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Address of editor's office
Česká asociace pro evropská studia – Czech ECSA, PF UP, tř. 17. listopadu 8, 771 11, Olomouc, Czech Republic.
Email:
nadezda.siskova@upol.cz;
ondrej.hamulak@upol.cz.

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OBSAH

LIST OF CONTRIBUTORS

Ondrej Hamuľák is a Senior researcher in EU law at the Department of International and European Law and Vice-dean at Faculty of Law, Palacký Univesity in Olomouc, Czech Republic.

Roman Petrov is a Head of the Jean Monnet Centre of Excellence at the National University of Kyiv-Mohyla Academy, Ukraine and holder of the Jean Monnet Chair in EU Law.

Michal Petr is a Senior researcher in EU law at the Department of International and European Law at Faculty of Law, Palacký Univesity in Olomouc, Czech Republic.

Jiří Georgiev is a Senior researcher in EU law at the Department of Constitutional Law at Faculty of Law, Charles University, Prague, Czech Republic.

Monika Forejtová is a Head of the Department of Constitutional and European Law at Faculty of Law, University of West Bohemia in Pilsen, Czech Republic.

Lenka Fojtíková is an Associate professor at the Department of European Integration at Faculty of Economics, VŠB-Technical University Ostrava, Czech Republic.

Hamed Alavi is a Lecturer at the Chair of Economic Law, Tallinn Law School, Tallinn University of Technology, Estonia.

Tanel Kerikmäe is a Professor in EU law, Head of the Jean Monnet Chair in EU law and director of the Tallinn Law School, Tallinn University of Technology, Estonia.

Tatsiana Khamichonak is a student at the Tallinn Law School, Tallinn University of Technology, Estonia.

Kristi Joamets is a Head of the Chair of Economic Law Tallinn Law School, Tallinn University of Technology, Estonia.

Lehte Roots is an Associate professor and Head of Chair of Public Law, Tallinn Law School, Tallinn University of Technology, Estonia.

Svitlana Vyshnovetska is an Associate professor at the Department of Civil Law and Civil Procedure; Law Institute of the National Aviation University. Kyiv, Ukraine.

Khrystyna Kmetyk is an Associate professor at Department of Civil Law and Civil Procedure; Law Institute of the National Aviation University. Kyiv, Ukraine.

Jaroslaw Kundera is a Professor at Institute of Economics, University of Wroclaw, Poland.

Alexander Balthasar is a Privatdozent at Karl-Franzens-University of Graz and head of Institute for State Organisation and Administrative Reform, Austrian Federal Chancellery, Vienna, Austria.

David Kopal is the Ph.D. candidate at Department of International and European Law at Faculty of Law, Palacký Univesity in Olomouc, Czech Republic and junior official at the Czech Ministry of Finance.

Anastasiia Fialkovska is the Ph.D. candidate at Faculty of Economic and Management of Production, Odessa National Economic University, Ukraine.

Iuliana Kikhaia is the Ph.D. candidate at Faculty of Economic and Management of Production, Odessa National Economic University, Ukraine.

Fausto de Quadros is a Professor of European Law and International Law, director of Centre of Excellence at Faculty of Law, University of Lisbon, Portugal and Holder of Jean Monnet Chair on Constitutional Law of the European Union.

Josef Blahož is a Leading scientific collaborator of the Institute of State and Law of the Academy of Sciences of the Czech Republic elected member of the International Academy of Comparative Law in Paris.

Naděžda Šišková is an Associate professor in EU Law and Associate professor in International Relations and the Head of Jean Monnet Centre of Excellence in EU Law at Faculty of Law, Palacký University in Olomouc, Czech Republic and a President of the Czech Association for European Studies.

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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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ARTICLES

Is Charter of the Fundamental Rights of the EU Taking Social Rights Seriously?

Ondrej Hamuľák*

Summary: The paper discusses the issue of a new position of the social rights brought by the adoption of a legally binding Charter of Fundamental Rights of the EU. The author examines whether formal turnover and incorporation of social rights into a single catalogue means also a revolution in the level of protection of these rights (which are traditionally associated with a cautious approach by both the national states and the international community). Author answers this question with a certain degree of scepticism. He points to the significant limitations which the Charter connects with social rights – namely the incompleteness of the catalogue, references to national law, an understanding of social rights as the principle of limited justiciability, and finally he discusses the special impact of the Protocol (No. 30) on the application of the Charter of Fundamental rights of the European Union to Poland and the United Kingdom on the social rights.

Keywords: Charter of the Fundamental Rights of the EU, Chapter IV. Solidarity, Protection of Social Rights, Formal Revolution, Material Doubts.

1. Introduction

Granting the legally binding force to the Charter of Fundamental Rights of the European Union (Charter) via adoption of Treaty of Lisbon[1] brought significant changes within the EU legal system as whole. Thanks to the Charter, the project of European integration entered a new stage and got a new image.

* Ondrej Hamuľák, Senior lecturer Faculty of Law, Palacký University in Olomouc, Czech Republic. Contact: ondrej.hamulak@upol.cz. This paper was issued with the support of the Jean Monnet Centre of Excellence at the Faculty of Law, Palacky University which is sponsored by the Jean Monnet Programme (project number 565445-EPP-1-2015-1-CZ-EPPJMO-CoE).

[1] The central provision is article 6 TEU which defines the three cornerstones of the protection of fundamental rights at the supranational level – Charter of fundamental rights of the EU, European Convention for the Protection of Human Rights and Fundamental Freedoms (potentially) and fundamental rights as general principles of law. These three pillars seems to provide Union within the most complex system of the promotion of fundamental rights which shall work as the one body of tools with three different heads – like Cerberus guarding the mythic underworld.

Breakthrough importance of adopting a legally binding catalogue of fundamental rights has several aspects:

- It can be viewed from the perspective of constitutional dogmatic where adoption of own internal catalogue of rights and freedoms completes the constitutional system of the Union. Next to the more or less established formal/procedural constitutional rules (relations of the Union and the Member States, the internal rules of separation of powers between a several Union institutions, quasi-federal rules on the application of Union law in the national practice, etc.) it brought clear material constitutional rules defining the relationship between individual and public authorities into the to the supranational constitutional system.[2]
- Moreover, this step can be evaluated from the perspective of some constitutional symbolism where the existence of the human rights catalogue serves as important legitimizing tool[3] vis-á-vis ever-expanding and deepening powers of the European Union or Member States acting on behalf of Union.[4]
- Finally, the legally binding Charter serves as an important revolutionary novelty in terms of theory and history of human rights. The Charter by its wide content revolutionizes the classic approach to human rights which used to be recognized by the separate documents in line with the theory of several human rights generations. The Charter abandons this traditional approach at least formally and recognizes civil and political rights as well as economic, social and cultural rights as part of one general human rights record.

Economic, social and cultural rights (hereinafter simply titled by the general term social rights) are traditionally assigned to the so-called second generation

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[2] Contours of material constitutionality of the European Union are defined primarily by the syss tem of protection of fundamental rights. The question of the role and place of fundamental rights within the European Communities and the European Union has undergone major developments during the history of integration (see ŠIŠKOVÁ, N. Actual Issues of the Creation of Constitutionalism in the Field of Human Rights at the EU Level and its Prospects. In ŠIŠKOVÁ, N. *The Process of Constitutionalisation of the EU and Related Issues*. Groningen: Europa Law Publishing, 2008, p. 7–13.) But it is non-disputable that only by adoption of the binding catalogue it reached the level of complexity and clarity.

[3] NEACSU E. D. The Draft of the EU Charter of Fundamental Rights: A Step in the Process of Legitimizing EU as a Political Entity, and Economic-Social Rights as Fundamental Human Rights. *Columbia Journal of European Law*, 2001, no.1, p. 141–146.

[4] Lenaerts and Cambien speak about increasing of the output democracy of the EU in this ree gards. Charter legitimizes EU with the same value as increased role of principle of representation and parliamentarism in the EU (the input democracy). See LENAERTS, K.; CAMBIEN, N. The Democratic Legitimacy of the EU after the Treaty of Lisbon. In WOUTERS J. (eds.). *European Constitutionalism beyond Lisbon*. Antverps: Intersentia, 2009, p. 185–207.

of human rights. They are significantly different to the widely accepted first generation rights – the civil and political rights. The difference between the first and the second generation lies mainly in the fact that former sum of rights and freedoms is accepted as self-determined and self-executive in politically, legal and also economic sense. Later the category of human rights is deeply understood as conditional in all aspects. From the political point of view the social rights are dependent on the willingness of political representation for their active systemic provision, they require an active role of law and autonomously (so without the active role of politics) they can hardly lead to the protection of individuals. They are strictly conditional also in economic sense, because many social rights are subject to the economic power, possibilities and supplies of the States. Finally social rights are interlocked with the existence of precise implementing regulation following the general non-applicable constitutional or international norm. Only existence of these ordinary laws which concretize the general norms makes the social rights living legal instruments. Different character and social rights is connected also with some formal diversity, both at the level of classical international law and constitutional law of the states. In the first case, social rights tend to be catalogued in autonomous legal documents separately to the first generation rights[5]. In the second case, the comparison within the constitutional catalogues appear significant differences in access to social rights, where these rights are neglected in some constitutional text; or treated as secondary (conditional) rights; or rarely assimilated with the first generation rights.

Having in mind the abovementioned differentiated traditional approach to the social rights, we must accept that the Charter of Fundamental Rights of the EU by putting all rights together to the one document provides the distinctive formal turnover. Charter of Fundamental Rights of the EU is certainly an ambitious project, an effort to (at least documentary) universal approach to human rights. But the project which gathers in one place the rights of all generations and types, have a priori raised doubts and some resistance, especially on the part of Member States. Therefore the main question is, whether such a formal (documentary) turnover can also be associated with any change in a material view on the rights of the second generation and whether it – in terms of protection – equalized the social rights with the core part of the human rights system? In this paper I will deal with the question whether the Charter brought a systematic fundamental change in the approach to the social

[5] See example of European Social Charter next to the European Convention for the Protection of Human Rights and Fundamental Freedoms or International Covenant on Economic, Social and Cultural Rights next to the International Covenant on Civil and Political Rights.

rights (elevating the level of their protection) or whether inclusion of the social rights into the Charter has only some symbolic value. I must admit that I answer this question rather negatively and sceptically. The form of anchoring social rights in the Charter has some critical points that undermine the hypothesis of universal access to fundamental rights. My rather critical opinion is based on the following assumptions, which I see as main factors decreasing the quality of protection of social rights in the framework of the Charter of Fundamental Rights:

- The first reason is a certain incompleteness. Inclusion of social rights into the Charter was not precise enough and overlooked some categories of these rights as they are recognized in other international instruments. Moreover, there are some doubts about possible reduction in standards of protection of social rights in Europe identified in the European Social Charter and its revised form via application and interpretation of the Charter in future.
- Next problem is wide use of so called national conditionality clauses in connection with most of the rights contained in Title IV of the Charter which brings the question whether any supranational approach to these rights is even possible.
- An important factor is also potential schematic understanding of the Title IV of the Charter as chapter containing mainly (only) the principles within the meaning of art. 52 para. 5, i.e. only unenforceable, secondary provisions unable to offer directly applicable individual rights.
- The last problem is connected with the adoption of the Protocol (No. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, which specifically affects the rights contained in Title IV (Solidarity) of the Charter.

2. Incomplete and "unstable" catalogue of social rights

Looking closely at the Title IV of the Charter we may found that it contains only some social rights and cannot be considered as exhaustive catalogue comparable to the European Social Charter of 1961, and its revised version of the 1996. The rights contained in the Title IV can be systematically divided into two general groups:

- the rights related to employment (thus mostly the workers' rights)
- and rights related to social responsibility, broadly construed.[6]

[6] See O'NEILL A. Social Rights in the Charter: Employment and Social Security. [online] Avaiı lable at: http://www.era-comm.eu/charter_of_fundamental_rights/library.html

The first group of rights includes workers' right to information and consultation within the undertaking (art. 27 of the Charter), the right to collective bargaining and action (art. 28 of the Charter), the right to protection in the event of unjustified dismissal (art. 30 of the Charter), the right to fair and just working conditions (art. 31 of the Charter), the prohibition of child labour and protection of young people at work (art. 32 of the Charter), the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave (art. 33 para. 2 of the Charter). The second category contents the provision about special status of the family in society and its protection (art. 33 para. 1 of the Charter), the right to social security and social assistance (art. 34 of the Charter), the right to health care (art. 35 of the Charter), access to services of general economic interest (art. 36 of the Charter), environmental protection (art. 37 of the Charter) and consumer protection (art. 38 of the Charter). Mixed nature on the border between the two groups has a right of access to placement services (art. 29 of the Charter).

It is true that Title IV anchors some traditional social rights of workers (which form the so-called "hard core" of the European Social Charter). And Charter itself gives floor to the social rights also elsewhere (e.g. art. 12 para. 1 containing the right of everyone to associate in the trade unions to protect their interests; art. 15 governs the right of free choice of profession and the right to work, or, for example, art. 25 and art. 26 concerning the rights of older persons and persons with disabilities). On the other hand, it is true that the text of the Charter lacks some other social rights such as the right to a fair wage and a minimum income, the right of workers to participate in the creation of working conditions and working environment, etc.[7] In my view this selective approach to the social rights brings the first manifestation of a precautionary attitude to the codification of these rights at the supranational level. I consider this selective approach and the omission of certain social rights not only as disputable and risky but also as slightly superfluous. It is because the creators of the Charter in fact introduced the complex sum of other limiting "measures" related to the social rights. I will discuss later on for example the national conditionality clauses or understanding of social rights merely as principles. These limiting instruments might have been use also in connection with, for example, omitted right to a fair wage. If one can accept the limitations via interpretation or application of some restrictive measures, he can hardly accept the absolute omission of come classical social rights. Even limited acceptation is far better than ignorance of some right.

[7] See GIJZEN, M. The Charter: A Milestone for Social Protection in Europe? *Maastricht Journal of European and Comparative Law*, 2001, no. 1, p. 40–41.

Other negative aspect I want to point on in this part of my paper is certain instability in the wide European level of protection of social rights which was brought by the adoption of the Charter. By this instability I understand open question whether a future application or interpretation of social rights in the Charter can lead to a reduction in level of protection of such rights compared to the standards set by the European Social Charter, the Revised European Social Charter and case-law of the European Committee of Social Rights? On one hand it is clear that the Charter builds on these documents and explanations relating to the Charter refer to them as an important source of inspiration. But on the other hand, no provision of the Charter defines clearly the relationship of the Charter and the social charters adopted on the level of Council of Europe. If we look at the European Convention on Human Rights, which represents another important source of inspiration for the Charter, it is expressly perceived as a minimum standard of protection that cannot be reduced by applying the Charter (see art. 52 para. 3 of the Charter). With regard to the social charters of the Council of Europe, however, the principle of non-regressive interpretation is not present in the text of Charter. How can we understand this silence about relation between EU Charter and social charters? If one tends to the positivistic interpretation, the conclusion therefore could be that the EU Charter defines its own autonomous access to social rights, which is not linked to standards settled by the social charters of the Council of Europe and thus creates space for possible regressive understanding of a particular individual right[8]. I disagree with this hypothesis. Using the postulate *inclusio unius est exclusio alterius* would be the improper simplification in this case. No direct reference to the social charters in comparison with express reference to the Convention cannot be interpreted as ignorance of the level of protection of social rights within the system of Council of Europe. On the contrary, the social charters (at least their "hard core" rights) should operate as a minimum standard, which may not be reduced by the application and interpretation of the EU Charter. I construct my conclusion on set of systemic arguments:

- The preamble of the Charter proclaims that the Union Catalogue is only a reaffirmation of rights already contained in other documents.
- Art. 53 of the Charter prohibits the restriction of the level of protection of the rights recognized by "international law and by international agreements to which the Union or all the Member States are party."
- Respect for fundamental social rights set out in the European Social Charter is expressly stated in art. 151 TFEU, which represents the initial "programming" provisions of Title X – Social policy.

[8] Ibid p. 40.

In addition we may use some teleological and historical arguments in favour of principle of on regression of the standards of protection of social rights:

- The intent of the authors of the legally binding EU Charter was to endorse further development of human rights within the Union, what logically comprises the respect for already reached level of protection of any right.
- The Charter in general is based on a universalist approach to human rights and according to its preamble its goal is not only preserve but strengthen the protection of fundamental rights in Europe.
- Finally, the application and interpretation of the Charter cannot be seen implemented in isolation from developments of human rights protection within the Communities and the Union. Social rights have been politically declared (by adoption of Community Charter of Fundamental Social Rights of Workers back in 1989) as well as enshrined in the Court's case-law (with express references to social charters of the Council of Europe as a source of inspiration, see for example case C-438/05 Viking Line).

3. Social rights and national conditionality

Another expression of the sensitive and reserved access of the lawmakers to the social rights may be seen in the inclusion of so called national conditionality clauses in respect of many rights contained in Title IV of the Charter. According to these clauses the pure recognition or practical application of some fundamental right is conditional and must be in compliance with national laws or even national practice. These clauses are present also in some other parts of Charter[9] but in connection with social rights they occurrence is most common. The national conditionality appears in the provisions related to the right of workers to information and consultation within the undertaking (art. 27 of the Charter), the right to collective bargaining and action (art. 28 of the Charter), the right to protection in the event of unjustified dismissal (art. 30 of the Charter) the right to social security and social assistance (art. 34 of the Charter), the right to health care (art. 35 of the Charter) and the right of access to services of general economic interest (art. 36 of the Charter).

The importance of conditionality clauses is emphasized also within the final 'horizontal' provisions of the Charter, which in art. 52 para. 6 lay down the duty to give full account to the national laws and practices as specified in the Charter. The main question, however, is how we shall conceive the meaning

[9] E.g. art. 9 (Right to marry and right to found a family), art. 10 para 2 (Right to conscientious objection) or art. 14 para 3 (Freedom to found educational establishments).

of these references to national laws and national practices, what importance do they have for practice of law enforcement? Explanations which accompany the Charter do not provide for any detailed guidance in respect of art. 52 para. 6. They contain only succinct suggestion according to which such clauses present a manifestation of the application of the spirit of subsidiarity. Link to subsidiarity in relation to the obligation to respect the national laws and practice is in my view a bit confusing.

First of all I understand the principle of subsidiarity as some 'legislative' rule setting when and who may, in certain areas, have the right to legislate. In this regard it gives the impression that the rights associated with a national conditionality clause have only a programmatic nature and cannot be enforced directly, but only on the basis of existing implementing legislation. This would mean the inclination to the classical understanding of social rights and thus move apart from the universal concept of the Charter[10].

Secondly, the principle of subsidiarity primarily determines the relations between Member States and the Union within the framework of the separation of powers, which act as a limit (mainly legislative) to the action of the Union. Subsidiarity is simply a boundary between Member States and Union action. Subsidiarity does not preclude all Union's action. It only limits the scope of Union's action by obligation to respect the legislative capacity of Member States. Therefore if we accept that application and interpretation of certain rights which are connected with the national conditionality is determined by national law, it is not quite clear where the space for autonomous legislative activity of the Union lays. The reference to the subsidiarity is superfluous also from another point of view. In fact in most of areas, where reference to national law and practice occurs, the Union has only limited or no legislative power at all.[11]

It is clear that inserting a reference to national law was intended to modify the effects of the Charter in relation to the sensitive problematic types of fundamental rights. Giuseppe Martinico puts these clauses into the relation with art. 4 TEU (which among other things protects the national identity of the Member States[12]) and understands then as another instrument which shall protect

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[10] For the critics of this vertical subsidiarity see KENNER, J. New Frontiers in EU Labour Law: From Flexicurity to Flex-Security. In DOUGAN M., CURRIE S. (eds.). *50 Years of the European Treaties Looking Back and Thinking Forward*. Oxford: Hart Publishing, 2009, p. 290

[11] See PEERS, S. Commentary on the Article 52 (6) of the EU Charter. In PEERS, S., HERVEY, T. (eds.). *The EU Charter of Fundamental Rights. A Commentary*. Oxford: Hart Publishing, 2014, p. 1513.

[12] See further ARNAIZ, A. S., LLIVINA, C. A. (eds.). *National Constitutional Identity and European Integration*. Cambridge: Intersentia, 2013.

national prerogatives of Member States, restrict the interpretative activity of the Court of Justice and limit "federal" (i.e. from the center) incorporation of certain rights to the Union constitutional structure[13]. Personally, I find references to national law and practice as unfortunate part of the system of the Charter. Once again, they interfere with the universal concept of the Charter and raise doubts about its supranational potential. Even though I may understand the motives of Member States I disagree with the chosen method. Since the Charter opens the space for differentiate approach by using the general derogation clause (art. 52 para. 1 of the Charter) case by case (at application level) it seems needless to include the general limiting clause for all situations (at normative level).

Notwithstanding the abovementioned criticism we must accept that national conditionality clauses form a part of the Charter and therefore we must look for their proper interpretation. The question is whether national law and practice shall limit some particular right in absolute meaning and derogate the effects of the Charter in the context of the specific Member State in respect with that right? I disagree with this rigid interpretation and incline to the relative understanding of the national conditionality as proposed by Steve Peers in the recent commentary to the Charter. Peers accepts only the relative effect of the references to national law, which although they may limit the scope of protection of certain rights, they shall not lead to their total elimination.[14] This conclusion is based on the practice of the Court of Justice that, in cases where Member States have a right to limit the exercise of certain individual rights steaming from EU law (e.g. free movement rights) takes a restrictive approach and rejects the absolute derogation which would touch upon the very nature of such rights.

4. Rights versus (social) principles in the Charter

One of the most discussed questions in relation to the adoption of the legally binding supranational catalogue of fundamental rights is a certain dichotomy which appeared in the content of the Charter. The Charter introduces two categories of provisions (and two levels of protection thereof) as it distinguishes between rights and freedoms on one hand and principles on the other. The dual

[13] See MARTINICO, G. *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe*. New York: Routledge, 2012, p. 95–96.

[14] See PEERS, S. Commentary on the Article 52 (6) of the EU Charter. In PEERS, S., HERVEY, T. (eds.). *The EU Charter of Fundamental Rights. A Commentary*. Oxford: Hart Publishing, 2014, p. 1514.

nature of the provisions of the Charter is underlined in the text of its Preamble and also in provision determining the addresses of the duty to protect the fundamental rights (EU and Member States) who have a duty to respect the rights and observe the principles. But the main provision which determines the dual approach to the content of the Charter is "horizontal" art. 52 para. 5. This provision raises the biggest controversy and opens wide discussions. According to it "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality." Explanations to the Charter in respect of this provision states that "Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities."

The text of art. 52 para. 5 of the Charter and its explanation give a clear message, saying that parts of the Charter which includes the principles have a significantly weaker position in comparison to those including rights and freedoms. Judicial enforcement of principles is significantly limited. Most scholars tend to the opinion according to which the principles do not provide individuals with the subjective claims enforceable directly in the proceedings before the courts.[15] The provisions containing the principles serve as programming stipulations and content of the principle, therefore they have only political importance – the principles are mere aspirations conditioned by the express will of the legislator: "the public authorities, and in particular the legislature, are called upon to promote and transform the 'principle' into a judicially cognisable reality, while at all times respecting the objective framework (the subject-matter) and its purposive nature (the results) as determined by the wording of

[15] See e.g. LADENBURGER, C. Institutional Report. In LAFFRANQUE, J. (ed.). *The Protection of Fundamental Rights Post Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*. Reports of the XXV FIDE Congress. Tallinn: Tartu University Press, 2012, p. 183; BESSELINK, L. General Report. In LAFFRANQUE, J. (ed.). *The Protection of Fundamental Rights Post Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*. Reports of the XXV FIDE Congress. Tallinn: Tartu University Press, 2012, p. 109–110; or PRECHAL, S. Commentary on the Article 52(5). In PEERS, S., HERVEY, T. (eds.). *The EU Charter of Fundamental Rights. A Commentary*. Oxford: Hart Publishing, 2014, p. 1505.

the Charter establishing the 'principle'".[16] Principles represent the conditional rights. Once embodied in the text of implementing measure, they get the concrete shape and only then they can be relied on by the individuals before the courts. There are also some opposite voices claiming the indivisibility of human rights.[17] Dichotomy established by the Charter clearly interferes with this universalistic approach. Even though it is sympathetic, the radical universal view on human rights seems to me a bit idealistic and contrary to the contemporary state of things. Hypothesis according to which all rights are equal is not valid merely because not all rights are the same. Even European Convention distinguishes between the irrevocable rights (like prohibition of torture, prohibition of slavery etc.) and those which may be derogated in special circumstances. Also material comparison between some rights confirms the distinctions where for example respect to right to life is without any doubts clearly self-executive and directly enforceable and for example right to fair trial or freedom of association always call for at least simple legal framework to be actively exercised.

I am prepared to accept that there are "stronger" and "weaker" rights. What I hesitate to accept is the exact provision (art. 52 para 5) portraying this fact. First of all it gives rise to wide debates about meaning, scope and content of that provision. One of the most discussed problems is determining which part of the Charter falls to the "weaker" category described above? Explanations related to the Charter give just a few demonstrative examples of provisions containing the principles (e.g. articles 25, 26 and 37). The situation is even complicated once we deal with the information according to which, in some cases, a provision of the Charter may contain both elements of a right and of a principle (e.g. Articles 23, 33, 34). The exact enumeration of the Charter provisions containing principles is missing. In this regard Charter brings a certain amount of uncertainty. But it is not necessary to perceive this openness negatively. It seems to me that open texture of the Explanations is balancing the rigid formulation of the Charter here. It is clear that list of principles as well as definition of their impact and relevance shall be brought by the future case-law. Court of Justice has therefore a wide space for individual approach in determining which provisions contain rights and which only programing stipulations. So even tough the uncertainty is a bit problematic it shall not be perceived completely in negative. On the other hand what must be mentioned

[16] Para 50, Opinion of Advocate General Cruz Villalón delivered on 18 July 2013, Case C-176/12 Association de médiation sociale, Association de médiation sociale (C-176/12) ECLI:EU:C:2014:2

[17] For some examples see LACIAKOVÁ V., MICHALIČKOVÁ, J. Rights and Principles – Is There a Need to Distinguish Them in the Charter of Fundamental Rights of the European Union? *Contemporary Readings in Law and Social Justice*. 2013, no. 2, p. 235–243.

as negative is a kind of hypocrisy which is present here. The approach towards principles seems to me only half way done. In connection to these principles which are mentioned as examples in the Explanations one must accept their weaker nature. In respect of them the Charter introduces the static and fixed scenario and excludes (or strongly complicates) any further flexible interpretation and development of principles to the at least partially directly enforceable rights. In connection to all other potential principles, we must wait for the reaction of the judicial practice and therefore we may only speculate about the margin of their possible direct applicability.

The abovementioned openness and uncertainty have a big negative impact in the field of social rights. The general approach is that the principles as some special category of human rights rules must be associated mostly with the Title IV of the Charter "Solidarity". I am not prepared to accept this generalization for some specific reasons:

- First of all this schematic understanding does not have any base in the text of preamble, Explanations or "travaux préparatoires" of the Charter. It is interesting enough that first draft of the Charter (2000) did not include a special provision (like todays art. 52 para 5) speaking about the "no-applicability" of principles. Charter just prescribes the duty to observe the principles (art. 51 para 1) by the Union and (in limited scope) by the Member States. The notion of principles was never clearly bound by the solidarity rights.
- Secondly, Title IV clearly includes some provisions which confer clear and directly enforceable claims to individuals. One of the traditionally accepted is the right of collective bargaining and action (art. 28 of the Charter), which was accepted as the enforceable right on the EU level even before Treaty of Lisbon. Another example of the clearly enforceable rights is the cogent prohibition of child labour (art. 32 of the Charter).
- Thirdly, such a generalized view completely denies the universalistic ethos of the Charter and codification of all generation of human rights in one catalogue. Here I must repeat that I did not perceive all types of human rights as equal and same. But although I'll accept social rights as mostly conditioned, in does not mean that whole category must be locked in the rigid class of non-applicable political aspirations.

5. Protocol No. 30 and social rights

One of the most discussed and emotionally portrayed questions related to the Charter was adoption of the Protocol (No. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the

United Kingdom. This protocol reflects serious political sensitiveness of the adoption of the supranational human rights catalogue. It clearly expresses some doubts raised in the UK and Poland. And it opened the wide debates and academic reflections discussing its legal impact, scope, interpretation and relation to the Charter. The existence of special source of primary law dealing with the question of application of the Charter in two Member States naturally evokes the specific mode of approach to the supranational catalogue in these countries. Thera are plenty of commentaries and reflections to this protocol. Most of the commentaries refer to the fact that Protocol No. 30 does not make any exception or opt-out in connection to the application of the Charter in the countries concerned, and that it is primarily interpretative and explanatory tool.[18] According to the major view, this protocol does not introduce any particular special status of the Charter but only confirms the following facts:

- that the Charter does not extend the competencies of the Union;
- that the application of the Charter must be fully in line with the principle of subsidiarity;
- that application of the Charter in connection with the Member States actions is not universal but on the contrary limited to the cases when Member States are implementing EU law (see art. 51 para 1 of the Charter);
- that in the case of the references to the national law of practice included in the particular provisions of the Charter, these national laws and practices must be taken into full account whenever some particular provision is to be applied vis-á-vis some Member States.

Such a view is based mostly on the wording of the preamble to the Protocol No. 30 (see para. 8 and 9) and teleological interpretations. I do not have any objection to this approach to the Protocol No. 30. But what I perceive as problematic and challenging is general use of this neutralizing understanding. For sure it can be accepted in connection with the art. 1 para 1 and art. 2 of the Protocol which have a general scope and general meaning.[19] But what can be seen as problematic and still open is application of the "no opt-out"

[18] See e.g. BARNARD, C. The EU Charter of Fundamental Rights: Happy 10th Birthday? *European Union Studies Association Review*, 2011, no. 1; or FORNI, F. Free movement of "Needy" Citizens After the Binding Charter. Solidarity for All? In DI FEDERICO, G. *The EU Charter of Fundamental Rights. From Declaration to Binding Instrument.* New York: Springer, 2011, p. 139–140.

[19] Finally this was confirmed by the Court of Justice in its decision in case C-411/10 N.S. and others. Here the Court confirmed that Protocol no. 30 does not represent any exemption or opt-out of the application of the Charter in UK. This opinion of the Court was raised in the case related to the art. 4 of the Charter (prohibition of inhuman or degrading treatment) so in connection to the classical right belonging to the 1st generation of human rights.

interpretation in connection with the art. 1 para 2 of the Protocol No. 30, the provision which relates directly to the social rights. This provision states that: "In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law." The language and complicated design of this provision causes the greatest debate and doubts. Debates turn around the question whether that provision must be construed as declaratory or as constitutive?[20] In the first case, it would not mean any exception for the United Kingdom and Poland, but it would only illuminate (with the meaning and impact for all Member States) that Title IV of the Charter does not include any judicially enforceable individual right but only the principles in the meaning of art. 52 para 5 of the Charter. Conclusion according to which title Solidarity includes only principles was refused in previous chapter of my paper. Also here I am not prepared to accept such a schematic view. Therefore I tend to the second interpretation of the art. 1 para 2 of the Protocol (the constitutive one) according to which Protocol No. 30 may serve as an opt-out in relation to the social rights. And by using of this interpretation we get to the negative result saying that Charter in respect of (in maximum)[21] two Member states and in the field of social rights is not capable to produce legal effects autonomously. In fact – from the perspective of enforceability of social rights – we are facing the "lose-lose" situation here. I prefer the second "lose" variation just because of its smaller negative impacts. It's clear that opt-out scenario would mean total non-enforceability of rights included in the chapter IV only for addressees of the Protocol No. 30. In contrast to that, the interpretative understanding of art. 1 para 2 would touch all Member States what I am not prepared to accept.

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[20] See LADENBURGER, C. Institutional Report. In LAFFRANQUE, J. (ed.). *The Protection of Fundamental Rights Post Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*. Reports of the XXV FIDE Congress. Tallinn: Tartu University Press, 2012, p. 180.

[21] It is because in fact this option means opt-out only in connection with single Member State – the United Kingdom, whereas Poland in its own law recognizes social rights to an even greater extent than provided for in Title IV. In this respect see also Declaration (no. 62) by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007: "Poland declares that, having regard to the tradition of social movement of "Solidarity" and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union."

6. Conclusion

In the introduction of this paper I put the question whether the formal turnover and the inclusion of social rights into a single catalogue of fundamental rights within the EU (next to the traditionally well-established rights of first generation) can be understood as a revolution in the level of protection of these rights and shift in their material understanding. I answered this question with certain amount of scepticism and offered a critical view on the real substantial change in this regard. But I have to confess that my conclusions were reached mainly by a static analysis of the structure of the Charter and the place of social rights in its system. From this textual point of view, it seems to me that the Charter has brought the one step forward and two steps back. The future certainly will be different. I realize that once the actual text of the Charter will get into the practice of the Court of Justice, we will get more colourful and maybe more positive picture. I am aware of the fact that the Charter is a living instrument of protection of rights in the same sense as other human rights catalogues. The fact that social rights have been associated with the most vivid resistance of the authors of the Charter is certainly not a surprise. It is after all that these rights are traditionally accompanied with the cautious approach of the states and the international community. On the other hand I do not think that it was necessary to create such a large amount of protective nets against this category of human rights. This enormous caution undermines the unity of the Charter, is in the opposition to the universalistic tendencies and eventually also lightens the revolutionary significance of this catalogue. Fortunately the law does not enter into real life through books but through action, thus opening space for a restrictive view of all the limits of social rights, which I discussed in my paper. Nick Bernard writes: "Lack of binding effect does not necessarily mean lack of legal effect."[22]

[22] BERNARD, N. A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU. In: HERVEY, T.; KENNER, J. (eds.). *Economic and Social Rights under the Charter of Fundamental Rights of the European Union*, Oxford: Hart Publishing, 2003, p. 247–268.

EU Association Agreements with Ukraine, Moldova and Georgia: New Instruments of Integration without Membership

Roman Petrov*

Keywords: European Neighbourhood Policy, Eastern Partnership, association agreement, EU acquis.

Summary: This paper analyses the EU Association Agreements (AAs) with Ukraine, Moldova and Georgia. It argues that this new legal framework, the objective of which is to establish a unique form of political association and economic integration, is characterised by three specific features: comprehensiveness, complexity and conditionality. After a brief overview of the background of the EU's relations with Ukraine, Moldova and Georgia, the following aspects are scrutinised: legal basis and objectives, institutional framework and mechanisms of enhanced conditionality and legislative approximation. Based upon a comparison with other EU external agreements, it is demonstrated that the AAs are innovative legal instruments providing for a new type of integration without membership.

1. Introduction

Association Agreements between the EU and third countries have become one of the most recognisable brands of the EU external policy. In particular, this relates to the countries of the EU's eastern neighbourhood (Ukraine, Moldova and Georgia), which have either already signed Association Agreements with the EU (Ukraine), or are about to do so in the near future. The new generation of the EU Association Agreements (AAs) with the EU's eastern neighbours will substitute outdated partnership and the Association Agreements which were concluded in 1994–1998[1]. The solemn signing of the AAs between the

* Roman Petrov, Jean Monnet Chair in EU Law, Head of the Jean Monnet Centre of Excellence at the National University of Kyiv-Mohyla Academy, Ukraine. Contact: petroveulaw@gmail.com.

[1] More on the partnership and cooperation agreements by this author in "The Partnership and Cooperation Agreements with the Newly Independent States" in A. Ott & K. Inglis (eds.) *European Enlargement Handbook* (Asser Press), 2002, pp. 175–194.

EU and Ukraine, Moldova and Georgia took place at the EU Summit in Brussels on 27th June 2014, followed by ratifications by national parliaments in Moldova, Georgia and Ukraine[2]. This long awaited event culminated a very long negotiation and signature process that had lasted since 2008. Ukraine's road towards signing the AA was extremely dramatic. Due to mounting economic and political pressure from Russia, the government of Ukraine decided to suspend the process of preparation for signature of the EU-Ukraine AA on 21st November 2013[3]. Following this news, hundreds of thousands of Ukrainians went to the streets. The "Maidan" revolution, which claimed more than a hundred victims, resulted in the dismissal of President Victor Yanukovich on 22nd February 2014 and the election of a new pro-European president Petro Poroshenko on 25th May 2014. As a consequence, the "most ambitious agreement the EU has ever offered to a partner country"[4] is back on the agenda and was signed along with the Moldovan and Georgian AAs on 27th June 2014[5].

Entering into force of the AAs will inevitably lead to the consideration of the legal effect and impact of these agreements on the legal systems of Ukraine, Moldova and Georgia. Yet there is no straightforward clarification of these issues because the AAs are going to be the very first framework international agreements in the modern history of Ukraine, Moldova and Georgia which imply their deep and far-reaching integration into the legal order of supranational international organisation.

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[2] The Moldovan Parliament expediently ratified the Association Agreement on 2nd July 2014. It was shortly followed by ratification by the Georgian Parliament on 18th July 2014. The final accord was played during the simultaneous ratification of the Association Agreement by the Ukrainian Parliament and the European Parliament (ratified all three agreements) on 16th September 2014. Meanwhile, all three Association Agreements are under a lengthy process of ratification by parliaments of the EU Member States. Therefore, the interim application of the Association Agreements is taking place in accordance with the EU Council's decisions (Council Decision 2014/295/EU of 17th March 2014 and COM(2014)609). Application of Title IV (deep and comprehensive free trade area) of the EU-Ukraine Association Agreement has been postponed till 1st January 2016, due to political and security pressure of the Russian Federation.

[3] The Ukrainian government's decision cannot be disconnected from the Russian proposal to establish a Eurasian Union building upon the already existing Customs Union between Russia, Belarus and Kazakhstan. On the background of this initiative and its implications for the EU-Ukraine relations, see: G. Van der Loo and P. Van Elsuwege, "Competing Paths of Regional Economic Integration in the Post-Soviet Space: Legal and Political Dilemmas for Ukraine", 37 *Review of Central and East European Law* (2012), 421–447.

[4] H. Van Rompuy, Press remarks by the President of the European Council following the EU-Ukraine Summit, Brussels, 25th February 2013 (EUCO 48/13).

[5] European Council, "Statement at the signing ceremony of the Association Agreements with Georgia, Republic of Moldova and Ukraine", Brussels, 27th June 2014, EUCO 137/14. Available at: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143415.pdf>, accessed 10 July 2014.

Taking the above as a starting point, the aim of this paper is to analyse what constitutional challenges will arise before Ukraine, Moldova and Georgia in the course of implementation of the AAs into their legal systems. The paper focuses on two major challenges to this intricate process. The first challenge is how to ensure effective implementation and application of the AAs within the Ukrainian, Moldovan and Georgian legal orders. The second challenge is how to solve potential conflicts between the AAs and the Constitutions of Ukraine, Moldova and Georgia.

2. Objectives and specific features of the Association Agreements with Ukraine, Moldova and Georgia

The AAs between the EU and Ukraine, Moldova and Georgia are the most voluminous and ambitious among all EU Association Agreements with third countries[6]. These are comprehensive mixed agreements based on Article 217 TFEU (Association Agreements) and Articles 31(1) and 37 TEU (EU action in area of Common Foreign and Security Policy)[7]. There are many amendments introduced to these agreements. Most prominent of them are strong emphasis on comprehensive regulatory convergence between the parties and possibility of application of a vast scope of the EU acquis within the Ukrainian, Moldovan and Georgian legal orders. Of particular significance in the AAs is the ambition to set up a Deep and Comprehensive Free Trade Areas (DCFTA), leading to gradual and partial integration of Ukraine, Moldova and Georgia into the EU Internal Market. Accordingly, the AAs belong to the selected group of "integration-oriented agreements", i.e. agreements including principles, concepts and provisions which are to be interpreted and applied as if the third country is part of the EU. It is argued that the AAs are unique in many respects and, therefore, provide a new model of integration without membership.

The AAs with Ukraine, Moldova and Georgia are innovative legal instruments which are characterised by three specific features: comprehensiveness,

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[6] For example, the EU-Ukraine AA comprises 7 titles, 28 chapters, 486 articles, 43 annexes of about 1000 pages.

[7] The EU-Ukraine Association Agreement (OJ 2014 L161). EU-Moldova Association Agreement (Proposal for a Council Decision on the conclusion of the Association Agreement between the European Union and its Member States on the one side, and the Republic of Moldova on the other side, of 10th March 2014, COM(2014)146 final). The EU-Georgia Association Agreement (Proposal for a Council Decision on the conclusion of the Association Agreement between the European Union and its Member States on the one side, and Georgia on the other side, of 10th March 2014, COM(2014)156 final).

complexity and conditionality[8]. The AAs are comprehensive framework agreements which embrace the whole spectrum of EU activities, from setting up deep and comprehensive free trade areas (DCFTA) to cooperation and convergence in the field of foreign and security policy, as well as cooperation in the area of freedom, security and justice (AFSJ)[9].

The complexity of the AAs reflects a high level of ambition of Ukraine, Moldova and Georgia to achieve economic integration in the EU Internal Market through the establishment of the DCFTAs and to share principles of the EU's common policies. This objective requires comprehensive legislative and regulatory approximation, including advanced mechanisms to secure the uniform interpretation and effective implementation of relevant EU legislation into national legal orders of Ukraine, Moldova and Georgia. In order to achieve this objective, the AAs are equipped with multiple specific provisions on legislative and regulatory approximation, including detailed annexes specifying the procedure and the pace of the approximation process for different policy areas in more than 40 annexes and based on specific commitments and mechanisms identified in both the annexes and specific titles to the agreement.

Furthermore, the AAs are founded on a strict conditionality approach, which links the third country's performance and the deepening of its integration with the EU[10]. In addition to the standard reference to democratic principles, human rights and fundamental freedoms as defined by international legal instruments (Helsinki Final Act, the Charter of Paris for a New Europe, the UN Universal Declaration on Human Rights and the European Convention on Human Rights and Fundamental Freedoms)[11], the AAs contain common values that go beyond classic human rights and also include very strong security elements, such as the "promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destruction, related materials and their means of delivery"[12].

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[8] These features of the AAs were described for first time by Peter Van Elsuwege in Guillaume Van der Loo, Peter Van Elsuwege, Roman Petrov "The EU-Ukraine Association Agreement: Assesment of an Innovative Legal Instrument", EUI Working Papers (Law) 2014/09.

[9] See Title II and III of the AAs.

[10] For example, the preamble to the EU-Ukraine AA explicitly states that "political association and economic integration of Ukraine within the European Union will depend on progress in the implementation of the current agreement as well as *Ukraine's track record in ensuring respect for common values, and progress in achieving convergence with the EU in political, economic and legal areas* [emphasis added].

[11] Arts. 2 EU-Ukraine, EU-Moldova and EU-Georgia AAs.

[12] Art. 2 EU-Ukraine AA and Arts. 3 EU-Moldova and EU-Georgia AAs.

Apart from the more general "common values" conditionality, the AAs contain a specific form of "market access" conditionality, which is explicitly linked to the process of legislative approximation. Hence, it is one of the specific mechanisms introduced to tackle the challenges of integration without membership. Of particular significance is the far-reaching monitoring of Ukraine's, Moldova's and Georgia's efforts to approximate national legislation to the EU law, including aspects of implementation and enforcement[13]. To facilitate the assessment process, the governments of Ukraine, Moldova and Georgia are obliged to provide reports to the EU in line with approximation deadlines specified in the Agreements. In addition to the drafting of progress reports, which is a common practice within the EU's pre-accession strategy and the ENP, the monitoring procedure may include "on-the-spot missions, with the participation of EU institutions, bodies and agencies, non-governmental bodies, supervisory authorities, independent experts and others as needed"[14].

3. Effective implementation and application of the AAs within the Ukrainian, Moldovan and Georgian legal orders

Implementation and application of the AAs within the legal systems of Ukraine, Georgia and Moldova will be governed by their national constitutional laws. Provisions of the constitutions of Ukraine, Georgia and Moldova on application of international agreements follow the same approach and provide that in case of conflict of the AAs provisions with their national legislation (excluding national constitutions), the former prevails. Once duly ratified by the Parliaments of Ukraine, Georgia and Moldova, the AAs will became an inherent part of their national legal systems as any other duly ratified international agreement[15].

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[13] Art. 475 (2) EU-Ukraine AA, Arts. 448-449 EU-Moldova AA, Arts. 414-415 EU Georgia AA.

[14] Art. 475 (3) EU-Ukraine AA, Art. 450 EU-Moldova AA, Art. 416 EU Georgia AA.

[15] Article 9 of the Ukrainian Constitution of 1996 provides that: "International treaties in force, consented by the Verkhovna Rada of Ukraine [Ukrainian Parliament] as binding, shall be an integral part of the national legislation of Ukraine. Conclusion of international treaties, contravening the Constitution of Ukraine, shall be possible only after introducing relevant amendments to the Constitution of Ukraine". Full text in English is available at <http://www.president.gov.ua/en/content/constitution.html>, last accessed on 10th July 2014. Article 8 of the Moldovan Constitution of 1994 provides that: "The Republic of Moldova pledges to respect the Charter of the United Nations and the treaties to which she is a party, to observe in her relations with other states the unanimously recognized principles and norms of international law. The coming into force of an international treaty containing provisions

Relevant provisions of the Constitutions of Ukraine, Georgia and Moldova imply that on the one hand, properly ratified AAs will not only be equated to the same status as national laws, but will also enjoy a priority over conflicting national legislation[16]. On the other hand, the AAs cannot overrule conflicting provisions of the national constitutions, and the legal systems of Ukraine, Georgia and Moldova do not envisage direct enforceability of international agreements in the national legal order.

The AAs are not just ordinary international agreements, but complex framework legal structures that contain not only specific norms that govern the functioning of the association relations and DCFTA between the EU and Ukraine, Moldova and Georgia, but also envisage a possibility of application of a vast scope of the "pre-signature" and "post-signature" EU acquis[17] within the legal system of the eastern neighbouring countries. The scope of the EU acquis to be applied by Ukraine, Moldova and Georgia covers not only primary and secondary EU laws, but also EU legal principles, common values, and even case law of the ECJ, as well as specific methods of interpretation of the relevant EU acquis within their legal systems. Hitherto, the Ukrainian, Moldovan and Georgian legal systems have not faced the necessity to implement and effectively apply a dynamic legal heritage of an international supranational organisation[18]. Subsequently, adherence of Ukraine, Moldova and Georgia to

contrary to the Constitution shall be preceded by a revision of the latter". Full text in English is available at <http://ijc.md/Publicatii/mlu/legislatie/Constitution_of_RM.pdf>, accessed on 10th July 2014. According to Article 6(2) of the Constitution of Georgia, an international treaty or agreement of Georgia, unless it contradicts the Constitution of Georgia, the Constitutional Agreement shall take precedence over domestic normative acts. Full text in English is available at <http://www.parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf>, accessed 10th July 2014.

[16] Article 19(2) of Law of Ukraine "On International Treaties of Ukraine" provides that "If duly ratified international treaty of Ukraine contains other rules then relevant national legal act of Ukraine, rules of the respective international treaty should be applied". Article 19 of the Moldovan Law No. 595-XIV "On International Treaties" of 24th September1999 states: "international treaties shall be complied with in good faith, following the principle of *pacta sunt servanda*. The Republic of Moldova shall not refer to provisions of its domestic legislation to justify its failure to comply with a treaty it is a party to" (*Monitorul Oficial,* 2 March 2000, No. 24). Article 6 (1) of the Law of Georgia "On International Treaties" states that an international treaty of Georgia is an inseparable part of the Georgian legislation. "Parlamentis Utskebani", 44, 11/11/1997.

[17] For more on application of "pre-signature" and "post-signature" EU acquis in the EU external agreements, see R. Petrov "Exporting the *acquis communautaire* through EU External Agreements" (NOMOS, Baden-Baden, 2011).

[18] May be with exemption of the application of the EU sectoral "energy" acquis under the framee work of the Energy Community which Ukraine joined in 2010. See R. Petrov "Energy Community as a Promoter of the European Union's 'Energy Acquis' to Its Neighbourhood", 38(3) Legal Issues of Economic Integration (2012), 331–35.

the dynamic EU acquis via the AAs will encapsulate a plethora of challenges to their national legal orders.

