64 ff.; Kersbergen Van K. and Vis, B., note 2, pp. 64–65; Esping-Andersen, G., note 2, p. 30.

[16] Kersbergen, K. and Vis, B., note 7, pp. 68, 69, 77.

After reaching its maximum in the seventies, the parabola drawn by the Welfare State of the western European Countries has begun its declining phase.[17] The deceleration in the rates of growth in the Industrialized Countries, the progressive expansion in the range of services provided by the State to wider and wider shares of the population, the introduction of automatism which loosened the check on public expenses, the run up of increasing expectations nourished for political-lobbying purposes all these attitudes and events have eventually produced that fiscal crisis of the State which now calls for sharp corrective measures aiming to provide again the economic system with efficiency and energy.

„The reduced ability to provide generous social programmes, infrastructure, and low rates of taxation is a direct consequence of the massive levels of debt that have been built up for the past several decades; and these debt burdens, according to rational choice theorists, are a consequence of political officials spending public money as a means of ensuring their reelection, or of unaccountable bureaucrats demanding excessive budgets".[18]

The deep changes that took place in the morphology of contemporary society, in which the industrial sector no longer plays a central role, produced important modifications in the structure of social demand. With the segmentation of the old social classes we are witnessing the emergence of new social elements, new values and new needs which, according to the circumstances, take up the features of demands for a better quality of life, enhanced autonomy and opportunities of self-realization, and more frequent and wider social participation.[19] Such demands are met neither by the centralized and bureaucratic structures of the Welfare State, nor by the neo-liberal policies.[20]

The building-up of a trade-off between efficiency and economic growth on the one side, and solidarity among the different social groups on the other side, pose the undeferrable problem of entirely reform the structure od the Welfare State.[21] The crux of the matter lies in the need for maximizing equity together with efficiency and the sustainable growth of the economic system. And yet no formula is able to define the optimal relationship among equity, efficiency and growth.

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[17] Esping-Anderson, G., After the Golden Age? Welfare State Dillemmas in a Global Economy (in Esping-Andersen, G., ed., note 15, pp. 1–31.

[18] Fierlbeck, K., Globalizing Democracy, Manchester 2008, p. 158. Crouch, C., Post-Democracy, Cambridge, Malden 2005, p. X.

[19] Barbier, J., C., note 1, pp. 65–75.

[20] Donnelly, C., M., note 15, p. 62.

[21] Kersbergen, Van, K., Vis, B., note 7, pp. 27–30, 103 ff., 123 pp.

Although it is true that equity brought beyond a certain limit is prejudicial to efficiency and growth, it is not easy to understand where this limit lies. In this situation all a social researcher can do is to analyze the most significant elements cropping up out of the existing crisis of contemporary societies and to investigate their likely evolution.[22]

A certain tendency to regard the activities of the Welfare State or Social State as charity has been brought about by negative experience with central management and, particularly, implementation of Welfare State activities in the course of which these activities in almost all countries of the European Union were subjected to excessive bureaucracy, abuse and waste of public means. The correct trend, even on global scale, is the maximum decentralization of Welfare State activities to the lowest tiers of local government while preserving the conceptual and control power of central authorities, in the future possibly including the authorities above state level and regional communities.

The experience with the negative impact of centralization in the implementation of Welfare State functions are well known from European countries – Great Britain, Italy, France – as well as from the USA. At the same time the decentralization of Welfare State activities connected with concrete benefit distribution brings about incorrect tendencies to consider Welfare State activities as charity stigmatizing the recipients of these benefits. I consider it necessary to emphasize again that the activities arising from the functions of the Welfare State are the activities of the modern responsible and responsive state or the activities arising from the concept of supranational institutions.

„The welfare state was the way in which society came to terms with the consequences of modernization. The enormously dynamic character of capitalism implies that political actors are permanently confronted with the new social, economic, and political issues to solve. Since the capitalist system has an inbuilt tendency … to produce periodic crises, the welfare state must respond and seems to move from crisis to crisis. Its demise has been predicted more than once. Yet, in the light of the permanently changing circumstances of development and recurring economic tribulations, the welfare state's survival skills have proven to be remarkably well developed".[23]

A considerable amount of scientific literature concerned with the processes of unification of the European Union and the present world has been produced for several decades. This literature concerns not only social sciences, although

[22] Fierlbeck, K., note 18, pp. 112, 191, 211 ff.; Gearty, C., Can Human Rights Survive, Cambridge 2006, pp. 17 ff., 60 ff.; Crouch, C., note 18, p. 3 ff.; Keller, J., Soumrak sociálního státu, Praha 2005.

[23] Kersbergen, Van, K. and Vis, B., note 7, p. 30.

the attention focused on this problem by social sciences is most intensive. The authors seek not only a system of world security, but also joint responsibility for its development as a whole and in its individual parts, as the world is being increasingly integrated.[24]

The fast collapse of the communist world system, i.e., actually the end of the second world, has aroused great expectations in respect of universal integration processes in all fields.

In many states, where market economy had not existed for over forty years and in which their citizens in productive age had never come into contact with it in their own country, the market economy was introduced in the course of two years.

We are witnessing a remarkable phenomenon. In all post-communist countries the state-planned economy is transformed into market economy, based on private property, by means of laws. In this analysis, we abstract from the fact, whether it is accomplished completely (e.g., in the Czech Republic) or whether this process has not been fully completed yet. Decisive is the fact that in the developed pluralist democracies market economy developed very slowly and without, we could say „creative" intervention of law.

It should be noted that social consensus concerning fast privatization and introduction of market economy, if we consider consensus generally and without detailed specification, originates relatively fast.

Even greater differences can be observed in the creation of social consensus in the social field and, consequently, in the creation of the Welfare State.[25]

The opinion of a major part of the population of these countries, however, is considerably schizophrenic in this respect (and it is no wonder): on the one hand they welcome privatization and introduction of free market, on the other hand they cherish subconsciously a wish, which is difficult to overcome, that the care-taking state should continue.[26]

The Czech Republic asserted the introduction of the liberal model, based primarily on the responsibility of the individual. With regard to the problem of social tension which could be connected with this transformation the legal model of the transition from the paternalist socialist type to the residual system of liberal type is gradual and phased. The target is evident-the reduction

[24] Merrit, R., L. and Russett, B., M., ed., From National Development to Global Community: Essays in Honor of Karl W. Deutsch. London, Boston 1981, pp. 145–183.

[25] Standing, G., Social Protection in Central and Eastern Europe: A Tale of Slipping Anchors and Torn Safety Nets (in Esping-Andersen, G., ed., Welfare States in Transition, London 2007), pp. 230–231.

[26] Saxonberg, S., Eastern Europe (in Greve, B., ed., note 7), p. 175 ff.; Standing, G., note 25, pp. 238–239.

of social expenditure. It goes without saying that the attainment of the liberal model of social security or the liberal model of Welfare State obviously will be a longterm process, as it is a model entirely new in the conditions of the Czech Republic. It is also entirely new in all other Central European post-communist countries.[27]

[27] Večeřa, M., note 18, p. 105; Blahož, J., Brokl, L., Mansfeldová, Z., Czech political parties and cleavages after 1989 (in Lawson, K., Römmele, A., Karasimeonov, G., ed., Cleavages, Parties and Voters), Westport, London 1999, p. 130.

The Unbearable Lightness of Being Guardian of the Constitution (Revolt and Revolution Dilemma in the Approach of Czech Constitutional Court Vis-à-Vis EU and Supranational Legal Order)[1]

Ondrej Hamuľák*

Summary: The article is devoted to the issue of acceptance of the effects of European law by the Czech Constitutional Court. National courts in connection with the membership in the European Union face the problem of "revolt or revolution." So-called "Revolt or revolution dilemma" confronts the Court with the choice between the national constitutions (revolt) or European law (revolution). In the existing case law of the Constitutional Court one can discover a hint of these two poles.