One of the serious challenges to be faced by the eastern neighbouring countries is the reluctance of the judiciaries in the eastern neighbouring countries to apply and effectively implement international law sources in their own judgments[19]. In practice, the Ukrainian, Moldovan and Georgian courts refer mainly to the international agreements which are duly signed and ratified by their national parliaments and which are self-executing within the Ukrainian legal system. Even in these cases, the correct application of international agreements is not guaranteed. It happens because one of the most important impediments for the application of international law by the Ukrainian, Moldovan and Georgian judiciaries is the correct understanding of these international conventions by national judges. The application of the AAs by the eastern neighbouring countries' judiciaries will increase through increasing familiarity with the AAs and the EU legal order as well, due to claims on behalf of the Ukrainian, Moldovan and Georgian nationals, based on provisions of the AAs and the EU "acquis"[20].

In the writer's opinion, the objective of effective implementation and application of the AAs may be achieved by issuing a special implementation law that will clarify all potential conflicts of provisions of this agreement with Ukrainian, Moldovan and Georgian legislative acts. For example, Ukraine has already gained some experience in ensuring the implementation and application of the European Convention of Human Rights (ECHR), which Ukraine ratified in 1997. The ratification of the ECHR by Ukraine took place by means of two laws. The first law was the law on ratification of the ECHR, wherein Ukraine recognised the jurisdiction of the European Court on Human Rights (ECtHR)[21]. The second law was a special law on application of case law of the ECtHR in Ukraine. It imposed on Ukraine a duty of mandatory and timely

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[19] R. Petrov and P. Kalinichenko, "The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine", 60 International & Comparative Law Quarterly, (2011) 325–353. This happens mainly due to: 1) the belief that international case law is not relevant to civil law systems; 2) the translation of case law and jurisprudence; 3) the lack of translation of case law into Ukrainian to help judges adjust their decisions to best European standards. Furthermore, the Verkhovna Rada of Ukraine is not always expedient in solving conflicts between ratified international agreements and national legislation.

[20] More on judicial activism and voluntary application of the EU acquis in the eastern neighbouring countries see P. Van Elsuwege and R. Petrov, "Legal Approximation of EU Law in the Eastern Neighbourhood of the EU: Towards a Common Regulatory Space?", (Routledge Press, 2014).

[21] Law of Ukraine "On Ratification of the European Convention on Human Rights 1950, First Protocol and protocols№ 2, 4, 7 and 11" of 17th July 1997, № 475/97-ВР.

execution of all judgments of the ECtHR related to this country[22]. In accordance with these laws, judgments of the ECtHR are being formally accepted by the national judiciary as sources of law and Ukrainian judges frequently refer to the ECtHR judgments in their decisions. However, the rate of effective application of the ECtHR case law in Ukraine is considered as unsatisfactory and lags far behind other European countries[23].

The special law on implementation of the AAs may solve much more complicated issues than the Ukrainian law on ratification of the ECHR in 1997. For instance, this law will face the necessity to clarify how binding decisions of the Association Councils should be applied in Ukraine, Moldova and Georgia. Direct applicability of the Association Councils' decisions will depend on their undisputed acceptance by national judiciaries. The special law on implementation of the AAs must clarify whether the ECJ case law constitutes a part of the EU sectoral acquis contained in the AAs' annexes. This issue is of prime importance for the Ukrainian, Moldovan and Georgian governmental agencies and the judiciaries which will deal with the interpretation of various elements of the EU sectoral acquis within their national legal orders. Another challenge is to clarify how the EU directives listed in the annexes to the AAs should be implemented into the legal system of Ukraine, Moldova and Georgia. In other words, may this process take into account the choice of form and method of implementation of the EU directives listed in the annexes to the AAs? Last but not least, what are the legal means of transposing the EU dynamic acquis into the Ukrainian, Moldovan and Georgian legal systems? All these issues will be novel for the relatively immature legal systems of Ukraine, Moldova and Georgia and, therefore, have to be answered in the special law on implementation of the AAs.

Ukraine, Moldova and Georgia may study and apply the experiences of other third countries which signed Association Agreements with the EU and issued national laws on implementation of these agreements. For instance, in 2001 the Croatian Parliament ratified the Stabilization and Association Agreement (SAA) and at the same time enacted the Act on Implementation of the SAA, which required implementation of all secondary association acquis, but did not envisage its direct effect within the Croatian legal order[24]. The

[22] Law of Ukraine "On Execution of Judgments and Application of Case Law of the European Court of Human Rights" of 23rd February 2006, № 3477-IV.

[23] See the 7th Annual Report of the Committee of Ministers 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights' in 2013. Available at <http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf >, last accessed 30th May 2014.

[24] S. Rodin, "Requirements of EU Membership and Legal Reform in Croatia" (2001) 38 Politička misao 87–105.

Norwegian Parliament adopted a statutory law on implementation of the EEA Agreement in 1992. This law granted provisions of the EEA Agreement and its secondary law a supremacy over conflicting national legislation. The Norwegian law on implementation of the EEA Agreement clarified that relevant EU regulations are to be implemented without change, but the implementation of EU directives must take into account the choice of form and method of implementation[25]. In order to ensure effective application of the relevant EU acquis within myriad of sectoral agreements with the EU, Switzerland adopted several implementation laws too. For example, Federal Law on Swiss Internal Market in 1996 mirrors most of the relevant EU acquis and Swiss Law on Federal Parliament ensures "euro compatibility" of Swiss law drafts with the EU acquis[26].

4. Conclusion

To conclude, we have set out a number of considerations which lead us to believe that the signature of the AAs with the EU will trigger significant internal reforms in the eastern neighbouring countries. First of all, the future AAs will serve as a template for further political and economic reforms in these countries. The obligation to share the EU's common democratic values will imply regular monitoring by the EU institutions. Thereby this should prevent the eastern neighbouring countries from undemocratic practices. The new joint institutions set up under the framework of the AAs will help to pursue the programme of approximating the laws with the help of their binding decisions. The process of effective implementation of the AAs will constitute the greatest challenge for Ukraine, Moldova and Georgia. These countries have to prove their adherence to the EU's common democratic and economic values, and ensure the proper functioning of their deep and comprehensive free trade areas. The latter objective may be achieved only under the condition of establishing truly competitive market economies and the adoption of international and EU legal standards. Ukraine, Moldova and Georgia will be bound by decisions of the dispute settlement body established by the AAs. Following the widely

[25] Statute of 27th November 1992, nr. 109. For more detail see K. Bruzelius, "The Impact of EU Values on Third Countries' National Legal Orders: EU Law as a Point of Reference in the Norwegian Legal System" in F. Maiani, R. Petrov, E. Mouliarova (eds.), *European Integration without EU Membership: Models, Experiences, Perspectives,* European University Institute Working Papers (Max Weber Programme), 2009/10, 81–89.

[26] F. Maiani, "Legal Europeanisation as Legal Transformation: Some Insights from Swiss 'Outer Europe'" in F. Maiani, R. Petrov, E. Mouliarova (eds.), *European Integration without EU Membership: Models, Experiences, Perspectives,* European University Institute Working Papers (Max Weber Programme), 2009/10, 111–123.

used practice in the EU's external agreements, the AAs contain so-called "evolutionary" and "conditionality" clauses. These are provisions in the EU's external agreements with specific objectives (for instance, granting a visa-free regime, access to all freedoms of the EU Internal Market), the attainment of which is conditional either on certain actions on behalf of a party to an agreement (such as the elimination of trade barriers and uncompetitive practices) or the effective functioning of democratic and market-economy standards (such as free and fair elections and fighting corruption).

Looking at the pattern of future implementation and application of the AAs and their impact on the Ukrainian, Moldovan and Georgian legal systems we may be concluded with a suggestion that the success of this process is threefold. First, the efficient implementation and application of the AAs implies considerable constitutional reforms in Ukraine, Moldova and Georgia in order to enhance the direct enforceability of international agreements. Second, effective application of the AAs requires Ukraine, Moldova and Georgia to issue implementation laws that will clarify all potential challenges of this process for their national legal systems. Third, the scope of the EU acquis to be adopted by Ukraine, Moldova and Georgia is massive and covers not only EU laws, but fundamental EU principles, doctrines and the ECJ case law. Ukrainian, Moldovan and Georgian civil servants and judges will require in-depth training in EU law in order to be able to apply the EU acquis in their everyday activities. In case these challenges are successfully met, Ukraine, Moldova and Georgia could claim the fruits of closer European integration and to engage into an expanding European Legal Space.

Privilege against Self-incrimination in International, European and Czech Law

Michal Petr*

Summary: Fair-trial guarantees were originally developed for the protection of natural persons accused of criminal conduct, taking into account the fact that such persons might be punished by imprisonment in case they would be found guilty. These guarantees stem from international, European and national law and the corresponding jurisprudence. Increasingly, this jurisprudence is being employed in proceedings of different nature – proceedings with legal persons, most often undertakings, equipped constantly with professional legal representation. Most case-law of such nature is connected with antitrust proceedings. On an example of privilege against self-incrimination, this article will argue that in antitrust proceedings against undertakings, the traditional jurisprudence, developed for the purposes of criminal proceedings, cannot be fully employed.

Keywords: Competition Law; Fair Trial; Fundamental Rights; Self-Incrimination

1. Introduction

The right to fair trial constitutes a fundamental right of any participant to any proceedings where the participant's rights and duties are being determined. Fair trial is especially important in cases where the participants are accused of illegal conduct and where sanctions may be imposed on them. Fair trial guarantees are regulated on various levels, including national, international and EU law. Due to inherent characteristics of these various legal systems, the interpretation of procedural rights is to certain extent different on every regulatory level.

Procedural safeguards were originally developed in order to protect the rights of natural persons, accused of committing a crime and threatened with imprisonment; nonetheless, they are currently applied in non-criminal pro-

* Michal Petr, Senior lecturer and Member of Jean Monnet Chair and Centre of Excellence, Faculty of Law, Palacký University in Olomouc, Czech Republic. Contact: michal.petr@upol.cz. This Article is based on the author's lecture on the conference "*The Charter of EU Fundamental Rights*" in Prague, 22 May 2015.

ceedings with non-natural persons. We will argue in this article that the fair trial guarantees may (and ought to) be more limited in non-criminal (or "less" criminal) cases.

National authorities are put in an especially precarious position. In case they apply EU law, they need to safeguard all the guarantees afforded by it, and they are subjected to supervision of the Court of Justice of the European Union (hereinafter referred to as "**CJEU**"). At the same time, they are also within jurisdiction of the European Court of Human Rights (hereinafter referred to as "**ECtHR**"). In case the jurisprudence differs, as is sometimes the case, they need to reconcile their approaches.

As is evident from the jurisprudence of the ECtHR interpreting the European Convention on Human Rights (hereinafter referred to as "**Convention**"), the vast majority of its cases does concern criminal proceedings against natural persons; the situation is similar on national level, which will be demonstrated on jurisprudence of the Constitutional Court of the Czech Republic (hereinafter referred to as "**CC**").

The situation is however different on the EU level. The Charter of Fundamental Rights of the EU (hereinafter referred to as "**Charter**") contains rights corresponding to those enshrined in the Convention and it is to be interpreted in the same way. Nonetheless, proceedings before EU institutions are often of different character, as they are mostly concerned with business entities – undertakings. The author will further employ antitrust proceedings as an example, because the case-law is most often dedicated to this field, but his conclusions are valid for other types of such proceedings as well.

This article explores the interpretation of the right not to incriminate oneself on international, EU and national level.[1] It argues that the level of protection accorded by the ECtHR to natural persons might hinder effective investigation of business entities; therefore, the more lenient approach, adopted by the CJ EU, may be fully sufficient to guarantee fair trial, while securing efficiency of the proceedings. It also notes that recently, Czech justices adopted a similar approach.

The rest of this article is structured as follows. In Chapter II it explores the nature of antitrust proceedings and its characteristics as far as the fair trial guarantees are concerned; Chapter III deals with the privilege against self-incrimination in the jurisprudence of ECtHR, CC and CJ EU; Chapter IV discusses a recent Czech judgment on this matter. The final Chapter brings the conclusions.

[1] The national level is almost exclusively concerned with the Czech Republic.

2. Antitrust proceedings

In the EU, competition law stems from Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter referred to as "**TFEU**"). These rules are applicable to such anticompetitive agreements (Art. 101 TFEU) or abuses of dominant position (Art. 102 TFEU) which can appreciable affect trade between EU member states. It can be applied by both the European Commission and the National Competition Authorities (hereinafter referred to as "**NCAs**").

Whereas the NCAs' proceedings are regulated by respective national laws, the Commission's conduct is primarily governed by the Regulation 1/2003.[2] With respect to fair trial, it claims that

"[t]his Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles".[3]

The Charter, which is the principal source of fundamental rights, has the same legal value as the Treaties;[4] the general principles of EU law, stemming from constitutional traditions common to the member states, which used to be the principal source of fundamental procedural rights,[5] will thus apply only secondarily.[6] The Charter declares that rights contained in the Charter corresponding to those in the Convention shall have the same meaning and scope.[7]

According to the Convention, the fair trial guarantees apply to "criminal charges".[8] According to the Regulation 1/2003, the penalties imposed by the Commission for breaches of competition law shall not be of a criminal nature;[9] the same is true for sanctions imposed by most of the NCAs, including the Czech Competition Authority (hereinafter referred to as "**CCA**"). The terms used in the Convention are however to be interpreted autonomously; the extent

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[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4. 1. 2003, p. 1.

[3] Preamble to Regulation 1/2003, par. 37.

[4] Art. 6 (1) of the Treaty on European Union (hereinafter referred to as "**TEU**").

[5] Case 11/70 *Internationale Handelsgesellschaft*, [1970] ECR 1125, par. 4.

[6] Art. 6 (3) TEU. See also *Wils, W*. EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights. [2011] 2 *World Competition* 189.

[7] Art. 52 (3) of the Charter.

[8] Determination of civil rights and obligations, also covered by the provisions on fair trial, is not discussed in this paper.

[9] Art. 23 (5) of the Regulation 1/2003.

of the term "criminal charges" was first considered in *Engel*, where the ECtHR held that "criminal" are not only those offences thus classified by national law, but also other offences, the criminal character of with may be implied from their "very nature" or "severity of penalty".[10] Assuming that competition law is "criminal" law within the meaning of the Convention,[11] the procedural guarantees provided for by the Convention shall also apply in antitrust proceedings of the Commission and the NCAs. It is indeed followed in practice.

It nonetheless needs to be observed that antitrust proceedings do not exhibit characteristics of "traditional" criminal proceedings. The ECtHR is itself aware of the fact that the Convention currently applies to situations different from those it was designed to deal with; it distinguishes between "hard core" criminal proceedings, typically those where natural persons are charged – in such situation, the fair trial guarantees need to be fully observed. In other cases, however, these guarantees do not necessarily have to apply with full stringency. As the ECtHR observed in *Jussila*,

"*[t]here are clearly "criminal charges" of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties […] [or] competition law […]. [These] differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency […]*".[12]

The ECtHR thus itself distinguishes between, on the one hand "hard" criminal law, usually connected with liability of natural persons, risk of imprisonment and "*significant degree of stigma*",[13] and on the other, infringements that fulfil the *Engel* criteria but do not belong to "*traditional categories of criminal law*" (we can call them "soft" criminal law), usually connected with liability of companies and other legal persons, that can be punished by pecuniary penalties. The ECtHR has explicitly proclaimed that competition law belongs to the latter category. Fair trial guarantees prescribed for criminal proceedings

[10] Case *Engel and others v. the Netherlands*, dated 8 June 1976, application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, par. 82.

[11] Case *Jussila v. Finland*, dated 23. November 2006, application no. 73053/01; case *Menarini Diagnostics v. Italy*, dated 27. November 2011, application no. 43590/08; see also *Andreangeli, A*. Toward an EU Competition Court: "Article-6-Proofing" Antitrust Proceedings before the Commission? [2007] 4 *World Competition* 608.

[12] Case *Jussila v. Finland,* dated 23 November 2006, application no. 73053/01, par. 43.

[13] *Ibid*.

therefore need to be observed in antitrust cases, but they do not necessarily have to be applied to their full extent.

On the EU level, the CJ EU has not yet specifically discussed whether it considers antitrust proceedings to be criminal. It is however not necessary, as the Charter guarantees the respect for the rights of the defence to "*anyone who has been charged*",[14] not "criminally charged" as in the Convention. The fair trial guarantees thus need to be applied by the EU institutions as well.

As has already been mentioned, the ECtHR's case law is mostly concerned with "hard" criminal law, whereas the CJ EU typically deals with "soft" one. We will therefore argue that even if the CJ EU was more lenient concerning the right not to incriminate oneself in antitrust proceedings, its findings do not necessarily have to be inconsistent with the ECtHR's jurisprudence.

3. Right not to incriminate oneself in case-law

The right not to incriminate oneself has been so far most extensively discussed in the ECtHR's jurisprudence. We will therefore start with its case law, and only then proceed to the EU one; we will also briefly outline the situation in the Czech Republic.

3.1 Privilege against self-incrimination in the ECtHR's case-law

Although not mentioned explicitly in the Convention, the ECtHR considers the privilege against self-incrimination as an essential condition for fair trial. As the court proclaimed in *Saunders*,[15]

"*the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. […] The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused*".[16]

According to the ECtHR, it is not possible to distinguish *a priori* which information is incriminating and hence covered by the privilege; decisive is the way in which the evidence will be used:

[14] Art. 48 (2) of the Charter.
[15] Case *Saunders v. the United Kingdom*, dated 17 December 1996, application no. 19187/91.
[16] *Ibid*, par. 68.

"*the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. […] It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial*".[17]

It can be concluded that "*[t]he right not to incriminate oneself is primarily concerned […] with respecting the will of an accused person to remain silent*".[18] Evidence gathered under compulsion and subsequently used in order to demonstrate liability of the accused would thus be contrary to the privilege against self-incrimination; in the *Saunders* case, the "compulsion" consisted in a legal duty, enforceable be penalties, to answer questions of investigators.[19]

Special rules apply to the evidence existing "*independent of the will of the suspect*". According to the ECtHR, the right not to incriminate oneself

"*does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant […]*".[20]

Arguably, this does not mean that the accused is obliged to submit to the investigators pre-existing documents of potentially incriminatory nature; the investigators are however not prevented from seizing such documents, typically during on-site inspections.

This conclusion seems to be supported by the *J. B.* case,[21] in which the accused natural person was requested to submit, for the purposes of tax-evasion proceedings, all documents concerning his involvement in certain companies; the accused was ultimately fined when he refused to do so. The ECtHR concluded that

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[17] *Ibid*, par. 71.

[18] *Ibid*, par. 69.

[19] In *Saunders*, the ECtHR found and infringement of the right to fair trial because "*the transcripts of the applicant's answers, whether directly self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant*" (par. 72).

[20] *Ibid,* par. 68.

[21] Case *J. B. v. Switzerland*, dated 3 August 2001, application no. 31827/96.

"*various provisions in criminal law [may oblige] a person to act in a particular way so as to enable the authorities to obtain his conviction, for instance the obligation to install a tachograph in lorries, or to submit to a blood or a urine test. In the Court's opinion, however, the present case does not involve material of this nature which, like that considered in Saunders, has an existence independent of the person concerned and is not, therefore, obtained by means of coercion and in defiance of the will of that person*".[22]

It is however important to note at this stage that the ECtHR's case law on self-incrimination has only concerned natural persons so far.[23]

3.2 Privilege against self-incrimination in the CC's case law

The jurisprudence of the Czech Constitutional Court may be summarised only briefly, because it is in principle identical with the ECtHR's one. The CC confirmed that the accused cannot be forced to actively help the investigating authorities to acquire incriminatory evidence; they are however obliged to enable the pre-existing evidence to be taken, as is often the case with biological materials.[24]

The CC has even ruled specifically on the duty to submit pre-existing documents. In course of a criminal investigation, the police requested a natural person to submit certain accountancy documents; when the request was declined, a fine was imposed upon that natural person. This decision was challenged and the dispute was ultimately solved by the CC, which proclaimed that no one may be compelled to hand over potentially incriminatory evidence; according to the CC, there is a *constitutionally guaranteed right not to be forced to self-incrimination, i. e. to submit incriminating evidence under coercion.*[25]

Similarly to the ECtHR's case law, it ought to be stressed that the CC arrived to this conclusion in course of "traditional" criminal proceedings against a natural person.

3.3 Privilege against self-incrimination in the CJ EU's case law

As has already been mentioned, parties to the antitrust proceedings are usually companies. When the CJ EU dealt for the first time with self-incrimination, it held in *Orkem*[26] that only natural persons enjoy such a privilege:

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[22] *Ibid*., par. 68.

[23] See also *Wils, W.* Self-incrimination in EC antitrust enforcement: a legal and economic analysis. [2003] 4 *World Competition* 567.

[24] Opinion of the CC plenary of 30 November 2010, ref. no. Pl. US 30/10.

[25] Ruling of the CC of 21 August 2006, ref. no. I. US 636/05.

[26] Case 374/87 *Orkem v. Commission* [1989] ECR 3283.

"*the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle […] which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular infringements of competition law*".[27]

Despite this conclusion, the CJ EU added nonetheless that the power of the Commission to ask information is not unlimited; whereas it is free to pose "factual" questions, it may not compel an undertaking to admit liability:

"*whilst the Commission is entitled […] to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not […] undermine the rights of defence of the undertaking concerned.*
Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove".[28]

The General Court later summarised this approach:

"*To acknowledge the existence of an absolute right to silence […] would go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the Commission's performance of its duty […] to ensure that the rules on competition within the common market are observed*".[29]

The CJ EU thus seems to be more lenient in antitrust proceedings than the ECtHR; in particular, it clearly accepts the duty of an undertaking to hand over pre-existing documents, even if they might be of incriminatory nature,[30] and to answer "factual" questions, as long as they are not obliged to admit guilt. [31] Conversely, the ECtHR's case law seems to suggest that the investigating

[27] *Ibid.*, par. 29.
[28] *Ibid.*, par. 34 and 35.
[29] Case T-112/98 *Mannesmannröhren-Werke v. Commission* [2001] ECR II-729, par. 66.
[30] For the sake of completeness, it ought to be mentioned that the General Court seems to have claimed in case T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon Co. Ltd and Others v. Commission* [2004] ECR II-1181, par. 406 – 408, that the privilege might cover also certain categories of pre-existing documents.
[31] This was explicitly acknowledged by Regulation 1/2003, which in its Preamble, par. 23, states that "*undertakings cannot be forced to admit that they have committed an infringement, but*

authorities are only allowed to seize such documents, while the accused has an absolute right to remain silent.

At the same time, the ECtHR itself distinguishes between "soft" and "hard" criminal proceedings, putting antitrust into the former category; it has not yet analysed the extent of privilege against self-incrimination in the context of "soft" criminal proceedings. Even though the CJ EU has not yet explicitly ruled on this issue, such thinking is already apparent, for example in opinion of Advocate General Geelhoed:

"*[ECtHR] case-law concerned natural persons in the context of 'classical' criminal procedures. Competition law concerns undertakings. […] It is not possible simply to transpose the findings of the European Court of Human Rights without more to legal persons or undertakings*".[32]

According to the Charter, rights enshrined in it need to be interpreted in accordance with the Convention.[33] Even though the ECtHR awards the accused more far-reaching protection, the author still takes the position that it is possible to argue that the "soft" nature of antitrust proceedings justifies the interpretation adopted by the CJ EU.

Indeed, the current EU jurisprudence is arguably capable of safeguarding the privileges of the accused in antitrust proceedings more than the absolute right to remain silent. Antitrust proceedings are based on vast quantities of evidence; for example, if abuse of dominant position by price-related conduct (e.g. predatory pricing, excessive pricing or margin squeeze) is under investigation, competition authority needs to collect precise accountancy information concerning costs and revenues of the undertaking concerned. Competition authorities are empowered to collect data during on-site inspections. If we compare the intrusion of public authority caused, on the one hand, by an inspection, which significantly affects operating of all of the undertaking, and on the other hand, by submitting data that the undertaking already has in its possession, the latter seems to be far less intrusive.

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they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement".

[32] Similar reasoning is apparent in the EU context as well. For example, Advocate General Geelhoed stated in his opinion to case C-301/04 P *Commission v. SGL Carbon AG and Others* [2004] ECR I-5915, par. 63, that "*[ECtHR] case-law concerned natural persons in the context of 'classical' criminal procedures. Competition law concerns undertakings. […] It is not possible simply to transpose the findings of the European Court of Human Rights without more to legal persons or undertakings*".

[33] Article 52 (3) of the Charter.

4. Privilege against self-incrimination in Czech jurisprudence

As has already been mentioned, these differences among CJ EU and ECtHR have most challenging impact on national enforcers, who need to reconcile them. It is therefore worth mentioning that the Regional Court in Brno, reviewing the decisions of the Czech Competition Authority, has attempted to do so.

In a cartel investigation, the CCA invited one of the parties to the proceedings (a suspected cartelist) to submit certain documents; as in other such requests, the CCA informed the undertaking concerned that it is under a legal obligation to do so and that its failure to provide the documents might result in imposition of a fine.[34]

The undertaking refused to submit the documents, claiming that it cannot be obliged to provide incriminatory evidence, and approached the Regional Court in Brno, seeking protection against an allegedly unlawful interference from the CCA.[35] The court rejected the complaint as premature, because the conditions for such a court proceedings were not fulfilled. According to it, the CCA's request did not directly and immediately infringe the undertaking's rights – it either could have refused to submit the documents, and if it was sanctioned, bring an action against the decision imposing fine, in which it might claim that it was not obliged to hand over the documents in question; or it could have submitted the documents and claimed the irregularity of the CCA's procedure while challenging the CCA's decision on the merits.[36]

The undertaking than submitted the documents, but after the CCA had issued a final decision finding a cartel, it appealed it to the Regional Court, claiming among others that its right not to incriminate oneself was breached. The court however rejected the appeal in its entirety.[37]

The court recalled the ECtHR's jurisprudence and admitted that also the CC had opined that even though the accused have to allow the evidence to be taken, they are not under any obligation to actively participate in the process.[38] The Regional Court than summarised the CJ EU's case-law and concluded that to grant the parties to the antitrust proceedings an absolute right to remain silent would go beyond what is necessary to guarantee a fair trial; it held that

[34] Sections 21e and 22c of the Act No. 143/2001 Coll., on the Protection of Competition, as amended.
[35] Section 82 *et seq*. of the Act No. 150/2002 Coll., Code of Administrative Justice, as amended.
[36] Judgement of the Regional Court in Brno Ref. No. 62 Af 3/2010 of 8 April 2010; judgement of the Regional Court in Brno Ref. No. 62 Af 46/2010 of 4 November 2010.
[37] Judgement of the Regional Court in Brno Ref. No. 62 Af 75/2010 of 23 February 2012.
[38] Opinion of the CC ref. no. Pl. US 30/10, *op. cit. supra*.

the privilege against self-incrimination is not violated if a competition authority requires certain materials or information, unless the undertaking is coerced to provide answers that would amount to accepting it breached the law, to provide answers other than those concerning solely the facts or to submit other documents than those already in existence when they were requested.

The Regional Court in Brno thus proclaimed that the CCA is allowed to request pre-existing documents from the undertakings suspected to have infringed competition law, and that it can pose such undertakings factual questions unless answering such questions would amount to admission of guilt.

Such an approach is fully in line with the CJ EU's case law. Regrettably, even though the court recalled the ECtHR's jurisprudence (and that of the CC as well), it did not substantiate why their more stringent requirements were not applicable in this case.

This judgement was upheld by the Supreme Administrative Court.[39] Unfortunately, the Supreme Court did not address the issue concerning self-incrimination, as it stopped the proceedings against the particular undertaking that raised these objections, because the time limits had elapsed.

5. Conclusions

The Charter has become a fully binding legal source of fundamental rights, which obliges both the EU and national institutions to interpret these rights in accordance with the Convention. The author has argued in this article, taking the privilege against self-incrimination as an example, that it is not possible fully to transfer the ECtHR's case law into antitrust proceedings – and correspondingly, to other proceedings with legal persons – and that it might be possible for the CJ EU to retain its current approach; such reasoning is also apparent on national level, as has been demonstrated by the judgement of the Regional Court in Brno.

This conclusion may be supported by experience in other jurisdictions. For example, the Supreme Court of the United States declared, that

"*[s]ince the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. The greater portion of evidence of wrongdoing by an organization or its representatives is to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal*

[39] Judgement of the Supreme Administrative Court Ref. No. 8 Afs 25/2012 of 29 January 2015.

records and documents, effective enforcement of many federal and state laws would be impossible".[40]

Similar reasoning might be found also in some EU countries. For example, the Bundesverfassungsgericht – the German constitutional court – likewise stated that the privilege against self-incrimination can only be invoked by natural persons.[41]

Taking all these facts into account, the interpretation adopted in the Czech Republic, even though not fully aligned with the ECtHR, may still be held in line with the Convention.

[40] *United States v. White*, 322 U.S. 694, 700, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944). See also Snider, J. G. *Corporate privileges and confidential information*. New York: Law Journal Press, 2006, p. 5–5.

[41] Decision of the *Bundesverfassungsgericht* of 26 February 1997, 1 BvR 2172/96 (*Radio Dreyeckland Betriebsgesellschaft mbH* and *M.*), which declared that „*[Das] Recht, sich nicht selbst einer Straftat bezichtigen zu müssen, ist […] nicht auf juristische Personen anwendbar*".

Does the Czech Constitution need a new EU Amendment Bill?

Jiří Georgiev*

Key words: sovereignty, constitution, Constitutional Court, European Union, Lisbon Treaty

Summary: Even under circumstances when no changes to Founding Treaties have occurred, adaptation of national constitutional provisions make sense. Not only amendments to organic laws like Constitutional Court Act or Standing Rules of both parliamentary chambers evolving from practice, but the system of delegation of powers involved in the Czech Constitution can be amended after the recent principal judgements of Constitutional Court relating to the European Union have been delivered. On one hand, the supremacy of the Czech Constitution – as the Polish Constitution (article 8/1) already acknowledges – could be confirmed in this way, and the existing (but still not formally upheld) practice of formal requirements for the future changes of Founding Treaties according to the article 10a of the Czech Constitution should be constitutionally corroborated too.

1. Introduction

The nature of the European Union as a "close community of states"[1], which cannot be classified as a federal-type entity because of its internationally-contractual basis, while at the same time, in terms of the principle of supra-nationality, it has grown beyond the definition of a simple international organisation, from time to time causes us to wonder whether it is not time to consider revising the current "European" provisions of the Czech Constitution. We recall that the necessary foundations for the Czech Republic's membership of the European Union were laid down by the so-called "Euro-revision" of the Czech

* Jiří Georgiev, external lecturer at Faculty of Law, Charles University, Prague, Czech Republic. Contact: georgiev@email.cz.

[1] The German Federal Constitutional Court consequently uses the term *Staatenverbund* to distinguish the nature of the European Union from a simple association of states (*Staatenbund*), without at the same time expanding the community into the form of a federal state (*Bundesstaat*). For more see ruling BVerfGE 89,155 on the Maastricht case.

Constitution more than ten years ago.[2] Since that time, not only has the Czech Republic acceded to the EU, but also – after an unsuccessful attempt to agree on a Treaty establishing a Constitution for Europe – revisions to the existing founding treaties were adopted in the form of the Lisbon Treaty.

The Member State experience with the functioning of decision-making mechanisms and the newly configured settings of the Union's institutional machinery represent clear factors justifying discussions on possible changes to the European provisions in the Czech Constitution. Such a revision would, however, not only reflect on development at the Union level, but also take into account the Czech Constitutional Court's case law, whose decisions on issues concerning sugar quotas, the European arrest warrant and the Lisbon Treaty pave the way for a more precise definition of the relationship between the national legislation (or constitutional order) and EU law.

2. Contractual Basis of EU Revisited?

In terms of the criteria we first mentioned, in other words changes to the contractual foundation of the Community, there is currently no apparent demand for reformulation of the Czech Constitutional provisions. The first reason might be the relatively general formulation of the relevant provisions in the Constitution. Another reason, however, is obviously the fact that the practical effect of the Lisbon Treaty has not triggered, in terms of constitutional foundations of the Member States, any fundamental move towards EU as quasi-federal state. Moreover, within the context of the economic crisis, post-Lisbon developments have highlighted the problematic nature of such predictions.

A revision of primary law also represents such a complex step that, with the exception of a few incremental changes, partly realised through the so-called simplified revision procedure, we are more likely to encounter the truly significant changes in the European integration process within recent negotiations of international agreements outside the framework of EU law. Both the Treaty establishing the European Stability Mechanism (hereinafter referred to as the ESM Treaty), and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (hereinafter referred to as the Fiscal Compact) were negotiated as separate instruments on the level of international

[2] Constitutional Act No. 395/2001 Coll. of 18 October 2001. A comparison of Czech legislation with that of other new Member States was outlined by Mlsna, P., *Reflexe komunitárního práva v ústavách středoevropských států*, Časopis pro právní vědu a praxi 1/2008, p. 22–30.

contractual capacity of the individual Member States[3], and in a form which, according to some opinions, may even cast doubt on compliance of these steps with applicable primary law. These doubts also had to be dealt with by the Court of Justice of the EU within the scope of the preliminary ruling procedure.[4] Other proceedings attracting attention in this particular respect include proceedings before the German Federal Constitutional Court which addressed (with a similar result to the Court of Justice of the EU) the question of whether certain agreements were compatible with the Basic Law[5]. In this situation, resulting from certain revival of intergovernmental decision-making methods outside the legal framework of EU, it is the return of the Member States into the role of leading players in the integration process that tends to be commented on[6], while the need to overhaul the constitutional basis required for the full participation of the Czech Republic in the Union integration project from the viewpoint of the current form of the Union's Founding Treaties is not the issue of the day.

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[3] For this reason we will leave aside the issue of the so-called financial constitutional amendment, whose adoption by the Czech Republic, which is not even a party to the Fiscal Compact, is not directly linked to the obligations of this contract.

[4] Compare the ruling on the Pringle case (C-370/12) from 27 November 2012, in which the EU Court of Justice held that "Article 4 para. 3 of the TEU, Article 13 of the TEU, or Art. 2 para. 3 of the TFEU, Art. 3 para. 1 (c) and para. 2 of the TFEU, Articles 119 to 123 of the TFEU, Articles 125 to 127 of the TFEU or the general principle of effective judicial protection do not prevent Member States whose currency is the Euro from concluding amongst themselves an agreement such as the Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Republic of Greece, the Kingdom of Spain, the Republic of France, the Republic of Italy, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Portugal, the Republic of Slovenia, the Republic of Slovakia and the Republic of Finland, concluded in Brussels on 2 February 2012, nor the ratification of this agreement by these Member States."

[5] The ruling by the German Federal Constitutional Court on 12 September 2012 (2 BvR 1390/12) confirmed that Germany may not continue in relation to the financial commitments arising from the Treaty on ESM without the permission of the German side. It also underlined the importance of the government's reporting obligations to the Bundestag and the Bundesrat.

[6] On this phenomenon, see for example Belling, V., *Finanční krize a návrat suveréna: Několik myšlenek ke státoprávnímu kontextu Fiskálního paktu*, AUC – Iuridica 1/2012, pp. 7–21. Certainly an interesting assessment of the position of the Czech Republic and the United Kingdom, which have not yet joined the Fiscal Compact (although this option remains open under Article 15 of the Fiscal Compact), is given by Frank Schorkopf, when in the given context he refers to both countries as "kerneuropäische Mitgliedstaaten mit einem selbstbewussten Eigensinn für politische Freiheit." At the same time he claims that British resistance to amending agreements was not sufficient reason for failing to respect different opinions and finding an intergovernmental solution outside the agreement. For more see Schorkopf, F., *Europas politische Verfasstheit im Lichte des Fiskalvertrages*, Zeitschrift für Staats- und Europawissenschaften 1/2012, pp. 1–29, here p. 20.

3. Case Law of the Czech Constitutional Court as the Pivotal Factor

If we take the case law of the Constitutional Court of the Czech Republic, which in the context of specific submissions formulates the doctrinal relationship between constitutional order of the Czech Republic and the European legislation, both primary and secondary, as the face value for these considerations, we should not outright reject that there is a certain justification for argument there exists a need for amendments to the constitutional text. It is certainly not this paper's purpose to discuss in detail various EU findings of the Czech Constitutional Court.[7] However, in this context, it is worth mentioning that the Constitutional Court has gradually embraced some of the fundamental features formulated by the German Federal Constitutional Court[8] in relation to European law and its effect on the national legal system, while obviously adapting these to the reality of the Czech Constitution, taking into account the fact that, unlike the Federal Republic of Germany, the relationship between national and international law in the Czech Republic is not dualistic in nature.

This convergence has obviously been gradual. In its decision on *Sugar Quotas*, the Constitutional Court ruled that the "general principles of Community law (…) radiate through its interpretation to constitutional law"[9] and stated, somewhat inaccurately, that through accession to the European Union, the Czech Republic had "transferred some portions of its state sovereignty" to this international organisation. Additionally, it opened the door to the European law influence on the constitutional order of the Czech Republic even wider by leaning toward the thesis that Article 10a (and not Article 10) of the Czech Constitution "opens up the national legal order to the operation of Community law, including rules relating to its effects within the legal order of the Czech Republic."[10]

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[7] An overview of these rulings is provided by Naděžda Šišková in *Evropské a české právo, jejich vzájemný poměr v judikatuře Ústavního soudu*, Praha: Linde 2010.

[8] More details in the volume edited by Kust, J. (ed.), *Evropská inspirace z Karlsruhe*, Praha: OEZ 2009.

[9] Pl. CC 50/04 of 8 March 2006

[10] This standpoint was defended by Kühn, Z., Kysela, J., *Na základě čeho bude působit komunitární právo v českém právním řádu?* Právní rozhledy 1/2004, pp. 23–27, and Kühn, Z., *Ještě jednou k ústavnímu základu působení komunitárního práva v českém právním řádu*, Právní rozhledy 10/2004, pp. 395–397. The opposite view was consistently defended by Jiří Malenovský in his papers *Mezinárodní smlouvy podle čl. 10a Ústavy ČR*, Právník 9/2003, pp. 841–849, or *Ve věci ústavního základu působení komunitárního práva uvnitř ČR nebylo řečeno poslední slovo*, Právní rozhledy 6/2004, pp. 227–229. Details on this debate and the possible consequences of the solution chosen are given in the monography by Bobek, M., Bříza, P., Komárek, J., *Vnitrostátní aplikace práva Evropské unie*, Praha: C.H.Beck 2011, p. 436nn.

However, as Jiří Zemánek quite aptly notes, in its *obiter dictum* the Constitutional Court failed to properly address the counterargument "in any adequate way when it did not address the issue of mutual relations between the two provisions (Art. 10a as a *lex specialis* to Art. 10?)."[11] Nevertheless, the Court realised what far-reaching effects this type of statement might have in times when the influence of European law is intensifying and its volume growing – even promoting European law provisions to the level of constitutional norms – as well as its serious consequences, and dismissed these in its subsequent decisions.

The Constitutional Court rejected the doctrine of the absolute primacy of European law already in its ruling on *Sugar Quotas*, and upheld the position of the Czech Republic as the "original bearer of sovereignty", who "conditionally bestows" certain of its sovereign powers solely for purposes of their joint execution at Union level. In this ruling, the Court also provided some guidance for the reviews of the EU secondary law or other measures derived from the authority of primary law. The exercise of the conferred powers must be compatible "with the preservation of the foundations of state sovereignty" and shall not threaten "the very essence of the substantive law-based state". By default, the Constitutional Court thus claimed the doctrine of *Solange* II as its own.

The decision concerning the *European Arrest Warrant* is also crucially important. Here, in one respect, the Court inferred the obligation to ensure that interpretation of national legislation conforms to the European law, in order that – if such an interpretation is possible – no conflict of legal systems arises. At the same time however, it adopted a position, following onto potential doubt that might arise from debates on the operation of EU law within the national legal framework, from which it is possible, within the scope of the powers conferred, to infer the primacy of European standards over national law, and therefore the establishment of the EU bodies' powers through the relevant international treaty, but does not conclude that the transfer of powers in itself surpasses the conflicting provisions in the constitutional order.[12]

The opposite conclusion, which could be formulated in response to the requirement of qualified (constitutional) majority needed for the adoption of amendments to primary law, would mean that all (and often very technical) provisions of the Founding Treaties can technically rise to the level of constitutional norms. Moreover, in terms of content – in case of reducing the terms of reference to the "material core" of the Constitution – there would no longer

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[11] Zemánek, J., *Otevření ústavního pořádku komunitárnímu právu potvrzeno, nikoli však nekontrolovatelné*, Jurisprudence 5/2006, pp. 47–51, here p. 50.

[12] Compare however the criticism of this approach in the papers by J. Kysela and R. Král in the collection by Gerloch, A., Wintr, J. (eds.), *Lisabonská smlouva a ústavní pořádek ČR*, Plzeň: Vydavatelství a nakladatelství Aleš Čeněk 2009.

be any reason in reviewing the conformity of international treaties with the national constitutional order, if such review should result in remedying potential inconsistencies pursuant to Article 89 paragraph 3 of the Czech Constitution. The Constitutional Court therefore logically deduced the exclusive authority of the national legislator to revise the text of the Constitution, in order to assure that a planned and intended commitment, which may directly conflict with the constitutional order, could be remedied (compare points 78 and 82 of the reasoning for the judgment referred to above).[13]

Referring to the Constitutional Court's decision on the *European Arrest Warrant* the Court did not revoke (unlike the German[14] or Polish Constitutional Courts[15]) the implementing measures and gave priority to the European-conforming interpretation of the Charter of Fundamental Rights and Freedoms' respective provisions over the option to adopt some form of explicit change to its Article 14(4), however on the other hand, it did indeed confirm that "national sovereignty … continues to prevail even within the EU." It also rejected the doctrine of the absolute primacy of the European law (although here, in the opinion of the dissenting judge, Eliška Wagnerová, it had failed to take sufficient account of the fact that a framework decision constitutes an act that falls under the third pillar of the European law, where, although the Member States commit themselves to loyal cooperation, their powers remain intact).

According to Ulrich Hufeld of Helmut Schmidt University Hamburg, it was therefore possible to conclude on the basis of the Constitutional Court rulings above, that – in conditions existing in the Czech Republic – the reservation of national sovereignty in relation to the European law has three basic components: a reservation of hierarchy (international agreements prevail over national law, but not over the Constitution), a reservation of quantity (only certain powers can be transferred from Czech authorities) and a reservation of scrutiny (the Constitutional Court has the power to review whether an act of EU law has been passed *ultra vires*, and a reserve power, stemming from the spirit of the *Solange* I and II doctrines, to review whether the protection of fundamental rights conforms to the standards guaranteed to its citizens by the constitutional order of the Czech Republic).[16]

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[13] Also compare the arguments in Pl. CC 66/04 of 3 May 2006, where the Constitutional Court admits that France, Latvia and Slovenia made direct amendments to the text of their constitutions in connection with the adoption of the European Arrest Warrant.

[14] Ruling by the German Federal Constitutional Court BVerfGE 113, 273 of 18 July 2005.

[15] Ruling by the Polish Constitutional Tribunal P 1/05 of 27 April 2005.

[16] Hufeld, U., *Staatliches Europaverfassungsrecht in Tschechien. Die Grundlagen und der Richterspruch zum Europäischen Haftbefehl*, Jahrbuch für Ostrecht 48/2007, pp. 263–278, Czech translation by Jan Grinc published in the Časopis pro právní vědu a praxi 4/2008.

Some of the open issues were also addressed or clarified by the Czech Constitutional Court in its *Lisbon* ruling. The Court had confirmed the reservation of hierarchy in ruling that the reference framework for reviews is constituted by the constitutional order as a whole, and not simply by the "material core" of the Constitution[17], whose expression in the applicable constitutional law of the Czech Republic still remains, even in comparison with the so-called "eternity clause" of German Basic Law, in the shadow of the doctrinal interpretation of the meaning of Article 9(2) of the Czech Constitution. Simultaneously, the Constitutional Court also explicitly confirmed the reservation of scrutiny in the spirit of the *Maastricht* and *Solange* doctrines, without closing the door on potential future review of methods of interpretation of the Lisbon Treaty provisions. On the other hand – in contrast to the Federal Constitutional Court in its *Lisbon* ruling[18] – it did not address the requirement to specify the material boundaries of the transfer of powers (reservation of quantity), nor did it establish procedural conditions for the use of the so-called evolutive (dynamic, self-amending) clauses of the Founding Treaties, which, unless the related national provisions were adopted, could not be used without casting doubt on the maintenance of the original competence of competences power of the Czech Republic, or without the risk of exceeding the framework set for the powers that can be transferred in accordance with Article 10a of the Constitution of the Czech Republic[19].

The second of the aforementioned "deficiencies" was nonetheless – and we will return to this later on – remedied by the activity of the parliamentary chambers, particularly the Senate, who instigated it, where a change in the Rules of Procedure of both parliamentary chambers was adopted in relation to the ratification of the Lisbon Treaty. This amendment also introduced the concept of the binding mandate into the Czech legislation, or to put it another way, a compensation clause, which, in relation to the significant expansion of the so-called "evolutive (self-amending) provisions" in the Lisbon Treaty, made any future changes occurring at the jurisdictional boundaries of the EU competences subject to prior approval by both parliamentary chambers. This offset the related weakening of the international-legal capacity of the Czech legislature, which would otherwise have to take place due to the absence of ratification procedures in cases of simplified amendments to the Founding Treaties.[20]

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[17] Compare points 84 and 85 of the Lisbon ruling (Pl. CC 19/08 of 26 November 2008).

[18] Points 252–260 of the Lisbon ruling by the German Federal Constitutional Court of 30 June 2009 (2 BvE 2/08).

[19] Compare points 153 and 165–167 of the ruling by the Pl. CC 19/08.

[20] This amendment to the Rules of Procedure of both chambers was adopted as Act No. 162/2009 Coll. of 6 May 2009. On the concept of a compensatory clause see Kysela, J., *„Lisabonské"*

In the context of this discussion, one of the subsequent decisions of the Constitutional Court that should be recalled is the ruling on the issue of Czech-Slovak pension rights (*Landtová* case), in which the Constitutional Court applied the *Maastricht* doctrine of the German Federal Constitutional Court on contested legal acts in practice and set aside prior decisions by national courts in this case.[21] According to the Constitutional Court "We cannot do otherwise than state, regarding the effect of the European Court of Justice judgment of 22 June 2011, C-399/09 on similar matters, that in this case a European Union body acted in excess of the law, resulting in a situation where an act enacted by a European body overstepped the powers which the Czech Republic had transferred to the European Union by virtue of Article 10a of the Constitution; the act ignored the limits of the powers thereby delegated and was thus ultra vires."[22] Although Jan Komárek's criticism of the ruling by the Constitutional Court on this case was certainly exaggerated[23], the fact remains that the finding of the Constitutional Court in reaction to the *Landtová* case, which had been brought before the EU Court of Justice, was not accepted unequivocally, and that is also not surprising. Unlike in situations where implementing act is repealed, i.e. where the move is played out on "home turf" in relation to national rules, and which is not an entirely unusual phenomenon,[24] here the Constitutional Court intervened in another legal system, i.e. in Union law, thereby "committing" an interference, which is sometimes recognised in literature in cases where general legal principles are interpreted by the EU Court of Justice in relation to national legal

novely jednacích řádů obou komor Parlamentu ČR. In: Zemánek, J. (ed.), The Effect of the Treaty of Lisbon upon the Czech Legal Order, Praha: MUP 2009, pp. 50–68, here p. 65.

[21] Ruling of the Pl. CC 5/12 of 31.1.2012.

[22] As this was the first case where the doctrine of an ultra vires legal act was applied in practice, the ruling by the Constitutional Court also attracted attention outside the borders of the Czech Republic – compare the commentary by Robert Zbíral in Common Market Law Review 4/2012, pp. 1475–1492.

[23] Compare the paper by Komárek, J., *Playing with Matches: The Czech Constitutional Court's Ultra Vires Revolution*, published on the website Verfassungsblog in February 2012.

[24] We recall the rulings by the Polish Constitutional Tribunal and the German Federal Constitutional Court on the European Arrest Warrant cited above, or the rulings that not only the Czech (Pl. CC 24/10 of 22 March 2011) and Romanian Constitutional Courts, but also the German Federal Constitutional Court (1 BvR 256/08 of 2 March 2010) set aside the faulty implementation of the Directive on the retention of data generated in connection with telecommunications 2006/24/EC to comply with the requirements of their national constitutional order. At least in the case of Romania, we can assume that not only aspects relating to the implementation of the norm, but also the obligations arising from EU law were called into question. Also compare Durica, J., *Directive on the Retention of Data on Electronic Communication in the Rulings of the Constitutional Courts of EU Member States and Efforts for its Renewed Implementation*, The Lawyer Quarterly 2/2013, pp. 143–158.

rules[25], but which is not documented vice versa, i.e. in case of decisions of supreme national judicial institutions in relation to the European law. Nevertheless, in a similar way as the ruling of the Czech Constitutional Court on the Czech-Slovak pension rights case was criticised, the ruling of the Federal Constitutional Court on the *Honeywell* case, in which the German Constitutional Court did not apply the Maastricht doctrine (despite an expert opinion favouring such an approach that was far from being marginal[26]) to the decision of the EU Court of Justice in the *Mangold* case, could be criticised from opposite perspective. Moreover, the *Honeywell* ruling laid down new conditions which will hamper the future use of *Maastricht* doctrine[27]. The admonition that the Czech Constitutional Court did not attempt to find a compromise solution and did not cooperate through a dialogue with the EU Court of Justice is odd in our view as a judicial authority is not a body whose task is to seek out a (political) compromise. Such a role is played by the executive or the legislative branches, which would be able in these cases to find a solution that satisfies the requirements of both courts (the Constitutional Court and the EU Court of Justice) and, of course, also the persons entitled from the case itself.[28]

One aspect of the so-called Czech-Slovak pension rights case was also the issue of possible preliminary reference to the EU Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the EU, i.e. an option where, before handing down a decision with such serious impact, the Constitutional Court would submit a request for a preliminary ruling, which would enable the Court of Justice to specify the conditions under which the grant of compensation for Slovak pensions (taking into account budget limits) would be acceptable under EU law. J. Komárek or M. Bobek would probably prefer this option[29], but on the other hand the Constitutional Court had – and for good reasons according to the author of this paper – rejected this possibility in its

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[25] Lastly, also compare the controversy over the interpretation of the term "scope of jurisdiction" in the Charter of Fundamental Rights of the EU in the ruling by the EU Court of Justice on the Akerberg Fransson case (C-617/10) on 26 February 2013.

[26] This type of approach was also favoured by Prof. Rudolf Streinz as co-author of the publication *„Mangold" als ausbrechender Rechtsakt*, München: Sellier 2009.

[27] Ruling by the German Federal Constitutional Court 2 BvR 2661/06 of 6 July 2010. Also the commentary by Payandeh, M., *Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice*, Common Market Law Review 48/2011, s. 9–38.

[28] The possibility of a constitutional solution to the situation regarding Czech-Slovak pension rights can be compared in Pítrová, L., *The Judgment of the Czech Constitutional Court in the Case „Slovak Pensions"*, The Lawyer Quarterly 2/2013, pp. 86–101.

[29] Compare Bobek, M., Komárek, J., Passer, J.M., Gillis, M., *Předběžná otázka v komunitárním právu*, Praha: Linde 2005, p. 221.

Pfizer ruling.[30] Certainly, in practical terms, the person who poses the question can obviously, in a certain sense, steer the answer, or prevent someone else asking it in a less fortunate manner, and that concern could constitute a rational enough reason for establishing such a practice. However, on the other hand, it is worth noting that, of the EU Member States that do have constitutional courts, only a minority of constitutional courts have taken a similar path.[31]

As the task of the Constitutional Court is to review constitutionality, the reference framework is constituted by the Czech constitutional order provisions. According to the Constitutional Court, "Community law is not a part of the constitutional order, and the Constitutional Court is therefore not in charge to interpret that law."[32] The right and sometimes also obligation to refer in certain cases for preliminary rulings to the EU Court of Justice still remains under conditions laid down in the primary law of the EU in general and administrative courts. However, given its specific function, a similar role cannot be attributed to the Constitutional Court, which should not accept to have its decision-making practices determined by the opinion of a judicial institution, which is not even specialised in cases involving alleged violations of fundamental rights and freedoms. If we focus on the judicial system of the Czech Republic, of the higher instances of the general and administrative judiciary, the Supreme Administrative Court is the one that is most involved in referring for preliminary rulings to the EU Court of Justice.[33]

4. Amending the Constitutional Court Act?

Before we attempt, in the light of previous decisions of the Constitutional Court specifying the relationship between the national and EU legal orders in

[30] Ruling by the II. CC 1009/08 of 8 January 2009.

[31] In addition to the Austrian and Belgian courts, this includes two courts from new Member States (Malta and Lithuania) as well as the Spanish and Italian constitutional courts – in the case of these last we can certainly talk of institutions whose decision-making practice in relation to European law has also been an inspiration for other Member States (e.g. the distinction between the primacy of European law in application and supremacy of national constitutional norms).

[32] In this context, I cannot help but note that any parallels between international treaties on human rights, whose standards were drawn in the constitutional order by the interpretative practice of the Czech Constitutional Court (compare ruling of the Pl. CC 36/01 of 25 June 2002, published as no. 403/2002 Coll.), and EU Founding Treaties ratified in accordance with the Article 10a of the Czech Constitution would be misleading and, given the differences between European and international law, difficult to defend.

[33] For an overview compare Chapter 4 of the publication by Malíř, J. et al., Česká republika v Evropské unii (2004–2009). Institucionální a právní aspekty členství, Praha – Plzeň: ÚSP AV ČR a Vydavatelství a nakladatelství Aleš Čeněk 2009.

terms of doctrine, to react to the question of whether a direct European amendment bill to the Czech Constitution is required, we should try to use the same perspective to look at – if we can afford to use such a term – key organic laws in force in the Czech Republic.[34] In this regard an issue arose, during the debate on Senate-based proposals to review the Lisbon Treaty before the Constitutional Court, as to whether such proceedings should be treated as adversary or non-adversary procedure, both with regard to differences between the parties with standing under Section 71a of Act No. 182/1993 Coll., on the Constitutional Court, who are competent to submit a petition for adjudging the conformity of a treaty with a constitutional act pursuant to Article 87 paragraph 2 of the Constitution and the whole range of consequences that this qualification would entail. The Constitutional Court has opted not to favour the thesis put forward by Professor Jan Filip, which viewed the given type of proceedings through the prism of an adversary procedure.[35]

It is clear from the ruling in the Lisbon Treaty case previously brought before the Constitutional Court that the legitimacy of the *de lege ferenda* argument advocating different standing of the parliamentary chamber prior to the ratification vote compared to the position of the outvoted senators, who may present completely different arguments in proceedings in the same category and on other petition-type actions, cannot be outright rejected. The parliamentary chamber is most likely filing the petition for review on the understanding that, were the Constitutional Court to confirm the constitutional conformity of the international treaty, euphemistically speaking, it is possible that it will subsequently approve the ratification of this treaty. At the same time, the President, who also negotiated the treaty, or who empowered the Government to conduct these negotiations, is, in the opinion of the Constitutional Court, required to ratify the treaty "without undue delay" unless it is found that it violates the constitutional order of the Czech Republic.[36] Practical doubts arose regarding whether it would be suitable to consider amending the relevant provisions

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[34] From the floor of the Standing Senate Commission on the Constitution of the Czech Republic and Parliamentary Procedures a proposed amendment to the Czech Constitution in 2001 envisaged the incorporation of this notion into the Czech legislation while also expanding the number of provisions included in Article 40 of the Constitution.

[35] Compare the reaction of Filip, J., *Nález Ústavního soudu k Lisabonské smlouvě z pohledu ústavního práva*, Časopis pro právní vědu a praxi 4/2008, s. 305–315 and the text by Wintr, J., *První rozhodnutí Ústavního soudu o ústavnosti mezinárodní smlouvy*, Jurisprudence 1/2009, s. 21–31.

[36] Points 119 and 120 from ruling of the Pl. CC 29/09 of 3 November 2009. On other aspects see Kysela, J., Ondřejek, P., Ondřejková, J., *Proces vnitrostátního projednávání mezinárodních smluv v ČR.* 2. část. *Problémy stávající úpravy a praxe,* Časopis pro právní vědu a praxi 3/2010, pp. 224–238, and particularly p. 234nn.

contained in the Act on the Constitutional Court to ensure that, compared with the legislation applicable in other Member States[37], distinctions are made concerning the nature of the different standings of the different categories of petitioners in this type of procedure.

5. Amendment to the Parliamentary Rules of Procedure as the Building Stone for Future Constitutional Revison?

However, if we should identify the greatest doctrinal weaknesses of the Constitutional Court, in relation ot the previous proceedings brought before it concerning relationships between national legislation and EU law and the decisions handed down in these cases, it is the opinion of the author of this paper, that we would find these in terms of competences. However, the question marks here go even deeper, into the related issue of the sources of decision-making legitimacy in the EU. In contrast to many fashionable, but generally logically non-consequential theories of *dual legitimacy*, it can be reasonably assumed that the initial source of legitimacy for the actions of the public authorities on the territory of the Czech Republic is derived from the principle of the sovereignty of the people.[38] Parliament, or the people themselves in a referendum, may decide to transfer some powers to an international organisation. This relatively clearly defines the hierarchy of legal rules in the Czech Republic, regardless of the practical application of the primacy of European law. The text of the Constitution, which, just as the constitutions of other new Member States, was revised in the context of the country's accession to the European Union, only mentions transfer of certain powers,[39] and is therefore hardly compatible with the thesis of the devolution of a *part* of state sovereignty[40], which is in fact an act which is conceptually excluded.

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[37] Compare Kust, J., Pítrová, L., *„Lisabonská smlouva" a předběžná kontrola ústavnosti mezinárodních smluv*, Právník 5/2008, pp. 473–504.

[38] In detail and to date the most thorough treatment of these issues in the Czech literature can be found in Belling, V., *Legitimita moci v postmoderní době*, Brno: Masarykova univerzita 2009, s. 125nn.

[39] The Polish constitution speaks of the transfer of power in certain cases (Art. 90 para.1), the Slovak only mentions the "transfer of the execution of part of its rights" (Art. 7 para.2). For details also Mlsna, P., *Reflexe komunitárního práva*…, passim.

[40] Compare the already cited ruling of the Constitutional Court of the CR on sugar quotas, and also for details the so-called second Lisbon ruling (Pl. CC 29/09 of 3 November 2009) in point 147.

Obviously, such a conclusion would fail to find support in the text of the Constitution. Moreover, it does not correspond to how, for example, the German Federal Constitutional Court, whose decision-making practice is close to that of the Czech Constitutional Court in relation to EU law, approaches the concept of sovereignty. At least since the *Maastricht* ruling, the German Federal Constitutional Court has clearly distinguished the concept of *sovereignty* from the *transfer of sovereign powers*, based on the logically consequent idea of the exercise of political rights by the German people (voting rights), from which it derives the conclusion that it is not possible for the Bundestag to accept any substantive vacation of the space for decision-making on key issues at a national level. The French Constitutional Council is similarly very clear in its distinction between the transfer of sovereign rights to the European Union and sovereignty itself. We can conclude from its previous practice that "in terms of the French constitutional order, sovereignty is the property of power fully exercised in the name of the nation, or the people. It cannot be limited, because this would entail a breach of the values on which a democratic society rests." It follows from this conclusion that the "principle of primacy of EU law does not establish a new hierarchy of norms, but is only a choice-of-law rule accepted by the national constitution."[41]

In this respect, it is hardly surprising that, in his response to a proposal by a group of senators to review the constitutionality of the Lisbon Treaty, the President cast doubt on the thesis of "pooled sovereignty". However, in this respect, he may have missed the fact that the Czech Constitutional Court has not accepted this thesis, which could obviously make sense in a *political science* discourse, but only stated that the "European Union has made by far the greatest advances in the concept of shared – "pooled" – sovereignty and has already created a *sui generis* entity, which is difficult to allocate to standard political categories."[42] As the first and the second *Lisbon* Treaty ruling accepted the *Maastricht* doctrine laid down by the German Federal Constitutional Court, no more significant concerns had to be expressed over this mere mention (which was neither an expression of conviction nor a declaration of intent).

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[41] For more details on French constitutional doctrine see Zemánek, J. et al., *Tvorba a implementace práva EU z pohledu vnitrostátního*, Praha: MUP 2012, p. 112nn., here particularly pp. 117 and 121. More details on French constitutional theory and practice are provided in a number of studies by Jan Malíř – compare for example on the given topic a collective monograph by Belling, V., Malíř, J., Pítrová, L., *Kontrola dělby pravomocí v EU se zřetelem ke kompetenčním excesům*, Praha – Plzeň: ÚSP AV ČR a Vydavatelství a nakladatelství Aleš Čeněk 2010, zde s. 45nn.

[42] Pl. CC 19/08, here point 104.

6. Boundaries of the Conferral of Powers

On the other hand, the objection that the Constitutional Court did not address the issue of competences in more detail – the material and procedural limits of the transfer of powers –is clearly a justified concern because these deficiencies grow more apparent, particularly in comparison with the *Lisbon* findings of the German Federal Constitutional Court. This on the one hand defined the risk of vacating the decision-making area for national legislators, while defining areas of competences where pre-understanding at the national level is particularly strong (e.g. criminal law matters, education etc.), but also clearly understands that the method of transferring powers is itself a limited individual empowerment (*begrenzte Einzelermächtigung*), which might be far from the too loosely worded jurisdictional provisions of the Lisbon Treaty.

In contrast with the benevolent view, where the Czech Constitutional Court obviously failed to understand the risk involved in the blanket nature of Treaty provisions or in the freely formulated self-amending clauses (particularly the simplified method of Treaty revisions pursuant to Article 48 paragraph 6 of the Treaty on the EU[43] and the flexibility clause pursuant to Article 352 of the Treaty on the Functioning of the EU[44]), the Czech Republic could not combine the opinions of the legislative and executive power on one hand, which as a result of their own experience had retained a more cautious attitude, and judicial power on the other hand.

It was especially the issue of the so-called "competence of competences" of the Member States and fears of a blurring of the boundaries of powers conferred on the EU that was in the background of the senatorial submission of the Lisbon Treaty for review by the Constitutional Court, and which had also previously resonated in the wording of Section 17 of the draft Act on the principles of conduct and relations between both Chambers and in their external relations that was submitted to the Chamber of Deputies in September 2008.

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[43] On Art. 48 para. 6 of the Treaty on the EU the German Federal Constitutional Court says: „Die Tragweite der Ermächtigung zur Änderung von Bestimmungen des Teils III des Vertrags über die Arbeitsweise der Europäischen Union ist nur eingeschränkt bestimmbar und in materieller Hinsicht für den deutschen Gesetzgeber kaum vorhersehbar" (point 311 of the Lisbon ruling BVerfG, 2 BvE 2/08 of 30 June 2009).

[44] On point 328 of the Lisbon ruling cited, relating to the flexibility clause, the German Federal Constitutional Court states: „Die Vorschrift stößt im Hinblick auf das Verbot zur Übertragung von Blankettermächtigungen oder zur Übertragung der Kompetenz-Kompetenz auf verfassungsrechtliche Bedenken, weil es die neu gefasste Regelung ermöglicht, Vertragsgrundlagen der Europäischen Union substantiell zu ändern, ohne dass über die mitgliedstaatlichen Exekutiven hinaus gesetzgebende Organe konstitutiv beteiligt werden müssen."

As the response by the Constitutional Court[45] has not provided more clues to resolve this issue, another initiative has grown from parliamentary soil. The Parliament, and particularly its upper chamber (the Senate), realised that despite the rhetorical emphasis on the role of national parliaments in Article 12 of the Treaty on the EU, the Lisbon Treaty could in reality weaken their role.[46] On one hand, by the fact that the extension of qualified majority voting in the Council will weaken the strength of the parliamentary mandate entrusted to the Government (a Member State can be outvoted), and on the other hand by introduction of dynamic (evolutive) clauses enabling adoption of measures (to amend or supplement the wording of the Founding Treaties) without their formal changes associated with ratification in the legislature. Any options enabling parliaments to *veto* the application of certain bridging clauses (Article 48 paragraph 7 of the Treaty on the EU or Article 81 paragraph 3 of the Treaty on the Functioning of the EU) cannot fully replace the *assent* procedure.

The so-called "binding mandate" (respectively clause compensating loss of international legal capacity of the Member States and their parliaments resulting from the introduction of dynamic, self-amending clauses) associated with the active consent of both parliamentary chambers relating to the use of self-amending provisions of the Founding Treaties has been introduced in a form of amendment to the Rules of Procedure of both parliamentary chambers. The chosen solution basically covers most of the dynamic provisions mentioned above (particularly the flexibility clause pursuant to Article 352 of the Treaty on the Functioning of the EU, the general and some of specific bridging clauses) and thereby allows the Parliament to approve the transition to qualified majority voting in the Council and the introduction of so-called ordinary legislative procedure, or the adoption of measures needed to achieve the objectives of the Treaties in European policies when the Founding Treaties have not provided the necessary powers. As this concerns a set of previously (i.e. at time of ratification of Lisbon Treaty) identifiable cases (bridging clauses), and does not lead to the transfer of new powers, parliament will decide by simple majority, presuming that the transfer of powers took place at the time the Lisbon Treaty was adopted.

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[45] Compare points 153 and 165–167 of the Lisbon ruling Pl. CC 19/08. In the second Lisbon ruling (Pl. CC 29/09) the Constitutional Court confirmed its position that limits to the transfer of power should be left to the legislature (point 111).

[46] This fact was clearly identified by the Federal Constitutional Court (compare its conclusion on the evolutive clauses and also point 293 of Lisbon ruling BVerfG, 2 BvE 2/08 of 30 June 2009), where in Germany the ratification of the Lisbon Treaty was conditional on accompanying legislation – the adoption of national legislation reinforcing the position of the Bundestag and the Bundesrat. For more see Gärditz, K.F., Hillgruber, Ch., *Volkssouverenität und Demokratie ernst genommen – Zum Lissabon-Urteil des BVerfG*, JuristenZeitung 18/2009, pp. 872–881.

In case of a simplified method of Treaty revisions in accordance with Article 48 paragraph 6, the binding mandate guarantees the prior agreement of the chamber with the simplified procedure while negotiating amendments to any of the provisions of part three of the Treaty on the Functioning of the European Union that relate to the internal policies of the EU. Such an agreed change to the primary law (through a decision taken by the European Council) is then discussed in the Czech Parliament (similarly) as an international treaty change.[47] *Per analogiam,* it can be said that any subsequent decisions of the European Council or the Council which modify or amend the wording of the Founding Treaties should be managed in the same way (i.e. by the consent of both chambers of Parliament with ratification), and that their validity requires the approval of the Member States in accordance with their constitutional provisions.[48]

The approach adopted by the parliamentary chambers and the Government in relation to the self-amending clauses corresponds to the well justified doctrinal findings of the German Federal Constitutional Court in response to the Lisbon Treaty, and in principle corresponds to solutions adopted in the context of the ratification of the Lisbon Treaty by Germany, Ireland and, in the form of a comprehensive revision, the United Kingdom.[49] The only area of doubt, *de lege ferenda,* relates to certain criminal law provisions which may give rise to uncertainties concerning the clarity of the delegation of powers through the ratification of the Lisbon Treaty. This concerns decisions to determine other aspects of criminal procedure, which should lead to the establishment of minimum rules for police and judicial cooperation with a cross-border dimension (Article 82 paragraph (d) of the Treaty on the Functioning of the EU), the determination of other areas of criminal activity, where minimum rules relating to the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension may be established (Article 83 paragraph 1 of the Treaty on the Functioning of the EU), or the establishment of a European Public Prosecutor's office in accordance with

[47] Compare the provisions of Section 109l para. 2 of Act No. 90/1995 Coll., on the Rules of Proo cedure of the Chamber of Deputies and Section 119o of Act No. 107/1999 Coll., on the Rules of Procedure of the Senate.

[48] This refers to changes according to Art. 42 para. 2 of the Treaty on the EU (common defence), and Articles 25 para. 2 (extending the rights of EU citizens), 218 para. 8 (2) second sentence (the EU's accession to the European Convention on Human Rights and Fundamental Freedoms), 223 para. 1 (rules for elections to the European parliament), 262 (jurisdiction of the EU Court of Justice in intellectual property matters) and 311 para. 3 (a system of sources of Union funding) in the Treaty on the Functioning of the EU as amended by the Lisbon Treaty.

[49] Here compare the afterword by the author of this paper to the monograph by Belling, V, *Legitimita moci*…, p. 165nn.

Article 86 paragraph 1 of the Treaty on the Functioning of the EU.[50] Here, the introduction of a binding mandate would in future contribute to strengthened legal certainty over an assessment of whether a respective decision is covered by the transfer of powers under the ratification of the Lisbon Treaty or not. Any finding that a transfer of powers is involved, from the perspective of the Czech constitutional order (!), would not automatically entail the frustration of the efforts of the Member States or the EU as a whole. The intended course of action could still be fulfilled (which is likely, particularly in case when the European Public Prosecutor should be established) through the enhanced cooperation in a group of Member States.

7. Conclusions

Having dealt with the issue of possible revisions of organic legislation, i.e. the Act on the Constitutional Court and the Rules of Procedure of both parliamentary chambers, let us now return to the question posed at the beginning of this essay. Is there any reason to open up the Constitution of the Czech Republic itself, and to adopt its second EU amendment bill? In the opinion of the author of this text, such a reason, a reason that cannot be resolved otherwise, may exist. Paradoxically, it does not relate to the abovementioned quality of European integration, its sometimes envisaged transformation into a federal entity, but instead it concerns the contractual foundations of the Community. Or, to put it more precisely, with the still insufficiently clarified concept of delegation of powers. Given the number of open questions relating to this problem, it is probable that the Czech Constitutional Court will return to this issue in its decision-making practice. Mainly because the issue of assessing the concept of powers has already provoked controversy among professionals, for example when assessing whether the ratification of subsequent amendments to the Lisbon Treaty should necessarily be classified as an international treaty pursuant to Article 10a of the Czech Constitution or not. Jan Kysela also pointed out the problem of defining the term *powers* soon after the publication of the Czech Constitutional Court's findings on the Lisbon Treaty.[51]

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[50] For more on these deliberations see Bříza, P., Švarc, M., *Komunitarizace trestního práva v Lisabonské smlouvě a její (případná) reflexe v právním řádu České republiky*, Trestněprávní revue 6/2009, pp. 161–171.

[51] Kysela, J., *Mezinárodní smlouvy podle čl. 10a Ústavy po „lisabonském nálezu" Ústavního soudu*. In: Gerloch, A., Wintr, J. (eds.), Lisabonská smlouva a ústavní pořádek ČR, Plzeň: Vydavatelství a nakladatelství Aleš Čeněk 2009, pp. 49 – 61.

However, as the Constitutional Court clearly stated in its Lisbon ruling that it did not intend to substitute for the role of constitutional legislator, it can be considered not only reasonable, but even appropriate, that the proposed solution comes from a non-judicial setting. This type of solution would not rely on the legally defined concept of powers, but in a new consequential understanding of the area of jurisdiction, with clear awareness of the fact that the authority for the execution of EU law is derived from a constitutional mandate, as formulated in Article 10a of the Constitution.

This constitutional change would, on the one hand, underline the importance of the Czech Constitution (and possibly also the Charter of Fundamental Rights and Freedoms) as the hierarchical base for the construction of the legal system in the Czech Republic. For example, it could, as in the case of Poland, explicitly identify the Constitution as the set of rules of the supreme legal force. In addition, for the sake of legal certainty and clarity, the fact that all revisions of the Founding Treaties are also enacted under Article 10a of the Czech Constitution should be explicitly confirmed by the Constitution itself. Given the lack of a clear understanding of the concept of powers in the previous case law and doctrine, the existing practice would be codified in this way, reflecting ratification of the so-called Spanish protocol, amending Protocol No. 36 of the Lisbon Treaty on the transitional provisions with regard to the composition of the European Parliament, or the revision of Article 136 of the Treaty on the Functioning of the European Union, or, most recently, the Protocol on the concerns of the Irish people on the Treaty of Lisbon (the so-called "Irish guarantees").

Over the past years, the executive moved towards the opinion that a qualified majority of parliamentary members should confirm changes to the Founding Treaties. A formal approach was therefore preferred to material approach, which would always require consideration, in each case, as to whether a ratification of amendments to Founding Treaties would result in a new delegation of powers. The choice of a purely formal approach was certainly also supported by both, the possible risk of litigation, which could arise in the case of simple majority voting and which could also delay the ratification process itself by initiating proceedings before the Constitutional Court on the conformity of the international treaty with constitutional law, as well as by the conviction that a wider political consensus should be found during discussions on international obligations applied on the territory of the Czech Republic in preference over the domestic law, meaning consent that generally extends beyond the government parties.[52] The Standing Commission on the Constitution of the Czech

[52] Compare here the Government's arguments during the parliamentary debate on the decision of the European Council amending Article 136 of the Treaty on the Functioning of the EU.

Republic and Parliamentary Procedures in the Senate has inclined towards this same opinion for some time now and has built on the principle of procedural equivalence in this regard.[53] It is this consensus between the executive and the legislature that might lead to the petrification of this practice in form of an amendment to the current text of the Constitution. It would also be a desirable example of a situation where amendments to the Constitution are achieved by the gradual crystallisation of practice and not as the result of a partial reflection of a specific situation or temporary political preference.

[53] A more detailed statement by the Standing Senate Commission on the Constitution of the Czech Republic and Parliamentary Procedure on the Government proposal to approve the ratification of the European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union, as concerns the stability mechanism for Member States whose currency is the Euro of 3 August 2011, or a ruling by the same Commission on the latest partial change in the primary law, which, according to the prevailing view, does not result in a transfer of powers (the so-called "Irish Guarantees") of 11 June 2013.

A Reflexion on the Conflict between the Right to Private Life versus the Right to Personal Data Protection

Monika Forejtová*

Summary: The article deals with the description of the legal solution of a particular conflict between the right to protection of privacy and the right to personal data protection, which came from the Czech Republic but has an impact on the entire European Union. The regulation from the Czech Republic at the level of the primary and secondary EU law is stated for the purpose of an easier orientation in the issue. The solution, which complies both with the constitution and with the European Union law, with regard to the conflict of fundamental human rights lies both in finding the facts of the case and above all in assessing the extent of the protection by means of the test of proportionality. Both Nejvyšší soud ČR (the Supreme Court of the Czech Republic) and the Court of Justice of EU contributed to solving this conflict of fundamental human rights.

Keywords: right to privacy, personal data protection, The European Court of Human Rights in Strasbourg, Court of Justice of the European Union in Strasbourg, approximation of laws, exercise of exclusively personal or household activities.

1. Introduction

The legal solution of the conflict between the extent of the protection of the right to privacy and the extent of the right to personal data protection had been one of the recurring topics in the Czech Republic since 2008, which undermined the legal status of an individual. However, it was partially solved only in December 2014.

The Czech Constitution[1] stipulates in Article 1 par. 1, 2 that the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens, and

* Monika Forejtová, Senior lecturer and Head of the Department of Constitutional and European Law, Faculty of Law, University of West Bohemia,Pilsen, Czech Republic. Contact:forejtov@kup.zcu.cz.

[1] The Constitutional Law No 1/1993 Coll., The Constitution of the Czech Republic as amended.

that it shall observe its obligations resulting from international law. From the perspective of the so-called legal licence, it includes the premise of the Czech Constitution that each citizen may do whatever is not forbidden by law, and nobody may be forced to do what the law does not impose.

Protection of individual human rights is not included in the Constitution of the Czech Republic[2], but in the Charter of Fundamental Rights and Basic Freedoms[3], which is part of the so-called constitutional order[4]. From the normative perspective, the Charter is not a direct part of the text of the Constitution of the Czech Republic, but a separate legal regulation, which has a character of a human rights catalogue. Its creation was inspired by the European Convention on Human Rights of the European Council in 1990 – 1991[5]. The constitutional protection of personal integrity and privacy is stipulated in Article 7, par. 1 of the Charter. The constitutional imperative prohibiting unauthorised collection, publishing or another type of misuse of personal data[6] is indicated in Article 10, par. 3 of the Charter. Like Poland, the Czech Republic has been a member of the European Union since the 1st May 2004 and its legal order includes the EU law. Since the passing of the amendment contract, i.e. The Treaty of Lisbon[7] in 2009, the EU Charter of Fundamental Rights[8] is a part of the primary law of the European Union. The article 7 of the Charter of Fundamental Rights (hereinafter referred to as "the Charter") stipulates that everyone has the right to respect for his private and family life, housing and

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2 GERLOCH, A. – KYSELA, J. (eds.) *20 let Ústavy České Republiky. Ohlédnutí zpět a pohled vpřed*. Plzeň 2013, page 43.

3 The resolution of the presidium of the Czech National Board no. 2/1993 Coll., about declaring the Charter of Fundamental Rights and Basic Freedoms part of the constitutional order of the Czech Republic.

4 The constitutional order is defined in the Article 112 Constitution of the Czech Republic. It has the character of an open catalogue of supreme laws of the constitutional legal force.

5 The European Court of Human Rights decided in a case with similar facts – the case Peck v. The United Kingdom, complaint no. 44647/98, point 57.

6 BOBEK, M. – KMEC, J. – KOSAŘ, D. – KRATOCHVÍL, J. *Evropská úmluva o lidských právech*. Commentary Prague 2012, or BOBEK, M. – KMEC, J. – KOSAŘ, D. – KRATOCHVÍL, J. *Dvacet let Evropské úmluvy v České republice a na Slovensku*. Prague 2013, page 26.

7 GERLOCH, A. – WINTR, J. (eds.) *Lisabonská smlouva a ústavní pořádek*. Plzeň 2009, page 16. or SYLLOVÁ, Jindřiška; PITROVÁ, Lenka; PALDUSOVÁ, Helena; a kolektiv. *Lisabonská smlouva. Komentář*. 1st edition, Prague: C. H. Beck, 2010, ISBN 978–80–7400–339–4

8 The protocol no. 30 about exercising the Charter of Fundamental Rights of the European Union in Poland and United Kingdom was added to the EU Charter of Rights, where both countries jointly made an objection to the fact that the Charter may not expand the possibilities of the Court of Justice of EU to state that any procedures or customs are not in compliance with the Charter. The Czech Republic made an objection to the Charter related to its application in the form of the so-called opt-out declaration, which has a political and not legal character. The Charter of Fundamental Rights of EU must be applied within the territory of the Czech Republic without restrictions.

communication. It is stipulated in article 8 par. 1 of the Charter that everyone has the right to protection of personal data relating to them.

Besides general provisions of the Charter, provisions of secondary law can be applied for the issue of personal data protection, as it includes particular procedures of protection of this fundamental right. The directive of the European Parliament and Council 95/46/EC from the 24th October 1995 about protection of natural persons in relation to personal data processing and about the free movement of these data includes an extensive adjustment of the given area. The mentioned directive does not apply to personal data processing, which is performed by natural persons for the exercise of exclusively personal or household activities.

The conflict between the two above-mentioned constitutional and EU rights, which are subject to the same extent of legal protection, which is guaranteed in the Czech Republic above all by the Constitutional Court of the Czech Republic[9], took place between citizens of the Czech Republic and on the territory of the Czech Republic. On one side, it was Mr. Ryneš (hereinafter referred to as "Complainant"), who was an owner of a house, and on the other side there were two citizens, who repeatedly burglarised the given house, and they were not caught, until Mr. Ryneš installed a safety camera system on his house.

This constitutional conflict between the constitutionally guaranteed right of the person, who protected their privacy, and the person, who defended their identity, was subsequently transferred not to the European Court of Human Rights in Strasbourg, but to the Court of Justice of the European Union in Luxembourg. The Court of Justice of EU is not primarily intended for the protection of fundamental rights and freedoms, but it is the main court body of EU, which supervises the uniformity of interpretations of the Community law and European Union law. The path to the legal solution of this conflict of two fundamental rights from the national level to the European Union level consisted of the preliminary-ruling proceedings[10], which is regulated by the Treaty on the Functioning of the European Union[11].

The facts of the entire dispute included the following events. An unknown person repeatedly attacked the property of the Complainant, the Complainant

[9] The Constitutional Court of the Czech Republic, as the supreme body for the protection of constitutionality in the Czech Republic id anchored in the Article 83 of the Constitution and its competences are enumerated in the Article 87 of the Constitution. The operation of the Constitutional Court is regulated by the special Law No 182/1993 Coll., about the Constitutional Court of the Czech Republic, as amended.

[10] DOUGLAS-SCOTT, S.: *Constitutional Law of the European Union*. Harlow: Pearson Education, 2002.

[11] Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01, Official Journal C 326, 26/10/2012 P. 0001 – 0390.

himself and his family for several years and the police did not manage to find this person. Windows of the house of his family were repeatedly broken by this unknown person in 2005 and 2007. The Complainant attempted to solve these attacks on his property and family, i.e. on the area falling under the term "privacy", by contacting the Police of the Czech Republic, but this was unsuccessful. Police officers even recommended to him to install a camera on his house, as the police had no camera in the street, where the Complainant lived. Consequently, the Complainant decided to install a camera system under the ledge of the roof at that time. The system was placed there from the 5th October 2007 to the 11th April 2008. The camera was placed in a fixed position, so it could not be rotated and it recorded only the entrance to the house, but it also recorded the public street and the entrance to the house on the opposite side of the street. The system used only video recording, which was saved into the recording equipment on a hard disk in the form of an infinite loop. As soon as it reached full capacity, the equipment would record over the existing recording, erasing the old material. No monitor was installed on the recording equipment, so the images could not be studied in real time. Only the Complainant had access to the system and its data.

The Complainant, who was repeatedly harmed, decided to buy the camera system at his own expense not for the purpose of focusing on the privacy of passers-by or neighbours living in the opposite house, but for the sole purpose of protecting his property, health of his family and his own health. On the night of 6 to 7 October 2007, a further attack took place. One of the windows of Mr Ryneš's home was broken by a shot from a catapult. The video surveillance system at issue made it possible to identify two suspects. The recording was handed over to the police and relied on in the initiated criminal proceedings against these persons, whom the Police of the Czech Republic identified.

The procedural defence of one of the persons, who was suspected from committing the crime, was the claim that the Complainant was not authorised to place this camera system on his house, and the suspect submitted a request for confirmation, if the operation of the camera system of the Complainant was lawful, to the Office for Personal Data Protection (hereinafter referred to as "the Office")[12]. To the surprise of the Complainant, on the 2nd April 2008, the Police of the Czech Republic notified the Office that the Complainant committed offences against *order* in state *administration* and against order in territorial self-government. The Office examined the request of the suspect and of the Police of the Czech Republic and found on 4th August 2008 that the

[12] The Office for Personal Data Protection: *Stanovisko č. 1/2006, leden 2006, Provozování kamerového systému z hlediska zákona o ochraně osobních údaj*ů, http://www.uoou.cz.

Complainant infringed the Law No 101/2000 Coll., about personal data protection, as amended[13], since:

- as a data controller, he had used a camera system to collect, without their consent, the personal data of persons moving along the street or entering the house opposite;
- he had not informed the affected persons of the processing of their personal data, the extent and purpose of that processing, by whom and by what means the personal data would be processed, or who would have access to the personal data; and
- as a data controller, Mr Ryneš had not fulfilled the obligation to report that processing to the Office.

2. As regards the possibility of operating a camera system in general according to the Czech Law No. 101/2000 Coll. about personal data protection

As it was already mentioned above in this article, the provision of the Law No 101/2000 Coll. does not have to be applied on every camera system and not always. In compliance with the provision § 3 par. 3 of the Law No 101/2000 Coll., this law does not apply to personal data processing, which is performed by a natural person exclusively for personal needs. Another situation, when the law is not used, follows from the Law No 101/2000 Coll. in connection with the opinions of the Office. This is a situation, when the camera system is operated without making a recording, i.e. it is only used to watch something on-line. In such case it is not considered personal data processing according to § 4 letter e) of the Law No 101/2000 Coll.[14]

The Czech Office for Personal Data Protection is a very strict institution with regard to punishing any unlawful collection of personal data and it often imposes high penalties. Penalties are imposed both on state administration bodies and on private subjects, e.g. for an unreported – and thus unregulated – collection of data about third persons. The Office bases its decision-making especially on the Law No 101/2000 Coll., the provisions of which reflect

[13] This law was passed in the Czech Republic and, in compliance with the law of the European Community, international treaties and to exercise the right of any person to protection against an authorised infringement on privacy, it regulates rights and obligations for processing of personal data and it stipulates conditions, under which personal data are handed over to other states.

[14] The Office for Personal Data Protection: Informační bulletin 2/2011 see https://www.uoou.cz.

international law regulations[15] and European Union regulations, especially the Directive 95/46[16].

The Office is entitled to issue both decisions and opinions, which it then also uses as a precedent, in all matters falling under its competence. The Office issued its opinion[17] in this respect on January 2006. According to the opinion of the Office, what is considered crucial for the issue – regardless of whether the operation of a camera system is personal data processing or not – is the fact, whether, besides the camera surveillance, recording is made as well or data are stored in the recording equipment – and at the same time, whether the purpose of the recorded data is their use for identification of natural persons in relation to a certain behaviour.

In compliance with the Law No 101/2000, the processing of personal data by operating a camera system is in principle only possible with the consent of the data subject. However, this condition cannot be fulfilled in most cases, as it is virtually impossible to clearly define a circle of persons, who find themselves or could find themselves in the reach of the camera. This means that we can only use the provisions of the Paragraph 5(2), letter e) of Law No 101/2000, under which the processing of personal data is possible in the absence of consent of the data subject, "*where doing so is necessary to safeguard the legally protected rights and interests of the data controller, recipient or other data subjects. However, such processing must not adversely affect the data subject's right to respect for his private and family life"*.

According to the Law No 101/2000 Coll., also the period, for which recordings from the camera system is stored, is important. According to the provision § 5 par. 1 letter e) of the Law No 101/2000 Coll., the data controller is obligated to store personal data only for the period, which is necessary for the purpose of their processing. The Law No 101/2000 Coll. does not include any more specific provisions with regard to the issue of adequacy of the period of storage of data. Therefore, it is necessary to proceed on the basis of interpretations included in opinions of the Office[18].

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[15] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data no. 108, declared under no. 115/2001 Coll. m. s

[16] The Directive of the European Parliament and Council 95/46/ES from 24th October 1995 about protection of individual in relation to personal data protection and free movement of these data

[17] The Office for Personal Data Protection: Opinion no. 1/2006, January 2006, *Provozování kamerového systému z hlediska zákona o ochraně osobních údajů*. See http://www.uoou.cz.

[18] The Czech Office for Personal Data Protection considers 3 days as an adequate period for storage of a common recording.

3. The procedural solution of the conflict of constitutionally guaranteed rights

The decision of the Office in the matter of the Complainant from the 4th August 2008, as the decision of the administrative body of the first instance, was in principle confirmed by the decision of the chairman of the Office from the 5th January 2009.

The Complainant subsequently brought an action challenging that decision of the Office, which sanctioned the Complainant, before the referring court. Městský soud v Praze (the Municipal Court in Prague) dismissed his action and stated the reasons for this decision in a very extensive finding from the 25th April 2012.

Mr Ryneš brought a cassation complaint against that judgment of the Městský soud v Praze (the Municipal Court in Prague) to Nejvyšší správní soud (the Supreme Administrative Court). According to the Civil Procedure Code and in compliance with Article 267 of the Treaty on the Functioning of the European Union, Nejvyšší správní soud (the Supreme Administrative Court) decided to stay proceedings and to refer the following question to the Court of Justice of the European Union (hereinafter referred to as "SDEU")[19] for a preliminary ruling:

"Can the operation of a camera system installed on a family home for the purposes of the protection of the property, health and life of the owners of the home be classified as the processing of personal data "by a natural person in the course of a purely personal or household activity" for the purposes of Article 3(2) of Directive 95/46/EC ..., even though such a system also monitors a public space?"

This brought the entire case to the grounds of the European Union and its significance for the entire European Union was reflected in the number of secondary participants, which intervened in the preliminary-ruling proceedings. Besides the participants of the original dispute: i.e. the Complainant and the Office, opinions regarding the preliminary ruling were also expressed by the Committee, Czech, Italian, Austrian, Portuguese, Polish, Spanish and UK government.

Moreover, the Advocate General Niil Jääskinen added his opinion about the matter on the 10th June 2014, the content of which was similar to the opinion of the Czech Office for Personal Data protection. Advocate General [20] dealt marginally with arguments of both side of the dispute at the national level, but he

[19] CRAIG, P. – DE BURCA, G. *EU Law. Text, cases and materials*. Fifth Edition. Oxford 2011, page 442.

[20] HAKENBERG, Waltraud. *Základy evropského práva*, 1st edition, Prague: C. H. Beck, 2000, ISBN 80–7179–301–6

focused on the interpretation of the European Union rights. Above all, he stated that the Charter, and especially its articles 7 and 8 can obviously be applied to the given case. He assumed that this was a conflict between fundamental rights of the "data controller" and fundamental rights of the "data subject". It concerned a conflict between the Complainant and the identified attackers in the particular case, but – in the context of the use of the Directive 95/46 in general, it concerned a conflict between the right to protection of private life of every natural person operating camera surveillance of a public space and the right to respect for personal data of every data subject, which finds themselves in this space.

The Advocate General stated that the nature of the entire conflict between both rights is the interpretation of the words "*for exercise of exclusively personal or household activities"*, on which it depends, whether the Directive 95/46 is to be applied on the camera surveillance performed by the Complainant. He refused to differentiate between the facts whether the camera surveillance fulfilled its purpose, i.e. whether it led to identification of the attackers, or whether it just led to recording of persons, who found themselves on the public space in front of the house of the Complainant. He emphasised that the substantial fact is that someone is recorded without their consent and awareness of it. Moreover, he emphasised the fact that there is a difference between the situation, when the camera surveillance is performed by public authorities or by legal persons. In case of public authorities the Directive 95/46 is used with the exception of the situations mentioned in article 3 par. 2 of the first bullet of this directive. In case of legal persons the Directive 95/46 is used without restrictions.

The Office responded positively to his opinion by stating that: "*The content of the opinion corresponds to the attitude of the Office for Personal data Protection and to its expressed opinion that cameras monitoring a public space and serving for identification of persons are not used for personal data processing exclusively for private or household needs, which the Office already claimed since the beginning. Therefore, such cases cannot be excluded from the effect of the European Directive and the Law about personal data protection. The Office welcomes the fact that its legal opinion was confirmed within the European context. As the particular case will be decided by Nejvyšší správní soud (the Supreme Administrative Court) in its final phase, the Office will not express any more opinions in this matter. We can just add that the subject of the proceedings was not any intervention into the privacy of the vandals, as some media claimed, but monitoring of persons on the street and inhabitants of the opposite house and infringement of their right to privacy."*[21]

[21] The Office for Personal Data Protection: The Opinion from the 11th July 2014. See http://www.uoou.cz.

4. Exploring the regulation of the use of camera systems in the labour law of the Czech Republic

The use of camera systems has become a very relevant issue in the Czech Republic. Camera systems appear on streets, in schools, in social facilities, in shops. The labour law takes camera systems into account, especially in the Law No. 262/2006 Coll., of the Labour Code, as amended (hereinafter referred to as "Labour Code").

Reasons for installation of the camera system may be varied from the perspective of the employer, both with regard to the protection of life and health of the employer, employees or other persons, protection of property of all the mentioned persons, monitoring of work performance of employees or prevention of criminality both on part of employees or third persons. Employers are entitled to protect their property even from the point of view of monitoring the work performance of employees. Restrictions following from the Labour Code must be applied to cases, when the monitoring of employees was too intensive, permanent and systematic. At the same time, it is necessary to emphasise that all employers have the right to monitor their employees, not just the employers who perform activities, which are extraordinarily dangerous or which represent an extraordinary threat.[22]

In any case, such an employer is also a data collector according to the Law No 101/2000 Coll. and as such he/she is obligated to report personal data processing to the Office before installing the camera system, including the information about the purpose of processing, extent of processing, facts, whether the personal data will be processed with the consent of the data subject or not, about the number, type, location and regime of the cameras. It is therefore obvious that the manner of solving this issue should have an expected impact on all camera system administrators.

5. The question for the preliminary-ruling proceedings before the EU Court of Justice, which was presented by Nejvyšší správní soud ČR (the Supreme Administrative Court of the Czech Republic).

The EU Court of Justice had the very precise wording of the preliminary question at its disposal. The question was focused on the interpretation of the words

[22] BĚLINA, M. a kol.: *Zákoník práce. Komentář.* 1st edition. Prague: C. H. Beck, 2012. page 1634.

"*for the exercise of exclusively personal or household activities*". According to the interpretation of these words, it would then be clear, whether the Directive 95/46 should be applied to the camera surveillance performed by the Complainant as an individual natural person, who does not have the public legal authorisation, which public authorities have at their disposal.

The Court of Justice assessed above all the interpretation no. 3 par. 2 of the Directive 95/46, which specifies two exceptions, under which the Directive 95/46 will not be used for personal data processing. In case of the Complainant it could be possible to use the exception included in the second bullet of this paragraph, according to which the Directive 95/46 does not apply to personal data processing performed by a natural person for the exercise of exclusively personal or household activities. The court compared the wording of the Czech legal regulation (§ 3 par. 3 of the Law No 101/2000 Coll.) with the wording of the European Union regulation (Article 3 par. 2 of the second bullet of the Directive 95/46) and it declared that the wordings correspond to each other in principle. The basic issue was, when the natural person performs personal data processing for their personal needs and when we can talk about personal data processing by the natural person for the exercise of exclusively personal or household activities.

The Czech[23], Italian, Polish and UK governments expressed their opinions in favour of the Complainant with regard to the preliminary ruling as well, stating that the exception according to Article 3 par. 2 of the Directive 95/46 applies to the Complainant. According to this opinion, the operation of the camera system, which was performed by the Complainant, and the purpose of which is the protection of property, health and life of owners of the house, can be considered an exercise of exclusively personal or household activities, despite the fact that the given camera system monitored a public space as well. The Austrian, Portuguese and Spanish governments, and also the Committee, had an opposite opinion, i.e. that the above-mentioned exception cannot be applied to the given case, and this opinion corresponded to the conclusions of the Advocate General. It is therefore obvious that the polarity of opinions among

[23] For more information see The report about the activity of the Government Agent for representation of the Czech Republic in front of the Court of Justice of the European Union for 2013, page 22: "*The declaration sent to the Court of Justice on the 2nd August 2013 expresses the opinion that the mentioned exception includes activities, which purpose a legitimate interest connected with personal or household activities (including the protection of life, health, property, private and family life and housing), if this activity geos beyond the pursued interest and if it does not infringe rights of third persons more than it is necessary. Application of this exception is not a priori excluded just for the reason of monitoring of a public space (if the principle of adequacy is fulfilled), nor for the reason of handing over the recording to the police (which is a legitimate procedure to protect the mentioned interests)*." See https://isap.vlada.cz.

the member countries of EU was crucial and that arguments on both sides were convincing.

The Court of Justice based its interpretation activity[24] especially on the general rule of interpretation that any exceptions are interpreted restrictively[25]. The use of an exception depended on finding the intention or aim of the Complainant, who performed the data processing exclusively for his own personal needs. According to the opinion of the Advocate General, which the Court of Justice of EU agreed with later, this concept is impossible.

From the perspective of the application of EU law in member states, it is not possible for the effect of the instrument of the European Union law to depend on a subjective purpose of the given natural person, as such an aim cannot be objectively found and verified, and such an aim is not relevant for the data subjects.

Did the Complainant perform personal data processing as a natural person exclusively for personal or household activities, when operating his camera system? What can be included in the term exclusively personal or household activities? Does the fact that the camera also monitored the public space and entrance to the opposite house play a role here?

The Court of Justice assessed the situation of the Complainant by means of a comparison test[26], when it compared obligations of legal persons and public authorities related to the operation of a camera system with the situation of natural persons, who operate a camera system for their own needs. The court came to the conclusion that in the situation, when the natural person performs a systematic camera surveillance of a public space, even if the purpose is to protect property, health and life of his/her entire family, the given person is still obligated to observe the same conditions, which are imposed by the Directive 95/46 on other persons.