Keywords: EU Law, National Constitutional Law, Czech Constitutional Court, Revolt, Revolution, Primacy, Acceptation.

1. Pluralism of players and dilemma of choice in the realm of the EU legal order

1.1. Plurality and no final arbiter

The system of the European integration is based on pluralism and on the separation of law making-centres. This structural characteristic together with the direct applicability of EU law creates space for the tension between the supranational law and national law of the Member States. Neil MacCormick talked about the plurality of players that logically implies the risk of a constitutional conflict.[2] Impossibility of building the legal system of the Union as a single pyramidal structure on one hand and the requirement for uniform and effective

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[2] MacCormick, Neil. *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*. New York: Oxford University Press, 1999, pp. 97–121.

application of supranational law in all Member States on the other hand offers an opportunity for potential disputes.

EU law is an independent legal system which significantly affects the understanding and contours of law, legal system and legal norms in all Member States. Supranational law may impact the legal order of a Member State in two ways. Either directly, in the form of normative influences on the national legal system i.e. its enrichment of the new "European" rules. Or indirectly, through the influence on the understanding and interpretation of the national law i.e. its enrichment of the new "European" meanings. Integration brings the plurality of norms, meanings and interpretations into one legal space – the legal practice within each of the Member States.

Neil MacCormick also wrote that to understand a new legal reality which results from the development of supranational entities a certain amount of imagination is needed.[3] Imagine then the legal system of European integration and its functioning as a certain game – such as football[4] – which has set certain rules. EU law and the Court of Justice as its chief interpreter provide the basic framework of that game. Matches, however, take place on playgrounds within Member States and national courts of the Member states have to be understood as a "players of that game."

Effects and impacts of EU law therefore create space for the emergence of the conflict between European and national rules or European and national modes of interpretation. These two sets of rules (two legal systems) are derived from separate legal systems and due to this separation we cannot apply the classical relational imperatives to determine their relationship. The principles of superiority (lex superior derogat legi inferiori), temporality (lex posterior derogat legi priori) and speciality (lex specialis derogat legi generali) cannot be applied here. The relation between those sets of rules is based on the principle of priority by which Court of Justice if the European Union articulated the preference of the application of EU law over national law. The primacy principle is derived from the requirement of en effective and uniform application of the EU law within all Member States. It is necessary to mention here that an application of the principle of primacy does not cause any (nor immediate nor future) invalidity or nullity of the national law. The issue of validity and invalidity in relation between EU law and national law of the Member States is out of the question. Those are two separate legal systems and there is no hierarchy

[3] Ibid.

[4] Similarly French Foreign Minister Laurent Fabius responded to the UK efforts for a special status in the EU by the words (January 2013): "Imagine Europe as a football team in which you participate, once you're in you cannot say let's play Rugby."

between them. Their relationship is defined by the matrix of applicability of concrete rules on the certain matters of fact.

1.2. The revolt or revolution dilemma of national courts

So there are two sets of rules and one supranational principle that resolves their potential conflicts or inconsistencies. But the question remains to what degree national authorities are willing to accept this principle? The paradox of European integration may be seen in the fact that the consensus of political representation of the Member States to choice the supranational method of integration (which serves as the base for the introduction of the principles of direct applicability and primacy of EU law) is followed by the sort of judicial disagreement. Tensions between EU law (and particularly Court of Justice) and the law of the Member States (and the national – especially constitutional – courts) are based on a different understanding of the legal foundations of the Union's legal system and on a different approach due to its validity.[5] According to the Court of Justice the EU law is autonomous legal system because it rises from its own source which is of the Treaty. From the perspective of national (constitutional) courts the reason of validity of EU law is enshrined in national constitutions.[6]

In the realms of European integration the national courts are confronted with the phenomenon of "revolt or revolution dilemma" once their resolve the question of the applicability of EU law rules and their potential conflict with the national constitutional rules.[7] They are facing the problem of ultimate choice between national constitutional requirements (the option of revolt) or EU law rules (the option of revolution). In the up-to-date case law of the Czech Constitutional Court (CCC) we may find a hint of both options. Revolution (in the classical constitutional doctrines) occurred when Constitutional Court recognized the normative autonomy of EU law and foremost when it formulated the modern concept of state sovereignty in the context of the European integration. On the other side it revolted against the EU law by

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[5] Borowski, Martin. Neil MacCormick's Legal Reconstruction of the European Community — Sovereignty and Legal Pluralism. In MENÉNDEZ, Agustín José, FOSSUM, John Erik (eds). *The Post-Sovereign Constellation. Law and Democracy in Neil D. MacCormick's Legal and Political Theory*. Oslo: Arena, 2008, pp. 194 et seq.

[6] Maduro, Miguel Poiares. *We The Court. The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty.* Portland: Hart Publishing, 1998, pp. 31.

[7] See Phelan, Diarmuid Rossa. *Revolt or Revolution: At the Constitutional Boundaries of the European Community*, Round Hall: Sweet & Maxwell, 1997, 540 p.

the introduction of the "Solange" attitude and by the actual use of the saving clause in January 2012.

2. The revolutionary features in the case-law of the Czech Constitutional Court

2.1. Broad acceptation of autonomy and originality of EU law

A key element of the independence of European Union law lays in its ability to have a normative influence on the national legal orders of the Member States. It is interconnected with the one of the greatest achievements of the Court of Justice jurisprudence – the principle of direct effect of EU law norms within the national legal practice. This principle built the bridge between EU law-makers and individuals. From the spring of the sixties not only states but also the individuals became the subjects envisioned by the supranational law (Van Gend). Direct effect is one of the elementary structural features of a supranational legal system. It is a prerequisite for the application of EU law and one of the conditions of effective functioning of the European integration.

Thanks to the direct effect the provisions of EU law are capable to create the rights and impose the obligations on the addressees within the national legal system without any need of the adoption of national acts of transposition. Therefore the supranational set of legal rules is able to serve as an autonomous legal order. Individual rights and obligations contained in the directly effective norms of EU law then may be a subject of decisions of the national authorities which apply the law (i.e. courts and public authorities). Or in more strict words the national authorities are under duty to accept and apply these legal norms as they are, without need of transposition by national legal acts. Lord Denning expressed this phenomena in his famous statement according to which EU law is "like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."[8] Supranational law is a body of legal norms that emanate from autonomous sources but have their arena of impact in the Member States.

The Czech Constitutional Court in its *Sugar Quotas* decision[9] explicitly recognized the independence of supranational law and its abovementioned impact. The basis for this approach lays in two-way interpretation of Article 10a of the Czech Constitution. CCC has expressed its attitude by taking a stance on the question of conferral and division of powers between EC and Member

[8] HP Bulmer Ltd v. J Bollinger AS (No 2) [1974].
[9] Decision of 8 March 2006, Pl.US. 50/04 Sugar quotas III

states. In connection with that CCC also resolves the dispute about the constitutional basis for the position of EU law within the Czech legal system. It concluded that the constitutional authorization for the delegation of powers to the EU in art. 10a of the Constitution has a dual nature. On the one hand, it is the basis for the transfer of national competences to a supranational body. On the other hand, it represents an open door for the inclusion of effects and the application of principles of EU law within the Czech legal system. CCC recognized the independence as a fundamental attribute of EU law and approved its application also within the Czech legal system. Its position relied on the existence and nature of transfer of powers to the EU. Opening of the Czech law by the gate of article 10a of the Constitution created space for the internal effects of EU law. Direct effect, priority in application as well as other effects of European Union law where therefore recognized as a result of the restriction of sovereignty and transfer of some powers to a supranational body.

Recognition of the autonomy of EU law is based also on the fact that CCC abandoned the possibility to review the constitutionality or validity of the supranational norms. In fact the CCC accepted the autonomy of supranational law. It stated that this law cannot be reviewed and tested by Czech constitutional rules. This position applies not only to the directly effective formal sources of EU law (like the Treaty or secondary legislative provisions) but it was extended also to national measures which implement the supranational requirements within the internal legal order of the Member State. Constitutional Court stated that it is not competent to judge the validity of the norms of EU law. Such matters fall within the exclusive competence of the Court of Justice. The law which is the outcome of the realization of the powers delegated to the European Union is beyond the control of the Constitutional Court.

In its second famous "European" decision (*European Arrest Warrant*[10]*) CCC continued in its Euro-friendly approach and furthermore it served as the prophet of future depilarisation of the EU law. The court has broadened its attitude towards the question of the autonomy of EU law with respect to (then) third pillar provisions. CCC in principle ignored the "weaker" nature of the law of the third pillar. It continued the development of its European doctrine that began in the Sugar Quotas Case* and granted a specific position within the Czech legal order also to non-community law. It presented its universal attitude towards EU law despite some critics[11]. Now we know that the evolution

[10] Decision of 3 May 2006, Pl.ÚS 66/04 European Arrest Warrant.

[11] The opposition came from the CCC itself. *See, e.g.,* the dissenting opinion of Judge Eliška Wagnerová in the *Sugar Quota Case,* who criticized a lack of reflection on the specifics of the third pillar of the European Union.

of European integration has confirmed its predictions. The doctrine of the CCC was enriched by respect for the principle of loyal cooperation and the principle of a "euro-conformal" (Euro-friendly) interpretation of national law. CCC has stated that if there are several ways to interpret the Constitution, then a constitutional court (as well as other bodies resolving cases with some European implications) has to choose and apply the one that leads to the fulfilment of EU law requirements. That means that potential conflict between constitutional law and European law rules will be resolved (or better stated, foreclosed) by reading the domestic rule into the meaning that reinforces the EU law substantive prerogatives. In the court's words: "If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected with supports the carrying out of that obligation, and not an interpretation which precludes its."

2.2. The revolutionary approach to the state sovereignty

The other manifestation of the CCC's open approach to the European integration is connected with its shift to the flexible understanding of the concept of state sovereignty. This display of the revolutionary option can be found in its decisions on the constitutional conformity of the Lisbon Treaty (*Lisbon Treaty I* in 2008, *Lisbon Treaty II* in 2009)[12]. Here CCC expressed beyond all doubts that it will not recognize the European Union and European integration as a prima facie threat to the constitutionality respectively sovereignty of the Czech Republic. European Union is an entity which in turn is the basis for strengthening and protecting of the national sovereignty in its modern conception.

According to CCC the notion of sovereignty passed through significant evolution and gained new meanings and proportions. It is no longer just a mere attribute of the national state and the expression of its power to have control over the territory. Today's concept of sovereignty is necessarily tied to the willingness and the will of the state to participate in international cooperation and use its possibilities and sources in conjunction with the other actors of the international community. Sovereignty is the manifestation of the "New order globalized world." In this globalized space we are facing not only to the interconnection of economies and decision-making processes but also the shifts of responsibility and rising of the new policy centres. The new order creates

[12] Decision of 26 November 2008, Pl.ÚS 19/08 Lisbon treaty I; Decision of 3 November 2009, Pl. ÚS 29/09 Lisbon Treaty II.

also new approaches to traditional terms and concepts. One of them – state sovereignty – necessarily gets a new dimension in the context of European integration. This notion is denotes as the pooled of shared sovereignty model.

The Constitutional Court rejected to measure notion of sovereignty and the question of transfer of competences to the supranational entity from the "protectionist" perspective. The process of European integration is not considered as a process of gradual disappearance of original power of the Czech Republic. On the contrary it brings the opportunity to reinforce the position of the state. The concept of sovereignty is understood as the ability of the state to determine its own future, the ability to move, share and use together a certain part of the powers, what leads to a simpler and more effective achievement of the objectives of the state. According to the CCC: "The European Union has advanced by far the furthest in the concept of pooled sovereignty, and today is creating an entity sui generis, which is difficult to classify in classical political science categories. It is more a linguistic question whether to describe the integration process as a "loss" of part of sovereignty, or competences, or, somewhat more fittingly, as, e.g., "lending, ceding" of part of the competence of a sovereign. It may seem paradoxical that they key expression of state sovereignty is the ability to dispose of one's sovereignty (or part of it), or to temporarily or even permanently cede certain competences."

The Constitutional Court reminded the modern concept of power-sharing between Member States and the European Union and the notion of pooled or shared sovereignty also in its second Lisbon decision. It stated that: "in a modern democratic state governed by the rule of law, the sovereignty of the state is not an aim in and of itself, that is, in isolation, but is a means for fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands. […] the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign's participation in a manner that is agreed upon in advance and is subject to review, is not a conceptual weakening of sovereignty, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole. […] A key manifestation of a state's sovereignty is the ability to continue to manage its sovereignty (or part of it), or to cede certain powers temporarily or permanently." It is evident that despite the critical voices which deny this concept, the Constitutional Court is in its approach stable and confirms its prior conclusions. Constitutional Court underlined that EU membership and the concept of pooled sovereignty is connected with certain amount of responsibility and cannot be viewed form mere national perspective: "sovereignty does not mean arbitrariness, or an opportunity to freely violate obligations from international treaties, such as the treaties on the basis of which the

Czech Republic is a member of the European Union. Based on these treaties, the Czech Republic has not only rights, but also obligations vis-à-vis the other Member states. It would contravene the principle of pacta sunt servanda, codified in Article 26 of the Vienna Convention, if the Czech Republic could at any time begin to ignore these obligations, claiming that it is again assuming its powers. If it were to withdraw from the European Union, even in the present state of the law, the Czech Republic would have to observe the requirements imposed by international law on withdrawal from the treaty with other Member States. This follows from Article 1(2) of the Constitution, pursuant to which "The Czech Republic shall observe its obligations resulting from international law". Thus, it is fully in accordance with this constitutional law requirement that the Czech Republic would have to, if withdrawing from the European Union, observe the pre-determined procedures […]".

3. The revolt signs and displays

3.1. Raised finger…

Although the Constitutional Court respects the law of the European Union as an autonomous legal system which through article 10a of the Constitution gain a space to produce its effects within the Czech legal order, it added that these effects cannot be considered as unlimited. In the very beginning of its "European" doctrine (*Sugar Quotas Case*) it presented its intention to operate as the ultimate guardian of the inviolable values of Czech constitutionality which cannot be affected in any case so even not by the impacts of autonomous supranational legal order. Material core of the Constitution protected by the eternity clause acts as a general corrigendum to all excesses of public authorities, both national and supranational.[13] The fact that the (implicit) openness to European integration is a constitutional principle does not exclude the necessity of material focus and this ultima ratio protection.

CCC explicitly referred to the fact that the doctrine of the primacy of European law was not and is not a trouble-free concept. It stated that "Without the Constitutional Court being obliged to gives it view on this ECJ doctrine, it cannot overlook the following circumstances. There are additional circumstances and reasons which must be considered when assessing this issue. First and

[13] See Tomoszek, M. Nezměnitelnost materiálního jádra ústavy jako řešení konfliktu ústavních hodnot [Inalterability of the material core of the Constitution as a solution to the conflict between constitutional values]. *Časopis pro právní vědu a praxi*, 2010, vol. 18, no. 4, pp. 325–329.

foremost, the Constitutional Court cannot disregard the fact that several high courts of older Member States, including founding members […] have never entirely acquiesced in the doctrine of the absolute precedence of Community law over the entirety of constitutional law; first and foremost, they retained a certain reserve to interpret principles such as the democratic law-based state and the protection of fundamental rights."