If we proceed from the equality principle of subjects of law[27], the method chosen by the EU Court of Justice is correct. However, if we want to apply the rule of the so-called legal licence[28], it means exceeding competences on part of state administrative bodies, as no such obligation is explicitly stipulated for natural persons in the particular regulation.

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[24] VERNY, Arsén; DAUSES, Manfred A. *Evropské právo se zaměřením na rozhodovací praxi Evropského soudního dvora*, 1st edition, The Institute of International Relations, 1998, ISBN 80–85864–41-X

[25] e.g. the of the Court of Justice in the matter C-101/01 *Lindqvist* (2003), and the decision of the Court of Justice in the matter C-73/07 *Satakunnan Markkinapörssi a Satamedia* (2008).

[26] FOREJTOVÁ, M.; TRONEČKOVÁ, M.: *Evropské právo v praxi*. 1st edition. Plzeň: The publishing house Aleš Čeněk, 2011.page 34.

[27] See FREDMAN, S.: *Discrimination law*. New York: Oxford University Press, 2011.

[28] Each citizen may do whatever is not forbidden by law, and nobody must be forced to do what the law does not impose, see the Article 1 par. 2 Constitution of the Czech Republic.

The Court of Justice based its decision on Article 7 letter f) of the Directive 95/46, which stipulates that personal data processing may only be performed, if:

- it is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed
- except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject, which require protection under Article 1(1) of this Directive.[29]

It further stipulated that, within the second condition, it is always necessary to measure individually and according to each particular case rights and interests, which are contrary to each other on the side of the data controller and on the side of the data subject. Therefore, the Court of Justice emphasised the principle of proportionality when assessing the extent of protection.[30]

In this respect, we can refer to the previous judicature of the EU Court of Justice related to the interpretation of the European Union law, when the court applied the Charter of Fundamental Rights of the European Union in the case of *Google Spain and Google*[31]. Here, SDEU decided that in the extent in which it regulates personal data processing, which can interfere with fundamental rights and freedoms, the provision of the Directive 95/46 must be interpreted in compliance with the Charter, and furthermore, the significance of the Directive 95/46 was emphasised in relation to ensuring an efficient protection of fundamental rights and freedoms of natural persons, especially the right to privacy in relation to personal data processing.

The issue of personal data processing in relation to respect for private life was also dealt with by the Court of Justice of EU in its recent decision in the case *Digital Rights Ireland and Seitlinger and others*[32]. Here, the Court of Justice of EU stated that*:* "*As it concerns the right to respect for private life, according to the established practice of the Court of Justice, the protection of that fundamental right requires that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary."*

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[29] "In compliance with this directive, member states shall ensure the protection of fundamental rights and freedoms of natural persons, especially their privacy, in relation to personal data processing."

[30] E.g. The protocol about the use of principles of subsidiarity and proportionality for the Treaty on the Functioning of the European Union.

[31] E.g. decision of the Court of Justice of EU in the case C-131/12, *Google Spain and Google* (2014)

[32] Joint matters C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger* and others (2014), point 52, 53

6. Conclusion

The legal theorist Rudolf von Jhering stated in his work „Struggle for Law“[33] that: „ *The end of the law is peace. The means to that end is war. So long as the law is compelled to hold itself in readiness to resist the attacks of wrong—and this it will be compelled to do until the end of time—it cannot dispense with war. The life of the law is a struggle,—a struggle of nations, of the state power, of classes, of individuals. Every principle of law which obtains had first to be wrung by force from those who denied it; and every legal right—the legal rights of a whole nation as well as those of individuals—supposes a continual readiness to assert it and defend it. The law is not mere theory, but living force. And hence it is that Justice which, in one hand, holds the scales, in which she weighs the right, carries in the other the sword with which she executes it. The sword without the scales is brute force, the scales without the sword is the impotence of law. The scales and the sword belong together, and the state of the law is perfect only where the power with which Justice carries the sword is equalled by the skill with which she holds the scales.“*

There can be certain doubts in this particular issue about achieving an individual justice for the Complainant. However, there can be obviously no doubts about the meaning of the decisions of both national courts of the Czech Republic and of the EU Court of Justice, which have a joint preventive character. Their aim is to regulate activities of natural persons, which could inadequately infringe on rights of others. It is also certain that a real jural battle for both rights – the right to privacy and right to personal data protection – took place at all levels. It is apparent that when you use a camera system, you may restrict a human right or freedom, especially the right to personal data protection. Each such restriction, each individual case of the use of a camera system must be subjected to the test of proportionality.

The right to protection of personal data still prevails over the right to privacy protection in the hitherto practice of SDEU, despite the fact that personal data are a subset of the right to privacy. In his opinion, the Advocate General pointed out that SDEU has not judicated any fulfilment of the conditions in any matter for the use of the exception according to Article 3 par. 2 from the bullet of the second Directive 95/46, although SDEU dealt with the possibility of using this exception in the case *Lindqvist*[34].

[33] JHERING R. Š.: *Boj o právo (Struggle for Law), Právní věda všedního dne*. Plzeň: The publishing house Aleš Čeněk, s.r.o. 2009. Page 6.

[34] The decision of SDEU in the matter of C-101/01 *Lindqvist* (2003).

The EU Court of Justice thus preserved the continuity of its decision-making and came to the conclusion that article 3 par. 2 from the second bullet of the Directive of the European Parliament and the Council 95/46/EC from the 24th October 1995 about the protection of natural persons in relation to personal data processing and free movement of these data must be interpreted in the following way: the visual recording of persons is saved in the form of an infinite loop into a recording equipment, such as a hard disk – placed by a natural person on his/her family house for the purpose of protection of property, health and life of owners of the house, and even if such a system monitors a public space, it does not represent data processing for the exercise of exclusively personal or household activities on the basis of the mentioned provision.[35]

[35] The decision of the Court of Justice (the fourth senate) from the 11th December 2014 in the matter C212/13 *Ryneš proti Úřadu pro ochranu osobních údajů (Ryneš vs the Office of Personal Data Protection)*, the subject of which is a request for a preliminary ruling on the basis of the Article 267 SFEU, submitted by the decision of Nejvyšší správní soud (the Supreme Administrative Court of the Czech Republic) from 20th March 2013, delivered to the Court of Justice on the 19th April 2013.

The European Union and the United States on the Way to Economic Integration

Lenka Fojtíková*

Summary: The foreign trade and investment flows between the European Union (EU) and the United States of America (USA) represent the biggest bilateral cooperation in the world. However, the economic and trade relations of these countries have not confirmed until now any preferential agreement that would enable to carry out these bilateral relations on a more favourable base than the multilateral trade cooperation based on the Most-favoured nation clause in the World Trade Organization (WTO). Although the idea about the creation of the Transatlantic Free Trade Area (TAFTA) was already open earlier, the EU-US negotiations about the creation of the Transatlantic Trade and Investment Partnership (TTIP) have only been managed since July 2013. The paper is focused on the current EU-US negotiations about TTIP and displays the development of trade and investment flows between the EU and US in the period of 2001 to 2012.

Keywords: Economic Integration; Trade Liberalisation; Free Trade Zone; WTO; Foreign Direct Investment.

JEL code: F13, F15, O24

1. Introduction

The European Union (EU) and the United States of America (USA or US) represent the largest bilateral trade partnership in the world. Both states are very important trading partners for each other not only in the area of merchandise trade, but also in the area of commercial services trade. The transfer of capital and foreign direct investments is indispensible and significant for both of them. Their connectedness and mutual dependence started to be significant especially from the end of the 20th century. A third of the EU and US bilateral trade is performed in the frame of intra-company transfers. Their mutual investments contribute to growth and jobs on both sides of the Atlantic. For example, the

* Lenka Fojtíková, Associate professor at Faculty of Economics, VŠB-Technical University Ostrava, Czech Republic. Contact: lenka.fojtikova@vsb.cz.

US affiliates in the EU account for about 13% of the EU GDP, while the EU affiliates in the US represent 11% of the US GDP. Trade between affiliates on the two sides of the Atlantic accounted for 47% of the total EU-US merchandise trade in 2002 and increased to 50% by 2012.[1] The US affiliates located in Europe employed more than 4 million workers, from which 1.9 million people were directly employed in processed industry in 2000. Another six million people in Europe found a job in other sectors of the economy thanks to the US investments. Similarly, the EU investments employed about 4.4 million people in the US. Taking into account indirect employment, another seven million US people obtained a job thanks to the EU investors at the same time.[2]

The transatlantic relationships also determine the shape of the global economy as a whole. Together, the EU and US economies account for about half the entire world GDP and for nearly a third of world trade flows. Although the US and a number of EU member countries, namely Finland, Germany, Sweden, the Netherlands and the United Kingdom, belong to the most competitive economies in the world, their leading position in the world economy is not steady. Traditional centres of the world economy, i.e. the US, the EU and Japan, which were developed as the core of American, European and Asian continents after World War II,[3] started to catch up by some rapidly growing economies, mostly represented by the BRIC groups (Brazil, Russia, India and China). Though these so-called "emerging markets" are developing countries, because the living standard of the inhabitants in these countries is low all the time, they take positions among the ten leading countries in the world now and are able to compete in a number of sectors in the EU as well as the US. The main factors that influenced this development were trade liberalisation that started to be promoted after World War II especially through the General Agreement on Tariffs and Trade (GATT), a higher transfer of capital and foreign direct investment in the 1990s connected with the reallocation of production from developed countries to developing countries and the fragmentation of the production, and also bigger willingness to cooperate among countries and to create regional integration groups. The economic reforms and political changes that were executed in some of these emerging economies also played an important role.

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[1] Lakatos, C., Fukui T. (2013). *EU-US Economic linkages: the role of multinationals and intra-firm trade.* Retrieved from http://trade.ec.europa.eu/doclib/docs/2013/november/traθ doc_151922.%202_November%202013.pdf

[2] Fojtíková, L. (2006). *Společná obchodní politika Evropské unie*. Ostrava: VŠB-TU. pp. 93–96. ISBN 978–80–248–1076–8.

[3] Cihelková, E. a kol. (2009). *Světová ekonomika. Obecné trendy rozvoje*. Praha: C. H. Beck. pp. 186–205. ISBN978–80–7400–155–0.

In the time of a globalised world economy and growing competition, the EU and the US try to remove untapped potential in their bilateral cooperation and to further deepen their economic cooperation. Although the Transatlantic Economic Partnership was created in the second part of the 1990s and the economic and political cooperation between the US and the EC/EU has already been carried out since the end of World War II, the idea of the creation of a complex free trade zone between them has been a current topic for the last two years. This paper gives a complex view on the trade and investment cooperation between the EU and the US in the period of 2001 to 2012 and deals with the current situation in negotiations running in the frame of the Transatlantic Economic and Trade Partnership (TTIP) on the background of their current economic development and political leadership. The choice of this period has its own foundation. It displays the development of the EU-US bilateral trade in the new millennium. Since 2001, both of the states have been affected by different events that have probably also influenced their bilateral trade. Let us remember the most important of them – the terrorist attack on the World Trade Centre in the USA in 2001, the biggest enlargement of the EU in the form of 10+2 in 2004 and 2007 and also the world economic and financial crisis in 2008−2009. The object of the paper is to highlight the main areas of the EU-US trade negotiations and to graphically present the development of the EU-US bilateral trade and investment flows. The methodology of the paper is as follows: firstly, the theoretical background of economic integration will be performed. Secondly, the current institutional framework of the economic cooperation between the EU and the US will be described. In the next part of the paper, the analysis of the macroeconomic environment and trade flows of both economies will be done. In conclusion, the main facts from the trade analysis will be presented and discussed.

2. Economic integration from the theoretical point of view

Economic integration represents a process in which the interconnection of national economies via removing obstacles to trade (merchandise trade as well as commercial services trade), capital flows and the movement of labour occurs. It is a long-term process followed by technological changes and accompanied by a functioning of political powers, such as industrial lobby, supranational groups or international agreements. Zlý mentions that global economic integration is a phenomenon or one of the processes that is an organic element

of contemporary globalisation, but is not identical with it.[4] El-Agraa claims that "*economic integration is concerned with the discriminatory removal of all trade impediments between at least two participating nations, and the establishment of certain elements of cooperation and coordination between them"*.[5] However, the WTO's rules, namely Article XXIV of GATT and Article V of GATS enable to create preferential areas, such as free zones and customs unions under given conditions. The effects of the creation of integration blocks were theoretically analysed by James Meade and Jacob Vinner, who in their models denoted the trade creation and trade diversion effects. Practically, economic integration can take the form of a regional trade agreement or preferential trade agreement or trading block.

Economic integration includes several stages. The first division of the integration stages was made by Béla Balassa in the 1960s, on which heretofore many other authors build.[6] Balassa's approach includes five stages of economic integration including: free trade areas, customs unions, common markets, complete economic unions and complete political unions. In a free trade area or free trade zone, the member nations remove tariffs among themselves, but retain their freedom to determine their own trade policies to the third countries. Zlý consider for which countries the creation of a free zone is the most economically advantageous and conclude that for those countries that have reached a high value of bilateral trade.[7] It enables them to use their comparative advantages and to effectively use all production factors, such as labour, land and capital. A customs union is very similar to a free trade area, except that the member states must conduct and pursue a common commercial policy, including adopting common customs tariffs on imports from non-member countries. A common market is a customs union that also allows for free factor mobility (i.e. capital, labour, technology) across the member nations' borders. A complete economic union is a common market plus complete unification of monetary and fiscal policies. It means that the member states must introduce a central authority to exercise control over these matters. In a complete political union, the member states literally become one nation. It means that the central authority

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[4] Zlý, B. (2009). Úvod do teorie mezinárodní ekonomické integrace. Brno: Tribun EU. 284p. ISBN 978–80–7399–719–9.

[5] El-Agraa, A. M. (2011). *The European Union. Economics and Policies.* Cambridge: Cambridge University Press. pp. 1–16. ISBN-13 978–1-107–00796–3 (hardback).

[6] El-Agraa, A. M. (2011). *The European Union. Economics and Policies*. Cambridge: Cambridge University Press. pp. 1–16. ISBN-13 978–1-107–00796–3 (hardback). Cihelková, E. a kol. (2007). *Nový regionalismus. Teorie a případová studie (Evropská unie)*. Praha: C. H. Beck. pp. 7–12. ISBN 978–80–7179–808–8, etc.

[7] Zlý, B. (2009). Úvod do teorie mezinárodní ekonomické integrace. Brno: Tribun EU. 284 p. ISBN 978–80–7399–719–9.

needed in the economic union should be paralleled by a common parliament and other institutions needed to guarantee the sovereignty of one state.

Zlý argues that the traditional division of economic integration should take into account real integration development.[8] He newly defines the individual stages of integration. The lowest stage of the free zone is kept as well as the second stage of economic integration that is represented by a customs union. Consequently, he divides the economic union into three stages, such as primary economic union, developed economic union and formative economic and monetary union. The sixth stage represents a full economic and monetary union, and the last stage is an economic and political union. This narrower division of economic integration provides more detail in some aspects of integration that Zlý points out on the development of the European Community (EC) and the EU respectively. However, all the time it is only a theoretical model. In practice, countries take different measures that usually cross the content of the theoretically defined stages of economic integration. It means that none of these stages can be found in its "clean" form.

3. From economic cooperation to economic integration between the EU and the United States: new ideas, new opportunities

The economic and political cooperation between the EU and the US has already been developing since the end of World War II. First the US provided economical and financial assistance to many European countries, and later trade and investment cooperation was developed between them, but without a framework bilateral agreement being signed. The economic relations of the EU with the US have been developing only on the base of the GATT/WTO rules and individual sectorial agreements. The idea to make trade between North America and Europe more preferential, i.e. to create a transatlantic free trade area, was first presented by the Canadian Ministry of Trade in 1994. Cihelková mentions several arguments why the Transatlantic Free Trade Area (TAFTA) has not been created until now.[9] It is especially because of relatively little developed economic relations between the EU-US and the unsolved global context of the TAFTA. Trade negotiations between the EU and the US about the Transatlantic

[8] Zlý, B. (2009). Úvod do teorie mezinárodní ekonomické integrace. Brno: Tribun EU. 284p. ISBN 978–80–7399–719–9.

[9] Cihelková, E. a kol. (2003). *Vnější ekonomické vztahy Evropské unie*. Praha: C. H. Beck. pp 139–217. ISBN 80–7179–804–5.

Trade and Investment Partnership (TTIP) have been led since 2013. The agreement about TTIP would be the first framework agreement covering the bilateral trade between the EU and the US carried out on a preferential base.

3.1 Development of the EU-US economic cooperation after World War II

The situation in the world economy after World War II indicated that international issues could be solved only through transatlantic cooperation. The main motivation of the US was to confine the growth of influence of the Soviet Union towards the West of Europe. The United States tried to help European countries by economic assistance and in this way to localise communism in Europe. West European countries usually accepted the economic support of the US through the Marshall Plan, but countries from Central and Eastern Europe refused this assistance and remained under the influence of the Soviet Union. In the period of the "cold war", the economic, political and military cooperation of the US was focused on the market oriented economies of Western Europe. Contrary to this cooperation, the US used different instruments (for example COCOM) to inhibit the diffusion of new technologies to central-planning economies. The economic cooperation among East and West European countries was also poor and accompanied by many discriminatory measures.

In the post war period of the 1950s, six West European countries founded the European Economic Community (EEC) that was deepened and extended in the following decades by other European countries. The mutual relations between the US and the European Communities (EC) were developed on the one hand by partnership in political and ideological areas (UN, NATO) and narrow cooperation in the economic area (OECD, GATT, etc.), but on the other hand by the growing political and economic rivalry that was the result of changing relations of power between European and American macroregions.[10] The main areas of the development of the economic cooperation of the EC and the US were trade in goods and commercial services, flows of capital, and industrial and scientific cooperation. However, this cooperation was carried out without any framework agreement about economic and trade cooperation. There was only non-formal dialogue between the EEC/EC and US and multilateral cooperation based on the GATT principles.

In 1990, the EU and the US signed the Transatlantic Declaration on EC-US Relations (non-officially called the Transatlantic Declaration). The declaration

[10] Cihelková, E. a kol. (2003). *Vnější ekonomické vztahy Evropské unie*. Praha: C. H. Beck. pp 139–217. ISBN 80–7179–804–5.

created a new institutional framework of bilateral relations between the EC and the US. Political dialogue between the EU and the US was initiated at various levels, including regular summit meetings that take place at the level of heads of state and government among the US, the European Commission and the country holding the EU Presidency. The cooperation is focused on the areas of economy, education, science and culture.

Other endeavours to amplify the EC–US relations culminated with the signature of the New Transatlantic Agenda (NTA) and the Joint EU-US Action Plan in 1995. The main purpose was to move from dialogue to common actions. The Action Plan contains four broad objectives of the EC-US collaboration: promoting peace and stability, democracy and development around the world, responding to global challenges, contributing to the expansion of world trade and closer economic relations, and building bridges across the Atlantic.[11] After the signature of the New Transatlantic Agenda, many sectorial accords were signed between the EC and the US, namely the EC-US Agreement on Customs Cooperation and Mutual Assistance in Customs Matters, the EC-US Agreement on Scientific and Technological Cooperation, the EC-US Agreement on Mutual Recognition, etc.

Other important steps to develop economic cooperation between the EU and the US came in March 1998 when the European Commission proposed the draft of the Agreement about the New Transatlantic Market. In the same year, the Transatlantic Economic Partnership (TEP), including the TEP Action Plan, was adopted. The TEP covers both bilateral and multilateral trade. Bilaterally, TEP addresses various types of obstacles to trade and strives to establish agreements on mutual recognition in the areas of goods and services. Cooperation in the areas of public procurement and intellectual property law was also mentioned. Multilaterally, the focus was on further liberalisation of trade within the World Trade Organization (WTO) in order to strengthen world trade. In the frame of the TEP, the Transatlantic Business Dialogue as well as other dialogues were created. The main object of the transatlantic partnership was the empowerment of the EU-US trade, the extension of opportunities for new investments and the liberalisation of multilateral trade relations. It was estimated that closer cooperation and the next trade liberalisation between the EU and the US could bring gains for both of them in the total value of 100 billion euros and 75 billion US dollars respectively.[12] At the EU-US summit

[11] United States Mission to the European Union. Retrieve from http://useu.usmission.gov/transatlantic_relations.html.

[12] Fojtíková, L. (2006). *Společná obchodní politika Evropské unie*. Ostrava: VŠB-TU. pp. 93–96. ISBN 978–80–248–1076–8.

in London in 2002, the Positive Economic Agenda was initiated by the US president George W. Bush and by the president of the European Commission Romano Prodi. In 2007, the EU and US created the Transatlantic Economic Council (TEC) with the object of removing subsistent barriers to trade between the EU and US. All these documents and steps were important for the development of the EU-US economic cooperation, but they have not brought significant change in the institutional framework of the EU-US bilateral trade until now.

3.2 Current negotiations about the Transatlantic Trade and Investment Partnership

The negotiations between the EU and the US about a comprehensive trade agreement that would cover all sectors of the economy was motivated by the continuing economic crisis and the stagnation of the multilateral trade negotiations in the WTO running in the frame of the Doha Development Round. In 2011, the EU and the US set up a working group of government experts to see what trade and investment agreement between the two economic powers might be developed. The group was chaired jointly by the EU Trade Commissioner and the US Trade Representative. The High Level Working Group on Jobs and Growth considered the opportunities and potential difficulties the agreement could bring and recommended launching negotiations. According to an independent study by the Centre for Economic Policy Research (CEPR) in London, an ambitious and comprehensive TTIP would increase the size of the EU economy by around 120 billion euros (i.e. 0.5% of GDP) and the US by 95 billion euros (or 0.4% of GDP) every year. However, according to CEPR's researchers, the TTIP will be beneficial not only for the EU and the US economies, but also for their trading partners around the world in the total amount of 99 billion euros. This is because economic growth in the EU and the US means more purchases by consumers and business of other countries, and common regulatory approaches between the EU and US will reduce costs for exporters from and those exporters.[13]

The first negotiation round for the EU-US Transatlantic Trade and Investment Partnership took place on 7−12 July 2013 in Washington. Beforehand, the EU member states had agreed to give the European Commission assent to start negotiations with the United States. The bilateral trade and investment

[13] European Commission. DG Trade (2013). *Transatlantic Trade and Investment Partnership. The Economic Analysis Explained*. Retrieved from http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf.

negotiation cover twenty areas, namely market access for agricultural and industrial goods, government procurement, investment, energy and raw materials, regulatory issues, sanitary and phytosanitary measures, services, intellectual property rights, sustainable development, small and medium sized enterprises, dispute settlement, competition, customs and trade facilitation, and state owned enterprises. The second round of negotiations took place on 11−15 November 2013 in Brussels and continued from where it left off in the first round. It means that dialogue was held on comparing different approaches to investment liberalisation and protection, on comparing their approaches to cross-border services, financial services, telecommunications and e-commerce, on regulatory issues and on ensuring reliable supplies of energy and raw materials. The third round of negotiations was held on 16−21 December 2013 in Washington. The negotiators made progress on the three core parts of the TTIP. These areas included: market access, regulatory aspects and rules. Regarding market access, the EU promoted to slash customs tariffs on imported goods, allow firms from either side to bid for government procurement contracts, open up services markets, and make it easier to invest. The discussion about trade-related rules covered several areas and was focused on ensuring free and fair trade. The fourth EU-US trade talks were held on 10−14 March in 2014 in Brussels. Teams of EU-US negotiators continued negotiations about TTIP in areas that included the area of services, labour, rules of origin, intellectual property and regulatory sectors.[14] A global report about the achieved progress in the actual negotiations should be published by July 2014 and the total negotiations about TTIP should be concluded by the end of 2015.

3.3 Comparison of the EU and the US trade policy measures

The substance of the trade negotiations that are currently being led between the EU and the US is to find a way and possibilities how to remove subsistent obstacles to transatlantic trade. Both of the states apply a general most-favoured nation tariff (MFN tariff) and also a special, i.e. preferential, tariff to countries with which they signed some kind of preferential agreement, for example an agreement about a free zone or customs union. In 2011, the United States had 11 bilateral or regional free-trade agreements in force with 17 countries. New agreements are currently being prepared to be signed with Colombia, the Republic of Korea and Panama. **The share of preferential imports in the total**

[14] European Commission. DG Trade (2013). Policy. *In focus: Transatlantic Trade and Investment Partnership. Resources.* Retrieve from http://ec.europa.eu/trade/policy/in-focus/ttip/resources/#advisory-group.

US imports was more than 20% in 2011. Reciprocal preferences accounted for 16.4% and unilateral preferences for 3.7%.[15]

In the EU, the member countries use the unit customs tariff and preferential treatment is carried out through the Common Commercial Policy of the EU that is applied to all third countries that are not EU members.[16] The European Union applies unilateral preferences to developing countries that are included in the General System of Preferences (GSP). Currently, there are three types of schemes (General plan, GSP+ and the Everything but Arms initiative) that recognise three levels of preferences. Reciprocal preferences are applied by the EU to countries that create customs unions with it, i.e. Andorra, San Marino and Turkey, or free trade areas. The EU has 33 free trade agreements and many other agreements are being negotiated now. The signature of the European Economic Area agreement with Iceland, Liechtenstein and Norway also means one of the ways of preferential treatment. As a result of preferential agreements and the GSP scheme, the EU applied the MFN tariff to only nine WTO members (Australia; Canada; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Hong Kong, China; Japan; the Republic of Korea;[17] New Zealand; Singapore; and the United States) in 2007. **These nine WTO Members accounted for only 27.5 % of the EU's total merchandise imports in 2007**.[18] It means that while in the EU the predominant part of imports is carried out through a preferential arrangement, in the US the largest part of import is done by the MFN regime.

Comparing the simple average MFN tariff in the EU and the US, the EU applies a little higher tariff than the US, especially in the area of agriculture products. Although the average MFN tariff applied to the EU agricultural imports declined from 16.5% in 2004 to 14.8% in 2013, in comparison with the US, where the average tariff for agricultural products was 8.5% in 2012, it was 1.7 times more in the EU than in the US.[19] Similarly, the EU simple average tariff stayed at the same level of 6.5% in the period of 2004−2013, but the US the simple average tariff declined by 0.4 percentage points in 2002−2012. It was also possible to import more goods duty free to the US than to the EU in the monitored period (see Table 1).

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[15] WTO (2012). *Trade Policy Review: United States of America. Secretariat report*. Retrieved from http://www.wto.org/english/tratop_e/tpr_e/tp375_e.htm.

[16] Fojtíková, L. (2009). *Zahraničně obchodní politika ČR. Historie a současnost (1945–2008*). Praha: C. H. Beck. 246 p. ISBN 978–80–7400–128–4.

[17] In 2010, the EU and Korea signed the Deep and Comprehensive Free Trade Agreement (DCFTA) that entered into force in July 2011.

[18] WTO (2009). *Trade Policy Review: European Union. Secretariat report*. Retrieved from http://www.wto.org/english/tratop_e/tpr_e/tp314_e.htm.

[19] The reports carried out by the WTO Secretariat about the trade policy of the EU and the US are not accessible in the same years, although the review period is the same for both of them and is done every two years.

Table 1: Structure of the MFN tariff of the EU and the US (%)

Country	EU			US		
	2004	2013	2013–2004	2002	2012	2012–2002
Simple average tariff (%)	6.5	6.5	0	5.1	4.7	-0.4
– WTO agriculture	16.5	14.8	-1.7	9.8	8.5	-1.3
– WTO non-agriculture	4.1	4.4	0.3	4.2	4.0	-0.2
Duty free tariff lines (%)	26.9	24.7	-2.2	31.2	37.0	5.8

Source: WTO[20], 2007; WTO, 2012; WTO, 2013

It is obvious that negotiations about market access will be more difficult in the area of lowering tariffs in the agricultural sector than in manufacturing. In the EU, animals and products thereof; fruit, vegetables and plants; and beverages, spirits and tobacco belong to the most protected products where the tariff range reached 1.5−197%.[21] In the US, the tariff for agriculture products is applied from 0 up to 350% to some tobacco products. The highest tariff is also applied to the import of sugar, peanuts, and dairy products, followed by beef, cotton, and certain horticultural products, such as mushrooms.[22] However, it is important to note that the evaluation of import possibilities should include not only the value of tariffs, but also **other non tariff barriers** (NTBs), such as domestic supports, exports supports, sanitary and phytosanitary regulations, other import fees, etc. that currently represent more serious obstacles to trade than tariffs. NTBs and regulatory differences can have two main effects. They can either increase the cost of doing business for firms, or they can restrict market access. In the US, for example, the imports are charged by COBRA fees (to recover processing costs in ensuring carriers, passengers, and their personal effects entering the US), the harbour maintenance tax (a fee on certain merchandise arriving by vessel in order to maintain the navigation channels), agriculture fees and the merchandise processing fee. Some measures, such as

[20] WTO (2013). *Trade Policy Review: European Union. Secretariat report*. Retrieved from http://www.wto.org/english/tratop_e/tpr_e/s284_e.pdf. WTO (2012). *Trade Policy Review: United States of America. Secretariat report*. Retrieved from http://www.wto.org/english/tratop_e/tpr_e/tp375_e.htm. WTO (2009). *Trade Policy Review: European Union. Secretariat report.* Retrieved from http://www.wto.org/english/tratop_e/tpr_e/tp314_e.htm. WTO (2007). *Trade Policy Review: European Union. Secretariat report.* Retrieved from http://www.wto.org/english/tratop_e/tpr_e/tp278_e.htm.

[21] WTO (2013). *Trade Policy Review: European Union. Secretariat report*. Retrieved from http://www.wto.org/english/tratop_e/tpr_e/s284_e.pdf.

[22] WTO (2012). *Trade Policy Review: United States of America. Secretariat report.* Retrieved from http://www.wto.org/english/tratop_e/tpr_e/tp375_e.htm.

the ACE system[23] or CSI system[24], were also taken by the US governments in order to insure bigger national security. In the EU, for example, import licenses are required on specific products that are subject to quantitative restrictions, safeguard measures or import surveillance and the many sanitary and phytosanitary measures applied to products of animal or plant origin.

It means that although the average tariff levels in both countries are relatively low already, various non-tariff barriers (often in the form of domestic regulations) on both sides of the Atlantic constitute important impediments to deepening transatlantic trade and investment linkages. It is estimated that as much as 80 % of the total potential gains come from cutting costs imposed by bureaucracy and regulations, as well as from liberalising trade in services and public procurement.[25] From this point of view, reducing non-tariff barriers will be a key part of transatlantic liberalisation. However, removing these NTBs means a difficult process, although the potential benefits in terms of productivity and incomes are substantial.

4. Structure and performance of the EU and US economies

The economic potential of the EU and the US is similar. In 2012, the gross domestic product of the EU and US reached 15.8 trillion US dollars (measured by purchasing power parity) and 16.5 trillion US dollars respectively.[26] Both economies belong to the most technologically powerful economies in the world. They are market-oriented economies in which private firms make most of the decisions and state governments buy the needed goods and services predominantly in the private marketplace. In comparison with the US economy, the EU economy is characterised by substantial heterogeneity and variety (economic, social, cultural, etc.) and also a high bureaucratic burden. In 2012 in the EU, the average value of the gross domestic product per capita was 34,500 US dollars with great differences among the member countries (from 13,000 to 82,000 US dollars). The average income per capita in the US was 52,400 US

[23] Automated Commercial Environment (ACE) is an electronic commercial trade processing syss tem for strengthening border security.

[24] Container Security Initiative (CSI) was launched in the aftermath of the terrorist attacks in September 2001 in order to address the threat to border security posed by the use of maritime container shipments.

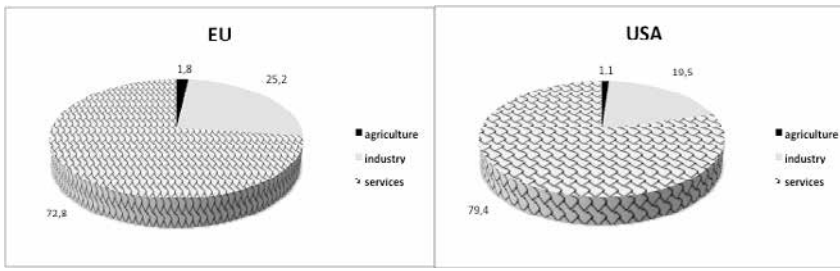
[25] CEPR (2013). *Reducing Transatlantic Barriers to trade and Investment. An Economic Assessement.* Retrieved from http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150777.pdf.

[26] CIA. *The World Factbook*. Retrieved from https://www.cia.gov/library/publications/the-world-factbook/.

dollars at the same time. From the EU member states, only the inhabitants of Luxembourg have a higher living standard than people in the US.

The structure of the EU and US economies is displayed in Figure 1. On the left side of the figure the EU economy is shown, with an almost 2 percentage share of agriculture in the total GDP. The share of industry is more than 25% and the share of services is almost 73% of GDP. The world's largest and most technologically advanced of the EU industries are ferrous and non-ferrous metal production and processing, metal products, petroleum, coal, cement, chemicals, pharmaceuticals, aerospace, rail transportation equipment, passenger and commercial vehicles, construction equipment, industrial equipment, shipbuilding, electrical power equipment, machine tools and automated manufacturing systems, electronics and telecommunications equipment, fishing, food and beverage processing, furniture, paper and textiles. On the right side of Figure 1 the structure of the US economy is shown, with an about 1 percentage share of agriculture in GDP, an almost 20 percentage share of industry and a more than 79 percentage share of services in GDP. Americans are the biggest producers of wheat, maize and cotton in the world. The US industry is highly diversified and competitive especially in the area of petroleum, steel, motor vehicles, aerospace, telecommunications, chemicals, electronics, food processing, consumer goods, lumber and mining. Both economies have developed the service sector, in which other commercial services take the main portion of the total commercial services besides transport and travel services.

Figure 1: GDP composition by the sector of origin in the EU and the US (%)

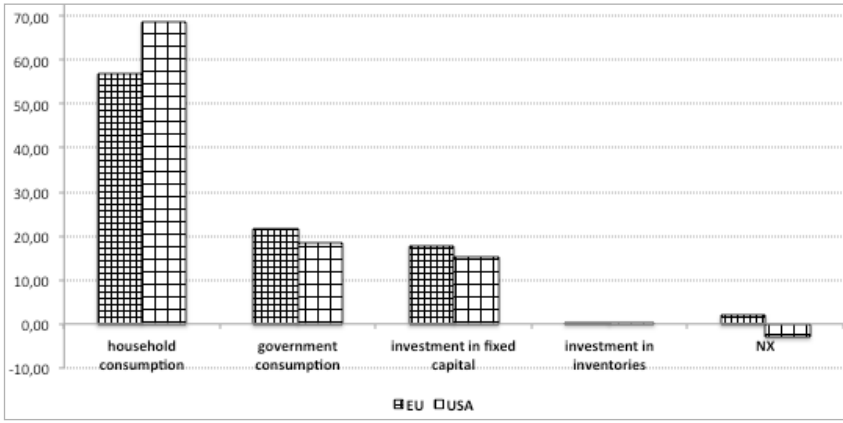


Source: CIA. Factbook, 2014. Author's data processing

From the component of GDP point of view, the main difference between the EU and US economies is obvious in the consumption of the household (see Figure 2). The US household consumption was higher by almost 12 percentage points than in the EU in 2012. In comparison with this, the EU recorded higher government consumption and investment in fixed capital, both by about 3 percentage

points, than the US at the same time. Investment in inventories was very low in the EU as well as the US. Other exports (i.e. export minus import) had a positive influence on the EU GDP growth, but negatively influenced the US GDP growth.

Figure 2: GDP composition by the final use in the EU and the US, 2012 (%)



Source: CIA. Factbook, 2014. Author's calculation and data processing

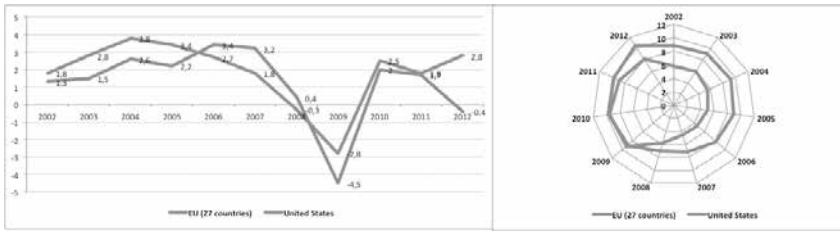
The development of the GDP growth in the EU and US is displayed in Figure 3. The rate of growth of the EU and US economies was about 1–2 % at the beginning of the new millennium. The short recession of the US economy at the beginning of the 21st century was caused by the deflation of a speculative bubble in the IT sector and the terrorist attacks in the USA. However, the US economy grew more quickly than the EU economy until 2006, but the financial and economic crisis caused slower GDP growth in the US from 2007 in comparison with the previous year as well as with the EU GDP growth. The EU economy grew until 2008, but more slowly than in the previous years. The decline of consumption, production and foreign trade occurred in the decline of GDP in both economies in 2009. Although the economic crisis hit all countries and regions in the world at the same time, the decline of GDP in the EU and US was higher than the world average. The fiscal and monetary expansion that was carried out by the national governments in the US[27], the EU and its member states, and also other countries in the period of 2008−2010, has contributed to achieving

[27] The first anti-crisis measure, i.e. *The Troubled Asset Relief Program* (TARP) was already proposed by Bush's administration and approved by the U.S. Congress in 2008. The amount of 700 billion US dollars was set to the support of the banking and financial system and automotive sector. After the accession of B. Obama to the presidential office, *The American Recovery and Reinvestment Act* (ARRA) was accepted in 2009. The amount of 787 billion US dollars was

economic growth in the EU and US since 2010. However, the debt crisis of the Eurozone caused another decline of the EU's GDP in 2012. The need to reduce the government debt and return national budgets from deficit to surplus numerals was connected with the adoption of many saving measures. This fiscal consolidation that has been topical in many EU countries since 2010 limited consumption and had a negative influence on the GDP growth in 2011−2012.

Unemployment (see the right side of Figure 3) was higher in the EU than in the US for the entire period. While the unemployment rate was 4.6% in the US in 2006, it was 8.3% in the EU at the same time. The economic crisis in 2008−2009 caused the increase of unemployment in both economies. However, the US has recorded a declining trend in the unemployment rate since 2011, while the EU has recorded a growing trend and unemployment is a serious economic and social problem of many EU countries all the time. The declining rate of unemployment in the US can be the result of Obama's fiscal measures, such as the *Small Business Legislation* from 2010 or the *American Jobs Act* from 2011, which were focused on the increase of GDP and the creation of new jobs. In the EU, the short-term fiscal and monetary measures to support economy have to be accompanied by deep structural reforms in many EU member states. A serious problem in many countries is especially high unemployment of young people that is the highest in Spain, where a half of the young population is without work.

Figure 3: a) Growth of GDP in the EU and the US in 2002−2012 (%);
b) Rate of unemployment in the EU and the US in 2002−2012 (%)



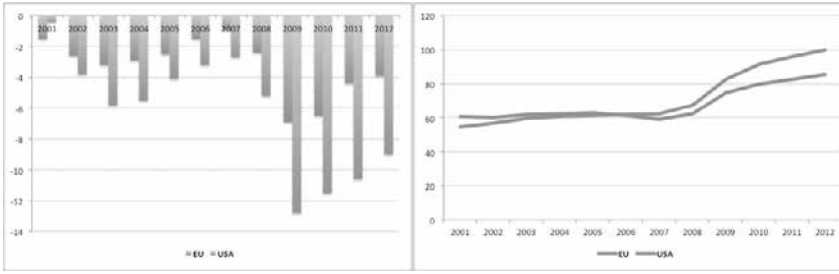
Source: Eurostat, 2014. Author's data processing

Figure 4 offers a comparison of public finances in the EU and US in 2001−2012. While in 2001−2007 both economies had a comparable level of government debt at about 60% of GDP, the financial stimulatory measures increased the government debt in both economies. On the whole, the EU government debt was the less than 61% in 2001 and more than 85% in 2012. In

assigned for investment into infrastructure, expenditure for research, for the support of small and medium enterprises, export, but also for health and social expenditure.

the US, the government debt was less than 55% in 2001 and almost 100% of GDP in 2012. It means that during the last twelve years the public indebtedness increased 2.4 times in the EU and almost by a half in the US (see the right side of Figure 4). On the left side of Figure 4 (see 4a), the development of the government budget in the EU and US is displayed. Both economies recorded a deficit budget for the whole time, but the US reached higher deficits than the EU. The highest deficit in the US (-12.8 % of GDP) was recorded in 2009. The EU recorded the highest deficit of 6.9 % of GDP at the same time. The budget deficit in both economies has recorded a declining tendency since 2010.

Figure 4: a) General government deficit/surplus in the EU and the US in 2001−2012 (% of GDP)
b) General government gross debt in the EU and the US in 2001−2012 (% of GDP)

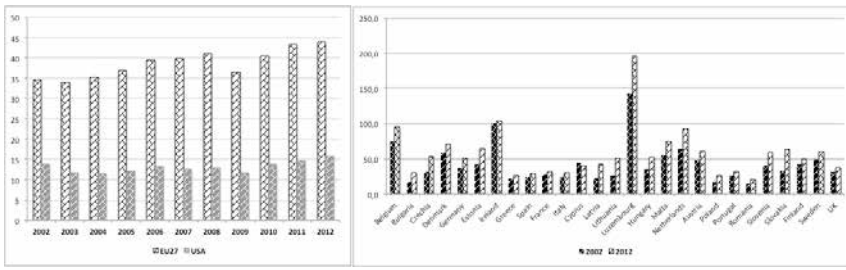


Source: Eurostat, 2014. The White House, 2014. Author's data processing

The internal market of the EU has about half a billion people; the number of the US population is about 312 million. Although the EU represents a bigger market than the US, the rate of economic openness[28] is higher in the EU than in the US (see the left side of Figure 4). While the rate of the EU's openness was 44%, the openness of the US economy was about 16% in 2012. A lower rate of economic openness was recorded by both countries in 2009, which was connected with the decline of exports and imports at the time of the economic crisis in the world and the amplification of protectionist tendencies in international trade (for example "Buy American"). In the EU, the highest level of economic openness was recorded by small economies such as Luxembourg, Ireland and Belgium. It is a long lasting tendency. The comparison of the rate of economic openness among the EU member states in 2002 and 2012 is displayed on the right side of Figure 5.

[28] The rate of economic openness was calculated by the author as the share of the average of exports and imports divided by GDP in a percentage expression.

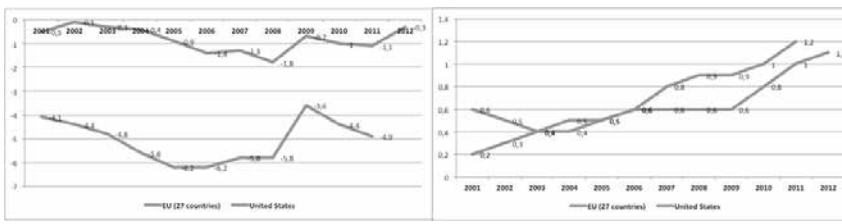
Figure 5: a) Rate of economic openness in the EU and the US in 2002−2012 (%);
b) Rate of economic openness in the EU member states in 2002 and 2012 (%)



Source: Eurostat, 2014. Author's calculation and data processing

The trade balance of the EU as well as the US has been in deficit for a long time (see Figure 6, the left side). However, while the EU's trade deficit was about 1 % of GDP, the US's trade deficit was almost 5 times bigger than the EU deficit in 2012. The external imbalance has been typical of the US economy already since the middle of the 1980s. Although the US belongs to the main exporters in the world, the US population likes consuming not only domestically produced goods, but also goods imported from abroad. The intention of Obama's administrative is to redouble the US export by 2015. The US has reached the highest trade deficit with China. From this point of view, the US government accuses China's government of the undervaluation of China's jüan and creates a political pressure focused on the revaluation of China's currency. In comparison with trade in goods, both countries have recorded increasing surpluses in the area of trade in commercial services (see the right side of Figure 6).

Figure 6: a) Balance of the EU and the US in trade in goods in 2002−2012 (% of GDP);
b) Balance of the EU and the US in trade in services in 2002−2012 (% of GDP)



Source: Eurostat, 2014. Author's data processing

5. Analysis of the EU-US trade and investment flows

The analysis of bilateral cooperation between the EU and US is divided into two parts. Firstly, the bilateral EU-US trade flows will be displayed. Secondly, attention will be focused on the EU-US investment flows.

5.1 Bilateral trade flows between the EU and USA

The USA is the EU's largest trade partner for both goods and services. However, there has been a steady decline in the share of the US in the total EU international trade in goods over the last decade. While in 2002, the US accounted for 28% of the total EU[29] exports and 20% of imports, by 2013 these shares had fallen to 17% and 12% respectively.[30] The EU is also the main trading partner of the US. However, when we consider the individual EU member states, then the US's main trade partners are Canada, China, Mexico, Japan and Germany. On the whole, there are five EU member states, namely Germany, the United Kingdom, France, the Netherlands and Italy, which belong to the 15 main trade partners of the US.[31]

From the point of view of the individual EU member states, there are quite big differences in their exports to the US (see Table 2). There are three main groups of states with different export dependence on the US market:

- The range of 0–10%: Bulgaria, Cyprus, Latvia, Slovenia, Romania, Poland, Hungary, Slovakia.
- The range of 11–20%: Greece, Luxembourg, the Czech Republic, Spain, Estonia, Italy, Portugal, France, Austria, Finland, Malta, Germany, Sweden, the Netherlands, Denmark.
- The range of more than 21%: Ireland, the United Kingdom, Belgium.

The largest part of the gains from the TTIP would be obtained by those EU countries in which the US takes a significant part of their extra-EU exports, i.e. Belgium, Ireland and the United Kingdom.

The development of the EU exports and imports of goods from the US is displayed in Figure 7. It is obvious that exports as well as imports recorded a decline in 2009 as a result of the economic crisis in the world. In 2012, the value of the EU export to the US was 291.8 billion euros and import 205.2 billion euros. Both numbers were higher in 2012 than in 2001. The growth rate of

[29] The data are about the EU-28, i.e. with 28 member states, including Croatia.

[30] Eurostat (2014). Retrieved from http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/themes.

[31] United States Census Bureau (2014). Foreign Trade. *Top trading partners.* Retrieved from http://www.census.gov/foreign-trade/statistics/highlights/toppartners.html.

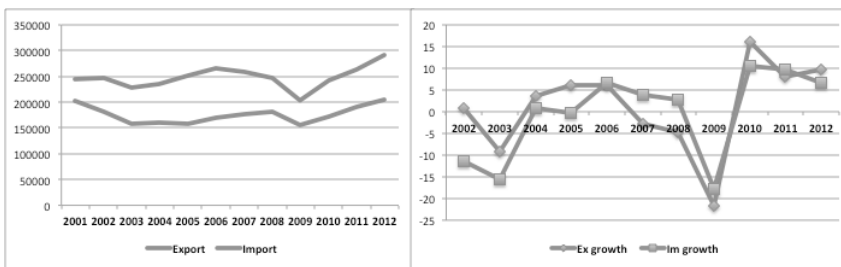
exports and imports of the EU to the US is recorded in Figure 7b (the right side of the figure). A significant decline of the EU export and import was recorded two times during the monitored period, i.e. in 2003 and 2009.