In response to that opinion, CCC adds that also in the Czech Republic it does not intend to accept the doctrine of absolute priority, according to which supranational law takes precedence also over national constitutional law. We have seen above that the basis for establishing the position of CCC with respect to the European legal issues lies within the interpretation of article 10a of Czech constitution. The doctrine of CCC is based on the concept of delegation of powers from the Czech Republic to the European Union. The Constitutional Court does not consider this delegation to be permanent and unlimited. Conversely, it states that: "[T]he delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. Should one of these conditions for the transfer of powers cease to be fulfilled, that is, should developments in the EC, or the EU, threaten the very essence of state sovereignty of the Czech Republic or the essential attributes of a democratic state governed by the rule of law, it will be necessary to insist that these powers be once again taken up by the Czech Republic's state bodies."

CCC repeatedly stressed its "Solange" attitude also in its Lisbon findings. It pointed out that openness and positive attitude towards the autonomy of EU law does not relieve its role of final arbiter which leaves the open door for the monitoring of the activities of the Union institutions in the future. It said that it will "[…] function as an ultima ratio and may review whether any act of Union bodies exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution. However, the Constitutional Court assumes that such a situation can occur only in quite exceptional cases; these could be, in particular, abandoning the identity of values and, as already cited, exceeding the scope of conferred competences."

CCC thus for the future leaves free space for re-delegation of powers back to the Czech sovereign and for some sort of preclusion of effects and the enforcement of EU law in a case in which it is in conflict with the inviolable basis of Czech constitutionality. CCC sees itself as the final arbiter called upon to review the European legislation (which is the result of the exercise of delegated powers) that is empowered to identify and select which of European norms

will apply as long as they do not endanger the fundamental values of Czech constitutionality. In the event that the EU will take and exercise powers which were not (and, as defined in article 9 paragraph 2 of the Constitution, never could be) bestowed to it by the Czech sovereign, the result of these activities will not have the characteristics which the Court of Justice granted to EU law. It may be concluded that CCC by its "Solange" approach raises a warning finger towards the legislative power of the EU (in the same way as BverfG) and notes that it intends to respect the effects and character of the EU law only as long as this law is compatible with the basic values of Czech constitutionalism. CCC builds the relation between EU law and the Czech constitutional law on the principle that Ulrich Hufeld determined as the principle of review/scrutiny reservation. This reservation forms a basis for the review of "seceding" acts of the European Union.[14] All acts of the European Union that could be considered as such "deflections" must pass a test of conformity with the elementary requirements of Czech constitutional law as contained in article 1, paragraph 1 of the constitution (protection of sovereignty and democratic, rule of law based state) and in article 9, paragraph 2 of the constitution (Substantive Heart of Constitutionality).

3.2. … and revolt episode in practice

At the beginning of 2012 the Constitutional Court gave an important and surprising decision in the case of *Slovak pensions*. This decision in which the Constitutional Court directly opposed to the Court of Justice and used the "raised finger" was classified as uprising of the constitutional court vis-à-vis the EU law.

The core of the conflict between the Constitutional Court and the Court of Justice lays in their different view on the issue of pensions of Czech citizens that before the demise of Czechoslovakia worked for an employer based in Slovak part of the federation.

In Czech legal system there is a rule (promoted mainly by the CCC itself) according to which citizens of the Czech Republic who were in the period until 31 December 1992 employed by an employer based in the Slovak part of common state, are entitled to a supplementary payment up to the amount of the expected (theoretical) pension that would have been granted if all the insurance

[14] See Hufeld, U. Česká ústavní úprava vztahu k Evropské unii. Podklady a nález k evropskému zatýkacímu rozkazu [Czech Constitutional Regulation of Reation towards European Union. Basis and Decision in European Arrest Warrant Case]. *Časopis pro právní vědu a praxi*, 2008, vol. 16, no. 4, pp. 316.

periods from the time of the joint state were considered to be Czech periods. In contrast to that, the Court of Justice expressed the opinion (in the judgment C-399/09 Landtová) according to which payment of a supplement to old age which benefits solely the individuals of Czech nationality residing in the territory of the Czech Republic constitutes discrimination on the grounds of nationality which is prohibited under EU law. According to the Court of Justice EU law has to take priority over national rule on the supplementary payment notwithstanding that this rule was defined and upheld by the Constitutional Court.

The critical opinion of the Court of Justice became the central-point of a derogative decision of the Constitutional Court. It opposed the view of the Court of Justice and explicitly accused that I Landtová decision it went beyond the powers delegated by the Czech Republic to the European Union. Therefore for the first time in history it used the reservation formulated in its previous "European" cases. By the words of the CCC "there were excesses on the part of a European Union body that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was ultra vires."

CCC's decision provoked opinions according to which silent duel or how aptly labelled by Joseph Weiler and Ulrich Haltern – Cold War between the courts[15] (national courts and Court of Justice) grew into a real conflict. The question (still open) is what consequences will arise from this conflict. Jan Komárek wrote in connection with this decision that CCC was playing with the matches[16]. Of course there was and still is a space for the consideration of some responsibility regimes. But the quiet after the storm may lead us to the conclusion that it was mere negligible episode[17] rather than revolution. In any event it is indisputable that the CCC just crossed the Rubicon of "threats" and brings the Solange abstract revolt to the real life.

[15] Weiler, J. H. H., Haltern, U. The Autonomy of the Community Legal Order – Through the Looking Glass. *The Jean Monnet Working Paper*, 1996, no. 10.

[16] Komárek, J. Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution. Verfassungsblog, 22 February 2012.

[17] See Zbíral, R. Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12. A Legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires. *Common Market Law Review*, 2012, vol. 49, no. 4, pp. 1475–1492.

REVIEWS

Tomášek, M., Týč, V. et al.: The EU Law. Prague, Leges, 2013, 496 p.

As the EU law is becoming ever more complex, it is increasingly difficult for a textbook to strike a right balance between a text introducing only its basic principles and an overly detailed discussion of its peculiarities. The authors of a new textbook published last year – *Právo Evropské unie* [The EU Law] were well aware of it and attempted to write, in the authors' words, a "middle textbook", targeted in particular on students of Czech faculties of law. Hence, it was meant to provide sufficiently thorough theoretical background for the students, but not to go into the complexities of individual EU policies, which would require a significantly more voluminous publication. Even though some readers might unavoidably argue that certain topics were covered in too much and some in too little detail, the authors managed to fulfil their vision of a universal textbook.

The collective of authors is impressive and unique in the Czech context. The main authors, prof. Michal Tomášek and prof. Vladimír Týč, heads of Departments of European law at the Law Faculties of Charles University in Prague and Masaryk University in Brno respectively. The authors comprise not only academicians from these universities, but also prominent figures associated with the EU courts, including prof. Jiří Malenovský, a Judge at the Court of Justice, prof. Irena Pelikánová, a Judge at the General Court, and Martin Smolek, the Agent for the Czech Republic before the Court of Justice. Despite the number and different background of the authors, the text is highly coherent.

The textbook consists of three blocks, each representing approximately a third of its volume: the first block deals with principal properties and structure of the EU law and the EU institutions, the second with material law and the third with EU judiciary.

As far as the first block is concerned, the complexities of the EU legal order are presented in a clear and comprehensible way, as well as its relationship with national law. The authors pay proper attention to the situation in the Czech Republic, in particular with respect to the Constitutional Court's jurisdiction, more examples demonstrating the effects of the EU law within the Czech legal order might however further facilitate better understanding of the issues discussed. Similarly, the chapter on institutional law, including not only the institutional architecture of the EU, but also its powers, liability and legislative process, is well structured and clearly presented.

The EU material law is particularly difficult to discuss in publications of this kind; firstly, the EU law covers so many areas that it is clearly not possible to tackle them all in a "middle textbook", and secondly, most of the areas are

so intertwined with national law that a complex presentation would in fact substitute textbooks on these specific fields. As far as the choice of topics is concerned, the authors distinguish between "economic" and "citizenship" related material law, and dedicate a separate chapter to each of them.

In the economic area, the text covers the four freedoms, consumer protection, tax law, public procurement, competition law, economic and monetary union and trade policy; clearly, not all the "economic" policies were covered, but the choice obviously reflects the authors' teaching experience and it is not our ambition to question it. It is however this chapter where the reader realizes that the book was written by a numerous collective, as the level of detail varies with respect to certain topics. For example, approximately a third of the chapter is dedicated not only to the four freedoms, but also to the competition law; this however leaves relatively little space for other policies, e. g. the tax law was given 10 times less space than the competition law.

Concerning the citizenship-related material law, mainly the EU citizenship, fundamental rights and the judicial cooperation are covered. Similarly to what was mentioned above with respect to economic policies, it is extremely difficult for more authors to find the same level of detail, and some topics are inevitably discussed more thoroughly than others. However, this does not make the reading any less interesting.

The final and relatively extensive block is dedicated to the EU judiciary. The level of detail is unprecedented in Czech textbooks, and it even includes a model preliminary reference and annulment action. The quality of this part is undisputed, it is easy to read and it provides the reader with a perfect understanding of the peculiarities of the judicial process; having in mind the character of this textbook, it may however be asked whether less detail would not have been sufficient, leaving more room for the material law.

Overall, *The EU Law* provides a clearly structured, proficiently written and highly coherent textbook of European law, which is relevant not only to students, but to anybody who wants to understand the complex world of the European Union.

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Šišková, N. et al.: Lisbon Treaty and its Impacts on the European, International and National Law of the Member States, Prague, Leges 2012, 284 p.

The readers hereby receive another important work that covers a very interesting range of important issues. The publication is a result of work of a wide team of authors. Its layout is in the form of a monograph rather than proceedings, thanks to Assoc. Prof. JUDr. Naděžda Šišková, Ph.D., leader of the author team. It is divided into six parts, twelve chapters and a conclusion. Part one deals with a general characteristics of the Lisbon Treaty, part two with the Lisbon Treaty in respect of human rights, the third one with the Lisbon Treaty from the viewpoint of enhancement of democratic grounds of the EU, the fourth with the Lisbon Treaty and the EU juridical system, the fifth with the impact of the Lisbon Treaty on the joint foreign and safety politics, and the sixth chapter studies the Lisbon Treaty in reflections from courts of the Member States.

The preface is written by PhDr. Vojtěch Belling, Ph.D., State Secretary for European Affairs.

Despite being products of twelve authors, all twelve chapters are written in styles comparable as concerns literary standards and communicativeness.

In the preface Assoc. Prof. Šišková characterises the Lisbon Treaty as a hastily chosen solution after rejection of the Constitution for Europe.

Part one contains only one chapter, written by Assoc. Prof. JUDr. Pavel Svoboda, Ph.D. (Charles University, Faculty of Law, Department of European Law), titled "Lisbon Treaty is not an example of legal perfectness". The article, though rather brief, is rich in ideas and presents an analysis of the core problems of the Lisbon Treaty that occur in the law of diplomacy – in representation of its subject of international law in relation to other sovereigns of international law the way it is divided among the President of the European Council, High Representative of the Union for Foreign Affairs and Security Policy, the European Commission President, and the Commissioner for the EU enlargement and neighbour policies. The author highlights that such a division of the law of diplomacy places high demands on the desired EU cohesiveness since responsibility for the cohesiveness is rather problematic, too (in general, all EU bodies are responsible). In the next brief survey, yet very concise and convincing in argumentation, the author analyses other legal impacts of the Lisbon Treaty, relating to general issues of institutional interconnection, systematics, terminology and duplications.

Part two consists of Chapters 1–4. The author of Chapter II – "The Lisbon Treaty and Human Rights – the balance of profit and loss" is the leader of the

author team, Assoc. Prof. N. Šišková, Ph.D. (Head of Department of European Law, Faculty of Law, Palacký University in Olomouc). Already in the first sentences, the author expresses her critical attitude, since as concerns human rights she considers the Lisbon Treaty another partly wasted opportunity for the EU to establish its own coherent and truly efficient system of human rights protection at the level of supranational entities (page 26). In her analysis, she focuses at the legal status of the EU Charter of the Fundamental Rights, its peculiarities as concerns its subject content within the notion of the Lisbon Treaty, distinction between rights and principles through the Explanations Relating to the Charter of the Fundamental Rights and Art. 52(5) newly incorporated into the Charter. The next part of the chapter contains a high quality analysis of horizontal provisions of the Charter, Protocol No. 30 to the Lisbon Treaty and the issues of enforcement of human rights at EU level.

Chapter three (written by Mgr. Králová – Ministry of Foreign Affairs of the Czech Republic, European Law Department) deals at a highly qualified level with the extraordinarily important issue of accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms and effect of the accession on the EU legal system. The author managed to work out the chapter, founded on extensive source material, the way that fits very organically in the concept of the monograph. From the same viewpoint a certain problem may be found in chapter four, dedicated to the protection of the human right to the environment in the European context based on the Lisbon Treaty (author – Assoc. Prof. J. Jankův, Ph.D. – Department of international and European law, University in Trnava). The author's study, rich in source material and scientific literature, describes the development of the universal international legal regulation of the right to the environment, in particular in the European region, while only two pages of the chapter and partly its conclusion deal with the regulation of this right in the EU Charter of the fundamental rights.

Part three is introduced by Chapter Five – "The notion of the European citizenship and its transformations in the post-Lisbon era" (author – JUDr. Jiří Georgiev, Ph.D. – Section for European Affairs, Office of the Government of CR). The subject of interest of the author are concisely worked up innovations of institutional and competence nature as concerns the concept of EU citizenship, brought by the Lisbon Treaty, even though they change nothing in the derived and complementary character of the EU citizenship, as the author highlights. Further, the author deals with the strengthening of the position of the European Parliament, newly conceived as a body of European citizens and also by introduction of the European citizen's initiative that reflects the effort to approximate decision-making at the EU level to the citizens. The author pays a special attention to the interpretation of the EU Charter of Fundamental rights

by the EU Court of Justice, which, in his words "already in the past significantly developed the immediate relationship between the Union's citizen and the institutes of the European law, with the use of general legal rules (in particular non-discrimination)" (page 120). High appreciation belongs to Chapter six which following a very brief introduction analyses impacts of the Lisbon Treaty to legal regulation of the European ombudsman (author – Mgr. et Mgr. M. Přidal – Office of the Public Defender of Rights). The focal point of Chapter seven (author – JUDr. M. Hodás, Department of legislation and law, Ministry of education, science, research and sport of the Slovak Republic, and the Faculty of Law, Komenský University in Bratislava) lies in the topic of a principal importance – critical review of the changes that the Lisbon Treaty brings about in relation with the national parliaments.

Part four contains only one chapter – chapter eight – with the title Lisbon Treaty and the EU system of courts (author – JUDr. V. Stehlík, PhD. – Department of European law, Faculty of Law, Palacký University in Olomouc). The topic is of an extraordinary importance and the author offers concise study elaborated on the grounds of rich source material and scientific literature. The author sees the benefits of the Lisbon Treaty in establishment of a firm base for still stronger protection of human rights a) by enhancement of powers of the EU Court of Justice in the field of the third pillar, b) by integration of the EU Charter of Fundamental Rights into primary law. What I consider a positiveness of the study is the fact that the author limits the necessary description to minimum and the article thus presents an analytical set of assessments and reflections, well balanced and coherent in content.