Table 2: Share of the USA in extra-EU exports by member states in 2010 (%)

Belgium	21.3	France	14.5	Austria	14.9
Bulgaria	3.5	Italy	14.1	Poland	8.7
Czech Republic	10.9	Cyprus	3.6	Portugal	14.4
Denmark	18.0	Latvia	4.0	Romania	5.3
Germany	17.1	Lithuania	7.0	Slovenia	4.7
Estonia	12.0	Luxembourg	10.9	Slovakia	9.5
Ireland	55.7	Hungary	9.3	Finland	15.4
Greece	10.8	Malta	15.9	Sweden	17.1
Spain	10.9	Netherlands	17.2	United Kingdom	28.6

Source: Eurostat, 2011

Figure 7: a) Exports and imports of the EU to the US in 2001−2012 (million euros);
b) Growth of exports and imports of the EU to the US in 2002−2012 (%)

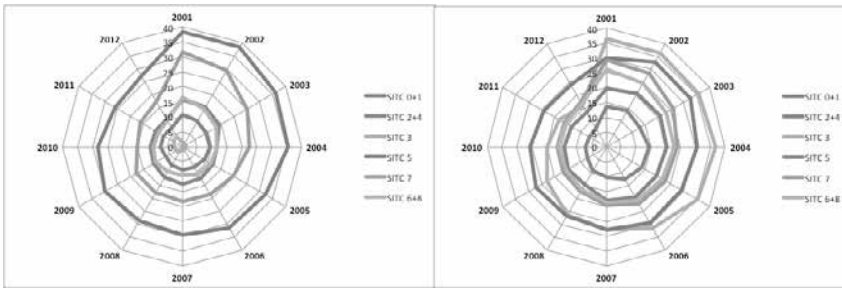


Source: Eurostat, 2014. Author's data processing

From the sectorial point of view, Chemicals (SITC 5), Machinery and transport equipment (SITC 7) and Raw materials (SITC 2+4) took more than a half of the total EU imports from the US, although SITC 5 and SITC 7 recorded the biggest decline of their share in the total EU imports from the US in 2001−2012 (see Figure 8a). On the export side, the share of the individual commodity groups was more variable than on the import side during the monitored period. In 2001, Mineral fuels created more than 36 per cent of the total EU exports to the US, in 2012 only about 16 per cent. Chemicals (SITC 5), Machinery and transport equipment (SITC 7) and Manufactured goods (SITC

6+8) represented the main export groups of the EU to the US in 2012 (see Figure 8b). The lowest portion of the EU-US trade belonged to Mineral fuels (SITC 3) on the import side and Raw materials (SITC 2+4) on the export side. The current share of the individual commodity groups in the total EU exports to the US corresponds with the results of a study that was published by CEPR. This means that the sectors that are likely to benefit most from the TTIP include metal products (exports up 12%), processed foods (+9%), chemicals (+9%), other manufactured goods (+6%), other transport equipment (+6%), and especially motor vehicles (40%). The overall output in agriculture, forestry and fisheries taken together is expected to increase by 0.06%.[32]

Figure 8: a) Share of the US imports in the total EU imports by products in 2001−2012 (%);
b) Share of the US exports in the total EU exports by products in 2001−2012 (%)



Source: Eurostat, 2014. Author's data processing

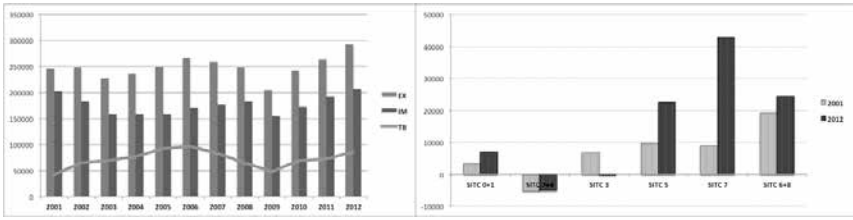
The trade balance of the EU with the US was in surpluses in the range from 42.3 billion euros to 96.4 billion euros in the period of 2001−2012 (see Figure 9, the left side). In 2012, the EU trade surplus with the US was 86.5 billion euros and only Belgium, Luxembourg and the Netherlands recorded a trade deficit in trade with the US. However, the Dutch trade deficit is over-estimated because of the "Rotterdam effect" where goods destined for the rest of the EU arrive and are recorded in harmonised EU external statistics in Dutch ports. This then has a positive effect on the external trade balance with the US of those member states to which the goods are re-exported as these shipments would be recorded as intra-EU trade with the Netherlands rather than extra-EU

[32] European Commission. DG Trade (2013). *Transatlantic Trade and Investment Partnership*. The Economic Analysis Explained. Retrieved from http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf.

trade with the US. From this point of view, the Belgian trade figures are similarly over-estimated.

Germany reached the highest trade surplus in the value of 48.2 billion euros, while the Netherlands recorded the highest trade deficit in the value of 8.3 billion euros. On the right side of Figure 9 (i.e. 9b), the EU trade balance with the US according to commodity groups is displayed. The EU reached deficits in trade with raw materials (SITC 2+4), but surpluses in the other commodity groups. The EU's trade of mineral fuels and lubricants (SITC 3) was in surplus in 2001, but in a small deficit in 2012. The trade of machinery and transport equipment (SITC 7) was the most in surplus for the EU for the entire time. All commodity groups, excluding SITC 2+3+4, recorded an increase of trade surplus in 2012 in comparison with 2001.

Figure 9: a) EU trade balance with the US in 2001−2012 (mil. euros);
b) EU trade balance with the US by sector (mil. euros)



Source: Eurostat, 2014. Author's data processing

Trade in services takes a smaller part of the total bilateral trade between the EU and US than trade in goods. However, the USA is still by far the EU's largest partner, accounting for 25% of EU exports of services and 30% of imports.[33] Data about this type of bilateral trade are accessible for the period of 2010–2012. Both exports and imports of services between the EU and US increased significantly between 2010 and 2012 (see Table 3).

The EU's bilateral trade in services with the US was positive for the EU for the whole period. In 2012, the EU reached the biggest trade surplus in the amount of almost 14 billion euros. It means that in 2012 the surplus was 4.8 times bigger than in 2010. The surplus in 2010−2012 was mainly due to surpluses in transportation. However, the group of "Other services" includes many other services such as communication services, construction services,

[33] Eurostat (2014). Retrieved from http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/themes.

financial services, computer and information services, etc. and some of them were in surpluses for the entire period, although the whole group was in deficit.

Table 3: EU trade in services with the USA in 2010−2012 (billion euros)

	Exports			Imports			Balance		
	2010	2011	2012	2010	2011	2012	2010	2011	2012
Total	39.7	149.7	164.8	136.7	142.8	150.9	2.9	6.9	13.9
Transportation	29.6	30.1	33.3	19.7	21.1	22.6	9.9	9.0	10.7
Travel	15.1	15.8	17.2	15.9	17.0	17.5	-0.8	-1.1	-0.4
Other services	95.0	103.7	114.4	98.3	102.2	108.3	-3.3	1.5	6.1
USA/total extra-EU (%)	24.7	24.6	24.9	30.0	29.9	29.7			

Source: Eurostat, 2014

5.2 Investment flows between the EU and USA

The US has been the leading investor as well as the host economy in the world for a long time. In the EU, the investment policy has been one part of the Common Commercial Policy of the EU since December 2009, when the Lisbon Treaty entered into force. It means that until this time, the EU member states carried out their national investment policies and signed bilateral investment agreements with non-EU states. From this point of view, the data about foreign direct investments (FDI) are better accessible for the individual member states than for the EU as a whole. In 2012, the United Kingdom, Ireland, Luxembourg, Spain, France and Sweden were among the top 20 host economies in the world, while the United Kingdom, Germany, France, Sweden, Italy, Ireland and Luxembourg were among the top 20 investor economies in the world.[34]

The EU's foreign direct investment flows with the USA have been at a high level (see Table 4). In 2005−2007, the FDI flows were increasing in both economies, but the economic crisis had a negative influence not only on foreign trade, but also on investment flows. While the US FDI flows to the EU were 197.6 billion euros in 2007, they were only 38.8 billion euros in 2008. Since 2009, the US FDI flows to the EU have been higher than the EU FDI flows to the US.

[34] UNCTAD (2013). *World Investment Report 2013*. Retrieved from http://unctad.org/en/publicaa tionslibrary/wir2013_en.pdf.

Table 4: EU FDI flows with the USA (billion euros)

	2005	2006	2007	2008	2009	2010	2011	2012
EU FDI	32.7	95.2	173.0	125.9	93.2	59.1	167.3	53.3
US FDI	60.2	76.9	197.6	38.8	112.9	77.6	264.4	91.5

Source: Eurostat, 2014

6. Conclusion

Although the EU-US bilateral trade in goods and services was increasing in the period of 2001−2012, the tariff and non-tariff barriers were applied all the time. It was found that the EU used a little higher tariff protection than the US, but more serious than tariffs are non-tariff barriers that are applied in both of them. They represent the so-called "grey area" because it is hard to calculate it and remove it from the different national interests. The liberalisation of the EU-US trade and investment flows should contribute to free movement of goods and services between them. During the last few years, the EU and US have manifested the interest to lead trade negotiations in these areas and integrate their economies into the Transatlantic Free Trade Area that would cover not only trade, but also investment and other horizontal areas of cooperation (such as intellectual property rights, government procurement, etc.). It is interesting that these two biggest trade partners in the world have not signed any preferential agreement until now, although they have signed this type of agreement with many other countries. The results of the analysis showed that the EU is more trade integrated with the world than the US. The EU reached trade surpluses with the US in goods as well as commercial services. Trade liberalisation should contribute to making the imports of the US goods and material cheaper and also to obtaining easier market access to the US market. In both of cases, the EU and US consumers and producers would be winners. The political decisions of the representatives of both states and their ability to reach compromise solutions will depend especially on their economic situation. It is obvious from the latest dates that the US economy is recovering from the economic crisis faster than the EU economy that was hit not only by an economic, but also a debt crisis of the Eurozone. However, not only the economic cycle but also the political cycle has to be considered. The EU-US trade negotiations will also be influenced by the presidential election in the USA in 2016 and the integration process in the EU.

The Adoption of Regulation Brussels I Recast: Analysis of the Introduced Changes

Hamed Alavi, Tanel Kerikmäe, Tatsiana Khamichonak*

Summary: The Regulation Brussels I is claimed to be the most successful instrument on international civil procedure of all time.[1] Together with its predecessor the Brussels Convention 1968 it has been instrumental in harmonizing the jurisdictional issues in the EU and EEA countries and reforming the process of recognition and enforcement of judgments. Recently further simplification of its subject matter has been carried out by the European law maker in the form of the Regulation Brussels I Recast, which came into force in January 2015. The paper addresses the most fundamental changes introduced by the Recast Regulation. We seek to analyses the major new amendments as opposed to the old regime under the original Brussels I Regulation and establish whether they are suited to achieve their objectives. To this end, the paper begins with Part I, which introduces the background and purposes of the new Recast Regulation. It is followed by Part II, which discusses the introduced changes: the abolition of exequatur, changes to the lis pendens rule, and the reinforced arbitration exclusion. The discussion is concluded with Part III, which gives an overview of the prognosis for the application of the newly amended provisions and the extent, to which the Recast Brussels I Regulation stands up to its purpose.

Keywords: Brussels I Regulation, Brussels I Recast, Amendments, Judgement Recognition, Enforcement, the European Union Law

1. Background and purposes of the Regulation Brussels I Recast

Eight years after Brussels I Regulation[2] entered into force, a number of amendments were proposed as necessary despite its overall success. The amendments meant to target the drawbacks that have proved unsatisfactory throughout the Regulation's application. Such included the exequatur procedure for

* Tallinn Law School, Tallinn University of Technology, Estonia. Contact: hamed.alavi@ttu.ee

1 Timmer, LJ 2013, 'Abolition of Exequatur under the Brussels I Regulation: ILL Conceived and Premature?', Journal of Private International Law, vol. 9, no. 1, pp. 129–147.

2 Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 L 12 p.1. Hereinafter 'the Regulation'.

recognition and enforcement of judgements rendered in another Member State; the limitation of the scope to defendants domiciled in the EU; the regulation of choice-of-court agreements and the notorious 'torpedo' actions; and finally, the exclusion of arbitration from the scope of the Regulation.[3]

The exequatur procedure has proved to cause extra costs and delays for the parties involved despite of it being fairly technical. Cases that involve defendants from 3rd countries are governed (with some exceptions) by national law. This causes two kinds of issues: unequal access to justice for companies that conduct business with partners from outside the EU and uncertainty as to whether the mandatory EU rules regarding consumers and employees are enforced. The existing under the Regulation approach provides a loophole for the 'torpedo' proceedings. Particularly, any court, even the one expressly designated by the parties in a valid choice-of-court agreement, shall stay the proceedings until such time as the court first seized establishes whether or not it has jurisdiction. The exclusion of arbitration from the scope jeopardizes the predictability of dispute resolution: when challenged before a court, arbitration agreements can lead to parallel proceedings and irreconcilable resolutions of the dispute.

Consultations with the stakeholders have consolidated the said shortcomings in the Commission's Impact Assessment and a number of amendments were suggested. Such included abolition of the exequatur; extending jurisdiction rules to disputes involving defendants from outside the EU; improving the efficiency of choice-of-court agreements; addressing the relationship between the Regulation and arbitration. Additionally, the reform was meant to facilitate coordination of proceedings before the Member States courts; access to justice in certain specific disputes[4], and clarifying the conditions for the circulation of provisional and protective measures in the EU.[5]

The legislative instrument resulting from the proposed amendments was a joint work of the European Parliament and the Council, with its legal basis in Articles 67(4) and 81(2)(a) and (c) TFEU. The Legal Affairs Committee with its rapporteur Mr. Tadeusz Zwiefka and the Working Party on Civil Law

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[3] Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, Brussels 17 December 2010.

[4] COM(2010) 748 final, Section 2, Article 5(3), Article 18(1), Article 22(1)(b), Article 24(2). So, the primary changes with regard to access to justice include the creation of a special jurisdiction rule regarding rights *in rem* in immovable property; provision for the possibility of proceedings brought against joint employers in different Member States; provision for the possibility of choice-of-court agreements in tenancy of premises for professional use; introduction of a rule to inform defendants of their right to contest jurisdiction and the consequences of not doing so, respectively.

[5] Ibid., p. 5.

Matters concluded the work on the Regulation Brussels I Recast[6] on December 6th, 2012. On December 12th it was published in the Official Journal.[7] The Recast Regulation entered into force in January 10th 2015 with the original Brussels I Regulation continuing to apply to judgments given in proceedings instituted before that date. Interestingly, already before entering into force, the Recast had already been amended in order to allow its rules to be applied by the two courts common to several Member States – the Unified Patent Court (UPC)[8] and the Benelux Court of Justice[9] – when they deal with matters that fall within the scope of the Recast Regulation.[10]

The Recast Regulation turned out to be less ambitious than the initial Commission Proposal. The exequatur was abolished but the conditions for contesting recognition and enforcement of judgements remained unchanged. The exclusion of arbitration from the scope of the Regulation was reinforced. The proposed extension of the scope of the original Regulation to 3rd-country defendants has retained references to national law in most cases. Thus, a defendant not domiciled in a Member State is subject to the national rules on jurisdiction in the Member State where a court is seized. In contrast, as regards protection of consumers and employees, certain rules in the regulation shall be applied regardless of the defendant's domicile.[11] By far the greatest change concerns the choice-of-court agreements and the *lis pendens* rule, which is meant to do away with 'Italian torpedo' actions.

It is suggested that the Recast Regulation is not simply a reworking of the pre-existing rules. Likewise, the original Brussels I Regulation is not a bare embodiment of the preceding Brussels Convention within the framework of

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6 Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L351 p.1.

7 Dickinson, A & Lein 2015, E, *The Brussels I Regulation Recast*, Oxford University Press, Oxford, UK.

8 The UPC was established on February, 19 2013 to ensure uniform applicability of patent law among the signatory states. The UPC Agreement provides that its international jurisdiction is to be established according to the Brussels I Recast Regulation or the 2007 Lugano Convention, where applicable. See Agreement of February, 19 2013 between 25 Member States (excl. Spain, Poland and Croatia) on a Unified Patent Court, OJ C175/1, 20 June 2013.

9 Benelux Court of Justice was established under the Treaty of March, 31 1965 between Belgium, Luxembourg and the Netherlands. In October 2012 the Treaty was amended so as to make it possible to transfer jurisdiction over certain matters falling under the scope of Brussels I Recast Regulation to the Benelux Court of Justice. See Protocol of October, 15 2012 between Belgium, Luxembourg and the Netherlands amending the treaty of 31 March 1965 on the establishment and statute of a Benelux Court of Justice.

10 Press Release of the Council of the European Union regarding the amendments to the recast 'Brussels I' regulation, Brussels, 6 May 2014, 9356/14 (OR. en).

11 Recital 14 of the Recast Regulation.

the European Union but 'the matrix of [transnational litigation]'[12]. The Recast Regulation is, too, one of a number of changes in transnational litigation, preceded by the legal instruments that have already altered the original scope of application of Brussels I Regulation.[13] These include, inter alia, the Small Claims Regulation[14], the Order of Payment Regulation[15], the Uncontested Claims Regulation[16], which allow the judgments rendered under their scopes to be enforced in other Member States. As a result, the scope of Brussels I Regulation both shrank and expanded, as certain procedures have been transferred to specific instruments. Thus, the Insolvency Regulation[17], for example, refers to the relevant provisions of the Brussels I Regulation regarding enforcement of certain judgments rendered during transnational insolvency proceedings. Other instruments borrow terms from Brussels I such as 'civil and commercial matters', which have acquired a very particular meaning in the EU legal vocabulary.[18] Therefore, the Recast Regulation does not introduce a totality of new rules and a new regime. It instead constitutes another string in the web of transnational litigation, alongside Brussels I Regulation and related legal instruments

2. The major changes to the old regime

2.1 Abolition of exequatur

Exequatur is a term that refers to the procedure of verification of foreign judgments. The word had been most popular in French legal vocabulary before it was consolidated in EU law after 2000s. In 2000s, after the 1999 European Council of Tampere, the course was taken for the simplification of recognition and enforcement of foreign judgments. After the Brussels I Regulation came into force, the verification procedure has become a mere technicality.[19]

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[12] Baumgartner, P 2014, 'Recent Reforms in EU Law. Recognition and Enforcement of Foreign Judgments', *Judicature*, vol. 97, no. 4, pp. 188–195.

[13] Ibid, p. 193.

[14] Regulation (EC) No. 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure, 2007 0.J. (L 199) 1

[15] Regulation (EC) No. 1896/2006 of the European Parliament and the Council of December 12, 2006, creating a European order for payment procedure, 2006 0.J. (L 399) 1

[16] Regulation (EC) No. 805/2004 of the European Parliament and of the Council of April 2004 creating a European Enforcement Order for uncontested claims, 2004 0.J. (L 143) 15

[17] Council Regulation (EC) No 1346/2000 of May 29 2000 on insolvency proceedings, 2000 O.J. (L 160) 1

[18] Baumgartner, P 2014 op.cit., p. 193.

[19] Cuniberti, G & Rueda, I 2010, 'Abolition of Exequatur. Addressing the Commission's Concerns', Law Working Paper Series, Paper Number 2010–03, University of Luxembourg, Faculty of Law, Economics and Finance, pp. 1–23.

Under Regulation Brussels I a foreign judgment is recognized, i.e. given the same effects of *res judicata* as in its State of origin, automatically. That is, no exequatur procedure is required, apart from submission of a copy of the judgment, which verifies its authenticity, and a certified translation, where necessary.[20] In contrast, Article 38 provides that a foreign judgment is enforced by a special declaratory decision – exequatur. The exequatur procedure is the only way a party can obtain enforcement. Hence, suing for a new judgment in the Member State where the enforcement is sought is no alternative. However, exequatur is a mere formality, after the completion of which a foreign judgment is declared enforceable. No review of the judgment on the grounds of public policy or other grounds is permitted. The exequatur decision can only be contested on appeal by the party against whom enforcement is sought.[21] At this stage limited grounds of refusal may be invoked relating to public policy, proper notice, irreconcilability of judgments, and violation of designated exclusive jurisdiction rules. In 90 per cent of cases the challenge is unsuccessful.[22]

Abolition of exequatur is motivated by both economic and political considerations. Thus, it would not only reduce the costs of verification of judgments and facilitate cross-border debt recovery but also allow the free movement of judgments as part of the functioning of the single market.[23]The new Recast Regulation was not a revolutionary instrument. Indeed, the first Regulation to abolish exequatur was Regulation 2201/2003 on matrimonial matters[24] followed by a number of other instruments dealing with specific matters.

The new regime under the Recast Regulation makes foreign judgments directly enforceable without the need for obtaining an exequatur. The same provisions apply to authentic instruments and court settlements, which also fall within the scope of the Regulation. According to Article 37(1), the party seeking to enforce a judgment must only produce its authentic copy and a certificate

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[20] Bogdan, M 2012, *Concise Introduction to EU Private International Law*, 2nd edn, Europa Law Publishing, The Netherlands. p. 72.

[21] Ibid. pp. 76–77.

[22] Kramer, XE 2011, 'Abolition of exequatur under the Brussels I Regulation: effecting and protecting rights in the European judicial area', Nederlands Internationaal Privaatrecht, vol. 4, pp. 633–641.

[23] Cuniberti, G & Rueda, I 2010 op.cit., p. 5.

[24] Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, OJ L338, 23.12.2003, p.1. It was followed by Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for Uncontested Claims; Regulation (CE) No 1896/2006 of 12 December 2006 creating a European Order for Payment Procedure; Regulation (CE) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure; Regulation (CE) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure.

issued by the court of origin. A translation of the judgment may also be required if the court or the competent authority is unable to proceed without it.[2526] Notably, direct enforcement does not circumvent the right of defense of the party against whom enforcement is sought. Now, an application for refusal must be submitted on that party's own accord after the certificate of enforcement is received and before the first enforcement measure is carried out.[27]

Among the voiced concerns about abolishing exequatur one of the most acute was that of human rights. It is pointed out that an exequatur procedure is a safeguard against importing human rights violations from the jurisdiction where they originate. This is so because to be recognized foreign judgments must meet the standards of the European human rights law. Such concerns, however, must be weighed against the effectiveness of other means for securing human rights, such as the mechanisms of the ECHR and the EU Charter of Fundamental Rights.[28]

2.2 Choice-of-court agreements and the lis pendens rule

The 'Italian torpedo' is an action designed to create delays and undermine the effectiveness of choice-of-court agreements. Particularly, a party to a dispute brings an action before a notoriously slow court system, often Italy, to bar an unwanted action in a quicker court system. According to the *lis pendens* doctrine the court seized second will be obliged to stay the proceedings until the first court establishes whether it has jurisdiction. Unsurprisingly, the changes introduced to this approach by the Recast Regulation were widely welcomed.

The old rules under the Brussels I Regulation left a loophole for 'torpedo' actions to be possible and popular. To this end, Article 23 of the Regulation provided for choice-of-court agreements as an expression of the principle of party autonomy. It allows the parties to agree on their own rules, including the choice of forum, provided that such rules do not contradict mandatory law[29]. This, in turn, provides for a considerable degree of certainly with regard to the place where potential disputes are to be adjudicated. Article 23(1) implies that it is immaterial whether there is a connection between the courts of the State chosen and the substance of or parties to the dispute, provided that is it not

[25] Article 37(2) of the Recast Regulation.

[26] Timmer, LJ 2013, 'Abolition of Exequatur under the Brussels I Regulation: ILL Conceived and Premature?', Journal of Private International Law, vol. 9, no. 1, pp. 129–147.

[27] Ibid. p. 134.

[28] Cuniberti, G & Rueda, I 2010 op. cit., pp. 7–8.

[29] Kuipers, JJ 2009, 'Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice', *German Law Journal*, vol. 10, no. 11, pp. 1505–1524.

a purely internal matter. Once the parties agree on a court it shall have exclusive jurisdiction over the substance of the dispute and over the validity of the choice-of-court agreement itself.

The convenience and certainty offered by prorogation of jurisdiction may lead to forum shopping and taking advantage of the *lis pendens* rule.[30] *Lis pendens* is recognised internationally as a means to avoid irreconcilable judgments and afford effective legal protection, whence later instituted proceedings are barred by prior action[31]. The rule is contained in Article 27 of the Brussels I Regulation and reaffirmed by the ECJ case law, particularly *Erich Gasser GmbH -v- MISAT Srl.*[32] It provides that where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. The article is mandatory, shall be applied *ex officio* and cannot be derogated from by the agreement of the parties. It is the *lis pendens* doctrine that makes 'Italian torpedo' possible. The court seized second shall await until jurisdiction is established by the court seized first. A related issue is the so-called 'race of plaintiffs', when a *mala fide* party seeks to create parallel proceedings and submits an action to a court not designated by the choice-of-court agreement. When the other party then brings the action with the same cause before the chosen court, the court will have to nonetheless apply the *lis pendens* rule and stay the proceedings. This loophole in the Brussels I Regulation has been widely criticised and the Recast Regulation means to leave no room for such a manoeuvre[33].

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[30] Ivanova, E 2009–2010, 'Choice of Court Clauses and Lis Pendens under Brussels I regulation', *Merkourios-Utrecht Journal of International and European law*, vol. 26, no.71, pp. 12–16.

[31] Martiny, D & Reithmann, C, *Internationales Vertragsrecht*, Schmidt, Dr. Otto, Germany.

[32] Case C-116/02 *Erich Gasser GmbH -v- MISAT Srl [2003] ECR 1–14693.* In the case, MISAT brought proceedings against Gasser before the Tribunale Civile e Penale in Rome. Seven months later, Gasser brought an action against MISAT before the Landsgericht Feldkirch in Austria regarding the same business relationship. Gasser indicated that the Austrian court was not only the one for the place of performance of the contract between the parties, but also the one designated in the choice-of-court cases, to which MISAT has never objected. MISAT relied on Article 2 of Regulation Brussels I, which confirred jurisdiction on the Italian court according to the place of establishment, and on the fact that proceedings were already started before the Austrian court was seized. The ECJ ruled that the *lis pendens* rule shall be interpreted broadly so as to mean that any court subsequently seized, even if it happens to be the one indicated in the valid choice-of-court agreement, shall stay the proceedings until the court first seized establishes whether or to it has jurisdiction. The ECJ also expressly stated that this rule cannot be derogated from for the sole reason that the court system of the court first seized is excessively slow.

[33] Nielsen, PA 2012, 'The State of Play of the Recast of the Brussels I Regulation', *Nordic Journal of International Law*, vol. 81, pp. 585–603.

The Recast makes an express exception to the general rule of *lis pendens*. The new amended rule provides that as soon as the *designated* court is seized all other courts, previously or subsequently seized, shall stay the proceedings. Recital 22 of the Recast Regulation provides that the designated court shall proceed regardless of whether the non-designated court has stayed the proceedings. This gives it authority to act immediately and independently of any potential parallel proceedings. To this end, Article 31(2) says that when a designated court is seized with exclusive jurisdiction any court of another Member State shall stay the proceedings until it declares – in case the agreement is invalid – lack of jurisdiction. If the designated court establishes jurisdiction, all other courts shall decline it in favour of the court under the agreement (Article 31(3)). The effect of the new rule is such as to prevent any attempt of filing an action with a court other than the one designated by the choice-of-court agreement.

In as much as such a change is welcome and significant, it has several issues that are to be tested in court now that the new Recast Regulation has come into force. The new rules deal expressly with exclusive jurisdiction under the choice-of-court agreements and leave non-exclusive clauses unaddressed.

It is also unclear whether the new rules tackle both identical[34] and related[35] proceedings, or only the former.[36] Identical and related proceedings fall under different articles in the Brussels I Regulation – Article 27 and 28, respectively. According to Article 27, any court is obliged to stay the proceedings until the court first seized decides whether it has jurisdiction. Article 28 gives courts discretion as to whether to stay or not stay the proceedings. Article 31 of the Recast Regulation is silent on the matter, neither including nor excluding either of them. The suggested interpretation, which relies on Recital 22 and Article 29(1) of the Recast Regulation, assumes that related actions were not envisioned for the purposes of Article 31. If this is the case, the exclusion of related actions presents a loophole in the Recast's mechanism of combatting 'torpedo' actions. Under the old regime a case regarding the same cause of action and between the same parties was brought before Italian courts to create a delay in litigation; today the party wishing to circumvent the choice-of-court agreement would only need to make slight changes to either the cause of action or

[34] Proceedings between the same parties and regarding the same cause of action.

[35] Proceedings 'so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'. Case C-406/92 The Tatry v Maciej Rataj [1994] ECR I-5439 [52].

[36] Kenny, D & Hennigan, R, 2015, 'Choice-of-Court Agreements, The Italian Torpedo, And The Recast Of The Brussels I Regulation', *International and Comparative Law Quarterly*, vol. 64, no. 1, pp. 197 – 209.

the parties involved, and voilà – the full force of the Recast Regulation Article 31 loses its significance.

The case faced with these concerns has very recently been decided in Ireland in February of 2014, *Websense v. ITWAY*. In the case, despite the existence of a valid choice-of-court agreement, which gave exclusive jurisdiction to the courts in Ireland, the Irish Supreme Court decided that the proceedings between the parties in Ireland be stayed until the Italian court first-seized rules on jurisdiction. It is argued that this case may not be the last one dealing with similar circumstances and failing to uphold the effectiveness and fair application of choice-of-court agreements.[37]

2.3 Arbitration exclusion

The Regulation Brussels I excludes arbitration from its scope. It is consistent with arbitration exclusion from the original Brussels Convention 1968: the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards and the 1961 European Convention on International Commercial Arbitration were believed to be sufficient. The rationale for the exclusion was prevention of parallel proceedings and irreconcilable judgments, which may result if one party to an arbitration agreement nonetheless brings a court action. The most unclear part under the old Brussels I Regime is the extent of the exclusion, i.e. whether the arbitration agreement, arbitral award and its consequences are altogether not covered. In the *Marc Rich*[38] case it was ruled that Brussels Convention did not cover cases where arbitration was the principal subject matter of the case. In line with this reasoning, in the *West Tankers*[39] case the ECJ decided that the validity of the arbitration agreement was not the main claim in the case. Instead, the subject matter was a claim for tort damages. Therefore, the incidental to it question about the validity of the arbitration agreement was also covered by the scope of Brussels I Regulation. It was considered inconsistent with the overall exclusion of arbitration and caused negative reactions from the arbitration community.[40]

The new Recast Regulation reinforces the exclusion of arbitration from its scope. This, however, is not contained in the main text of the Regulation but in Recital 12. The Recital 12 reads that when any court is seized of a matter in respect of which the parties have entered into an arbitration agreement, the

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[37] Ibid., p. 198.

[38] Case C-190/89, Marc Rich & Co. AG v. SocietA Italiana Impianti PA, 1991 E.C.R. 1–03855

[39] Case C-185/07, Allianz SpA v. West Tankers, Inc., 2009 E.C.R. 1–00663.

[40] Moses, M 2014, 'Arbitration/Litigation Interface: The European Debate', *Northwestern Journal of International Law & Business*, vol. 35, no. 1, pp. 1–47.

court may refer the parties to arbitration, stay or dismiss the proceedings, or examine the validity of the arbitration agreement. Further, it lays down that when a court rules on the validity of an arbitration agreement, the decision is outside the scope of Recast Regulation's recognition and enforcement rules regardless of whether it is a principal issue or an incidental question. Paragraph 3 of the recital specifies, that when a court rules on the validity of an arbitration agreement and finds it null and void, it can still rule on the substance of the dispute. The decision concerning the substance of the dispute shall be recognised and enforced according to the Recast Regulation. Besides, Recital 12 in conjunction with Article 73 mean that arbitration awards that deal with the same subject matter and are inconsistent can be enforced under the New York Convention, which takes precedence. Finally, the Recital explains that the Recast Regulation does not apply to any action or ancillary proceedings, which relate to the establishment of an arbitral tribunal, powers of arbitrators, etc.

The effects of the following amendments will show more clearly after the provisions on arbitration are tested in court. On the face of it, the clarifications provided by Recital 12 reduce some controversy about the extent of the exclusion and provide protection of arbitration proceedings from parallel proceedings.

3. Conclusion

The Recast Brussels I Regulation introduces a number of improvements to the old regime, not all of which are accommodated in this paper. Some other changes concern the extension of the provisions on jurisdiction agreements, which now can be concluded between the parties, none of whom are domiciled in the EU. Moreover, protective rules relating to consumer contracts and individual contracts of employments are extended to apply in some circumstances to 3rd-country parties.[41] It is evident that the Recast Regulation is far less ambitious than the original Commission proposal. It does, however, bring certain amendments that are highly welcomed by the international community.

[41] Johnson, A, Pertoldi, A, Peacock, N & Ambrose, H 2015, 'The Recast Brussels Regulation. Implications for Commercial Parties', Thomson Reuters (Professional) UK Limited.

Marriage of an Adolescent in the Context of Migration

Kristi Joamets & Lehte Roots*

Summary: The laws of EU member states in relation to age an adolescent can marry differ from state to state but not considerably. This difference is justified by the protection of different cultures of member states. Article discusses how different those cultures in Europe actually are giving the grounds for the conflicts in recognising the marriages or maturity evaluation of adolescents in another member state. It shows that the legal instrument in fighting against the forced and child marriages: "to forbid the adolescent's marriages at all" does not protect the rights of the child in all cases; even more, this can even lead to the violation of the children's rights, especially in the context of comparing the marriage to cohabitation and the rights derived from both.

Keywords: marriage capacity, migration, cultural pluralism, adolescent, marriage, family law, human rights, EU law, fundamental rights.

1. Introduction

It is widely known that diversity of family laws of EU member states can cause legal conflicts when there is a cross-border element in a family relation. Protecting culture is one of the justifications to maintain family formulation regulations in the state legislation as they are. This type of approach nevertheless can lead to the violation of fundamental rights. However, taking a deeper look into the conflicting regulations and comparing them to the fundamental rights these regulations must be in conformity with each other. One can notice that the justification of different treatment, based on the protection of culture is questionable.

Marriage capacity is about validity of marriage, which differs from the traditional legal capacity, as it provides additional requirements for being able to marry. Marriage capacity carries the values of society that vary depending from the historical, cultural and social values of state[1], but it is not often so

* Tallinn Law School, Tallinn University of Technology, Estonia. Contact: kristi.joamets@ttu.ee; lehte.roots@ttu.ee.

[1] In this article a term *marriage capacity* has been used as a legal concept covering the following elements – general legal capacity, gender, age, kinship, validity of previous marriages etc. In

evident that those differences exist in reality. Social relations are not static, they are changing and this is justified by the dynamic nature of marriage law. In this respect also restictions to marry on the basis of age has a new meaning compared to the past.

In a legal literature after the gender the age is another widely discussed element both in EU and even more globally. The main debate is about the protection of the child. While Western tradition allows adolescent marriages starting from certain age and after the evaluation of child maturity, then other traditions have no age limits or these limits are (too) low in respect of maturity. Frankly saying no maturity control exists. In these cultures the married child becomes an adult despite of the age he/she has. In this respect the Western and other cultures collide, furthermore also the collision of human rights and religion or tradition in a certain single state can be observed.[2] However, also the laws of EU member states collide as they declare different age limits for adolescent marriages.

This article explores the differences deriving from the age as an element of marriage capacity related to the marriages of adolescents in the context of migration within Europe by using Estonian example.

Article is based on a legal research that analyses the valid legal norms and principles. Child marriages and collision of cultures is very comprehensive topic. The legal analyse with sociological aspects is discussed comparatively. Questions related to the age and marriage in EU member states are compared.

First, age as an element of marriage capacity is introduced through the patterns of laws of member states of EU. Secondly, the age is discussed through

a literature different terms have been used refering to the aforementioned elements and they are often also devided into different groups. See Joamets K. 2012. Marriage Capacity, Social Values and Law-Making Process. *International and Comparative Law Review* 12. Palackỳ University, 97–115, p 98–99.

[2] See e.g. Thomas C. 2009. Forced and Early Marriage: A Focus on Central and Eastern Europe and Former Soviet Union Countries with Selected Laws from Other Countries. Expert Paper. United Nations; Gangoly G., Chantler K. 2009. Protecting Victims of Forced Marriage: Is Age a Protective Factor?. Fem Leg Stud, Vol. 17. DOI 10.1007/s10691–009–9132–7, 267–288; Chantler K. 2012. Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse. Trauma, Violence, & Abuse, 13(3), 176–183. Sagepub.com; Myers J. 2013. Research Report. Untying the Knot. Exploring Early Marriage in Fragile States. World Vision, UK. Available at: *www.**worldvision**.org/...nsf/.../**Untying-the-Knot**_report.pd...* (16.12.2013); Malhotra A., Warner A., McGonagle A., Lee-Rife S. Solutions to End Child Marriage. What the evidence shows. ICRW. 2011. www.icrw.org/childmarriage; Khanna T., Verma R., Weiss E. Child Marriage in South Asia: Realities, Responses and the Way Forward. „Solidarity for the Children of SAARC". 2013. Available at: *www.icrw.org/.../**child-marriage-south-asia-realities-respons**...*; Chandra-Mouli V., Camacho A. V. and Michaud P.-A. 2013. WHO Guidelines on Preventing Early Pregnancy and Poor Reproductive Outcomes Among Adolescents in Developing Countries. Journal of Adolescent Health 52. Elsever Inc., 517–522, etc.

the general legal capacity theory and application of family regulation in an Estonian example. Then the conflict of laws has been examined by the example of Estonian and Lithuanian law showing the problems that the different regulations can cause and raises a question where the non-recognition is grounded? After that the age, related to marriage, is discussed in the migration process.

The article raises a question whether the cultures of EU member states are so different that the younger age of a child cannot be recognised to respect the marriage and if there is a possibility to overcome the conflict of law in this respect?

2. Age as an impediment for marriage in Europe

In most European countries the main principle follows that a person who wants to marry must be at least 18 years old. This age is presumably related to the legal capacity expressing person's ability to excercise the rights and obligations deriving from the certain deed – in most European states this age is 18 (full active legal capacity) when a person understands the responsibility and is able to protect her/himself in case of dispute. However, in most member states also the restricted legal capacity is common, which means that from certain age an adolecent can make valid deeds with or without the consent of her/his guardian. According to the report of European Union Agency for Fundamental Rights there is no internationally accepted definition of legal capacity, it can be defined as "the law's recognition of the decisions person takes: it makes a person a subject of law, and a bearer of legal rights and obligations; without such recognition, an individual's decisions have no legal effect or validity; they cannot make binding decisions".[3]"

Gangoly and Chantler explain that „the notion that one is more mature as one gets older is often accepted as "common sense" and therefore "not subject to further scrutiny"; "this common sense has its roots in developmental psychology, where the links between age and maturity are evident"[4]. In this respect age shows the maturity of a child.

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[3] Legal capacity of persons with intellectual disabilities and persons with mental health proɵ blems. Luxembourg: Publications Office of the European Union, 2013. Published by European Union Agency for Fundamental Rights, 2013. Available at: www.google.ee/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CEMQFjAD&url=http%3A%2F%2Ffra.europa.eu%2Fsites%2Fdefault%2Ffiles%2Flegal-capacity-intellectual-disabilities-mental-health-problems.pdf&ei=T26nUqWuKsOI4gSo2ID4Cg&usg=AFQjCNHP31TyrKW3gb0aeRjUOo2dRmehDA&sig2=wvrJom1E53imqI0Efm3WMw&bvm=bv.57799294,d.bGE (09. Dec 2013), p. 9.

[4] Gangoly G., Chantler K. 2009. Protecting Victims of Forced Marriage: Is Age a Protective Factor?. Fem Leg Stud, Vol. 17. DOI 10.1007/s10691–009–9132–7, 267–288, p 276.

Marriage capacity as a special legal capacity has also an exception related to the general rule of the marriageable age[5] – in EU member states it varies from 15[6] to 16[7] years[8]. However, most of the states recognise the age 16, which allows an adolescent to marry with the consent of her/his parents or guardian or court or certain administrative organ dealing with adolescent's rights. The general understanding has been for decades that a parent or a guardian of the minor knows if the child is developed mentally, emotionally and she is sexually mature[9] that he/she can act as a grown up in a marriage relation; and as a parent or guardian in general on behalf of the interests of the child. In some states court or other state institution can be involved in the process of allowing an adolescent to marry, such institution must control the mental ability of the child instead or next to the parent/quardian, being an additional institution for determining the child's interests in this context. In some states an adolescent can turn for the permission to the court in case his/her parent does not give a permission for marriage. In some states only court gives such permission[10].

Nevertheless, in every EU member state the interest of the child are controlled. Probably the court or other institution which determines the adolescent ability to take the obligations related to marriage, is more neutral than a parent, on the other hand a parent knows his/her child best. Procedure in a court or state organ is more time-consuming and raises a question how competent judges or public officials are to evaluate the maturity of a child.

Comparison of the laws of EU member states shows that in some states[11] there is a restriction that only one of the future spouse can be adolesent, another must be of full-age. This is an interesting principle and raises a question what is the aim of such rule? What does it protect?

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[5] Eruklan states refering to Dixon-Mueller (2008) that a review of psysiological and cognitive readiness at different stages of adolescence concluded that early adolescence (younger than age 15) – is generally "too early" from any point of view, for transitions such as sexual initiation and marriage. (Eruklan A. 2013. Adolescence Lost: The Realities of Child Marriage. Journal of Adolescent Health Vol. 52, 513–514, p 513. Reference to the Dixon-Mueller R. 2008. How young is "too young?" Comparative perspectives on adolescent sexual, marital and reproductive transitions. Stud Fam Plan, Vol. 39, 247–262).

[6] For example Estonia, Slovenia, Lithuania, Sweden, Denmark.

[7] For example Austria, Bulgaria, Croatia, Czech Republic, Germany, Greeck, Hungary, Italy, Latvia etc.

[8] Council of Europe Family Policy Database. Family law and children's rights. Marriage and cohabitation. Available at: www.coe.int/familypolicy/database (10.12.2013)

[9] Maertens A. 2013. Social Norms and Aspirations: Age of Marriage and Education in Rural India. World Development Vol. 47, 1–15. Elsevier Ltd. p 13. Reference to the Billig M., S. 1992. The marriage squeeze and the rise of groomprice in India's Kerala state. Journal of Comparative Family Studies, 23(2), 197–216.

[10] E.g. in Estonia.

[11] E.g. Austria, Germany, Latvia.

As a general principle by the law the spouses are treated as equal[12]. In case one of the spouses is adolescent, in order to maintain the equality of spouses, the maturity of adolscent has to correspond to the level of a person with full active legal capacity.

3. Adolescent marriages in Estonia

As already mentioned, Estonia is an exception state, where adolescent can marry already in age 15[13], but only by the consent of the court[14]. In Estonian legislation a parent or guardian as a consent-giver was replaced by the court "to protect better a child" as court would be more neutral in deciding the consent giving in 2010[15].

In this process the court must clearly express in its decision that a child is able to perform the acts required for the contraction of marriage and for the exercise of the rights and performance of the obligations related to marriage[16]. However, in Estonian case it is not clear what are those obligations related to marriage, e.g. that does this give active legal capacity to the spouse to register the birth of his/her child and does it allow to divorce or buy and sell the property for the needs of the family[17]?

As having children is not a compulsory element of marriage, it would be arguable if court can deal with this question in its decision at all. On the other hand, when this right has not been mentioned in a decision then it can be discussed if a permission to marry includes an active legal capacity related to the legal representation of the children born in this marriage. Estonian court has expressed the ability of an adolescent exactly by the words of the regulation,

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[12] See footnote 17.

[13] Estonian Family Law Act par 1 (4). Also in Lithuania the age is 15.

[14] According to Estonian General Part of the Civil Code a 15-year old adolescent can acquire from a court a full active legal capacity (par 9). This right is not related to marriage, instead is meant for starting a business.

[15] An Explanational Letter of Estonian Family Law Act (in Estonian). However, there is no statistic that consent given by the parents have been caused any problems.

[16] Estonian Family Law Act par 1 (4).

[17] According to Estonian Family Law Act spouses have equal rights and obligations with respect to each other and family; they organise together their marital cohabitation and satisfaction of the needs of their family considering the well-being of each other and their children and they shall each accept responsibilities relating to marriage with regard to the other; spouses participate in the organisation of shared household and earning of income to the best of their ability; a spouse shall select his or her area of activity and operate in his or her area of activity by making the best use of his or her ability to obtain the assets for maintenance of his or her family. (par 15).

e.g. *"X. X is able to perform the acts required for the contraction of marriage and for the exercise of the rights and performance of the obligations related to marriage"*?[18] Such wording puts a state organ or other institution using the active legal capacity of an adolescent in a complicated situation when interpreting the decision: does this or another deed or transaction belong to the context of marriage? For example, when court extends the restricted active legal capacity of an adolescent of at least 15 years of age whether this is in the interests of the adolescent and the level of development of the adolescent so permits, court must decide the transactions which the adolescent is permitted independently to enter into[19]. Based on this principle in case of deciding the permission of marriage of an adolescent court should point out certain deeds and transaction adolescent can make[20], but Family Law Act does not provide such obligation or even an authority for a court to decide the aforementioned matters.

Prevailing understanding is that in most cases the reason for marriage of adolescents is pregnancy. When court has extended the legal capacity of an adolescent he/she gets probably also the right to represent his/her soon born child, e.g. in registering the birth of the child. If adolescent's active legal capacity is not extended, the guardian of the child is a full-age parent or if both of the parents of the child are adolescents with no extended active legal capacity, then the local government; local government performs guardian duties until the appointment of the guardian for a born child[21] and hence the birth of the child is also registered by the local goverment as a guardian of the child who has also the custody over the child. This makes the legal relations in a family complicated as adolescent parent has on the one hand a custody over the child, but still cannot represent his/her child in any deeds[22].

There can also be questioned if such a court decision gives an adolescent a right to choose a marriage property regime in the process of marriage[23]. In the process of deciding whether an adolescent is ready to take the responsibilites related to marriage, then she or he must be able also to decide which property regime suits him or her best. However, considering of 15-year old

[18] See Estonian Family Law Act par 1 (4).
[19] General Part of Civil Code Act par 9.
[20] General Part of Civil Code Act par 9.
[21] Estonian Family Law Act par 176.
[22] See Estonian Family Law act par 139 (A parent with restricted active legal capacity does not have the right to represent a child and shall exercise the right of custody over person with respect to a child together with the legal representative of the child. If the guardian or special guardian is the legal representative of the child, the opinion of the parent shall be preferred in the case of divergent opinions between the parent and the representative.)
[23] See Estonian Family Law Act par 24: in a procedure of marriage future spouses must choose a matrimonial property regime.

child who maybe has never even been working in his or her life and the only relation to the question "On what I should spend my money?" is related to the pocket-money, it seems considerably difficult for a judge to decide the level of knowledge in economy of this adolescent. For example, in Bulgaria a married adolescent can conclude real estate transactions only with the permission of the respective district court where he or she lives[24]. Estonian family law does not have exceptions in marriage property regime for adolescents in this respect. If a child's active legal capacity has been expanded then she/he has a full legal capacity on the deeds court determined. In such case the obligations taken for the marriage are valid for both spouses, not depending on the age of the spouse.

One characteristic of the development of family law in Western world is the decrease of marriages and increase of cohabitations. The same pattern is in Estonia. In many European states cohabitation has been regulated by registration procedure or by providing more or less similar rights to the factual cohabitants. Estonia has not directly regulated cohabitation yet[25], however there are legal norms in several legal acts giving cohabitants the same rights as to the married spouses[26]. By the Cohabitation Law Act the registration is not allowed to the adolescent. Unlogical is the reason restricting the adolescents to register their cohabitation – "adolescents marry only because of the pregnancy of one spouse, but our society does not condemn factual cohabitation"[27].

There is no reference to the certain research confirming such statement; comparing the statement to the regulation in Estonian Family Law Act providing the right to marry, there can be noticed a contradiction between regulations: 15-year old adolescent can marry by the consent of the court, but cannot register the partnership, because of the reason refered above.

Those adolescents whose legal capacity has not been expanded for marriage[28], live in a factual relationship (i.e. not registered). Because of the non-expansion of their legal capacity in every (legal) deed they cannot make the transactions or deeds to protect and support their "family", they need to involve their parents or

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[24] Council of Europe Family Policy Database. Family law and children's rights. Marriage and cohabitation. Available at: www.coe.int/familypolicy/database (10.12.2013)

[25] In October 2014 Estonian Parliament adopted the Cohabitation Law Act, but it will be enforced only in 2016.

[26] See Draft of Cohabitation Act. Available at: http://www.riigikogu.ee/?page=en_vaade&op=ems&enr=650SE&koosseis=12. Last accessed 10.08.2014.

[27] See the explanatory letter of the Estonian Draft of the Cohabitation Law Act. Available at: http://www.riigikogu.ee/?page=en_vaade&op=ems&enr=650SE&koosseis=12. Last accessed 10.08.2014. (in Estonian).

[28] According to the courts' view they are not mature enough to take obligations and responsibilities related to marriage.

guardians to have their consent[29]. Situation is somehow different when one of the spouses is of full age and another adolescent. A person of full age has legal ability to take the obligations for the family and in some cases these obligations can lead to the financial commitment of the both spouses[30]. According to the study about the decision-making in a family it was ascertained that decisions of buying something expensive for the family are made mostly together (74%)[31]. Study covers also adolescents who live together with a partner creating a family. This example shows that in reality the adolescents are also involved with the decision-making processes related to property, though in a legal regulation this has not been clearly determined. In such situation the rights of an adolescent spouse living in a factual cohabitation can be restricted. In factual cohabitation live also adolescents who have got a "negative decision" from the court in widening the legal capacity to get married. As according to the study mentioned above also such adolescents decide the property questions with another grown-up partner of a factual cohabitation, there can be claimed that the adolescent can be manipulated and induced as a non-mature person for such decisions.

Though the number of the adolescents who marry or want to register their partnership is small, their legal relations need more thorough analyse to ensure their rights to family life. As the restriction in age has been provided for a protection of a child then there should be considered the other negative aspects the decision of a court can cause violating the other rights or interests of the child.

4. Permission to marry regulations in private international law

The applicable rules how conflicts between the diversity of the law should be resolved are found in private international laws of member states. In order to

[29] According to the Estonian General Part of the Civil Code a multilateral transaction entered into by a person with restricted active legal capacity without the prior consent of his or her legal representative is void unless the legal representative subsequently ratifies the transaction. If a person acquires full active legal capacity after entry into the transaction, he or she may ratify the transaction himself or herself. (Par 11).

[30] According to the Estonian Family Law Act a solidary obligation of the spouses arises from a transaction made by one spouse for the organisation of shared household or in the interests of children or in order to satisfy other common needs of the family if the amount of the transaction does not exceed the reasonable rate according to the living conditions of the spouses. (par 18)

[31] See Vainu V., Järviste L., Biin H. Soolise võrdõiguslikkuse monitooring. Uuringuraport. (Monitoring of Gender Equality) 2009. Sotsiaalministeeriumi toimetised 2010. Published by Ministry of Social Affairs 2010, p 130–131. Study includes also cohabitants and married couples from age 15.

find out the applicable legislation one has to look at the substantive laws of different member states.

Prevailed understanding in European legal space related to family law is that this branch of law is so deeply related to the culture of each member state that it is not possible to harmonise the family laws of member states[32], while the others see instead one common European cultural identity[33] and hence the culture is not an obstacle for harmonisation of family laws of EU. In this respect there could be raised a question that how to solve in cross-border cases the diversity of ages of adolescents who want to marry abroad or have already married abroad.

For example, according to Lithuanian law a female younger than 15-years can marry in case of pregnancy by the permission of court. When such girl gets a permission from the Lithuanian court and receives by this a certificate of no impediments for marriage and wants to marry in Estonia then according to Estonian Private International Law Act (par 56) the prerequisites of and hindrances to the contraction of a marriage and the consequences arising there from shall be governed by the law of the state of residence of the prospective spouses. In this case it can be Lithuanian. However, in the process of marriage it is also assessed if those conditions are in accordance to Estonian law. As according to Estonian law an adolescent can marry only since the age of 15, there is a collision between the laws of two member states. Furthermore if the Lithuanian girl is residing in Estonia the 14-year old girl cannot get her marriage recognised and therefore deprived from fundamental rights to enjoy family life and get benefits that the marriage status can bring her in Lithuania.

Similar situation is in case of adolescents of age 15 and 16. The maturity of an adolescent is controlled by the state of residence or citizenship. Problem rises in another state which applies its own legislation while determing the full active legal capacity.

In case of marriage in Estonia the administrative body does not agree to contract the marriage between the aforementioned 14-year old Lithuanian girl

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[32] See for example Connolly A. J. 2012. Naturalising Cultural Difference and Law: Author's Introduction. *Australian Journal of Legal Philosophy* 37, Monash University, 280–292 and Pintens W. 2003. Europeanisation of Family Law. Perspectives for the Unification and Harmonisation of Family Law in Europe. Boele-Woelki K. (ed.). Intersentia. Antwerp-Oxford-New York.

[33] See for example Dethloff N. 2003. Arguments for the Unification and Harmonisation of Family Law in Europe. Perspectives for the Unification and Harmonisation of Family Law in Europe (ed. Boele-Woelki K.). Intersentia. Antwerp- Oxford-New York and Meeusen J. 2007. System Shopping in European Private International Law in Family Matters. International Family Law for the European Union. Meeusen J., M. Pertegás, G. Straetmans, F. Swennen (eds.). Intersentia. Antwerpen-Oxford. Antokolskaia M. 2010. Harmonisation of Substantive Family Law in Europe: Myths and Reality. *Child and Family Law Quaterly* 22, Jordan Publishing, 397–421.

who has a certificate of no marriage impediments, because the preconditions to marry are not followed, the girl does not have marriage capacity according to the Estonian law. When this Lithuanian girl marries in Lithuania and plans to live in Estonia with her husband as a married couple then Estonia will not recognise this marriage because her age is less than 15 and is hence in conflict with Estonian prerequisites of marriage, that is, in collision with Estonian substantive law.

As already mentioned, the differences in age as an element of marriage capacity derives as claimed by the different cultures of member states. Undoubtedly culture is reflected in law, but in this example case it raises a question if Estonian and Lithuanian "culture" are in respect of maturity of children so different? That is, how much is 15-year child more mature than 14-year child related to marriage? How different can be the principles Lithuania uses in the process of maturity evaluation compared to the principles in Estonia?

Protection of culture in this context means that state protects certain values by this non-recognition. In Estonian case there is no clarity what values and how does the recognition of marriage capacity certificate issued by the Lithuania violate?

And more, whose responsibility it is to protect the rights of these adolescents? Can they represent themselves by themself or should their parents be involved? This is a question of the legal capacity of the child which can be different in both states and not recognised, again. Such non-recognition can be disputed. Person who can submit the claim, can differ from state to state as well.

As explained above, the registration of the birth of the child in case one parent or both is/are adolescents, is complicated in Estonia. When into this process is included the cross-border element then such procedure becomes even more difficult as the parent of the adolescent should be involved. In case discribed above the marriage contracted in Lithuania is not recognised, this means that the birth of the child must be registered as a birth of non-married parents. As a mother is adolescent she cannot provide an application for registration in Estonia. Even when a father of the child is full-of-age he cannot represent a child in this process because he is not a legal father yet: the acknowledgement of a child must be done first. After that he is a legal representative of the child and can present an application to register the birth of the child. However, adolescent mother is also involved, but partly together with the local government. In case a father of the child is also adolescent, he cannot represent a child in this process and local government as a legal representative of a child presents the application of registering the birth of the child. According to Estonian law a representative of a child is the local government where a child lives[34]. Before

[34] Family Law Act par 176.

registering the birth a child does not have a registered residence. In this case a mother's residence is applied. However, in case a mother does not have a residence in Estonia yet, it is disputable, which local government should represent the child in a process of registering the birth.

If both of those parents of the child, who are actually married in another member state, are adolescent, their parents must be involved, they must give their consents to the statements of intent – e.g. to the acknowledgement of fatherhood, to the name of the child etc. Consent derives from the responsibility of a parent to protect the interests of their child. Analysing more deeply such protection one can notice clear overregulation and waist of time instead of protecting anything in reality.

As Estonia does not recognise the marriage of those adolescents, then they will not get the rights of the spouses; however, they still can be considered as a family and their rights can be evaluated as through the factual cohabitation.

5. Marriages of adolescents in the case of migration

Another question which can be raised is that how are protected the interests of the adolescents when evaluate the situation throught the prism of free movement right? Is the right of free movement within EU restricted by the refusal to recognise their marriages contracted abroad? Again, the restriction to free movement within EU is legitimate when protecting certain value. But this value must be clear and in the process of restriction a proportionality principle must be followed. In Estonian case the values related to marriage are not clearly expressed in legal acts nor their interpretations, including the documents provided in a law-making procedure.

In the case the adolescent wants to move from one EU state to another the situation becomes even more complicated. Prevailed understanding in European legal space related to family law is that this branch of law is so deeply related to the culture of each member state that it is not possible to harmonise the family laws of member states, while the others see instead one common European cultural identity and hence the culture is not an obstacle for harmonisation of family laws of EU[35]. In this respect there could be raised a question that how to solve in cross-border cases the diversity of ages of adolescents who want to marry abroad or have already married abroad.

The free movement of EU citizens is regulated by the Treaty articles and by the directive 2004/38/EC. Article 20 §2 of the TFEU states that citizens of

[35] See p. 125.

the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have right to move and reside freely within the territory of the Member States. Article 21 of TFEU gives the Union citizens a right to move and reside freely within the territory of any of the Member States subject to the limitations and conditions contained in the Treaties and secondary legislation. The right to move derived from the EU legislation though does not resolve the collision of norms of family law and the right to marry of adolsents.

If marriage or relationship is not recognised in another member state there might raise problems of the application of art 7 of the 2004/38/EC directive. Article 7 of the citizenship directive states the right of residence for more than three months. According to § 1 "all Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and – have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c)."

The enjoyment of free movement rights in EU are not unlimited which means that the fact of being married and having additional rights from the fact that one is married can increase these possibilities, because the family members of the EU citizen can relay on the income of the spouse in order to justify their right to stay in another member state.

Art 2.§ 2 c) of the directive states: that family members are the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b).

Refusing to recognise the adolecent marriage in another member state might lead to discrimination and deprivation from some family benefits or other social benefits that are available only for families or registered couples. Also additional problems are realated to sickness insurance coverage as in Estonia the spouses can be covered with sickness insurance if one of the spouses

is working and paying social tax.[36] Furthermore ECHR art 8 gives the right to enjoy family life to all human beings regardless of the age and art 12 of ECHR gives the right to marry and found a family according to the national laws. The only limitation provided is the marriageable age which seems to be controversial in the European Union legal space.

6. Conclusion

Contemporary society can be characterised as a globalised, multicultural, pluralistic and tolerant society. Cross-border family relations have mixed the cultures and changed the understanding about family as well as about marriages. Single European culture and the jurisdiction based on traditions are discussed more and more also that the culture of national state is weakening its positions. EU member states are becoming more tolerant and try to find solutions, to solve the cross-border problems related to marriage and ensure the free movement of EU citizens and respect of human rights. Marriage where one spouse is adolescent needs an additional attention because of its specific problematics.

With no doubt the rights of the children should be protected on the one hand, but on the other hand the right of being recognised as couples is also a right of the child. Right for marriage/family life is a human right and protected by the ECHR (Art 12) as well as by the European Union Charter of Fundamental Rights (Art 9). Based on the practice of ECtHR[37] member states can restrict the right to marry in case there is a need to protect the certain value of the member state, but as already mentioned this restriction must be evaluated and explained clearly by this that what are those interests and values such marriage will endanger and whether this restriction is the only suitable mean to protect those interests and values.

Through the analyse in respect of age in relation of context of marriage, it seems that it is not correct to refuse to confirm the contract or to recognise the marriage when one of the (future) spouses is younger than it is provided by the state legislation, which has to fulfill the procedure of the confirming the contract of marriage or recognise the marriage contracted in other member state. Probably the strongest argument in this attitude is the fact that another state

[36] Art 5; Par 3[1] Estonian Health Insurance Act, RT I 2002, 62, 377.

[37] See e.g. Rees v. UK 1986, Cossey v. UK 1990, B.v. V France 1992, X, Y and Z v. UK 1997, Christine Goodwin v. UK 2002, Van Kück v. Germany 2013, Vallianatos and others v. Greece 2013 etc.

already has evaluated the maturity of the child. In Lithuanian case it seems the only possible solution.

The analysis of the marriage capacity in Estonia and Lithuania which are both EU member states has leaded us to the conclusion that there is urgent need for European legislation of family law. In this article only the specific issue as marriage capacity was discussed and analysed but there are more cases where the differences in the state legislation can lead to the human rights violations or impede the enjoyment of the free movement rights. Futhermore the research should be done how the non-recognition of marriages or partnerships in different EU states may impede the free movement rights and fundamental rights in general.

Legal Regime of the European Patents

Svitlana Vyshnovetska & Khrystyna Kmetyk*

Summary: Authors describe the peculiarities of the modern regional patent systems, especially deal with the European regional patent system. The article focuses on the essence of the European patent, its special features as substantial step towards the integration of the worldwide unified patent system. The procedure for granting the European patent, requirements placed on the patentee and the extent of the exclusive rights are described in the article.

Keywords: EU, EU law, industrial property, invention, regional patent systems, the European Patent Organization, the European Patent Convention (EPC), the European Patent Office (EPO), European patent.

1. Introduction

The industrial property objects are protected by multilateral system of international legal protection of industrial property[1]. The system of international legal protection of industrial property includes international legal acts and activities of international organizations[2]. International legal protection of industrial property became necessary when foreign participants refused to take part in the international exhibition of inventions in Vienna in 1883 in order to prevent stealing of their ideas by other countries. In the same year the Paris Convention for the Protection of Industrial Property was adopted by 11 countries: Belgium, Brazil, France, Guatemala, Italy, the Netherlands, Portugal, El Salvador, Serbia, Spain and Switzerland (Guatemala, El Salvador and Serbia denounced and reapplied the convention via accession). It was the first main

* Svitlana Vyshnovetska, Doctor of Legal sciences, docent; Professor of the Department of Civil Law and Process; the Law Institute of the National Aviation University, Kiev, Ukraine; Khrystyna Kmetyk Candidate of Legal sciences; Docent of the Department of Civil Law and Process; the Law Institute of the National Aviation University, Kiev, Ukraine. Contact: vyshnsv@ukr.net.

[1] Підопригора О. А., Святоцький О. Д. Право інтелектуальної власності: Академічний курс: Підручник для студ. вузів. — К: Ін Юре, 2004. — 672 с.

[2] Право інтелектуальної власності: Акад. курс: Підруч. для студ. вищих навч. закладів / О. П. Орлюк, Г. О. Андрощук, О. Б. Бутнік-Сіверський та ін.; За ред. О. П. Орлюк, О. Д. Святоцького. — К: Видавничий Дім «Ін Юре», 2007. — С. 325–329.

international treaty establishing a Union for the protection of industrial property. According to Articles 2 and 3 of the Convention, juristic and natural persons who are either national or domiciled in a state party to the Convention shall, as regards the protection of industrial property, enjoy in all the other countries of the Union, the advantages that their respective laws grant to nationals[3]. The Convention is currently still in force and nowadays 140 countries have become its members and members of the International Union for the Protection of Industrial Property the purpose of which is legal protection of juristic and natural persons of the states parties to the Convention in foreign countries. Another important international treaty adopted in the sphere of industrial property protection is the Patent Cooperation Treaty (PCT) done at Washington on June 19, 1970[4]. The Treaty defines a simplified patent application procedure for 146 countries worldwide. It enables inventors to file a single international application designating many countries, instead of having to apply separately for national or regional patents.

So, in the international phase an international search and international preliminary examination are performed. In the national or regional phase, the patent granting procedure is carried out by the relevant national or regional patent offices, for example the European Patent Office (EPO).

The key organizational structure in the sphere of intellectual property is the World Intellectual Property Organization (WIPO). WIPO is the global forum for intellectual property services, policy, information and cooperation; it is self-funding agency of the United Nations, with 188 member states. Its mission is to lead the development of a balanced and effective international intellectual property system that enables innovation and creativity for the benefit of all[5]. The system of international legal bodies includes organizations that protect the rights of industrial property, such as: the European Patent Organization[6], the Eurasian Patent Organization (EAPO)[7], the African Intellectual Property Organization (AIPO)[8] and the African Regional Intellectual Property Organization (ARIPO)[9].

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[3] Paris Convention for the Protection of Industrial Property of March 20, 1883. Available at: http://www.wipo.int/treaties/en/text.jsp?file_id=288514.

[4] Patent Cooperation Treaty of June 19, 1970. Available at: http://www.wipo.int/export/sites/www/pct/en/texts/pdf/pct.pdf.

[5] World Intellectual Property Organization. Official web-site of WIPO is available at: http://www.wipo.int/about-wipo/en/.

[6] European Patent Organization. Available at: https://www.epo.org/about-us/organisation.html.

[7] The Eurasian Patent Organization. Available at: http://www.eapo.org/en/.

[8] African Intellectual Property Organization. Available at: http://www.oapi.int/index.php/fr.

[9] Organisation Africaine de la Propriété Intellectuelle. Available at: http://www.aripo.org/.

2. Regional Patent Systems

The European Patent Organization is an intergovernmental organization that was set up on October 7, 1977 on the basis of the European Patent Convention (EPC) signed in Munich in October 5, 1973[10]. Since 1973 the European Patent Organisation has grown to include 38 member states and two extension states (European patents can also be extended at the applicant's request to Bosnia-Herzegovina and Montenegro), covering an area with nearly 600 million inhabitants. It has two bodies, the EPO and the Administrative Council, which supervises the EPO's activities. The EPC's purpose is to facilitate the procedure of submitting patent applications: instead of submitting several patent applications in different languages to patent offices of different countries it is possible to submit one application in one language to EPO in order to obtain patents in European countries.

On September 9, 1994 in Moscow CIS countries (except of the governments of Uzbekistan and Turkmenistan) signed the Eurasian Patent Convention[11]. The Convention came into force on August 12, 1995 and its main purpose was to create an international regional system of legal protection of inventions on the basis of a common Eurasian patent with validity in all states parties to the Convention. The Convention's entry into force has created a unitary patent system throughout the territory of its states parties that provides for: a simple and inexpensive procedure for obtaining patents with validity in all states parties to the Convention (one Eurasian application in one language – one examination – a common Eurasian patent); strong Eurasian patents since all Eurasian applications have to undergo substantive examination; harmonised protection of the patentee's rights within a unitary patent area on the basis of the Convention and other related regulations. Ukraine has signed the Convention but did not ratify it, so the Eurasian patent's validity does not extend to its territory. However, juristic and natural persons of states not parties to the Convention may also apply and receive the Eurasian patent directly submitting to the Eurasian Office. The Eurasian patent system is organizationally shaped in the Eurasian Patent Organization and the Eurasian Office with headquarters in Moscow. The main task of the Organization and the Office is to secure legal protection of inventions in member states with a view to: upholding rights and legitimate interests of patentees, i.e. those who took part in the creation and

[10] European Patent Convention of October 5, 1973. Available at: http://documents.epo.org/projects/babylon/eponet.nsf/0/00E0CD7FD461C0D5C1257C060050C376/$File/EPC_15th_edition_2013.pdf.

[11] Eurasian Patent Convention of September 9, 1994. Available at: http://www.eapo.org/en/documents/norm/convention_txt.html

commercial use of inventions, as well as new products and processes embodying them; preserving and multiplying the intellectual, scientific, technological, innovation and industrial potential of its members in the face of strong competition in the global IP market; developing mutually beneficial cooperation with partners from other countries of the world in science, technology, trade, economy, patenting and licensing; as well as facilitating the flow of foreign innovative technologies and investment to the economies of the countries in the region; promoting rapid economic growth in its members on the basis of national and global intellectual resources. As part of this brief, the Eurasian Office has also made its information resources available to the third parties for free access to Eurasian and world patent documentation.

Patent Office of the member states of the African Intellectual Property Organization (AIPO) is located in Yaounde (Cameroon) and carries into practice legally significant functions in respect of applications and law-enforcement documents to certain industrial property object in the countries-members of AIPO, such as: Benin, Burkina Faso, Gabon, Guinea, Cameroon, Congo, Ivory Coast, Mauritania, Mali, Niger, Senegal, Togo, South Africa and Chad.

Patent Office of the countries-members of the African Regional Intellectual Property Organization (ARIPO) is located in Harare (Zimbabwe) and carries into practice legally significant functions in respect of applications and law-enforcement documents to certain industrial property object in the countries-members of ARIPO, such as: Botswana, Ghana, Zambia, Zimbabwe, Kenya, Lesotho, Malawi, Swaziland, Sudan and Uganda.

3. The European Patent as a Type of Regional Patents

3.1 The Essence of the European Patent

Original ideas and creative work are assets which may be of commercial value in the same way as material goods. Establishing and protecting the ownership of ideas and their representation or application is the function of intellectual property rights such as patents, utility models, copyright, trademarks or designs and models. Patents are concerned with technical and functional aspects of inventions.

The word “patent” originates from the Latin “patere”, which means “to lay open”, i.e. to make available for public inspection. More directly, it is a shortened version of the term “letters patent”, which was a royal decree granting exclusive rights to a person, predating the modern patent system. Similar grants included land patents, which were land grants by early state governments in the

USA, and printing patents, a precursor of modern copyright. In modern use, the term "patent" is a set of exclusive rights granted by a sovereign state to an inventor or assignee for a limited period of time in exchange for detailed public disclosure of an invention. An invention is a solution to a specific technological problem and is a product or a process[12]. The term "patent" usually refers to the right granted to anyone who invents any new, useful, and non-obvious process, machine, article of manufacture, or composition of matter. Patents confer the right to prevent third parties from exploiting an invention for commercial purposes without authorisation. An invention can be, for example, a product, a process or an apparatus. To be patentable, it must be new, industrially applicable and involve an inventive step. The purpose of patents is not to establish long-term monopolies. They are granted for a limited period, which can only be extended in the case of medicines and pesticides which have to undergo lengthy clinical trials for safety reasons. The wide-ranging economic significance of patents derives from the fact that patentees can prevent third parties from commercially exploiting their inventions for up to 20 years from the date of filing of the application. This enables them to recoup their development costs and gives them time to reap the rewards of their investment. The applicant's obligation to publish a full technical description not the invention contributes greatly to the dissemination of new technical knowledge. Over 80 % of the world's technical knowledge can now be found in patent documents[13].

The procedure for granting patents, requirements placed on the patentee, and the extent of the exclusive rights vary widely between countries according to national laws and international agreements. Typically, however, a granted patent application must include one or more claims that define the invention. A patent may include many claims, each of which defines a specific property right. These claims must meet relevant patentability requirements, such as novelty, usefulness, and non-obviousness[14].

The patent's special feature is its territorially limited validity: it is valid exclusively in the territory of the state the patent office of which issued this document. However, there are exceptions – so-called regional patents as one of the way to patent somebody's decision in foreign countries. The essence

[12] WIPO Intellectual Property Handbook: Policy, Law and Use. Chapter 2: Fields of Intellectual Property Protection. Available at: http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch2.pdf.

[13] European patents and the grant procedure. Available at: http://documents.epo.org/projects/babylon/eponet.nsf/0/e6ce616afbb87afac125773b004b93b5/$FILE/EPO_EuroPatente13_en.pdfhttp://documents.epo.org/projects/babylon/eponet.nsf/0/e6ce616afbb87afac125773b004b93b5/$FILE/EPO_EuroPatente13_en.pdf.

[14] Patents: Frequently Asked Questions. Available at the official web-site of WIPO: http://www.wipo.int/patents/en/faq_patents.html#protection.

of regional patent system is that certain countries of the region (for example, Europe, CIS, Asia or Africa) sign a treaty determining a possibility to receive a single patent with validity in all countries of the region. Regional patent is a patent granted by the regional patent offices, in particular: the European patent (with validity in the majority European countries), Eurasian patent (with validity in CIS), AIPO's patents and ARIPO's patents (with validity in the majority countries of Africa).

3.2 The Grant Procedure

Under the law of the EPC, patents are only granted for inventions that are new, that involve an inventive step and that are industrially applicable. An invention meets these requirements if it was not known to the public in any form prior to the date of filing or to the priority date, was not obvious to a skilled person and can be manufactured or used industrially. Discoveries, mathematical methods, computer programs and business methods as such are not regarded as inventions. Surgical and therapeutic procedures along with diagnostic methods practised on the human or animal body are excluded from patentability. New plant or animal varieties are completely excluded from patentability. EPC does not recognise inventions whose commercial exploitation would be contrary to "ordre public" or ethical principles, such as means of cloning human life or the use of human embryos for commercial and industrial purposes. The cost of a European patent depends very much on the number of designated states and the planned term of the patent[15].

All the states parties to the EPC offer the possibility, as a first step, of applying for a national patent. Filing an application with a national patent office has the advantage that entry to the procedure is relatively cheap and that applicants can deal with a patent authority in their own language. If they decide that they also need protection in other countries, they have twelve months from the date of first filing to file applications for the same invention elsewhere. They can claim the priority of the date of first filing for such subsequent applications. A European patent application can claim the priority of a national application or, as is less commonly the case, may itself be a first filing. A European application can also be derived from an international application filed under the PCT.

European patent applications can be filed at the EPO in Munich, The Hague or Berlin or at the central industrial property office of any contracting state.

[15] European Patent Convention of October 5, 1973. Available at: http://documents.epo.org/projects/babylon/eponet.nsf/0/00E0CD7FD461C0D5C1257C060050C376/$File/EPC_15th_edition_2013.pdf.

They may be filed online, by post or by fax or delivered in person. European patents are granted by the EPO in a centralised and thus cost-effective and time-saving procedure conducted in English or French or German, its three official languages. They have the same legal effects as national patents in each country for which they are granted. Therefore if it was filed in any other language, a translation in English, French or German needs to be filed within two months. Every European patent undergoes substantive examination and can be obtained for countries which otherwise have "registration-only" systems, thus providing strong protection. The term, scope of protection, binding text and grounds for revocation of European patents are the same for all contracting states to the EPC.

European patent applications consist of four or five parts: 1) a request for grant; 2) a description of the invention; 3) one or more claims; 4) any drawings referred to in the description or the claims; and 5) an abstract. After filing, the subject-matter of a European patent application cannot be extended beyond the content of the application as filed.

The description of the invention must describe the invention clearly and completely enough for a person skilled in the art to be able to carry it out. The description forms the basis for the claims. The claims must define the subject-matter for which patent protection is sought in terms of its technical features. They must be clear and concise and be supported by the description. The application may also contain drawings. These form a useful addition to the description when they illustrate the features of the invention. The abstract is purely for technical information and is not used to assess the patentability of the invention.

The first step in the European patent grant procedure is the examination on filing. This involves checking whether all the necessary information and documentation has been provided so that the application can be accorded a filing date. The following are required: an indication that a European patent is sought, particulars identifying the applicant and a description or a reference to a previously filed application. If no claims are filed, they need to be filed within two months. This is followed by a "formalities" examination relating to certain formal aspects of the application, including the form and content of the patent application, the translation, the designation of the inventor, the appointment of a professional representative and the payment of fees due. In parallel with the formalities examination, a European search report is drawn up, listing all the documents available to the Office that are considered relevant for assessing novelty and inventive step. The search report is based on the patent claims but also takes into account the description and any drawings. Immediately after it has been drawn up, the search report is sent to the applicant, together with

a copy of any cited documents and an initial opinion on whether the claimed invention and the application meet the requirements of the EPC.

The application is published – normally together with the search report – 18 months after the date of filing or the priority date. Applicants then have six months from the date of mention of publication of the search report to respond to the extended European search report and to decide whether or not to pursue their application by requesting substantive examination. Alternatively, an applicant who has requested examination already will be invited to confirm whether the application should proceed, unless he has waived this invitation. From the date of publication, a European patent application confers provisional protection of the invention in the states designated in the application as published. However, it may be necessary under national law to file a translation of the claims with the patent office in question, and to have this translation published.

After the request for examination has been made, the EPO examines, in the light of the search report and taking into account the applicant's reply to it, whether the European patent application and the invention to which it relates meet the requirements of the EPC, and in particular whether the invention is patentable. The grant will, however, not be issued before translations of the claims into the other two official languages have been filed and certain fees paid. An examining division consists of three examiners, one of whom deals with the application up to the point at which a decision is made to grant a patent or to refuse the application. This examiner maintains contact with the applicant or representative and issues the necessary communications on behalf of the division. The final decision on the application is taken by the examining division as a whole. This ensures maximum objectivity for the applicant[16].

The granted European patent is a "bundle" of individual national patents. In many contracting states, for the patent to retain its protective effect and be enforceable against infringers, it must be validated. That means that where necessary, the patent owner has to file a translation of the specification or at least of the claims into an official language of that state with the national patent office. Fees may also be payable by a certain date. These matters are governed by national law.

After the European patent has been granted, it may be opposed by third parties – who will usually be the applicant's competitors – if they believe that it should not have been granted (for example, because the invention lacks novelty or does not involve an inventive step). Notice of opposition must be filed

[16] Richard Howson, Points and prizes, or how to Play Your Cards Right at the European Patent Office, Journal of Intellectual Property Law & Practice, 2007 2(3):170–173.

within nine months of grant being mentioned in the "European Patent Bulletin". The examination of oppositions is handled by the EPO's opposition divisions, which are usually also made up of three examiners. After publication of an application, third parties may present observations on the patentability of the invention to which the application or patent relates, as long as proceedings are pending before the EPO.

The patent proprietor may request limitation or revocation of the patent at any time after it has been granted.

The EPO's decisions concerning issues such as the refusal of an application or opposition matters are open to appeal. Decisions on appeals are taken by the EPO's independent boards of appeal[17].

At the post-grant stage, competence is transferred to the contracting states designated in the European patent. Some of these countries require a translation of the patent specification, or at least of the claims, if the patent has not been granted in one of their official languages. Since translation costs can be considerable, applicants should use market analyses to pinpoint the countries for which they really need protection. The overall cost of obtaining a European patent will generally include fees for the services of a patent attorney. Further details of these costs can be obtained from any patent attorney authorised to act as a professional representative before the EPO[18].

The detailed scheme and timeline of the European patent application are described as below[19].

4. Conclusions

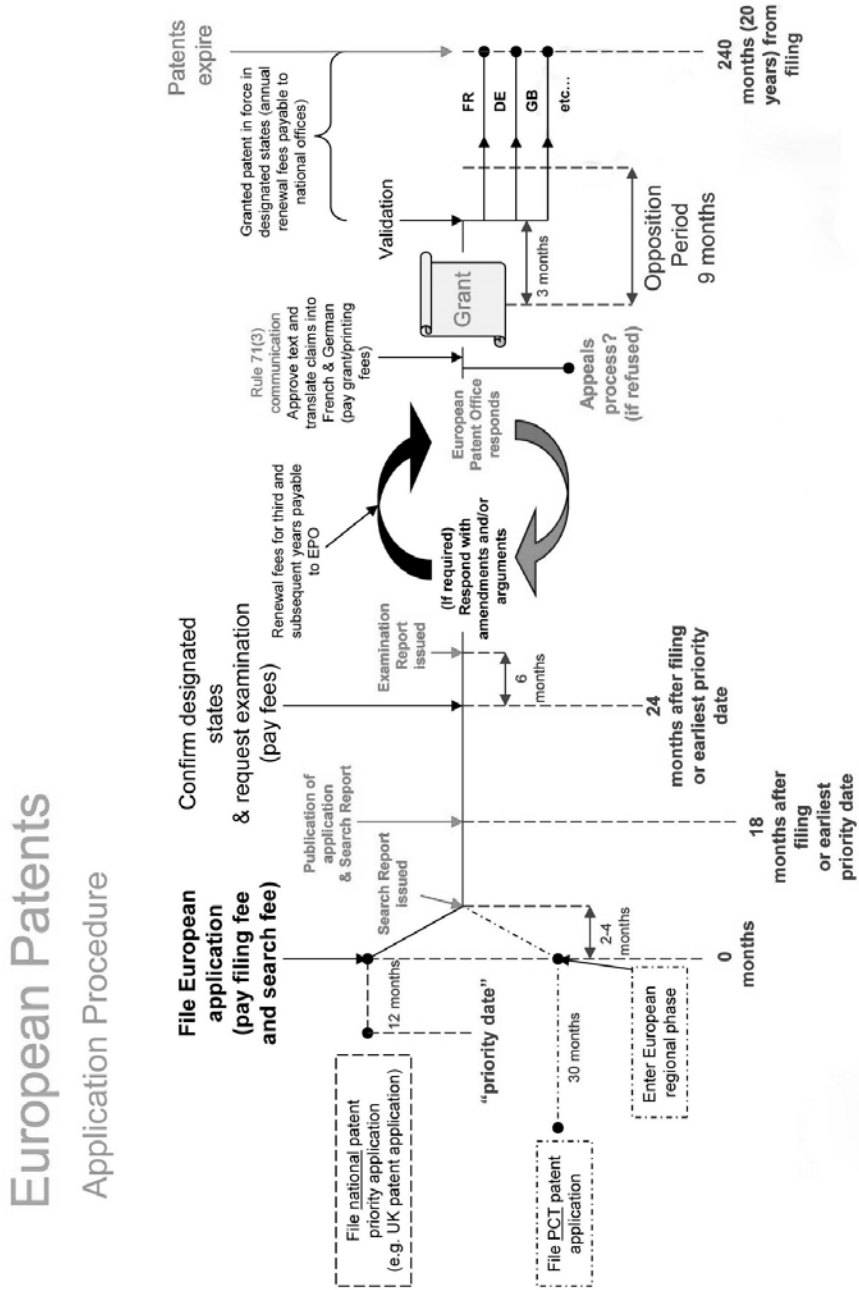
The exclusive right granted to a patentee in most countries is the right to prevent others, or at least to try to prevent others, from commercially making, using, selling, importing or distributing a patented invention without permission.

The European patent is an essential step towards the integration of the worldwide unified patent system. With one unique European patent application, drafted in only one official language (English, French or German) and

[17] The Patenting Process. Available at the official web-site of the European Patent Organization: http://www.epo.org/learning-events/materials/inventors-handbook/protection/patents.html

[18] European patents and the grant procedure. Available at: http://documents.epo.org/projects/babylon/eponet.nsf/0/e6ce616afbb87afac125773b004b93b5/$FILE/EPO_EuroPatente13_en.pdfhttp://documents.epo.org/projects/babylon/eponet.nsf/0/e6ce616afbb87afac125773b004b93b5/$FILE/EPO_EuroPatente13_en.pdf.

[19] Timeline of a European patent application. Available at: http://www.hgf.com/media/25513/Timeline-of-a-European-patent-application.pdf.


European Patents
Application Procedure
File European application (pay filing fee and search fee)
Confirm designated states & request examination (pay fees)
Publication of application & Search Report
Search Report issued
Examination Report issued
(If required) Respond with amendments and/or arguments
European Patent Office responds
Renewal fees for third and subsequent years payable to EPO
Rule 71(3) communication Approve text and translate claims into French & German (pay grant/printing fees)
Appeals process? (if refused)
Grant
Validation
Granted patent in force in designated states (annual renewal fees payable to national offices)
Opposition Period 9 months
Patents expire
FR
DE
GB
etc...
3 months
6 months
12 months
30 months
2-4 months
0 months
18 months after filing or earliest priority date
24 months after filing or earliest priority date
240 months (20 years) from filing
File national patent priority application (e.g. UK patent application)
"priority date"
File PCT patent application
Enter European regional phase

filed in one filing office, the steps of the grant procedure (publication and examination of the application) can be unified. Once granted by the EPO, the European patent becomes a bundle of national patents in accordance with the designations chosen by the applicant at the filing date.

The aim is to make the protection of inventions in the member countries cheaper and more reliable by creating a single procedure for the grant of patents. Filing and prosecuting an application at a regional granting office is advantageous as it allows patents in a number of countries to be obtained without having to prosecute applications in all of those countries. Moreover, it has the advantage that it involves only one administration, specifically the EPO which manages the procedure and grants European patents, with the resulting unification of administrative proceedings and requirements. So, the advantages of this regulation for juristic and natural persons wishing to register a unitary European patent are: 1) one application is enough to guarantee the protection of its patent in the 25 participating member states; 2) the application for the 25 participating member states can be filed in one of the three official languages; 3) there is no need to translate the application into each national language; 4) the cost will be drastically reduced by avoiding the translation costs and by establishing a unique annual tax. The disadvantage is that within nine months from granting the European patent third parties can file opposition at the EPO. If the opposition results in the patent being refused or restricted in scope, this is effective in all of the member countries chosen.

Poland in the EU: How to Deal with Economic Crisis

Jaroslaw Kundera*

Summary: After 2008 the EU has passed the deepest economic crisis since its inception. The crisis extends not only to the countries in the euro zone, but also affects the new Member States which joined the EU with a view to boost economic development. The main objectives of Polish integration with the EU like the other new member countries is economic growth and convergence with member states at higher level of development. The purpose of this study is to examine the main factors of convergence process during Polish participation in the EU. With analysis based on the theory of integration and empirical studies suggest that the impact of the integration of the Polish economy was essential and multi-sector. Effects of integrative formed not only under the influence of free trade and European single market with free movement of capital and workers, but also as a result of EU aid under the structural policies, namely, regional policy and agricultural policy. The benefits of the integration has prevailed economic costs, therefore, a total of Polish participation in the EU has brought an increase in economic growth of at least 0.5% of GDP per year to 1.75%. Integration marked the beginning of a process of catch-up better developed member countries, and the assistance from the structural funds had allowed the avoidance economic crisis.

Keywords: integration processes, benefits of integration, economic crisis, free trade, foreign direct investment, mobility of labour, structural funds.

During first ten years membership in the EU Poland have passed from fast economic growth which turned out to slower progress of production accompanying by increase of unemployment and high unequlibrum in public finance The development gap of our country in the advent of accession to the EU in comparison with 15 members states imposed an obvious task to use the opportunities afforded by accession to pursue a modern development policy with a view to a sustainable and high pace of economic development. Overall, it is

* Jaroslaw Kundera, Professor at the Institute of Economics, University of Wroclaw, Poland. Contact: jaroslaw.kundera@uwr.edu.pl.

not doubt that the accession of Poland to the EU in 2004 has created an opportunity to speed up the rate of our economic growth and improving living standards of our citizens. It involved all sectors of polish economy, changed public policy, environment of many firms, position of single consumers. It opened the market thirdly times larger than Poland's GDP for polish producers of goods and services. It gave the Poles the opportunities to take up jobs nearly all around the Europe on the conditions of non- discrimination. It brought about new institutional and business regulations and created favourably condition to additional attraction of Foreign Direct Investment. On the other hand it opened the polish market for foreign competition, brought about new rules concerning public procurement, environmental, transportation rules. Accession to Common Agricultural Policy and Regional Policy of the EU gave Poland opportunities to use the Structural Found to carry out modern regional policy, to support polish agriculture, to finance investments in different sectors of economic activity. In the long run Poland would like to attain the average level of GDP, comparable with the partner's countries, which joined earlier the EU. The seven years' experience of our participation in the EU assume an obvious task to assess the economic effect of membership for our economy, to answer for the questions if the accession of Poland was beneficial for our economic development, which segments of the European Single market have brought about the biggest benefits for polish economy, if an accession to the EU helped to speed up the economic development of all country and particular regions and helped our economy to overcome or avoid economic crises. Although the analysis is a short period one, it may also shed some light on our future place in the EU and long term impact of the membership in the EU on polish economic development.

Poland membership in the EU has influenced deeply polish economy by different factors related directly and indirectly with integration processes. The integration factors which benefited Polish economy were coming mainly from adoption the rules of European Single Market with its four freedom as well as from participation in the EU structural policies:

Firstly, the benefits for polish economy were coming from deepening the rules of free trade under the customs union regulations. The statistics reflects in nearly the whole process of trade liberalization the dynamic trade growth between Poland and the EU: just after accession Poland became the member country showing the highest dynamics of growth of export among the partners. In 2004 the export of goods from Poland grew by 27%, ahead of Czech Republic – 26%, Lithuania and Estonia 21%, and far ahead of the old member's states: Germany, Holland, Austria showing only 10% growth of export, in 2005 polish global export grew by 19,6% to 71, 4 billion euro and in the

same time global import from third countries to Poland grew by 13% to 80, 6 billion euro, in 2006 global export increased by 22,6% -equalled 87,9 billion euro and import by 23,2% to more than 100 billion euro. In 2007 Poland continued fast growth of international trade: export increased to the EU by 15, 7% to 80.3 billion euro and import from the EU increased even larger by 19.8% to 77.2 billion euro. In 2008 Polish global export increased by 12.5% to reach 116, 2 billion euro and import increased by 15, 7% to 142, 4 billion euro so, Poland became also more and more important market for producers from the EU with import worth more than 140 billion euro. One key channel of transmission of global financial crisis in 2009 to the real economy was foreign trade. Although in the time of financial crises we observed decrease of international trade in Poland as well as all around the global economy our reduced value of trade volume was smaller than in the most developed and developing countries. In 2009 Polish Foreign Trade due to the financial crisis decreased with all group of partners: global import turnover dropped by 24% from 142 billion euro in 2008 to 107.5 billion euro in 2009 and global export turnover dropped by 15% from 116.2 billion euro to 98.2 billion euro. Due to the deeper decrease of import then export Poland diminished his negative balance of payments from 26.2 billion of euro to 9.3 billion euro. The negative tendencies of trade development were nearly the same with the EU partners as in global turnover: import dropped by from 88.1 billion euro in 2008 to 66.5 billion euro in 2009 and export dropped from 90 billion euro to 78.2 billion euro. Poland increased his positive trade balance with the EU countries from 7.8 billion euro in 2008 to 11.6 billion euro in 2009. It is worth to add that the value of polish export calculated in current prices was 1.5% higher in 2009 than 2008 because devaluation of polish zloty by 40% made foreign selling more competitive and import ("boarder shopping") more expansive due to the strong devaluation of polish zloty. Although calculating in polish zloty our global trade was still growing, counting in euro the value of polish export was lower by 13% and polish import by 27,5% in euro.[1] Trade turnover fall down the most dramatically with Russia by 50% to 11.2 billion and with Romania by 68%.[2] However it should be remembered that every slowdown in international trade and economic growth is temporary and cyclical. In 2010 we see the coming back of polish trade on the strong path of growth. Polish export became one of the engine of growth of domestic

[1] Informacja o sytuacji społeczno- ekonomicznej kraju. Rok 2009. Główny Urząd Statystyczny, Styczeń 2010, p. 68- 76. Trzy lata członkostwa Polski w Unii Europejskiej, Urząd Komitetu Integracji Europejskiej, W-wa 2007, s. 56–57

[2] GUS. Aktualności. 2009–11–10. http://www.stat.gov.pl/cps/rde/xchg/gus, Rzeczposplita 19.11.2009,B3.

production and over passed the value of 150 billion US dollars. Strong economic recovery in Germany drew growth of polish exportation, especially parts and components to German cars, engineering and machinery industry. On the other hand growth of domestic consumption, replenishment inventories served to increased import from the EU and third countries. According to prediction made by Institute for Market, Consumption and Business Cycles Research polish export grew in 2010 by 13,7% and polish import would grew by 12,4% in euro value.[3]

Table 1: Polish foreign trade turnover in total and by countries in 2014

	in million.	Euro in %
EXPORT	**165 773**	**100,0**
Developed countries	139 383	84.1
of which EU	128 398	77.5
of which euro-zone	89 129	53.8
Developing countries	13 439	8,8
Countries of Central and Eastern Europe	12 040	7.3
IMPORT	**168 432**	**100,0**
Developed countries	110 985	65.9
of which EU	99 457	59.0
of which euro- zone	78 219	46.4
Developing countries	37 615	22.3
Countries of Central and Eastern Europe	19 831	11,8
SALDO	**– 2 658**	
Developed countries	28 389	
of which EU	28 941	
of which euro -zone	10 910	
Developing countries	– 2 3265	
Countries of Central and Eastern Europe	– 7 791	

Source: GUS, Główny Urząd Statystyczny, Statistical; Yearbook 2015, Warszawa 9. 2. 2016

[3] Economic Policy of Poland in the Integrating Europe 2008- 2009. Annual Report, Warsaw, p. 19.

According to General Statistical Office (GUS) data, export of goods from the Poland in 2013 increased by 6.5 per cent, reaching a level of 152,77 billion euros. The value of imports totaled while 155,09 billion euros and was 0.7% higher than the year before. In 2013 the export increased much faster for developing markets and less developed. Exports to the EU increased by 4.5% (up to 114,3 billion euros), while the slightly slower to euro area (3.8% to 77.3 billion) than the other EU markets (about 6 per cent, to more than 37 billion euros). In 2014, the value of Polish export total amounted to 165.8 billion and was higher than a year earlier to 7.0%. The value of total imports of Polish in 2014 was 168.4 billion euros, which meant an increase of 7.3% compared to 2013.. The balance of foreign trade in overall was negative and amounted to minus EUR 2.7 (in 2013 – minus 2.0 billion), while trade in agriculture foodstuffs articles amounted to plus 6.7 billion euros. During nine month of 2015 Polish exports expressed in euro amounted to 164 223 million while imports amounted to EUR 160 736 million (an increase in exports of 7.4% and in imports of 3.7% respectively).

Therefore, after 10 years of membership in the EU we became heavily dependent on the European single market: 77.5 % of all polish export is directed to the EU partners and 59.5% of all polish import is coming from the single market (see table 1) and taking into consideration the relatively high participation of international trade in polish GDP (69,9%) one can say that our development is closely interrelated with the economic progress of our EU' partners. In 2008–2009 from ten the biggest polish export markets eighth belong to the EU (see tab no. 2) and from 10 greatest polish supplier 7 belong to the EU. It is important to note that in the time of economic crisis we see the growing relative importance for polish exporters the biggest polish selling markets in: Germany (growth from 25,0 % to 26,2 %), Italy (growth from 6,0% to 6,8%), France (grow from 6,2% to 6,8%), UK (grow from 5,8% to 6,4%), Netherlands (grow from 4,0% to 4,2%), and substantial relative decrease for polish export the markets: in Russia (drop in polish export from 5,2% to 3,7%), Ukraine (drop from 3,7% to 2,6%). On the other hand in the year 2008 – 2009 we see growing importance in polish import suppliers from China (growth from 8,1% to 9,2%) and Republic of Korea (growth from 2,5% to 3,1 %) and the USA (grow from 2,0% to 2,4%).Although the EU partners countries were still the biggest polish import partners, they lost a little importance in polish import: Germany from 23,0% to 22,5%, France from 4,7% to 4,5%.Overall on the basis of latest trade development we can say that economic crisis stroke more exporters from the EU partners countries by decreasing their role in polish import then polish exporters who gained some relative position in export participation on the European single market.

Table 2: Main Polish Trade partners in % in 2008 and 2009

Export structure %			
Country	**2008**	**2009**	**Change**
1. Germany	25.0	26.2	+1,2
2. Italy	6.0	6,8	+0,8
3. France	6.2	6,8	+0,6
4. Great Britain	5,8	6,4	+0,6
5. Czech Republic	5,7	5,8	+0,1
6. Netherlands	4,0	4,2	+0,2
7. Russian Federation	5,2	3,7	–1,5
8. Ukraine	3,7	2,6	–1,1
9. Sweden	2,8	2,7	–0,1
10. Hungary	2,8	2,7	–0,1
Import structure in %			
Country	**2008**	**2009**	**Change**
1. Germany	23,0	22,5	–0,5
2. China	8,1	9,3	+1,2
3. Russian Federation	9,7	8,6	–1,1
4. Italy	6,5	6,7	+0,2
5. France	4,7	4,6	-0,1
6. Czech Republic	3,6	3,6	0,0
7. Netherlands	3,4	3,6	+0,2
8. Republic of Korea	2,5	3,1	+0,6
9. Great Britain	2,8	2,9	+0,1
10. United States	2,0	2,4	+0,4

Source: Główny Urząd Statystyczny. Portal Informacyjny. 2009–10–11, Informacja o Sytuacji Społeczno- Gospodarczej Kraju. Rok 2009, GUS Warszawa 2010, p.70

There has been an important increase in the level of external trade of the EU countries in 2000 years up to the financial crisis. In 2008- 2009 period in all EU countries the level of international transaction decreased substantially, but in Poland increased only a little. As one can see in table no 2 the EU countries rejected protection as a method of intervention and safeguard their openness even in the time of financial crises. In some countries like Belgium, Netherlands, the Czech Republic, Hungary the volume of trade were higher

than GDP. Poland had been placed as a medium open economies: the relation of export and import to the GDP in 2009 reached the level of 76.7%. In 2009 it was higher than in 2006 – 69.9% and Poland showed the same relation of international trade to GDP as in Germany. Poland had lower relation of export to GDP – 38.8% then German economy and higher relation of import to GDP – 37.8 %. In 2009 the less open economies then Poland had such euro zone member countries as France, Greece, Italy or Portugal.