Part five is introduced (chapter 10. – author dr. E. Ruffer, Ph.D., European Law Department, Ministry of foreign Affairs of the Czech Republic) by an extensive analysis of changes in the field of contracting international treaties within EU after the Lisbon Treaty's coming into effect. The chapter is apparently the work of an experienced expert both in theory and practice, since it is not of only an analytical-descriptive nature, but deals as well with occurring problems and their solutions. Further, Part five includes chapters 11 and 12, devoted to the European External Action Service (author – dr. J. Kušlita – Department of International Law and European Law, Faculty of Law, Trnava University) and the Stockholm Programme including Action Plan for its implementation, and EU Internal Security Strategy (author – Assoc. Prof. JUDr. B. Pikna, CSc., Department of International law and Security Studies, Metropolitan University in Prague).

Part Six consists of one chapter (No. 12, written by dr. O. Hamuľák – Department of European Law, Palacký University in Olomouc) titled Union versus republic (On the nature of the European integration, erosion of the state

sovereignty and the Czech Lisbon saga). This chapter is a set of carefully selected and well formulated issues, the solution for which the author offers in the light of reflection of Constitutional Court case law, seen from the comparative viewpoint (cf. in particular pp. 238–252).

Undoubtedly, the reviewed book is, in particular thanks to extraordinarily creative contribution of Assoc. Prof. N. Šišková, the leader of the author team, a valuable benefit to recognition of the current stage of development of the European Union. Critical assessment of the Lisbon Treaty, shown in many chapters of this monograph, in our opinion reflects the current conditions of the EU, which supporters of the rejected Constitution for Europe may call development retreat from the set objectives, stagnation and an unsuccessful compromise, while opponents of the EU strengthening, either from the viewpoint of mere consolidation of the EU Member States cooperation and more extensive bolstering of EU bodies, or from clearly anti-federalisation viewpoint, will consider the reached level of the EU development stipulated in the Lisbon Treaty and supplementing acts as a desirable a long-term step of the EU development.

The content of the book induces new asking of questions that were raised at the very establishment of the European Communities and were formulated over and over again during the European process of unification.

Though fully realising that the process of development of the society and its organisational and governing arrangement is something never ending and the only objective thereof is development as such, it may be useful as concerns the EU future, to consider a certain perceivable level of development that will mean an important divide in the current EU status. Many very experienced scientists and politicians already in early 1990's envisaged establishment of European federation through it unifying tendency. A well- known political scientist and lawyer (originating from a German family in Prague), professor of Harvard University Karel Deutsch at the first conference of foreign experts on the preparation of the new constitution for (then) ČSFR, held by the Salzburg Seminar of American Studies in April 1990, predicted that the establishment of the European federation may not be expected before late 2090's. Another participant to the conference, Canadian ex-prime minister Pierre Trudeau fully shared this consideration. Several years later Jacques Delors called the then established European Union "an unidentifiable legal object". In our opinion, this is given by the fact that EU has been transforming, with certain twists and phases of stagnation, from originally internationally legally established Communities into a community that gradually acquires attributes of statehood (a state is characteristic by a complete set of all attributes of statehood, not only by one or several of them), therefore into a subject of constitutional law that is not a subject of only international law, but also a subject of constitutional law,

legal sociology, theory of state, and constitutional legal comparatistics. Further, this consideration raises more questions. Will the European Federation, so far hidden in a misty future, be a classical federation as we know from the constitutional models defined during 18th – 20th centuries? While asking that question, we must add that asking thereof evokes the current actual development of constitutional and international arrangements, in which we clearly see that the reality of functioning of the state power and international relationships noticeably move away from the original arrangement model.

The process of globalisation, currently running worldwide, raises considerations on the establishment of a global constitution – global constitutionalism (cf. the recently established Global Constitutionalism, a journal published by Cambridge University Press, that has become very popular), its character and it particular its function that will substantially differ from the models of constitutionality on which constitutions of states founded in 18th – 20th centuries are based.

Constitutional arrangement of the European Union becomes the centre point of interest for constitutionalists and internationalists namely for the reason that nowadays it is clear that the process of constitutional globalisation in its initial stages will be distinguished by global regionalisation. Most probably, the European region, with regard to the scope of historical constitutional experience and democratic traditions, will become a laboratory to create a global constitutionalism.

Anyway, we may envisage that the function of the emerging EU constitutional system EU will be completely different from the functions of traditional state powers as they are fixed in still valid state constitutions and the way they are defined by modern theory of state and constitutional law. This function of the EU constitutional bodies will acquire features of the conception of governance formulated at the turn of 1980's and 1990's. According to the Commission on Global Governance[1], "the process of governance at global level should be approached in particular as interstate cooperation, including collaboration of non-governmental organisations (NGO), civil movements, private supranational corporations and capital market. The concept of governance is not viewed institutionally but from the viewpoint of process. It is the actual functioning of public power, emphasising that public power is considered the power that in practice exercises the public power, not the one that is exclusively defined by the constitution and laws. The reason may be seen in the fact that from the beginning 1990's the private sphere began to exert influence over the

[1] The Commission on Global Governance, Our Global Neighbourhood, Oxford University Press, 1995, pp. 2–3.

lagging state- and international institutions to the extent that practical solution of many issues, formerly belonging to the state power and international institutions established by the states, factually devolved over to the private sector that thereby acquired many attributes of public power".

One of the key questions that in our opinion arise before the authors of this reviewed book and its readers is the future determination of the European Union: will it grow towards the classical concept of statehood or towards the above mentioned concept of governance?[2] That question is asked by both theory and practice still more often today. Our opinion is that the future development will be characteristic by permeation of both the development trends.

In conclusion, we would like to acknowledge the author team led by experienced scientist N. Šišková for the creation of a valuable work that will enrich both theory and practice.

Josef Blahož[3]

[2] Eriksen, E. O., and Fossum, J. E., Europe at a Crossroads: Government or Transnational Governance, (in Joerges, Ch., Sand, I. S., Teubner, G., Transnational Governance and Constitutionalism), Oxford and Portland, 2004, pp. 115–143.

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Kerikmäe, T. et al.: Protecting Human Rights in the EU. Controversies and Challenges of the Charter of Fundamental Rights, New York, Springer, 2014, 195 p.

A recently published book, edited by Tanel Kerikmäe, professor at Tallinn Law School, contributes to the ongoing debate on the role that human rights play in the EU legal order, and specifically on effects brought about by the Charter of Fundamental Rights (hereinafter referred to as "Charter"). It is not meant to provide an exhaustive analysis of this extensive area; it rather presents several topics, both general and very specific, chosen by 13 authors of the individual book's chapters. Most of the authors are associated with the Tallinn Law School, but some do also come from other Baltic countries (Lithuania) and from Central Europe (Austria, Czech Republic). Hence, the authors' experience stems from legal systems which are discussed less frequently on the European level, thus providing a novel point of view to topics discussed more frequently in "bigger" jurisdictions.

In most of the contributions, the authors strive to reconcile the jurisprudence of the European Court of Human Rights (hereinafter referred to as "ECtHR") and the Court of Justice of the European Union (hereinafter referred to as "CJEU"), as professor Kerikmäe observes in his opening chapter. He also identifies another recurrent theme present in most of the articles – the discussion has only started and the CJEU's case law will need more time to settle down. As he puts it, "*whether the Charter will open a new era in the development of the EU […] remains unclear. Future practice […] will provide more answers".* A third theme, running through most of the contributions, draws our attention to the fact that human rights have started to play a significant role in areas traditionally associated "only" with economic arguments, such as the free movement of persons or competition law.