Table 3: External trade of the EU members states as % of GDP in 2009

Member country	Export of goods and services as % of GDP	Import of goods and services as % of GDP	Global trade as % of GDP
Austria	50.5	46.0	96.5
Belgium	70.3	76.2	146.5
Czech Republic	69.1	63.5	132. 6
France	23.0	25.0	48.0
Germany	40.7	36.0	76.7
Greece	18.8	28.5	47.3
Hungary	77.9	70.9	148.8
Italy	24.0	24.4	48.4
Netherlands	69.1	61.9	131.0
Poland	38.9	37.8	76.7
Portugal	28.0	35.6	63.6
Romania	31.2	37.2	68.4
Spain	23.7	25.7	49.4
Sweden	48.5	41.6	90.1
United Kingdom	27.8	30.1	57.9
EU- 27	17.2	18.3	35.5

Source: The EU in the World. A statistical portrait. Eurostat. European Commission 2010. p. 21

De Benedicts and Tajoli argue that similarity in export composition between the new and old members of the EU is positively and significantly associated with the convergence of income between former and later countries. In other words, the new member countries whose export composition was the closest to the structure of the EU core countries enjoyed a faster catching-up processes.[4]

[4] De Benedictis, L.L Tajoli, Similarity in trade structures, integration and catching –up, Econoө mics of Transition, vol 16, No 2, pp 165–182.

Poland began the liberalization process with highly concentrated export specialization. Poland showed stable and well defined comparative advantage in relation to the EU partner countries in heavy industries and agricultural goods. This strong entrenched comparative advantages in trade between Poland and the EU partners induced the development of trade according to the rules of inter-industry specialization and before accession to the EU the place of Poland in the division of labour with members countries was defined rather by cost and price factors then factors related to technological development.

As we see from table 3 Poland specialized on the European single market mainly in machines and mechanical appliances (25,7% of all polish export in 2007), transport equipment (15,7 %), base metal and articles thereof (13,3%), plastics and rubber and its articles (6,3%), chemicals (4.4%), prepared foodstuff (4.1%), minerals products (4,6%). The volume of polish export of machines and mechanical appliances, electrical engines equipment grew from 8.3 billion euro in 2004 to 20.6 billion euro in 2007 and to 9.1 billion euro in first half of 2009 and for transport equipment from 5.4 billion euro in 2004 to 12.5 billion euro in 2007 and to 6.9 in first half of 2009 (see table 3). In 2007 in comparison with 2004 year the greatest increase of export share in global export showed such branches as: live animals (growth from 2,2% in 2004 to 3,5% in 2007), prepared foodstuff (growth from 2.1% in 2004 to 4.46 % in 2007), base metals and articles thereof (growth from 11% in 2003 to 13,3%). These branches due to fast growth of selling maintained their key position as polish export specialization. It is worth to note that Poland maintained high position of export to the European Single Market of transport equipment and machines and mechanical appliances, electrical engines, equipment even in the time of financial crises. In 1996- 2007 – 2009 year the greatest decrease of importance in polish export on the European Single Market showed textiles and textiles products (drop from 15,8% share in total export in 1996 to only 3,4% in 2007 and 3,12% in 2009).

Table 4: Structure of Polish export to the EU in mlions Euro and in (%) in 2004–2007–2009 groups of goods

Group of products	2004	2007	2009*
1. Live animals, animals products	703 (2.2)	3075 (3.5)	1421 (3.11)
2. Vegetable products	634 (1.9)	1550 (1.9)	771 (1.69)
3. Fats and oils	4 (0.0)	242 (0.3)	108 (0.24)
4. Prepared foodstuff	700 (2.1)	3268 (4.1)	2037 (4,46)
5. Mineral products	1416 (4.3)	3658 (4.6)	1103 (2.46)
6. Products of chemical industr	1114 (3.4)	3563 (4.4)	1833 (4,0)

Group of products	2004	2007	2009*
7. Plastics and rubber and its articles	1590 (4.9)	5079 (6,3)	2158 (4,71)
8. Raw hides and skins, its articles	388 (1,0)	334 (0,4)	130 (0,28)
9. Wood and articles of wood	1205 (3.7)	2218 (2,8)	890 (1,95)
10. Pulp of wood, paper, paperboard and articles thereof	984(3,0)	2068 (2,6)	1023 (2,24)
11. Textiles and articles	2446 (7.5)	2858 (3.6)	1425 (3.12)
12. Footwear, headgear and articles	164 (0,5)	217 (0,3)	121 (0,27)
13. Articles of stone, ceramics, glass	649 (2,0)	1698 (2,3)	661 (1,45)
14. Pearls, precious stones and metals, articles thereof	159 (0,5)	477 (0,5)	239 (0,52)
15. Base metals and articles thereof	3586(11.0)	10652 (13.3)	3467 (7.57)
16. Machines and mechanical appliances electrical engines, equipment	8349 (25,5)	20606 (25,7)	9172 (20.02)
17. Transport equipment	5461(16.7)	12599 (15.7)	6987 (15,31)
18 Miscellaneous manufactured articles	4887 (7,2)	5509 (6,9)	2412 (5,27)

Source: GUS data for 2007 quoted after: Rocznik Statystyczny Handlu Zagranicznego, GUS, Warszawa 2008, p. 57, Handel Zagraniczny Styczeń-Grudzień 2008, Warszawa 2009, p. 34–37,* data for 2009 year include volume of trade 1–06 2009

As far as import is concerned (tab. no 4) we observed that the highest position in polish import from the EU were occupied by machines and mechanical appliances, electrical engine: 18.6 billion Euro in 2007 (24.1%) and 7.1 billion euro in the first half of 2009 and transport equipment: 10,5 billion euro in 2007 (13,7%) and 3,6 billion euro in the first half of 2009 and chemical and related products 8, 4 billion(10,9%). Poland exported in sum more machines, mechanical appliances, electrical engines and transport equipment then imported from the UE. Proportionally more goods Poland imported from the European single market then exported in such positions as plastics and rubber and its articles, products of chemical industry. Textiles import was becoming less and less important in trade with the EU members countries. In the time of economic crises dramatically diminished numbers of cars imported from the EU to Poland which value drop from 10,5 billion euro in 2007 (13,7% share in global import) to only 3,6 billion in the first half of 2009 (7,33% share). After accession to the EU we saw not only continuation of some growth of base metal and articles thereof import from 3.5 in 2004 to 11.3 billion euro in 2007 (14,7%), but also live animals (from 0,6% in 2004 to 1,4% in 2007 and 1,76% in 2009, arms and ammunition from null to 1.2 billion euro, footwear, headgear and articles thereof from 134 million euro (0,4%) in 2004 to 826 million euro (1,7%) in the first half

of 2009. In 2004- 2007 – 2009 years there were share decrease in import from the European single market of such group of products as: products of chemical industry (from12,4% in 2004 to 10,9% in 2007 and 8,06 % in 2009), pulp of wood, paper, paperboard and articles (from 4,8% in 2004 to 3,8% in 2007 and 2,49% in 2009), textiles and textiles articles (from 6,2% in 2004 to 3,9% in 2007 and 2,33% in 2009), machines and mechanical appliances, electrical motors and equipment (from 26,3% in 2004 to 24,1% in 2007 and 14,42% in 2009) and small in plastic and rubber and its articles (from 9,7% to 9,6% in 2004).[5]

Table 5: Structure of polish import from the EU in millions Euro and in % in the period 2004–2007–2009

Group of products	2004	2007	2009*
1. Live animals, animals products	204 (0,6)	(1,4%)	868 (1,7)
2. Vegetable products	667(1,7)	(2,1%)	850 (1,72)
3. Fats and oils	169 (0,5%)	(0,3%)	153 (0,31)
4. Mineral products	576 (1,6)	3450 (2,0%)	1111 (2,24)
5. Products of chemical industry	4577(12,4)	8433 (10,9%)	3984 (8,06)
6. Plastic and rubber and its articles	3277 (9,7)	7394 (9,6%)	2857 (5,78)
7. Raw hides and skins, articles thereof	459 (1,2)	510 (0,7)	1463 (0,30)
8. Wood and articles of wood	314 (0,9)	882 (1,1)	290 (0,05)
9. Pulp of wood, paper, paperboard and articles	1772 (4,8)	2938 (3,8)	1230 (2,49)
10. Textiles and textiles articles	2301 (6,2)	2991 (3,9)	1149 (2,33)
11. Footwear, headgear and articles thereof	134 (0,4)	184 (0,2)	826 (1,7)
12. Articles of stone, ceramic products, glass	760 (2,1)	1359 (1,8)	490 (0,99)
13. Pearls, precious stones and metals, articles thereof	47 (0,1)	199 (0,3)	826 (0,17)
14. Base metal and articles thereof	4045 (11,0)	11365 (14,7)	3714 (7,52)
15. Machines and mechanical appliances electrical engines, equipment	9685 (26,3)	18643 (24,1)	7124 (14,42)
16. Transport equipment	5398 (14,6)	10585 (13,7)	3620 (7,33)
17. Optical, photographic, measuring, checking instrument	652 (1,7)	1322 (1,7)	577 (1,17)
18. Arms and ammunition	12 (0,0)	40 (0,1)	1234 (2)
19. Miscellaneous manufactured articles	714 (1,9)	1260 (1,6)	565 (1,15)
20. Works of art, collectors Piece and antiqua	4 (0,0)	240 (0,3)	156 (0,31)

Source: Rocznik Statystyczny Handlu Zagranicznego, GUS, Warszawa 2008, p.56, Handel Zagraniczny Styczeń- Grudzień 2009, Warszawa 2009, data for 2009 include volume of trade in 1–06 2009

[5] Biuletyn Statystyczny, Warszawa 2009, No 2

In 2009 polish export grew in comparison with 2008 in such branches of production as machinery and equipment (by 6.4%), cars and accessories (7.4%), paper and cardboard (15.9%), meat and (8.5%, cooper and its articles (3.9%), meat and pluck (8.5%), perfume and cosmetics (21.4%), clothes (10.4%), pharmaceutics (27.8%) plastics (1.1%).. On the other hand in 2009 polish import dropped in comparison with 2008 in such groups as; products of iron and steel (-15.2%), oil and mineral oil (-25.2%), cast- iron and steel (-41%), wood and its articles (-2.7) dairy products (-1.9%)

Table 6: Percentage growth of polish export in 2009/ 2008 and its volume in billion zloty according to groups of products.

	%	billion zloty
1. machinery and equipment	6.4	106.7
2. cars, parts and accessories	7.4	62.9
3. plastics	1.1	16.5
4. products of iron and steel	-15.2	14.8
5. oil and mineral oil	-25.4	12.7
6. paper and cardboard	15.9	10.6
7. cast-iron and steel	-41	8.8
8. wood and its articles	-2.7	8.6
9. cooper and its articles	3.9	8.4
10. meat and pluck	8.5	7.4
11. cosmetics and perfume	21.4	6.5
12. clothes	10.4	5.5
13. pharmaceutics	27.8	5.0
14. dairy products	-1.9	4.5

Source: Rzeczpospolita. Warsaw 26.03.2010, B4

Overall the single market helped to some change in the structure of mutual trade with the growing importance in polish export capital intensive goods (machinery, cars), more technologically advanced goods, especially easy to imitate (machines and mechanical appliances, electrical equipment (see tab no 7) and decrease labour intensive goods (furniture, agricultural products). Despite similar directions of evolution in the structure of Poland's intra – EU trade according to the intensity of factors of production in 2000–2007, the structure of polish export with the EU partners was still different then the intra EU polish import. Technologically intensive goods played key role in delivery

to Polish market with 42,2% in all polish imports from the single market. Poland share of high- technology export in total export was only 3%, but for example in Germany -14%, France -18%, Ireland -29,%, United Kingdom -26%, Finland -18%, Czech Republic -13%, Spain -5%, Estonia -8%.[6]

Table 7: Structure of Poland's intra – EU trade by factor of production in 2000–2007.

Type of products	2000		2007	
	Export	Import	Export	Import
Raw material – intensive	14,8	9,8 (+5)	15,6	11,6 (+4)
Labour intensive	35,4	25,5 (+9)	26,4	20,2 (+6,2)
Capital intensive	22,0	20,5 (+1,5)	26,2	25,0 (1,2%)
Technology intensive	27,8	44,7 (-16,9)	31,6	42,2 (-10,6)
easy to imitate	6,6	16,4 (-9,8)	9,6	16,4 (- 6,8)
difficult to imitate	21,2	28,3 (-7,1)	22,2	25,8 (-3,3)

Source: J. Misala, Competitive Position in External Economic Relations, Poland Competitiveness Report 2008, Warsaw 2008, p.72).

It is worth to add that in the European single market Poland developed more intensive and diversified intra-industry specialization with the partners producers, although the level of intra- industry coefficient is still less than more advanced members countries. The very convenient method of measuring the similarity or dissimilarity of economic structure in countries taking part in the international division of labor is the index of intra industry specialization. If the intra industry specialization prevail over inter industry specialization, that means the partners specialize in export of similar products of the same industry (including parts and accessories), which may testify the same level of their development and similar structure of their production. We observed development of intra-industry specialization in trade of capital- intensive industries (machinery), labour –intensive (textiles) and resource- intensive (building materials). The phenomenon of development of intra- industry specialization in some industry branches, like textiles and cars, may be explained by the foreign direct investment in Poland (for example Fiat, Volkswagen, Opel) and two-way trade developed inside the companies structure. For example, in 2006 Poland exported automotive products to the values of Euro 14 billion (95% of all motor vehicles produced in Poland) that was 16 % of total Polish export, which was composed of private motor vehicles – 38%, automotive parts and

[6] L'etat de l'Union 2009. Raport Schuman sur l'Europe, Paris 2009, p240

components – 28% and automotive diesel engines – 20%. However in 2009 year polish cars industry was badly hit by the economic crises, production drop by 16%, export decrease by 3 billion euro, some factories like Opel in Gliwice, FSO in Warsaw decreased production by 57–60%. In 2008 car selling from Poland abroad reached nearly 18 billion euro, but one year later dropped by 3 billion to the value of 15 billion euro.[7] The shipbuilding sector nearly collapsed after liquidation two shipyards in Gdynia and Szczecin. The other industries such as machinery, metal and mechanical engineering, television receivers, musical instruments, parts for office machines, footwear, toys, games, sport requisites, aircraft, as well as agricultural goods have had more opportunity to fill in some niches on the European single market.

After accession to the European single market polish trade in services grew also at faster rate than the EU average, despite small volume of mutual trade in 2004. Growth of export was coupled with the growing competitiveness of polish firms especially in transportation, tourism, construction services, growth of import was connected with the need to import more sophisticated services in financial, insurance, computer and information services. Since 2006 Poland showed positive balance in trade in services with surplus of almost 1,8 billion euro. However polish export of services to the EU member countries had played thus far small role in exchange on the European single market. Only on the German market the share of polish services in total import exceeded 10% of all import from the EU which equalled 45% of participation polish export to the EU, in comparison with the United Kingdom it accounted for only 3,1%. Among the EU partners Germany was also the dominant market for polish services suppliers. Weakness of polish services export seems to be dangerous to development of the all economy and is connected not only with its lower competitiveness on the European single market but also with its high specialization concentration: travel and transportation services accounted for 68% of total export to the single market. The crises of 2008–2009 had already brought about some structural problems for polish services sectors with the drop of profits of tourism and transportation firms. Overall, Polish services sector seemed to become less affected by the economic crises 2008–2009 (except financial and banking sector) then industry. Retail sales realized in the period of three quarters of 2009 were by 1.9 % higher (in annual terms) and increase was recorded in the majority of groups. Construction and assembly production grew in the same period by 4.7% which was the result of a high dynamics in civil engineering. Up to October 2009 128 thousand dwellings

[7] Eurostat. Statisctics in Foucus, 107/2008, Newseek, 11.10.2009, Poland in the European Union, GUS, Warsaw 2007

were completed, that means 4,1% more than corresponding period of 2008, but private investors built 56 747 dwellings (3,7% less than in the previous year) and obtained permits for construction 88 288 new dwellings (7,7% less than in 2008).

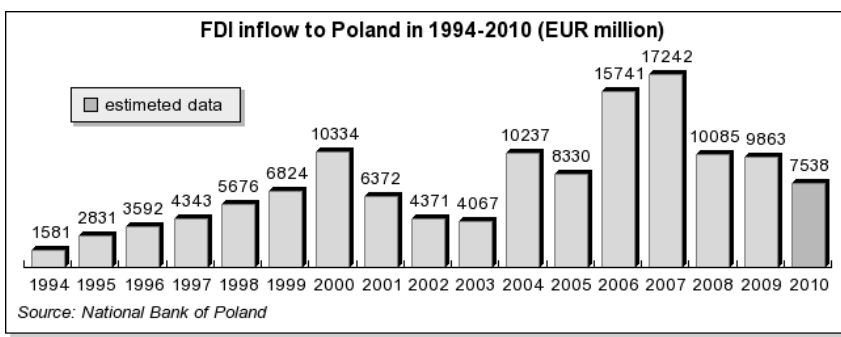
As a result of accession to the customs union Poland has also adopted the EU external customs tariff. In the case of industrial goods an average customs tariff (weighted by imports) had been reduced from 6,2 % to 2,6%. It is estimated that lowering of customs tariffs for industrial goods from third countries have had limited impact upon the level of market protection in Poland. The new UE protection was no related with "common tariffs shocks" with negative consequences of trade diversion effects. It has brought about not reduction of polish trade with third countries, but growth of trade as far as the industrial goods are concerned. After few years of accession we observed that the trade relation between Poland and the third countries (outside the EU) remained at unaltered, one may said, normal level. Over the all period of trade liberalization, the exchange between Poland and the EU has been developing much faster than with the thirds countries. The growth of trade has been more likely due to the effects of trade creation than trade diversion influencing on positive allocation of polish and the EU economic resources. However, after few years of accession we observed that the trade relation between Poland and the third countries grew even faster than inside EU (growth of oil prices). Some negative consequences were connected with introduction of visa requirement to the Ukraine, Russia and Belarus citizens, which constituted some obstacles to trans-border trade. On the other hand some positive integration effects occurred in connection with coverage of polish producers by the EU export subsidies for trade in agricultural goods.

There was common opinion expressed by economists that after accession the growth of polish import from the EU would exceed polish export dynamics mainly due to rising demand for foreign consumers and investments goods and more aggressive market selling strategies of multinational firms at polish market. It would also come due to the real appreciation of polish zloty. However, the forecast on the temporary deterioration of polish trade balance didn't come true. In 2005 for the first time polish trade balance showed small surplus with the EU countries, in 2006 Poland obtained even bigger surplus in trade with the EU countries of 4,79 billion euro and in 2008 +4,5 billion euro. Surprisingly, in 2009 year financial crises created positive impact on situation in balance of current account which affected an increase the positive balance of trade with EU partners to +11,8 billion euro and to +2,9 billion with euro zone. Due to the higher decrease of import then export we changed the negative balance of current account from -972 million euro in July 2008, – 1764 million

euro in September 2008, to positive one + 910 million euro in February 2009, + 459 million euro in June 2009 (8). In the three quarters of 2009 the negative balance in Polish foreign trade diminished more than two times (from 65,6 billion to 27,8 billion zloty in three quarters of 2009) and to 8,7 billion euro in the all year. This trend continued even in crisis period: in 2011 Poland obtained even bigger surplus in trade with the EU countries + 16.4 billion euro and in 2012 + 20.4 billion euro. In 2013 as a result of faster growth of export then import, significantly decreased global trade deficits (nearly 8.3 billion euros in 2012) to 2.3 billion euros and trade with the EU showed 24.2 billion euro surplus. After eleven months of 2015 the positive balance reached the level of euro 3 486 million euro. The positive trade balance with the EU partner countries showed, that Polish economy was able to withstand the competition forces of the single market even in economic downturn The change in balance of current account was brought into existence by abrupt 40% devaluation of Polish zloty and a favourable level the terms of trade index (drop of oil prices) that restrained progress of economic downturn.

Secondly, after accession to the EU our economy received a lot of foreign direct investment (FDI) and Poland continued to lead in attracting them in central European region in the term of annual flow and its overall amount with 26, 3% of all foreign investment undertaken in this region. (in sum about 124 billion euro). Annual flow of foreign direct investment grew from about 4 billion euro in 2003, to 10.2 billion euro in 2004, 8.3 billion euro in 2005, 15.7 billion euro in 2006 up to even 17.2 billion euro in 2007 when Poland placed as a second most attracting place to invest in European single market after UK, and 9,9 billion euro in 2008. Since the accession to the EU we were observing double growth of foreign direct investment: the inflow of FDI in 2006–2007 was four times larger than before accession.

Figure 1: Inflow of the FDI in Poland in 2000- 2010 in billion Euro



About 85 % of all the FDI in Poland originated from the EU members countries (see tab no 7)The increase in FDI in Poland has been paralleled by significant increase in growth of trade on the European single market, hence one may said about synergy effects of capital and trade flows, when trade liberalization induced capital inflow but on the other hand FDI had positive impact on growth of export. Capital originated from the EU partners was invested in a number of sectors: car industry, telecommunication, textile, service sector, business services, real estates, etc. In Foreign direct investment flows we observed the growing importance of reinvested profits 37,1% – 18,8 billion Euro in 2004–2007, which may signify long term engagement of foreign capital in Poland. On the basis of inquiry dispersed among foreign investors in Poland one can conclude that economic growth was the main reason for their investing in our economy (50% respondents), other reasons were size of polish market (44,6%), supply of labour force (30,3%). It is interesting to note that over 55% of foreign investors praised also the qualification of Polish managerial staff (6).

Table 8: Foreign Direct Investment Stock (FDI) in Poland from specific countries

Country	Value of FDI in billion Euro	Share
1. Netherlands	22.04	19.0 %
2. Germany	18.14	15.7 %
3. France	12.46	10.8 %
4. Luxemburg	10.02	8.7 %
5. USA	7.10	6.1 %
Others	45.90	39.1 %

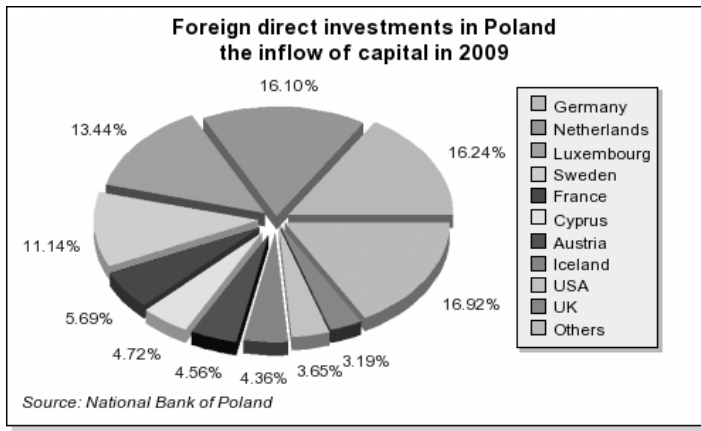
Source: PAIZ/ Inwestycje zagraniczne w Polsce/ http://www.paiz.gov.pl/polska/2010–02–14

However, in the second half of 2008 FDI inflow to Poland started to wane and even worst was situation in 2009 year when the import of new foreign direct investment was practically stopped because of financial crises. Portfolio investors were no longer concerned about profit, but about security and in some cases they took back their capital from Poland to its source countries. In 2009 there was considerably slowdown in the first quarter when the value of FDI (1 925 million euro) turned out to be 44, 1% lower than in 2008. Alarming was a dramatic fall in investment in the Polish special economic zone from 3,2 billion zloty in the first quarter in 2008 to 0,5 billion zloty in first quarter of 2009, where a mere 20 foreign companies obtained the permit to start business.[8]

[8] Spadają inwestycje w specjalnych strefach, The Wall Street Journal Polska, 1305.2009, Les echos Pologne, No 96- Avril 2009, www.echos.pl, p 12, Poland Competitiveness Report 2008. Focus on Services, Warsaw 2008, s.114–115

Although to the end of August 2009 foreign investors have invested in Poland only 4,5 billion Euro, in the second half of the year investment climate in Poland has been improved and between July and October average monthly FDI inflow exceeded 1,2 billion euro. In all 2009 year to Poland came 9.863 billion euro Foreign Direct Investment and 92% originated from the EU members states.[9] The amount of FDI composed of 4.099 billion reinvested earnings in foreign owned firms, 3.8 billion investment in equity capital, 1.964 billion euro intercompany loans. The most investments were located in: food processing (1.7 billion euro), real estates and business services (1.64 billion euro), financial intermediation (1.61 billion euro), trade and repairs (948 million euro) electricity, gas and water supply (856 million euro), transport equipment manufacturing (524 million euro). The biggest investors in Polish economy were in this still crisis year the EU partners countries: Germany: 2.1 billion (21.73%), France – 1.3 billion (13.98%), Luxemburg -1.25 (12.71%), Sweden – 940 million euro (9.56%) Austria – 585 million euro (5.96 %), Netherlands – 478 million euro (4.86%), Italy – 459 (4.67%), Spain – 393 (4.%), except USA – 895 million euro (9.1%),). At the end of 2009 cumulative FDI stock in Poland was at the level of 128.8 billion euro. In 2010 FDI inflow to Poland reached lower level 7.53 billion euro. However, after financial crises we expect returning flow of foreign direct investment to Poland to its at least previous level above 10 billion yearly. The investment climate has been already moderately improved since the middle of 2009 year by rising tendency of stock prices crossed 2700 points.

Figure 2: Investments from specific countries and regions



[9] PAIZ/ Aktualności/ Inwestycje w Polsce/ 20010–02–14

The latest statistical data shows that the inflow of FDI to Poland has not been stopped: accounted for 9.0 billion in 2014. It consisted of equity of 1.7 billion euro, reinvested profits 6.0 billion euro and remained the capital of the 1.3 billion. The status of foreign direct investment in Poland was 171.7 billion euro at the end of 2014. The major foreign investors, according to the states at the end of 2014, were investors from: the Netherlands – 29.6 billion euros, Germany – 28.0 billion euros, Luxembourg – 20.4 billion euro. Broken down by sector the largest amount of FDI accounted for: industrial processing – 50.5 billion, financial and operations, insurance – 39.7 billion euros, wholesale and retail trade including the repair of vehicles – 23.1 billion, real estate-related activities – 11.6 billion.

Thirdly, after accession to the EU we observed strong wave of emigration of polish workers to the EU partners countries: Polish emigration rose from about 1million before accession to a peak 2,2–2,5 million emigrants, so we may reasonable assume the positive effects of the integration on net polish migration against no enlargement scenario. It is worth to note that the European single market has brought about not only creation of new flows of migration of workers, but sticking to migration restrictions by some the EU countries result also in the diversion of Polish migration from traditional destination countries like Germany, Austria, to the countries with more liberal immigration policies like UK and Ireland. The EU members were among the most important destination for polish emigration and included: UK (650 thousands), Germany (490 thousand) Ireland (180 thousands), Netherlands (108 thousands). Against popular opinion Poles are not the most mobile people among the European nation (emigration constitute about 2% of working population): less than in Lithuania (3,1%), in Cyprus (3%), in Romania (2,5%) and in the long perspective much less then in Portugal (9%) and in Ireland (8,2%). As we see in tab. no 10 during the crisis in 2008–2012 the emigration flows from Poland to the EU decreased by 250 000 from 1 820 000 to 1570 000. Because of financial crises in 2009 in UK one third (200 000) among the Polish emigration declared their willingness to come back to Poland.

Table 9: Temporary Migration from Poland in 2007–2012 (in thousands, end-of year stock)

	2007	2008	2009	2010	2012
1. United Kingdom	690	650		587	635
2. Germany	490	490			470
3. Ireland	200	180	140	125	120

	2007	2008	2009	2010	2012
4. Netherlands	98	108	84	89	
5. Spain	80	83	84	50	
6. Italy	87	88	85		
7. France	55	56	47		60
8. Austria	39	40	38		
9. Belgium	31	33	34		
10. Sweden	27	29	31		
11. Greece	20	20	16		
12. Denmark	17	19	20		
Overall	2270	2210	1870	1940	
EU	1860	1820	1570		

Source: EU 10 October 2008. In Focus: An Update on Labour Migration from Poland, page 18., Główny Urząd Statystyczny. Departament Badań Demograficznych, 2009, 2010, Warszawa. Gospodarczo –społeczne efekty członkostwa w Unii Europejskiej, z uwzględnieniem wpływu rozszerzenia na UE- 15, Warszawa 2012, p. 11.12,

Polish migration was composed mainly from young, energetic and well educated people who found job in not technically advanced sector of the economy of the host country like construction, agriculture, simple services in restaurants and hotels. About 80% of Polish citizens left the mother country due to the economic reasons: the main motive were lack of job in Poland and lower average wages in Poland (about 5 euro per hour) then in the EU 15 members states (from 25 to 30 Euro per hour). Young people taking up first job were able to get minimal wages per one month in purchasing power parity three times less in Poland (379) then in Ireland (1050). Like in the other new accession countries macroeconomic impact of migration of Poles seemed rather limited effect on the Polish economy taking into consideration by remittances for families, growth of productivity, reduction of unemployment, pushing up wages and adding to skill shortages Emigration brought about some negative consequences for polish economy: emigrants left behind Poland of course decreasing the potential rate of their economic growth and it is assessed that: emigration contributed to decrease of the GDP by -2,22% for all accession countries. Additionally some branches of industries and services started to complain about the lacking of adequate labour force on the local market (brain drain of doctors and informatics). It is also doubtful if emigration constituted a serious labour marker relief in terms of unemployment for the rapidly growing polish economy able to increase the number of employed from 13,7 million to 15, 2 million

in post accession period. On the other hand each year transfer of money from emigrants to mother country was higher than 2 billion euro, (2,3 billion in 2008) in 2008 even reached 5.7 billion, in 2010 – 4.2 billion euro, in 2011 – 3.67 billion euro which benefited polish economy (see tab. no 10). Remittances from abroad constituted in the 2007 year of only 4,5% of income from polish export. Moreover, the migrations contributed to increase and accumulate their human capital: Poles functioning in international environment got learned about new management and organization methods, new models of professional carriers, what is particularly important taking into consideration the fact that after financial crises in 2008 the more and more polish people lost their job abroad and began to come back to Poland. In the case of Poland due to emigration reduction of the population in working age as a whole depressed GDP in 2005 by 0,16% GDP, in 2006 by 0,25%, in 2007 by 0,24% GDP, in 2008 by 0,23% GDP and in 2009 by 0,31% GDP, decreased unemployment by 0,29% in 2005, 0,45% in 2006, 0,41% in 2007, 0,32% in 2008, 0,21% in 2009. The substitution of labour by capital, starting up building the capital stock and stepping up investment lead to the productivity increases of polish workers by 0,16% in 2005, 0,33% in 2006, 0,47% in 2007, 0,58 in 2008 and 0,63% in 2009. Practically all evidence suggest that benefits outweigh the cost of migration: remittances payments increased household income, consumption tended to offset the downward effect of emigration on GDP in Poland because of the reduction of working population with positive impact net on per capita growth by 0,28% in 2005, 0,51% in 2006, 0,58% in 2007, 0,58% in 2008 and 0,51% in 2009.[10]

Table 10: Remittances of polish emigrants for their families in Poland

Year	in billion euros
2004	2,30
2005	2,90
2006	3,50
2007	4,10
2008	5,70
2010	4.20
2011	3.67
2012	0.97

Source: own estimation on the different data. Y- means numbers for first quarter of 2012.

[10] Ray Barrel, John F. Gerald, Rebecca Railey, EU enlargement and migration: Assessing the macroeconomic impact, NIESR Discussion Paper No 292, March 2007, p.13–15.

Fourthly, the accession of Poland to the EU is to be positive in the terms of the balance of structural funds. The structural aids from the EU budget to Poland rose year by year: from 1,1 billion euro net in the first year of accession to 1,61 billion euro in 2005, 2,49 billion in 2006, 4,79 billion in 2007, 3,99 billion in 2008 and we expect that it will have the level of about 9 billion euro in 2013 (see tab. no 11). In 2007 net payment from the EU budget to Poland attained more than 2% of the GDP. In the end of 2009 the EU budget has passed to Poland more than 7 billion Euro that means about 10% of all Structural Funds resources preview for the period 2007–2013 (64 billion euro). In 2009 proportionally more resources from Structural Funds the EU have transferred to Lithuania (17,4% of all resources for the period 2007–2013), Estonia (14,8%), Latvia (12,9 %), less for Czech Republic (9,7%), Slovakia (9,5%). Thus far from total sum of Structural Funds Poland got used up to about 20% of all allocation in the budgetary period 2007–20013. It is said that the latest speed up in spending European grants was caused by economic crises when polish provincial governments decided to increase subvention for local investments in enterprises and infrastructure.

Table 11: Balance of payments between Polish and the EU budget in billion euro in 2004–2013

Total Years									
2004	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**
Structural aids from EU									
2.42	4.01	5.05	7.62	7.39	9.25	11.22	14.27	15.4	15.63
Polish contribution to the EU Budget									
1.31	2.38	2.55	2.78	3.40	3.23	3.48	3.73	3.56	4.43
EU Structural Funds net transfer to Poland									
1.10	1.62	2.49	4.79	3.99	6.01	7.73	10.49	11.86	11.19

Source: Ministerstwo Finansów. Skumulowane przepływy finansowe między RP a UE w latach 2004–2013

We see growing progress in the implementation of the National Cohesion Strategy in Poland: up to the March 2011 53 050 contracts for co-financing were signed with beneficiaries for the amount of 234.3 billion zloty – amount of co-funding on the part of the EU of 161.7 billion zloty (about 40 billion euro) which constitutes 61.9 % of all allocation from Structural Funds to Poland for the 2007–2013 period. In the end of 2009 year two polish regions: Opolskie and Lubuskie got used 30% of all money previews for the period

2007–2013, but Mazowieckie voivodship used less than 10%. From all Operational Program carrying out in Poland the most advanced was Innovative Economy, the less Infrastructure and Environment which used only 7% from all the quotas of 28 billion euro at the end of 2009.[11] Before enlargement the prognosis indicated about difficulties of absorption by Poland the structural funds seems now to be exaggerated.. To the December 2009 structural funds has financed 97 thousands different projects in Poland.[12] For example, due to the structural aids Poland was able to build 400 new railroads and nearly 5 thousands km new roads: 192 new motorways (A2 highways between Konin and Łodź, A4 between Wrocław and Legnica), 142 km new express ways and 92 ring roads. In comparison in the same period polish government supported by only budgetary resources to build: 20 km highways, 28 km express ways and 230 circuit roads. Additionally we are now in the process to build new superhighways of 99 km long, 170 km new express ways with the financial participation of structural aids. The European Social Funds delivered grants to introduce new active forms fighting against unemployment: aids to set up new firms, professional courses, professional consulting, what was among the greatest success of utilization of structural aids in the first period of Polish membership in the EU. According to opinion by E. Kryńska from Institute of Work and social affairs the structural funds helped to create 400 000 new jobs in the 5 years of membership of Poland in the EU.[13] The European Social Fund supported the training of 2,3 million of polish workers: 520 thousand of them were employed in the firms which used the structural aids to improve their qualifications; 650 thousands were unemployed persons who attended the courses financing by the EU to get new useful qualifications to enter back to the labour market. On the one hand the realization of the EU regional policy has forced the regional authorities in Poland to learn and adjust their practices to European rules, enlarge their capacity, reinforce the competency of polish regional authorities. Substantial acceleration in spending structural funds was accomplished during the crisis, hence Poland is being considered as one of the most successful countries among the EU new members countries in terms of utilization of structural funds. Each year the EU budget has passed to Poland more than 10 billion euro, since 11.22 billion euro in 2010 to 15.63 billion euro in 2013. The financial aids of Structural Funds helped polish regions to become more and more important actor in achieving the goal of development, transport, education, technology, industrial and environmental policy on regional

[11] Rzeczpospolita, 8 Października 2009, B2
[12] Por. Fundusze Europejskie, Dotacja krok po kroku, Listopad-grudzień 2009 Nr 6, p. 15
[13] Rzeczpospolita 30 kwietnia- 1 maja 2009, B2,3

level. On the other hand the most important barriers which faced Poland in the first years of accession was the complicated beurocratic system of utilization of structural aids. This bureaucratic barrier was not only imposed to Poland by the EU law but is increased also by polish regulations (for example public procurement) and administrations practices. In the first period of accession polish enterprises pointed out also to a mismatch between the Structural Funds support and their real needs.[14] The EU funds generally positively contributed to economic growth, improved many sectors of polish economy like transport, environmental protection, education, functioning of small and medium size enterprises and convergence among regions. In assessing the impact of Structural Funds it is used to distinguish between the short – term demand effects and long term supply effects. Investments in infrastructure or in human capital, which create additional demand increase production and employment in short run. In the long run investments act for increase productivity of factors of production and structural change, hence bring long term growth. According to HERMIN demand model European Commission assesses increase of GDP in Poland yearly by 0.4%–0.5% over the course of spending period. More significant are the supply side effects of Structural Funds 2007–2013 in polish regions estimated in the range from 8% to 12% of GDP. ([15]). K. Piech by the help of three macroeconomic models (HERMIN, MaMoR2, CGE-type model) assessed that with the aids of the EU funds, which are going to be spent in the period 2007–2013, Poland will be able to reach almost 70% of the EU-25 GDP in 2020 and without the Structural Funds – about 3 points less. Overall, it is assessed that about 1/6 of the level of development in Poland is to be contributed by resources coming from structural funds. Only one Operational Program-Development of Eastern Poland is expected- according to the macroeconomic modelling – to deliver additional GDP of 1,38% and up to 13 610 new jobs annually in five the least developed polish voivodships.[16]

Fifthly, inclusion of polish agriculture into Common Agricultural Policy was accomplished without any major economic and social problems and has brought a lot of positive changes. After accession to the EU the polish agro-food sector became an export hit on the market of many EU countries: growth rate of agricultural export was almost twice faster than import growth. In

[14] Fundusze Unijne. Aktualności, 25.04. 2007, http://www.mrrr.gov.pl/ Aktualnośći, Fundusze+ unijne04–06/wdrażanie, Structural Funds' Implementation in Poland – Challenges for 2007–2013. Budgetary Affairs European Commission 4/9/2007, p.4)

[15] Investing in Europe's Future. Fifth Report on Economic, Social and Territorial Cohesion, Bruu ssels 2010, p. 249 -254.

[16] K. Piech, Result of the EU funds macroeconomic impact assessment- the case of Poland, Riga 29 May 2008, p 1- 37.

2004–2009 the agricultural production grew by 23% in Poland. However according to GUS data, since 2008 we have seen deterioration in Polish foreign trade in agricultural products: in 2009 this dynamic growth of export was decreased to 12,1% (11,3 billion euro) due to the financial crisis and imports rose even more by 21,7 % to 9,8 billion euro, but the trade balance was still positive (1,5 billion Euro). The share of agriculture food articles in the value of the entire Polish exports accounted for 9.0% and these export grew dynamically also during the crisis. The positive trade balance with the EU partners in agro-food sector indicated that polish farmers were able to compete on the European Single Market even having only partial direct payment from European Structural Funds. The polish farmers were the only one social group who get the direct aids and 1,4 million of them applied for the Structural Funds. It has been calculated that as Poland was gradually covered with direct payments between 2007 and 2015, EU budget funds in sum amounted to EUR 16.3 billion. Against critics polish agricultural information system (IACS) proved to become efficient effectively support a lot of small polish farms. The rise of export to the European single market, prices for many agricultural products, and direct aids have increased of farmers income and profitability from agricultural production. After accession to the EU the average income of farms in Poland grew from 24% to 48% in reference with average income of workers working in the industry and services sectors. Although polish agriculture received only part of direct aids (25 % in 2004, 60% in 2009), lower than the EU 15 members states farming (the full payment will happen in the budgetary period 2013–2020) increment of income in Polish agriculture after accession was over 70% caused by increase of subsidies, while the share of other factors accounted by other 30% (increase production, price, technical change.[17]

Table 12: Direct payments transfers for polish agriculture in million euros in the period 2005–2012. In brackets the preview payments

Years	Direct payments in million euros	
2005	(755,8)	702
2006	(881,7)	811
2007	(1140,8)	935
2008	(1425,9)	1037

[17] M. Piotrowska, L. Kurowski, Global Challenges and Policies of the European Union- Consee quences for the" New Members States, Research Papers of the Wrocław University of Economics, 2009, p.387

Years	Direct payments in million euros
2009	(1711)
2010	(1996,1)
2011	(2281,1)
2012	(1566,2)
2013	(2851,3)

Source: 5 Years in the EU, Warszawa 2009, p.207

On the one hand from 1 800 thousands polish agricultural farms, the output of the especially 500 thousands biggest farms have been growing at a fast rate and restructuring and modernization of farms have been accelerated (these farms produce about 90% of all agricultural production in Poland.), on the other hand in some small farms up to one or two hectare direct aids create 90% of their average agricultural income[18] where significant amount of payments became in an effect social aids and helped to increase rather the consumption in small farms then investment with little influence to change them to more productive sector of economy. Altogether with a lot of success we see that it was rather doubtful that Common Agricultural Policy was able to profoundly change Polish agriculture into more productive sector of the economy in a relatively short period of time. Existing CAP intervention provide incentives for continuing small and low- productivity farming: research done by the Agricultural University in Poznań indicates that after accession to the CAP number of polish farms decreased only by 148 thousands and about 420 thousands farmers in Poland still make a living from farms not larger than 2 hectares. During the last 10 years an average size of an individual farm increased in Poland by only around 1ha and percentage of people employed in agriculture decreased from 18,3% to 15%.[19] To change polish agriculture profoundly the corrective mechanism of Common Agricultural Policy is still needed in the long run perspective.

After accession to the European Union Poland showed robust economic growth for a couple of years (5% in 2004, 3,2% in 2005, 5,8% in 2006, 6,4% in 2007, 5% in 2008. In 2009 the growth of GDP dropped to 1, 7%, but Poland was the only country in the EU to post positive rate. In 2010 real growth increased to 3.8%, total consumption expenditure was by 3.2 higher than a year

[18] Global Challenges and Policies of the European Union- Consequences for the " New Member States, Research Papers of Wrocław University of Economics, No 59, 2009, p. 384

[19] Frenkel, Ludność wiejska (w:) Polska wieś, FDPA, Warszawa 2008, p.54. Polityka nr 43 (2728) 24 października 2009

before but investment rates was 19.5% while in 2009 – 21.2%. For the period 2007–2011 the Polish economy to grow at a high pace, generating the highest compounded annual growth rate in the European Union as a whole (4.3% to 0.5% in the EU-27). Poland remained on a path of economic growth even in times of crisis for many EU' member countries. In 2012, the pace of growth pact Polish economy slipped to 1.9% of GDP, but it was still positive. In 2014 – 2015 rates of growth were above 3% and for 2016 it is predicted at the level 3.7%. The EU structural funds helped Poland to avoid a recession at the time of euro zone crisis. We estimate that, on average 0.5 -1 percentage points of annual growth over the period was the result of investments co-financed by the EU. It is worth noting that, in the period 2014–2020 Poland will receive another huge potential of 73 billion euro of structural funds. Additional growth due to the accession to the EU is assessed by different analysis from 0,5% -1% to 1,75 % of the polish GDP. The positive economic effects of our accession to the EU was shown by dropping of polish unemployment statistics from nearly 20% unemployment of total labour force in 2004, to 17,6% in 2006, 14% in 2007, and even 8% in the middle of 2008. In 2009 unemployment grew to 10, 9% and in 2010 and 2011 to more than 11%., but dropped below 10% after 2014. We saw the growing confidence by the part of businesses and consumers in the prospect of polish economy in the European Single Market, which created new investment and consumption boom. After accession to the EU Poles bought a lot of new cars, building materials, AGR goods, the expansion of industry production was spread across the entire spectrum of industry: growth was seen in as many as 25 out 29 sectors. Polish GDP constituted in 2004 approximately 41% of the average GDP of EU at purchasing power parity, in 2008 about 50% of the average GDP 27 members states, in 2009 -55% due to decrease on average of GDP in the EU by about 4,% and growth more than 1% in Poland, in 2010 reached the level of 57% of the EU average, in 2015 – 67% of the average of the EU GDP, and it was estimated that as an effect of the rapid growth of polish economy after crises our GDP would be approximately 70% of the 27 EU members states by 2020 and more 80% in 2040 year.

After accession to the EU we observed temporary and limited negative impact of the European single market on polish economy. The most visible was the growth of prices on some agricultural products (especially sugar) as well as building materials, alcohol, cigarettes, connected with changes in indirect taxation. But the level of inflation gradually decreasing in the following years and in 2006 with 1,4% yearly inflation Poland was among three EU members countries indicated the lowest level of its rates. The fears that Polish enterprises would start to wind on mass scale after accession did not (come true) materialize. On the contrary polish firms developed their sale to the European

single market and improved their profitability. However, the accession to the EU of new member country is as usual connected with differentiation process of regional development. It is argued that some regions in Poland gained more on the integration processes then others that: capital Warsaw seemed to receive the most profit from adhesion into the EU as the city to be able to compete at a European level and attracting a lot of foreign capital, the greatest benefits from integration processes fall also to large agglomeration (Poznań, Cracow, Wrocław Tri- city – Gdańsk, Sopot, Gdynia, Lodź), integration benefited some regions like Mazowieckie voivodship, Śląskie, Wielkopolskie, Dolnośląskie voivodships, places localized near modern communication links, but most disillusioned regions were located in the east part of Poland facing external EU tariffs barriers, personal control, losing business connections with eastern partners, and regions dependent on heavy industry, cool mine production, shipbuilding sector and states farming.

The main drivers of the recovery for polish economy from negative consequences of economic crises after 2008 seems to be gradual rebound of international trade and capital movement, further increase of public investment and policy of fiscal consolidation. The rebound in demand on the European Single Market is expected to support again polish export growth since 2010. Together with growth of export one can predict also coming back of inflow of FDI to Poland with a view of enlarge selling possibilities. The planned growth of public investments financed by Structural Funds during actual budgetary period 2013- 2020 are going to offset the expected fall in private investments by polish firms. Reduction of budgetary deficit and public debt seems to be a goal of medium term polish economic policy to accomplish convergence criteria, but it would probably happen not earlier then in 2016–2020. The risk factors of this recovery are connected with unfavourable labour developments and low elasticity of the labour market. Falling employment, emigration and slowing real wages may depress growth of interior consumption, private investments, firms expansion and recovery in the housing market. The crises may also weaken the incentive for structural reform; the risk of populism may spreading with a call for protectionism, to rise tax and budgetary spending, to delay entry of younger workers to the labour market.

The economic crises after 2008 posed new challenges for integration of Poland in the EU by declining dynamics of trade, investment and services circulation, coming back polish emigrants from abroad, hence the question arise what will be the future position of Poland in the EU and which efforts should be undertaken to safeguard the achievements of accession. Firstly the gains from accession to the European Single Market can be further exploited by deepening the integration of markets of goods and services with the EU partners. To gain

more profit from international division of labour the structure of polish export have to change continuously towards production of goods with high value added and to develop intra-industry specialization. Our economy should not only compete on the basis of lower labour costs (agricultural goods, textiles,), and production of capital intensive goods (transport equipment, machinery) but also strive to increase productivity (now at the level of about 60% of the EU 27 average), technological development and spending more resources on R+ D to export more technology intensive products. We should act also to implement completely the 2006 Service Directive, for further liberalization of the electricity and telecommunication sector, for easing of restriction in professional services (accounting, architecture, legal and business services). A Copenhagen study calculated that the new service directive could create up to 600 000 new jobs on the European Single Market and increase the GDP of members states by 0,6%. Secondly, the economic crises and financial interdependence between Poland and the EU partners underscores the importance of strengthening the EU cooperation in financial sector and its common supervision. The UE ought to do the best to restore stability, transparency and confidence in the financial sector and to undertake reform of the common banking regulators. Thirdly, Poland on the European Single Market should increase the effectiveness of public administration to cut red tape and improve functioning of its judiciary system. Simulation made by the European Commission shows that output and consumption could increase by 3% in the EU new members states, if 25% reduction in administrative burdens were achieved. Fourthly, financial crises has exposed also vulnerabilities of polish budgetary equilibrium and fiscal system. Polish huge budget deficit 7.2% in 2009, and about 6.9% in 2010, reduced below 3% in 2015 is going to be increase according the government plan to more than 3% in 2016, public debts -49,8% in relation to GDP in 2009 grew to 53% in 2011 and to 55% in 2015. According to Quest -1% increase in the public consumption may cut potential output in the range of 0,6% to 1,6% after ten years period. Therefore, sound fiscal policy is essential for our further integration in the European Single Market as well as to accomplish convergence criteria, hence in the medium term we should increase its quality and make reform concerning spending on public sector (health care, pension, education).Fifthly, the further benefits from European Single Market can be achieved due to the accession into euro zone. The standard analysis shows that polish benefits are to be comparable to the elimination of non-tariffs barriers under the single market program and will give additional moderate impulse to economic growth by 0,4–0,5% of GDP each year during medium term period. This additional growth would come mainly from: intensification of trade with the EU partners, increase of competition, elimination of risk of rate of exchange and transaction

costs, increase of attractiveness of polish market for international investments, new possibilities for polish economic agents to finance their activities on European Single Market. These benefits will not occur, however, in the short term, because the new Polish Government likely will postpone accession to the euro zone outside 2020r.