The first chapter, written by Tanel Kerikmäe himself, outlines the basic characteristics of the Charter and its place in the EU legal order, including its ambition to "*establish a dialogue between national and supranational levels*"; he also opens debate on horizontal effects of the Charter, i. e. to what extent an individual may invoke rights contained therein against another individual.

The following chapter, carved by Katrin Nyman-Metcalf, tries to evaluate whether the rights contained in the Charter are truly of universal nature, or whether they should be discusses contextually, taking into account the specific traditions and peculiarities of individual countries in which they are to be applied. She concludes that currently, the trends in the perception of human rights speak in favour of universality and that "*the EU and the Charter may lead by example and provide new understanding of [fundamental] rights*".

These rather theoretical opening chapters of the book are complemented by an article of Ondrej Hamuľák with a provocative title "Idolatry of Rights and Freedoms", concerned with the role the Charter played in the process of constitutionalization of the EU; he highlights the importance of fundamental rights being enshrined in the EU legal order, concluding that "*fundamental rights' protection played […] crucial role as the autopoietic argument […] accompanying the evolution of independent supranational legal order and its constitutionality*".

The rest of the chapters are concerned with specific, narrowly defined topics, illustrating how the discourse in these fields was altered by adoption of the Charter. Procedural rights are frequently being discussed, as in the Edita Gruodytė and Stefan Kirchner's article on the right to legal aid or Marco Botta and Alexandr Svetlicini's deliberations on fair trial guarantees in competition law enforcement. It is interesting that despite the wording of the Charter, we cannot expect any relevant change concerning the right to legal aid ("*the contribution of the Charter […] is less than spectacular*", as the article concludes). On the other hand, concerning the judicial review of competition enforcement decisions, even though the wording of the Charter delimiting the right to fair trial does not bring anything fundamentally new, there might be differences in jurisprudence of CJEU and ECtHR which may make the CJEU reconsider its previous case law; however, "*the potential diverging views between the courts in Luxembourg and Strasbourg will be clarified only when the EU accedes to the ECHR*".

Arguments based on fundamental rights, both procedural and substantive, are not uncommon in other areas under discussion, as in the Lehte Root's chapter on asylum, Katrin Nyman-Metcalf, Pawan Kumar Dutt and Archil Chochia's discussion of interplay between competition and intellectual property law or Kristi Joamet's analysis of marriage impediments in the context of free movement; these contribution not only summarise the current case law, but attempt to appraise its future trajectory as well.

In other areas, recourse to fundamental rights has so far been rather limited and the contributions contained in this book open new horizons for discussion, since these topics have so far been discussed mostly in the context of free movement of persons, as is the case with Katarina Pijletlovic's article on fundamental rights of athletes or Kari Käsper's discussion of free movement of students.

The individual chapters are well balanced, both by extent and style, and the choice of topics is illuminating. The whole book is thus both coherent and comprehensive, which is unfortunately often not the case with similar compilations. Overall, the book brings new insights into the place of fundamental

rights within the EU legal order and its possible future developments, and is sure to find its place among other publications on this topic.

Michal Petr[1]

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Šišková, N. et al.: European Law II. EU's Single Internal Market, Praha, Wolters Kluwer ČR, 2012, 263 p.

Even though a number of textbooks on the EU's internal market has already been written, also after the Lisbon Treaty coming into force (2009), is not a self-evident pleasure for a legal literature reader to come across a book that not only goes in depth, but is also readable while its scope does not disqualify the work in advance from the bookcase of an averagely overburdened lawyer. All these features may be attributed to the work European Law II – EU's Internal Single Market from the pen of Assoc. Prof. Naděžda Šišková and her team of renown authors from both academic environment and practice (Assoc. Prof. Bohumil Pikna, dr. Michal Petr, dr. Jiří Georgiev, dr. Blanka Vítová, dr. Ondrej Hamuľák), who are not necessary to introduce to the legal readers community.

The work is a positive proof of truthfulness of the saying "*the length of a professional treatise is in inverse proportion to the level of comprehension of the issue by the author"*. Next plus, necessary to mention, is the fact that even though the book was written by a team of authors, its impression is very homogenous and compact, which must be attributed to the thoroughgoing care by the leader of the authors team Naděžda Šišková.

The co-authors not only demonstrated masterly grasping of the theory and practice of their respective chapters, but also a wider knowledge of theory and case-law. For the reader, most positive is the fact that the authors team will not drown in their knowledge but actually cooks and serves the reader a meal which is tasty, colourful and easy to digest; however, they do not do it in a novelist's manner, but hold on to a clear and well-arranged pattern that meets all demands placed on a scientific work, and enables the reader to get an inside view into particular issues even when you do not feel like reading the whole work. Also, this systematic character proves that the authors have their respective branches fully under control.

Thus, the only remaining issue for the reviewer is the title of the work alone, which offers the reader a range of issues wider than mere EU internal market, but also e.g. the Area of Freedom, Security and Justice; therefore, a title like "European substantive law" or so would probably capture the entire content of the work more aptly.

Pavel Svoboda[1]

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INFORMATION

Czech Association for European Studies held its 3rd Annual Conference in Prague on the topic: *"The EU and the Czech Republic in 2014 – a reflection of the current state and future perspectives"*

The middle of June 2014 was an important date for the Czech Association for European Studies (CAES – Czech ECSA). It organised its Third Annual Conference, the event with cross border significance and international impact. The venue of the conference was the residence of the Czech Ministry of Foreign Affairs, the Czernin Palace in Prague. The Conference bore the title **The EU and the Czech Republic in 2014 – a reflection of the current state and future perspectives** and the event was held under the auspices of H.E. Mr Lubomír Zaorálek, Minister of Foreign Affairs of the Czech Republic. The conference was organised in cooperation with the Faculty of Law, Palacky University in Olomouc and Czech Ministry of Foreign Affairs. Over 20 detailed papers of the invited speakers and profound discussions took place within the two days, 12th and 13th June 2014. About 150 participants from several EU Member States as well as Eastern Partnership countries representing the academia, practice, state administration and diplomatic services were registered for this important event.

The Conference took place at the time of 10th anniversary of the accession of the Czech Republic into the EU and the 5th anniversary of the launching of the Eastern partnership policy and its goal was to reflect relevant actual problems of European integration, to summarize the results of the last elections to the European Parliament and discuss the issues related to the continuation of the Year of the European Citizenship.

The whole event and first day of conference was opened by the welcome address given by Assoc. Prof. Naděžda Šišková (the President of the Czech Association for European studies, Jean Monnet Chair in EU Law and Head of the Department of European law, Faculty of Law, Palacky University in Olomouc) who presented the goal, content and ambitions of the present annual conference. The opening panel then offered two papers of distinguished guests Mr. Juraj Chmiel (Special Envoy for the External Dimension of the EU

at the Ministry of Foreign Affairs of the Czech Republic, former Minister for European Affairs of the Czech Republic) who gave a speech on topic: "The Czech Republic and the EU in the turning year and the crucial times – the new challenges and reflections" and Assoc. prof. Pavel Svoboda (Faculty of Law, Charles University in Prague and newly elected Member of the European Parliament) with the presentation titled: "The elections to the European Parliament 10 years after the Czech accession to the Union – some considerations."

First discussion panel was devoted to the highly actual topic – *EU after the economic crisis*. This panel was chaired by dr. Emil Ruffer (Director of the European Law department, Ministry of Foreign Affairs of the Czech Republic) and offered the presentations of the four distinguished scholars. Prof. Fausto de Quadros (Department of Administrative Law, European Law and International Law, Jean Monnet Chair in EU law, Faculty of Law, University of Lisbon) presented paper titled "Europe after the economic crisis: towards a political Union" in which he analysed and critically evaluated the impact of the current economic crises to the further steps in deepening of the European integration. Prof. Takis Tridimas (Chair of European Law, Director, Centre of European Law, The Dickson Poon School of Law, King's College London) in his paper "The post-Lisbon integration paradigm: EU competences and EU rights" focused on the impact of the ever deeper integration and new competences of the European Union on the level of protection of individual (fundamental) rights. Dr. Lenka Pitrová (Head of Strategies and Institutions Department, EU Affairs Section, Office of the Government and Faculty of Law, Charles University in Prague) analysed the processes of changing and amending the EU "Constitution" both from legal and political point of view. Her paper bore the title: "The new trends in the modification of the content of the primary law of the EU". Last speaker Assoc. Prof. Lubor Lacina (Jean Monnet Chair in European Economic Studies, Jean Monnet Center of Excellence, Mendel University in Brno, Euroteam member) in the paper titled "Ex-ante Coordination of Economic Policies in Eurozone – Impact on the Czech Republic" offered the reflection of the selected instruments of the new economic governance in the Eurozone from the perspective of the economic science.

Second panel dedicated to the topic *European citizenship and the deepening of elements of the civic dimension of the Union* was chaired by the Assoc. Prof. Běla Plechanovová (Jean Monnet Chair, Head of the Department of International Relations, Faculty of Social Sciences, Charles University in Prague) and offered the presentation on the questions of identity of supranational and national institutions, legitimacy, cultural roots and constitutional aspects of the integration in general and ties between Union and individuals in particular. The panel put together dr. Jiří Zemánek (Judge of the Constitutional Court of

the Czech Republic) with the paper called "The Identity – building and democratic legitimacy beyond the nation state: the role of European citizenship"; Assoc. Prof. Alexander Balthasaar (Director, Institute for State Organization and Administration Reform, Austrian Federal Chancellery, Vienna) who presented the topic "Cultural, religious and humanist inheritance of the Europe"; and prof. Josef Blahož (Institute of State and Law of the Czech Academy of Science) with the paper titled "European Union and Welfare (Social) State – Reforms and Transformation".

Third thematic panel dealt with the topic *European citizenship and human rights* and the papers given in it were focused on the new challenges for the European Union in the field of protection of fundamental rights after Lisbon and economic crisis. This panel was presided by Assoc. Prof. Naděžda Šišková (the President of the Czech Association for European studies, Jean Monnet Chair in EU Law and Head of the Department of European law, Faculty of law, Palacky University in Olomouc). The panel includes three speeches. Prof. Werner Schroeder (Head of the Institute, Institute for European and International law, University of Innsbruck) presented the paper titled "The EU and the Rule of Law – Dealing with a Rule of Law Crisis in the Member States." Prof. Pavel Šturma (Head of the Department of the International law, Faculty of law, Charles University in Prague) spoke about "Protection of Fundamental Rights in the EU: how many levels?" and dr. Emil Ruffer (Director, European Law Department, Ministry of Foreign Affairs of the Czech Republic) had a presentation on the problem of "The accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms".

First day of the Conference was concluded by the award ceremony on which president of the Czech ECSA, Assoc. Prof. Naděžda Šišková and vice-president of the Czech ECSA prof. Eva Cihelková handed the awards of the Czech Association for the significant contribution to the development of science in the field of European studies to the notable laureates: prof. Oldřich Dědek (in the field of European economy); prof. Michal Tomášek, prof. Pavel Šturma and Assoc. Prof. Vlasta Kunova (all three in the field of EU law).

Second day of the conference was opened by the *fourth thematic panel* dedicated to the topic: *The EU, the Czech Republic and external relations. Perspectives of the Eastern Partnership. The destiny of the EU – Ukraine Association Agreement. The Association Agreements with other states of Eastern Partnership.* This section was chaired by dr. Michal Petr (Faculty of Law, Palacky University in Olomouc) and comprised of the presentations given by dr. Petr Mareš, CSc. (Special Envoy for Eastern Partnership of the Ministry of Foreign Affairs of the Czech Republic) who offered the paper titled "Eastern Partnership: the Czech Contribution to the Development of the Policy" and

Assoc. Prof. Liudmyla Falalieieva (Academy Advocacy of Ukraine, Kiev) who presented the paper called "Adaptation of the Eastern Partnership to the new geopolitical realities: legal aspects".

Last section of the conference hosted the special guests form the Ukraine and was devoted to the topic *Rule of Law, human rights and approximation of laws as a conditio sine qua non for acceptation of duties of the Associated state*. This panel was presided by dr. Ondrej Hamuľák (Vice-dean of the Faculty of Law, Palacky University in Olomouc). The panel offered the insights to the legal developments in the Ukraine related to the process of the approximation and future association of Ukraine with the European Union. First speaker prof. Natalie Kuznetcova (Department of civil law, Kiev National University Schevchenko) presented the paper "The reform of the judicial system of the Ukraine – in accordance with the standards of the quality of justice". Second member of the panel Assoc. Prof. Olena Zakharova (Department of Justice, Kiev National University Schevchenko) gave the speech about "The access to justice and its integral parts under the Ukrainian legislation". Next speaker prof. Oksana Grabovska (Kiev National University Schevchenko) spoke about "European Convention on the protection of human rights and fundamental freedoms and its application in the civil proceedings of the Ukraine". Last member of the panel who presented the final paper of the whole conference was Assoc. Prof. Lydia Gruzinova (Academy of Advocacy of Ukraine, Kiev) devoted her paper to the topic of "Influence of EU law on the transformation of the labour legislation of Ukraine".

Third Annual Conference of the Czech Association for European Studies represented one of the most profound and influential academic events in the first half of the year 2014 in national but also European perspective. The conference joined the representatives of academia and practice from different parts of the European Union and also guest from outside the EU and offered the wide space for the discussions and finding the solutions of the hot topics of the current state of the European integration (its internal as well as external dimension). The selected papers given on this event are presented to the wider academic community thanks to upcoming volume of the journal *European Studies – The Review of European Law, Economics and Politics* published by Czech ECSA in cooperation with the Wolters Kluwer. There are always people responsible for the organisation of every event. Czech ECSA conference in Prague couldn't be so successful without the hard work of the Scientific and Organization Committee which comprised of Assoc. Prof. Naděžda Šišková (Palacky University in Olomouc), prof. Fausto de Quadros (University of Lisbon), prof. Eva Cihelková (Economic University in Prague), prof. Běla Plechanovová (Charles University in Prague) dr. Emil Ruffer (Ministry of Foreign

Affairs of the Czech Republic), Mgr. Jan Škeřik (Ministry of Foreign Affairs of the Czech republic) and dr. Ondrej Hamuľák (Palacky University in Olomouc).

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ABOUT THE JOURNAL

European Studies – The Review of European Law, Economics and Politics is a peer reviewed periodical in the form of year-book of the Czech Association for European Studies. The presented journal reflects the interdisciplinary character of this scientific society, therefore it does not limit to only one discipline within the European studies, but on the contrary, it pursues for a multi-disciplinary approach and analysis of various aspects of the European integration. That is why the concept of the journal accounts with the scientific articles and expertise not only from the field of European law but from European economy, European political science, EC/EU history and other relevant disciplines relating to supranational entities as well.

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

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- Authors are encouraged to submit their articles electronically. MS Word format (.doc) is the preferred format but rich text format (.rtf) is acceptable.
- No fees or charges are required for manuscript processing or publishing of the papers.
- An abstract up to 150 words should precede the main text, accompanied by up to 15 key words.
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