„Cultural, Religious and Humanist Inheritance of Europe“ – Its Future Legal Relevance

Alexander Balthasar*

Summary: By the Treaty of Lisbon, the “Masters of the Treaties” not only completed a catalogue of founding values (Article 2 TEU) but provided also an indication wherefrom these values “have developed”, i.e. “from the cultural, religious and humanist inheritance of Europe”. This contribution – originally presented at the Third Annual Conference of the Czech Association for European Studies Prague, 12. and 13. June 2014 – aims at analyzing the normative relevance and implications of this indication which might mean a considerable change of paradigm for secular Member States like Austria, Czech Republic or France.

Keywords: Cultural, Religious, Humanist Inheritance; Reference to God; Transcendent Foundation; Laicism; Values; Common Good; Preamble; Scepticism; Checks and balances; Principle of Equal Treatment; Justice

1. Prologue

*“In a nutshell, the project of the Enlightenment consists in adherence to the **rule of reason**” which, in turn, entails “the **sharp divide between faith and reason**”.*[1]

From that perspective, any religion claiming relevance not only in the private sphere of an individual, but in politics has to be considered as a “frontal attack against” that said “separation between the realm of faith and that of reason”[2], and, thus, as a severe challenge for “the neutrality of the secular state”.[3]

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* Privatdozent at Karl-Franzens-University of Graz; Head of the Institute for State Organisation and Administrative Reform, Austrian Federal Chancellery, Vienna, Austria. Contact: alexander.balthasar@bka.gv.at.
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1 Cit *Michel Rosenfeld*, Law, Justice, Democracy, and the Clash of Cultures. A Pluralist Account (2011), 1, 7.

2 It is worth noting, however, that at least the Roman Catholic Church does not at all accept this separation, cf the most recent Encyclica *Lumen Fidei* of 29 June 2013 (AAS 2013, 555ff), point 32:

It is apparently in this vein that the Charter of Fundamental Rights of the Czech Republic[4] not only grants, in its Article 15 (1), *explicitly* also the right to have *no* denomination at all[5], but states, in Article 2 (1): *"The State is founded on democratic values and may not be bound either by an exclusive ideology or by a religious belief"*[6], hence **opposing** "democratic values" to adherence to (*any*!) religious belief and, thus, at least implicitly declaring *democracy to be a priori incompatible with religion*.

At first sight, these constitutional provisions[7], together with the preamble to the Constitution[8], reflect the high degree of **secularization** of the Czech Republic.[9] At second sight, however, one realizes not only that the first presi-

"Fides christiana, quatenus veritatem nuntiat totalis amoris Dei et ad potentiam huius amoris fovet aditum, ad magis reconditum centrum pervenit experientiae hominis, qui amoris ope in lucem editur, et ad amandum vocatur ut in luce maneat. Desiderio compulsi omnem realitatem illuminandi, initium sumentes ab amore Dei in Iesu manifestato, eodem amore amare quaerentes, **primi christiani Graecum orbem, esurientem veritatem, invenerunt** socium idoneum **ad dialogum**. Eo quod **evangelicus nuntius philosophicam doctrinam apud antiquos convenit**, id decretorium fuit iter ut ad omnes gentes perveniret Evangelium, idque effecit **ut fides et ratio inter se agerent**, quod saeculorum decursu usque ad nostram aetatem increbruit. Beatus Ioannes Paulus II in *Litteris Encyclicis Fides et ratio* monstravit **quomodo fides et ratio altera alteram confirment**. …" – a position fully in line with traditional Aristotelian cooperation between "nus" and "episteme", cf *Manfred Riedel*, Für eine zweite Philosophie (1988), 40, 43.

3 Cit *Rosenfeld*, Law, 6.

4 Act. Nr. 2/1993 (Listina základních práv a svobod).

5 This **negative aspect** of the freedom at issue ("freedom *from* a particular religion") has also been recognized by the ECtHR under Article 9 ECHR (cf *David Harris et al*, Harris, O'Boyle &Warbrick, Law of the European Convention on Human Rights[2] [2009], 430; *Christoph Grabenwarter/Katharina Pabel*, Europäische Menschenrechtskonvention[5] [2012], § 22, point 104, both volumes referring to ECtHR's Judgment of 18 February 1999, ANo 24645/94 [*Buscarini v. RSM*], point 34; see also ECtHR's Judgment of 18 March 2011, ANo 30814/06 [*Lautsi et al v. Italy*], point 60: "freedom not to belong to a religion") and, therefore (i.e. by virtue of its Article 52 [3]), also Article 10 of the EU Charter of Fundamental Rights (EUCFR) is to be interpreted in this way (see, e.g., *Norbert Bernsdorff*, comment on Article 10 EUCFR, point 12, in: *Jürgen Meyer* [ed], Charta der Grundrechte der Europäischen Union[3] [2011]). But it is (only) the Czech Charter where this aspect is **explicitly stated in the text**. See for that Article in more detail *Petr Jäger*, comment on Article 15, in: *Eliška Wagnerová* et al, Listina základních práv a svobod. komentář (2012), 371ff.

6 See in more detail *Eliška Wagnerová,* comment on Article 2, in: *Wagnerová* et al, komentář, 79ff.

7 Pursuant to Articles 3 and 112 (1) of the Czech Constitution, this Charter forms part of the Constitution.

8 As *Vojtěch Šimíček* (comment on the preamble, point 7, in: idem et al, Ústava České republiky. komentář [2010]) puts it: It is evident from the **absence of any reference to God** in the Preamble that the **Czech Republic is a secular state** („laický stát").

9 „The Czech Republic is often said to be one of the most secularized countries in Europe …" (cit *Jakub Havlíček/Dušan Lužný*, Religion and Politics in the Czech Republic: The Roman Catholic Church and the State, IJSSS 2013, 190ff, 193).

dent of Czechoslovakia, *Tomáš Garrigue Masaryk*, originally stated that *"our whole humanitarian programme is **founded in religion** and has, as its ultimate source, the Brethren and the Reformation ...*[10], but that, "at the macro level", "religion" seems to be still of "persisting importance" for contemporary political life even in the Czech Republic.[11]

It is in particular against that somewhat inconsistent background that a provision of European Union primary law, the second recital of the preamble to the current version of the Treaty on European Union (TEU) – whereby **the value of "democracy",** enshrined in Article 2 TEU, is **also founded** at least *inter alia* on the "**religious** … **inheritance** of Europe" – deserves specific attention also and above all in the Czech Republic which has now been a member of the EU for a decade and **shares**, therefore, *also in purely national contexts*[12] the values mentioned in Article 2 TEU and, thus, also their "starting point"[13], the "inheritance" mentioned in the said recital.

2. The "… Religious … Inheritance" as part of Instated Law

2.1 The Second Recital

Already the preamble to the "Treaty establishing a Constitution for Europe[14] *began* with the following recital: *"DRAWING INSPIRATION from the **cultural, religious and humanist** inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.."*

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[10] See *Tomáš Garrigue Masaryk,* Jan Hus. Naše obrození a naše reformace (1896), 333, cited via *Zwi Batscha*, Eine Philosophie der Demokratie. Thomas G. Masaryks Begründung einer neuzeitlichen Demokratie (1994), 117; cf also the references given by *Batscha*, ib, 115ff.

[11] *Havlíček/Lužný,* IJSSS 2013, 197, refer to the "Te Deum mass" accompanying the "presidential inaugurations of Václav Havel" as well as to the "plea" of President Miloš Zeman "for God's mercy" when concluding his inauguration address, and conclude, with specific regard to the "importance of" St. Vitus Cathedral in Prague "for Czech statehood and national identity" (cit 197) that also in the Czech Republic "the **state needs**" (or, perhaps more precisely, continues to need) "**religion**" (cit 200; emphasis not original). See also *Horák*, Religion and the Secular State, 251 ("… the religious communities play quite an important role in Czech society"), *Wagnerová,* comment on Article 2, point 28, and infra fn 33.

[12] Arg the proposition by which the second sentence starts: „These values are common to the Member States …".

[13] Arg "from which have developed …".

[14] OJ 2004 C 310, 1.

This Constitutional Treaty never came into force, but the Lisbon Treaty which was signed on 13 December 2007 and enacted on 1 December 2009 also adopted precisely this recital.[15]

In addition, the second paragraph of the Preamble to the Charter of Fundamental Rights of the European Union (EUFRC) also evinces a religious context, seeing that it begins (in the *German* version) with: *„In dem Bewusstsein ihres* ***geistig-religiösen und sittlichen*** *Erbes gründet sich die Union auf die unteilbaren und universellen Werte der Würde des Menschen, der Freiheit, der Gleichheit und der Solidarität. Sie beruht auf den Grundsätzen der Demokratie und der Rechtsstaatlichkeit. ....*

This text already formed part of the original version proclaimed on 7 December 2000[16] (which then lacked, however, full binding force, whereas the current version, pursuant to Article 6 (1) TEU, "shall have the same legal value as the Treaties"[17]).

It is true that the religious context in the Charter is still given somewhat *less emphasis* e.g. in the *English* or in the *French* version, which states: "Conscious of its *spiritual and moral* heritage…" or "Consciente de son *patrimoine spirituel et moral*…"[18] respectively. So it was claimed these discrepancies of language versions might be the result of a German peculiarity[19], or even just a simple translation error.[20] For the versions of the current second recital to the preamble to the TEU, however, this interpretation cannot apply, since, as far as it can be seen, **all of** the language versions also **explicitly** state the "**religious**" inheritance.[21]

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[15] Second recital to the preamble to the TEU.

[16] OJ 2000 C 364, 1.

[17] This normative statement means not only equal rank in the hierarchy of norms, but also, that – notwithstanding the time gap as to the drafting – the current versions of the Treaties and the Charter entered into force *simultaneously*, so that the lex posterior rule cannot apply.

[18] Cf also the Danish („Unionen, der er sig *sin åndelige og etiske arv* bevidst, …"), the Italian („Consapevole del suo *patrimonio spirituale e morale* …"), the Dutch („De Unie, die zich bewust is van haar *geestelijke en morele erfgoed* …"), the Spanish („Consciente de su *patrimonio espiritual y moral* …") or the Czech ("Unie, vědoma si svého duchovního a morálního dědictví, …") version. This wording shows close similarity with the 6th paragraph of the preamble to the Czech constitution where reference is made to the *inherited* wealth, be it natural or cultural, material or *spiritual*.

[19] Cf *Jürgen Meyer*, comment on the Preamble, point 25, in: idem, Charta; see also ib, points 18 and 21, where we see how controversial (and *strongly opposed by the majority*) still then the insertion of a reference to religion had been, in particular with regard to the **French laïcité** (see, therefore, in particular point 25, fn 66).

[20] See the references given by *Meyer*, Preamble, point 32.

[21] What we realize here, therefore, is that during the small period of time between the drafting of the Charter and that of the Constitutional Treaty, a double rapprochement of the other language versions a) to the German one and b) to religion. So, since the entry into force of the Treaty

Now, this recital of the TEU does *not* set itself firmly *only* upon the "religious heritage" but **also appeals to the "cultural" and the "humanist heritage"** in the same breath. And clearly the term "religious inheritance" incorporates *not only Christianity* or even just its subset, (Roman) Catholicism; neither does it limit itself to monotheism, but appears to include – in the sense of the well-known dictum of *Theodor Heuss* who had claimed that the "Occident" had its beginnings on the three hills of the Capitol, Acropolis and Golgotha[22] – even the *polytheistic religions of antiquity*, at least of Greece and Rome, into which evidently the "humanist heritage" is rooted. In contrast, some may doubt, regarding the history of Europe[23], whether *Islam* – although monotheistic – actually is to be considered part of the European "*inheritance*", at least *as such.*[24]

2.2 What is "Religion"?

So reference to "religion" *does*, since 1 December 2009, form part of European Union law. But what is actually the meaning of the Treaty term "religion"? When we understand it here, in the preamble to the TEU, in the same way as in Art 17 (1) of the Treaty on the Functioning of the European Union (TFEU) – where a *difference* is made between "churches and religious associations or communities" on the one hand and "philosophical and non-confessional organisations" on the other hand – or in Article 10 EUCFR – where "religion" is *juxtaposed* to "belief" – and when we take also into account that the terms "philosophical"[25] as well as "belief"[26] are, in the German version, expressed by the *same* term "Weltanschauung", we may infer that

- on the one hand, "religion" is **comparable** to a "philosophy", "belief" or "weltanschaung"
- on the other hand, there must be a **differentia specifica** which "religions" have, whereas other – secular or laical – "weltanschauungen" do not.[27]

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of Lisbon, it is hard to argue that the EU continues to be a "secular institution" (as did in fact *Pierre-Arnaud Perrouty/Julie Pernet*, Dialogue with religious and philosophical organisations: toward an equal and fair dialogue?, in: *Johannes W. Pichler/Alexander Balthasar* [eds], Open Dialogue between EU Institutions and Citizens – Chances and Challenges [2013], 183).

22 Reden an die Jugend (1956), 32.

23 As it is well-known European identity several times (in Spain, on the Balkan, in medieval Palestine) was developed by veritable *crusades against* Islam.

24 To the extent to which the results of Islamic dogmatic theology correspond to those of Christianity or Judaism, the question obviously does not hold any practical importance.

25 In the French version: "philosophique".

26 In the French version: "pensée".

27 It is exactly this opposition of "religion" to "secularism" or "laicism" which is why, originally, in the Charter Convention, the majority still resisted the insertion of the term "religious" (see supra fn 19).

This differentia specifica, however, is, quite obviously[28], rooted in the sphere of the "*sacred*"[29], including *divine* service, adoration and worship[30] and, thus, a **belief in a transcendent authority**.[31]

So, in a way, current European Union Law on Treaty – and, thus, "constitutional" – level contains exactly that "constitutional **reference to God**" which had, most prominently, also been supported[32] by a member of the European Parliament for twenty years, *Otto von Habsburg*, also the last heir to the Czech Crown.[33]

2.3 The European Constitutional Tradition in Regard to Religion

What remains to be done is a closer analysis of

- the **normative relevance** of this and if this can be sufficiently found,
- its **normative content.**

But before this, it should be mentioned briefly that the mentioning of the "religious … inheritance" – which is, in essence, the adoption of an explicit "constitutional reference to God" – in the primary law of the European Union

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[28] Cf, e.g., *Antonius Liedhegener/Ines-Jacqueline Werkner* (eds), Religion, Menschenrechte und Menschenrechtspolitik (2007); although this book lacks any explicit definition of the term "religion", it is perfectly clear that this term is understood as including only Christianity and Judaism, Islam and Hinduism as well as those parts of Chinese thinking related to the existence of "God" or "Heaven".

[29] *Havlíček/Lužný,* IJSSS 2013, 192, cite the standard definition of *Emile Durckheim*: "a religion is a unified system of beliefs and practices relative to **sacred** things, that is to say, things set apart and surrounded by prohibitions – beliefs and practices that unite its adherents in a single moral community called a church", the weakest part of which, nevertheless, is the definition of the "sacred".

[30] Cf *Grabenwarter/Pabel*, EMRK, § 22, point 102.

[31] So also *Jäger*, comment on Article 15, point 12. Cf, to that extent, also paragraph 1 (1) of the Austrian Law on the recognition of religious associations of 20 May 1874, Imperial Law Gazette No 68 (originally also valid for Bohemia, Moravia and Silesia), containing the term "Gottesdienst", or the Explanatory Memorandum (RV 938 Blg NR XX. GP) to the Federal Austrian Law on religious confessions, BGBl I 1998/19, referring to the "Transzendenzbezug".

[32] Cf, e.g., http://www.zenit.org/de/articles/otto-von-habsburg-vieles-spricht-fur-eine-re-christianisierung-europas (last visit on 20 May 2014).

[33] This Crown is (like in the Hungarian Constitution, see infra fn 42) still, in a way, mentioned in the preamble to the current Czech Constitution ("věrni všem dobrým tradicím dávné státnosti zemí Koruny české …"; *faithful* to *all the good old traditions of statehood of the lands of the Czech Crown* [!]). Remembering that (also) this Crown – of St. Wenceslaus – was founded in the transcendent sphere the explicit commitment to stay "faithful" to "all the good old traditions of statehood" represented by this Crown might very well serve as a sufficient constitutional justification for the – otherwise – somewhat startling sociological finding mentioned supra in fn 11.

in no way represents a fundamental break with its own former traditions, since **in no way** have **all member states** been as secular or laical as *France*[34]*, the Czech Republic*[35] or *Austria*[36]*:*

Instead, there is – if one takes only the republics (monarchies as a rule have always been founded upon the "grace of God", although the only clear statement left at present is the preamble to the Danish constitution of 5 June 1953) – an explicit **invocatio dei** still in the preambles to the constitutions of **Ireland**[37] and of **Greece**[38], and a marked **reference to God** in **Germany**.[39]

In closest proximity to the ambiguity of the second recital to the TEU preamble, however, seems to be the preamble to the **Polish** constitution of 2 April 1997:

"Having regard for the existence and future of our Homeland. we, the Polish Nation – all citizens of the Republic both those who believe in God as the source of truth, justice, good and beauty as well as those not sharing such faith but respecting those universal values as arising from other sources, …"[40]

But also the invocation of "the political and cultural heritage of our forebears" in the preamble of the **Slovakian** constitution (of 1 September 1992) as well as of the "*spiritual heritage of Cyril and Methodius*"[41] there, similar to the fourth sentence of the "National Testimony" which now stands at the

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[34] Pursuant to the first sentence of Article 1 of the French Constitution of 4 October 1958, "France is an indivisible, laical, democratic and social Republic".

[35] See supra Prologue.

[36] See in more detail *Alexander Balthasar*, Die österreichische bundesverfassungsrechtliche Grundordnung unter besonderer Berücksichtigung des demokratischen Prinzips. Versuch einer Interpretation (2006), 326ff. During the 20th century, only the constitution of 1 May 1934 (in force until 13 March 1938) took the opposite perspective, starting with the invocatio dei „Im Namen Gottes des Allmächtigen, von dem alles Recht ausgeht …“ (In the Name of almighty God, the source of all the law …)..Cf, however, now (since BGBl I 2005/31) Article 14 (5a) of the current Austrian Constitution (B-VG) where the founding values of the schools are mentioned and where the goal is spelled out that the students will be able to assume responsibility "… **guided by** social, **religious** and moral **values** …".

[37] "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, …" (ex 1937).

[38] „In the name of the Holy and Consubstantial and Indivisible Trinity" (ex 1975).

[39] „Im Bewusstsein seiner Verantwortung vor Gott …“ (Conscious of its responsibility to God …); this formula was created in 1949 but upheld in 1990 when the preamble was reformulated on the occasion of the German reunification.

[40] Some years ago apparently exactly this formula inspired *Herwig Hösele*, former president of the Austrian Second Chamber of Parliament ("Bundesrat") and then member of the Austrian Constitutional Convention of the time to make a very similar proposal (see *Herwig Hösele*, Was ist faul im Staate Österreich? Eine Reformagenda [2010], 51f).

[41] As is well known, *St. Cyril* and *St. Method*, who were declared Patrons of Europe by Roman Catholic Pope *John Paul II* in 1980, bear enormous **religious significance**.

beginning of the **Hungarian** constitution of 25 April 2011[42], are to be mentioned in this context.

All this of course does not provide grounds for a "common constitutional tradition" (in the sense of Article 6 (3) TEU) among the Member States.[43] But it can indeed be concluded from this evidence – and here the constitution of founding member Germany is of particular importance – that even an explicit "**constitutional reference to** God" was **never irreconcilable** with the fundamental values of what is now the European Union.

3. Regarding the Normative Relevance of the Second Recital of the TEU

3.1 The Status of Preambles in EU Fundamental Law

In Austria, where originally even the two first *articles* of the federal Constitution were denied any normative relevance[44], a simple *recital* in a *preamble* might be considered as rather insignificant from a legal perspective, as apparently might also be the case in the Czech Republic.[45]

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[42] "We recognize the role which Christianity has played to preserve the Nation. We respect the different religious traditions of our country." See, however, also the first declaration (reference to King St. Stephen who made Hungary part of Christian Europe) and the 18th declaration (reference to the Holy Crown).

[43] Even with the most favourable calculation (all the six republics mentioned in the text plus the seven monarchies) it would still be only a – strong – minority of the current 28 Member States disposing of any religious reference in their respective constitution.

[44] See first *Hans Kelsen/Georg Froehlich/Adolf Merkl*, Die Bundesverfassung vom 1. Oktober 1920 (1922), 65 („Art1 hat **keinen relevanten Rechtsinhalt**" [Article 1 does not contain any significant normative content), 66 („Ähnlich wie die Bestimmungen des Art. 1 hat auch die Deklaration: ‚Österreich ist ein Bundesstaat' an und für sich keinen relevanten Rechtsinhalt" [Similar to what is true for Article 1, neither does the declaration "Austria is a federal state" hold any significant normative content); see further the references given by *Heinz Peter Rill/Heinz Schäffer*, comment on Article 1 B-VG, in: iidem (eds), Bundesverfassungsrecht. Kommentar (first delivery 2001), points 1ff, fns 3 and 6. *Ludwig Adamovich/Bernd-Christian Funk/Gerhart Holzinger/Stefan Frank*, Österreichisches Staatsrecht 1[2] (2011), point 10.007, still follow this line of thinking, not *Robert Walter*, however (Österreichisches Bundesverfassungsrecht. System (1972), 105f. See now also *Balthasar*, Grundordnung, 187ff, in particular 201f; *Theo Öhlinger/Harald Eberhard*, Verfassungsrecht[9] (2012), point 64; *Walter Berka*, Verfassungsrecht[4] (2012), point 133.

[45] Cf *Vladimír Sládeček/Vladimír Mikule/Jindřiška Syllová*, Ústava České republiky*:* komentář (2007), 2, point 1 („Sama o sobě sice nemá normativní význam (není závazným pravidlem chování), může však být důležitou pomůckou při výkladu zákona"; the preamble has *no normative relevance* (because it does *not contain a binding rule governing our behaviour*) but may be of importance for the interpretation of the normative part of the legislative act). See, however,

For the European Union, however, it is possible to show[46], upon accumulated consideration of

- the fact that the TEU continues to form part of international law[47]
- the status which Art 31 (2) of the Vienna Convention on the Law of Treaties (VCLT; of 22 May 1969)[48] bestows on a "preamble" in relation to other text in the treaty[49]
- the position which is accorded to the VCLT in current international jurisprudence in general and in the case law of the Court of Justice of the European Union (CJEU) in particular even beyond formal status of ratification[50]
- the significance which the (formal predecessor of the current) CJEU itself attached – in a case which continues to be of crucial importance for the legal system of the EU – to the fact that the **preamble** of the then Treaty establishing the European Economic Community (EEC Treaty) was not only **addressed** to governments, but also **to** the respective **peoples**[51]

that at least EU *primary* law preambles[52] indeed **have normative relevance**, namely as the **binding context** of the following provisions.

3.2 The Function of the Second Recital of the TEU

Precisely this function as "binding context" is now evidently **claimed** by the recital at issue **itself**, since it states explicitly that: *"the universal **values** …"*

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supra fn 8 (*Vojtěch Šimíček* is even ready to draw fundamental normative conclusions from the fact that a certain content was not enshrined in the preamble; cf also ib, point 4).

[46] See in detail *Alexander Balthasar*, Was ist eine Präambel wert? Eine neuerliche Auseinandersetzung mit einem alten Thema aus Anlass der nunmehrigen Berufung der Europäischen Union auf ihr „kulturelles, religiöses und humanistisches Erbe“, in: *Erich Schweighofer* et al (Hrsg), Zeichen und Zauber des Rechts. Festschrift für Friedrich Lachmayer (2014), 717ff.

[47] Cf *Oliver Dörr*, comment on Article 47 TEU, point 78; in: *Eberhard Grqabitz/Meinhard Hilf/Martin Nettesheim* (eds), Das Recht der Europäischen Union (loose-leaf, 44. delivery, May 2011); *Wolfgang Graf Vitzthum*, Begriff, Geschichte und Rechtsquellen des Völkerrechts, in: idem, Völkerrecht[3] (2010), point 40.

[48] The VCLT did, however, not enter into force until 27 January 1980.

[49] In the introductory sentence we read: "**text, including its preamble** …" Cf also *James Crawford*, Brownlie's Principles of Public International Law[8] (2012), 381.

[50] Cf *Crawford,* Brownlie's Principles, 368.

[51] See ECJ's Judgment of 5 February 1963, case No 26/62 (*Van Gend & Loos*), Official Collection 1963, 1ff, 24.

[52] For the status of preambles in *secondary* law see further *Balthasar*, FS Lachmayer, 721ff, with specific reference to the relevant case law of CJ (on the one hand, see its Judgment of 11 June 2009, C-429/07 [*Inspecteur van de Belastingdienst v X BV*], point 31 and the case-law cited there; on the other hand, however, note also the more recent Judgments a) of 1 March 2011, C-236/09 [*Association belge des Consommateurs Test-Achats ASBL*], point 17, and b) of 28 February 2013, C-483/10 [*Commission/Spain*], point 43 in conjunction with points 44f).

*have **developed** directly "**from** the cultural, religious and humanist inheritance of Europe".*

If one takes the other part of this recital as well, whereby the international law representatives of the Member States listed at the beginning of the preamble – in a concise description of the German Federal Constitutional Court, the "Masters of the Treaty"[53] – in fact **drew inspiration from exactly this inheritance** when agreeing[54] on the *following Treaty content*, then it is more than obvious from that fact alone (not to speak of the full coincidence of the text[55]) that the "rights" and "values" mentioned in this recital are exactly those upon which, according to *Art*icle *2 TEU,* not only the Union is founded but which in addition *"all Member States ... have in common"*.

The second recital to the Preamble to the TEU is thus – as a **binding context** – of **imminent relevance for the interpretation of Art 2 TEU.**

3.3 The Relevance of the Second Recital – read in conjunction with Article 2 TEU – for the Status of a Member State

The significance of this finding is illuminated by the interlacing of the Article 2 TEU with its Article 7:

The declaration of Article° 2 TEU (that the Union is founded on certain values which are also "common to the Member States") is by no means mere "constitutional lyricism", since already "a clear risk of a serious breach by a Member State of the values referred to in Article 2" (Article 7 (1)), even more so naturally "the existence of a serious and persistent breach" (Article 7 (2)) triggers severe sanctioning according to the **proceedings set out in Article 7 TEU**.[56]

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[53] See its Judgment of 12 October 1993, 2 BvR 2134 et al, BVerGE 89, 155, point 112 (*Maastricht*), and, likewise, the Judgment of 30 June 2009, 2 BvE 2/08 et al, BVergE 123, 267, point 298 (*Lissabon*); also Article 88 (1) of the French Constitution takes this perspective, cf *Christoph Grabenwarter*, Staatliches Unionsverfassungsrecht, in: *Armin von Bogdandy/Jürgen Bast* (Hrsg), Europäisches Verfassungsrecht[2] (2009), 121ff, 172.

[54] Cf the last sentence of the preamble.

[55] "Freedom, democracy, equality" and "the rule of law" appear likewise in the two provisions, whereas the value of "the inviolable and inalienable rights of the human person" (recital) may, without any difficulty, be parallelized to the "respect for human dignity" and "for human rights" (Article 2).

[56] In the meantime, an additional layer has been introduced (see the Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, of 11 March 2014, COM(2014)158 final/of 19 March 2014, COM(2014)158 final/2. For the background cf Gabriel Toggenburg, Was soll die EU können dürfen, um die EU-Verfassungswerte und die Rechtsstaatlichkeit der Mitgliedsstaaten zu schützen? Ausblick auf eine neue Europäische Rechtsstaatshygiene. ÖGfE Policy Brief 10'2013; Waldemar Hummer, Die gemeinsame Wertebasis in der EU, in: Johannes W. Pichler (ed), Rechtswertestiftung und Rechtswertebewahrung in Europa (2015), 65ff, 86ff.

Hence, the respective **predominant understanding of the normative content of Article 2 TEU** – and closer yet, of the content of the "cultural, religious and humanist inheritance of Europe" as the **source** of the values enshrined in Article°2 TEU – ultimately attains **decisive significance for the legal and political standing of a Member State in the European Union**.

4. The Normative Content of the Second Recital

4.1 "Herculean Task"

No one can seriously expect me to exhaustively summarize the content of "Europe's inheritance" to you here, now and in just a few sentences. The **reclaiming** and **repossessing** of this inheritance – which is administered today by various fields of disciplines, namely philosophy, literary studies and art history, but also by the different theologies which come into consideration[57], in part, however, also by specialised fields of jurisprudence as, in particular, international law, history of law, but also philosophy of law – **by European law and national constitutional law scholars** is – as I have already said on other occasion[58] – a veritable "Herculean task", and accomplishing it, after having realized the need thereof at all, would certainly in most countries have to result in fundamental **modifications of the curricula for the study of law**.

4.2 Epistemological Implication

What can be said, however, already now is that reference to this "inheritance" as ultimate source of binding values implies that it is in fact **possible**, at least to a sufficient degree, to **ascertain** the **content** of that "inheritance" in an intersubjectively convincing way[59]; so, apparently, the "Masters of the Treaty" have – as a precondition for the foundation of the values in "Europe's inheritance"

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[57] See supra text below fn 21.

[58] FS Lachmayer, 717, 720, 734.

[59] Cf, for that philosophical point of view, already *Theodor Adorno*, Philosophische Terminologie 1 (1973), 113ff, or *Adam Schaff*, Geschichte und Wahrheit (German version 1970), 71ff, 95, 111ff, 125ff, 169ff, and, in particular, *Karl-Otto Apel*, Wahrheit als regulative Idee (ex 2003), reprinted in: Ders, Paradigmen der Ersten Philosophie (2011), 322ff, 336f, 342f; see also *Alexander Balthasar*, Wieviel Reinheit braucht und wieviel verträgt die Rechtslehre? Zugleich ein Beitrag zur (angeblichen) Dichotomie von Sein und Sollen. Mit einem Anhang, Part 2, ZÖR 2007, 97ff, 141, fn 418. Cf also, recently, *Paul Boghossian*, Angst vor der Wahrheit: Ein Plädoyer gegen Relativismus und Konstruktivismus (German version 2013).

conducted by them – **rejected fully-fledged scepticism** or relativism as the appropriate underlying philosophy for the application of the Treaties.[60]

4.3 Selected Examples

In order, however, to not only offer you stones but at least a bit of bread[61], I would like to conclude with the following three examples where the said "cultural, religious and humanist inheritance" could indeed be of crucial importance for the future interpretation of our "common" European constitutional order:

- The principle of "**checks and balances** – requiring *control of every administration* of office as well as the *ban on the delegation of unlimited powers* of office – is, interestingly enough, not explicitly named in Article°2 TEU, though it most certainly forms part of the "common constitutional traditions of Member States" and hence is implied in the concept of "rule of law".

  On the basis of the second recital, however, we may either refer to *Juvenal's* question: "Quis custodiet ipsos custodes?"[62] and thus recourse to the "humanist inheritance", but also quite definitely to the Christian teachings of **original sin**.[63]
- "It is settled case law that the principle of equal treatment requires that comparable situations must not be treated differently, and that **different situations must not be treated in the same way**, unless such treatment is objectively justified".[64] Nevertheless, it is difficult[65] to deduce the second

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[60] Instead, for *Hans Kelsen* „political relativism" was the logical consequence of his fundamental scepticism regarding knowability of truth and values (see Vom Wesen und Wert der Demokratie, [1]1920, Chapter VII, [2]1929, Chapter X).

[61] Cf Matth 7, 9.

[62] Juvenalis Saturae VI, 347f.

[63] See *Alexander Balthasar*, Was heißt „völlige Unabhängigkeit" bei einer staatlichen Verwaltungsbehörde? Zugleich eine Auseinandersetzung mit dem Urteil des EuGH vom 09.03.2010, C-518/07 (Kommission/Deutschland), ZÖR 2012, 5ff, 33, fn 143, with reference to *Erich Kaufmann*, Die Grenzen des verfassungsmäßigen Verhaltens nach dem Bonner Grundgesetz, insbesondere: was ist unter einer freiheitlichen demokratischen Grundordnung zu verstehen? Festvortrag auf dem 39. deutschen Juristentag 1951 (printed by *Erhard Denninger* [ed], Freiheitliche demokratische Grundordnung I. Materialien zum Staatsverständnis und zur Verfassungswirklichkeit in der Bundesrepublik Deutschland [1977] 96).

[64] Cit CJ Judgment of 10. October 2013, C-336/12 (*Manova*), point 30 (with reference to previous case law); cf also *Koen Lenaerts/Piet van Nuffel*, European Union Law[3] (2011), point 7–050.

[65] See e.g. *Wolfgang Rüfner*, Der allgemeine Gleichheitssatz als Differenzierungsgebot, in: *Burkardt Ziemske* et al, Staatsphilosophie und Rechtspolitik – FS Martin Kriele (1997), 271ff; *Olivier Jouanjan*, Gleichheitssatz und Nicht-Diskriminierung in Frankreich, in: *Rüdiger Wolfrum* (Hrsg), Gleichheit und Nichtdiskriminierung im nationalen und internationalen

element of this phrase logically from the semantic structure of our present-day fundamental rights equality principle, e.g. from the wording of Article 20 EUCFR, which states:

"Everyone is equal before the law".

Actually this element – containing an **obligation to differentiate**[66] which might be highly welcome as a counterweight[67] to excessive conclusions drawn from abundant prohibition of discrimination[68] – may be less a product of "equality" than of **"justice"** as it was understood in the traditional sense of *Ulpian's* "suum cuique"[69] and as it can be traced back already to the proportional principle of *Aristotle.*[70]

The legitimation, however, to refer even today within the framework of our current legal order to this jurisprudential inheritance can now be found in the Second Recital read in conjunction with Article°2 TEU, where the term "justice" indeed appears (in the second sentence).

- Every kind of political rule – even democracy – builds on the acceptance of decisions of the ruler by every individual forming part of the polity even in case that the decision would result in a **personal disadvantage** for the individual – including, in extremis, an existential **sacrifice.** This acceptance, however, seems to require a **transcendent foundation**, even if the content of the decision indeed corresponds to *Rousseau's* "volonté générale"[71], i.e. the **common good.** Furthermore, without transcendent foundation the rulers – in a democracy the majority of citizens – would seem to have no motivation whatsoever to base the decisions on the common good instead of their own interests.[72]

Menschenrechtsschutz (2003), 59ff, 67ff; *Martin Borowski*, Grundrechte als Prinzipien[2] (2007), 402ff; *Magdalena Pöschl*, Gleichheit vor dem Gesetz (2008), 157ff; *Sven Hölscheidt*, comment on Article 20 EUGRC, Rz 14, in: *Meyer*, Charta. Cf also the survey given by *Werner Heun* (in *Horst Dreier* [ed], Grundgesetz. Kommentar I[2] [2004], point 2).

66 Cf also the medieval proverb "**bene docet qui bene distinguit**" (see *Christoph Meyer*, Die Distinktionstechnik in der Kanonistik des 12. Jahrhunderts. Ein Beitrag zur Wissenschaftsgeschichte des Hochmittelalters [2000], 65).

67 Originally, CJ used to understand the principles of equal treatment and of non-discrimination as **one** principle (see still its Judgment 26 September 2013, C-195/12 *[Industrie du bois*], points 50, 82); more recent Judgments, however, seem to indicate a **separation** (see e.g. those of 14 November 2013, C-388/12 [*Comune di Ancona*], point 46, and C-221/12 [*Belgacom NV*], point 43, respectively). Cf already *Georg Nolte*, Gleichheit und Nichtdiskriminierung, in: *Wolfrum*, Gleichheit und Nichtdiskriminierung, 235ff.

68 Note that current Article 21 (1) EUCFR contains at least – *non exhaustive* (arg "such as") – 16 elements of non-discrimination (!).

69 Iustitia est *constans et perpetua voluntas* **ius suum cuique tribuendi"** (D 1.1.10pr).

70 Ethica Nicomachea, V/6.

71 See Du Contrat Social II/3; cf also *Jürgen Habermas*, Faktizität und Geltung (1994), 678.

72 In the language of *Rousseau* (see previous fn) corresponding to the „volonté de tous".

> In this sense, and almost 50 years ago, in fact *Ernst-Wolfgang Böckenförde* published his famous "paradox" according to which
> *"the liberal secular state lives on premises that it cannot itself guarantee".*[73]

It would now appear as though *all* the "Masters of the Treaties" (even the Czech Republic![74]) had reacted to this and ultimately – with the Second Recital – **provided** a comprehensive **transcendent foundation of our community of polities**, since its welfare otherwise, at least in times of crisis, could not (any longer[75]) **be guaranteed**.[76]

[73] Die Entstehung des States als Vorgang der Säkularisation (first published 1967, here cited from idem, Recht, Staat, Freiheit. Erweiterte Ausgabe [2006], 92ff, 112). Cf also *Dieter Gosewinkel*, „Beim Staat geht es nicht allein um Macht, sondern um die staatliche Ordnung als Freiheitsordnung". Biographisches Interview mit Ernst-Wolfgang Böckenförde, in: *Böckenförde/Gosewinkel*, Wissenschaft, Politik, Verfassungsgericht (2011), 30fff, 430ff.

[74] Cf supra fn 9.

[75] *Böckenförde* himself had been more optimistic originally, adding the following sentence to the sentence quoted in the main text: „Das ist das große Wagnis, das er" – dh „der freiheitliche, säkularisierte Staat" – "um der Freiheit willen eingegangen ist" (this is the great risk that the – liberal, secular – state has faced for the sake of liberty).

[76] I have developed this line of thought in more detail in my presentation at the Andrássy University Budapest on 24 March of this year (see *Alexander Balthasar*, Demokratie im europäischen Mehrebenensystem. Ein Plädoyer für das Machbare, in: *Alexander Balthasar/Peter Bußjäger/Klaus Poier* [eds], Herausforderung Demokratie. Themenfelder: Direkte Demokratie, e-Democracy und übergeordnetes Recht [2014], 163ff, 175ff).

YOUNG RESEARCHERS PAPERS

Is Constitutional Pluralism Really Pluralist?[1]

David Kopal[*]

Summary: This paper addresses two possible understandings of the relationship between European and national law which are represented by Miguel Poiares Maduro's and Mattias Kumm's conceptions of constitutional pluralism. The first section of the paper discusses the possible approaches to the relationship between national and European law generally, followed by a more detailed description of Maduro's and Kumm's theories. In the main section, it is argued that although both authors claim that their theories are pluralist, their true nature is actually based on the principles which are typical for monism.

Keywords: constitutional pluralism, relationship between European and national law, constitutionalism beyond the state, contrapunctual law, primacy of EU Law

1. Introduction

From the beginning of the European integration there were many theories which have tried to describe the character of EU law and its relationship to Member States' legal orders. Currently, we can distinguish between three general conceptions of such a relationship. The first one is the monism, the traditional approach which sees EU as an autonomous legal order independent from the Member States' national law and EU law as the law which has primacy over national law,[2] including constitutional law.[3] This approach was adopted by the Court of Justice of the European Union (CJEU) in its case law.

The second conception is the so-called statism and it is reflected in the case law of national constitutional courts, most famously Federal Constitutional Court of Germany (FCC).[4] According to it, EU cannot be autonomous since

[*] David Kopal, Ph.D. candidate at Faculty of Law, Palacky Univrsity in Olomouc, Czech Republic. Contact: kopaldvd@gmail.com.

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[2] Case 6/44, *Costa* v. *Enel*, [1964] ECR 585.

[3] Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125.

[4] E.g. 89 BVerfGE 155 (*Maastricht decision*).

there is no coherent and integral *demos* present at the EU level and the status of EU law is thus determined by the national constitution. Only the national constitutional law, as the law of the sovereign nation state, derived from the *demos*, can be supreme. The problem of each of these two conceptions is the adoption of one-sided perspective through which they describe the relationship between legal orders.

The third conception is represented by constitutional pluralism which introduced a more complex perspective that can be adopted by EU as well as by its Member States. Since it has many disguises,[5] it is difficult to provide an exact definition. Nevertheless, there are some major characteristics which distinguish it from the preceding two theories. As its title suggests, it stresses pluralism of legal orders or claims to constitutional authority. These orders or claims must not be in hierarchical but in the heterarchical relationship, which means that no legal order *a priori* prevails over another. Each legal order must respect the autonomous character of the other. This is the basic characteristic which distinguishes constitutional pluralism from monism and statism. But sometimes the difference between these approaches can be very delicate. It is thus important to define the fundamental characteristics which need to be satisfied for the particular conception to be described as constitutional pluralism and not monism or statism.

In this paper, I will analyze two theories of constitutional pluralism which are quite influential and also share some common characteristics, particularly Kumm's liberal constitutional theory and Maduro's contrapunctual law. I have chosen three articles from each author since they well illustrate the evolution and the development of each author's approach. I will also argue that although these theories are called pluralistic, they share some significant characteristics with the monist conception. The question of this paper thus is: Do these theories actually represent constitutional pluralism or rather monism?

2. Theories of Constitutional Pluralism

2.1 Liberal Constitutional Theory

Mattias Kumm introduced his theory as a clear reaction to several decisions made by national constitutional courts,[6] which challenged the claim that the

[5] Avbelj, M. Komárek, J. Introduction. In: Avbelj, Matej; Komárek, Jan (eds.). *Constitutional Pluralism in the EU and Beyond.* Oxford: Hart Publishing, 2012, p. 4.

[6] Kumm, M. Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court Justice [1999] 36 *C.M.L.Rev.* 351.

CJEU is the final authority of constitutionality in Europe regarding EU law.[7] Kumm is thus trying to determine which court has the *kompetenz-kompetenz* with regard to EU law. He analyzes two possible answers to this question – monism or statism.

The principle which lies at a heart of the monist conception is the "Principle of Expanding the Rule of Law" to supranational sphere. Its aim is to ensure uniform application and interpretation of EU law. In the case of statism, the underlying principle is the "Principle of Liberal Democratic Governance" which aims to establish *"*the highest possible level of fundamental rights protection and democratic legitimacy on each level of governance."[8]

Kumm criticizes both positions as unpersuasive since neither of them reflects the reality of the relationship between EU law and national law. As a solution to this unsatisfactory state of affairs he offers his own approach, the so-called "European Constitutionalism" approach. The main task of his conception is to refocus the debate from the question of the ultimate rule to the principles which are common to European constitutionalism.[9]

According to this conception there are three conflicting principles which are crucial to determine which legal order will prevail in the particular case. There is the vital "Principle of Constitutional Fit" which means that there are common normative principles which lie at a heart of European and national constitutional orders. This principle is the crucial since it has pluralistic nature according to which there is no one supreme law but only common principles.[10] Next two already mentioned principles are the "Principle of Expanding the Rule of Law" and the "Principle of Liberal Democratic Governance".

These principles are not concerned with a clash of absolutes but instead, they can be implemented to the higher or lower degree. According to Kumm, the best set of conflict rules is that which ensures the realization of these principles to the highest degree possible. He stresses that this conception is applicable to the national legal orders of the Member States as well as to the European legal order. Furthermore, it is more complex than monism and statism since it does not reflect only one limited perspective.[11]

Kumm also introduces a practical application of his approach to the FCC's case law. According to him, the FCC plays a double role in a case of constitutional conflict between EU law and national law. Firstly, the FCC acts as a subsidiary guardian of the European legal order. This means that the FCC's review

[7] Maastricht decision*, op. cit.*, note 4.
[8] Kumm, *op. cit.*, note 6, p. 375 – 376.
[9] Kumm, *ibid.*, p. 374 – 375.
[10] Kumm, *ibid.*, p. 375.
[11] Kumm, *ibid.*, p. 358.

and decision must be compatible with other Member States' courts practices and must not undermine the coherence of the European legal order. The basis for this position is the principle of expanding the Rule of Law which gives a presumptive weight to EU law over national law.

However, this presumption can be rebutted if there is a manifest and grave violation of EU law. In such a situation, the principle of liberal democratic governance comes into play and the FCC acts as the highest guardian of the principles contained in the national constitution.[12]

According to Kumm, the CJEU has *kompetenz-kompetenz* at the EU level and national constitutional courts have it at the Member States' level. Thus, the question of final authority in Europe is not an issue in his conception of constitutional pluralism.

Several years later, Kumm developed his theory even more.[13] His conception remains very similar, although its name changes to "Constitutionalism Beyond the State." Kumm from now on recognizes not only three but five relevant principles which come to play in a case of constitutional conflict between legal orders. The essential one is still the "principle of fit." Next is "the formal principle of legality" which establishes a strong presumption for national courts to apply EU law even over national constitutional provisions. However, this presumption might be rebutted if one of the following countervailing principles prevails.

First is the "substantive principle of the protection of basic rights". Second is the "jurisdictional principle of subsidiarity" which protects jurisdictional limits of the EU. Third is the "procedural principle of democracy" which stresses the democratic deficit of the EU.[14] Kumm considers the last principle as the likeliest source of potential constitutional conflict if the violated fundamental national constitutional provision is clear and specific since democratic deficit was, is and will be a persisting problem of the EU.

According to Kumm, these are the principles of liberal democratic constitutionalism which reflect legal and political practice at the Member States' as well as at the European level. Therefore, they might provide the best solution to possible constitutional conflict between EU law and national law. He also stresses the important role of cooperation between national courts and CJEU as well as between national courts themselves when they are addressing constitutional conflict. He calls this "mutual deliberative engagement."[15]

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[12] Kumm, *ibid.*, p. 380 – 383.

[13] Kumm, M. The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty [2005] 11 *European Law Journal* 262.

[14] Kumm, *ibid.*, p. 299 – 300.

[15] Kumm, *ibid.*, p. 301.

In his later works,[16] Kumm broadened his theory to the relationship between EU law, UN law and national law. He presented it on the CJEU's *Kadi*[17] case, where he compared whether the CJEU's approaches in *Costa v ENEL* and *Kadi* are consistent. At first sight, these decisions contradict each other just like *Costa* and decisions of some national constitutional courts.[18] It is again Kumm's own approach, in this case called "Cosmopolitan Constitutionalism," through which both *Costa* and *Kadi* cases can be understood as consistent.[19]

At the time of delivery of *Costa* judgment, primacy claim of EC was not fully persuasive primarily due to the lack of fundamental rights protection and competence boundaries. However, EU gradually improved these deficits by responding to decisions of national constitutional courts. According to Kumm, similar evolution has taken place in *Kadi*. His reading of this decision suggests that the CJEU's approach is the one of constitutional pluralism, where the relationship between UN and EU is of mutual dialogue. EU has reviewed implemented UN resolution because of the manifest deficits on the UN level, just as national courts have reviewed EU acts according to Kumm's theory. He is certain that EU, just like national courts, would be deferential if the deficits were not so manifest. Approach adopted by the CJEU in *Kadi* might therefore improve UN' deficits just as national courts decisions improved EU's. Kumm therefore concludes that shared constitutional principles contributed to the evolution of EU law, UN law and also national constitutional law.[20]

In general, Kumm is trying to develop a common language which can be applied to the relationship between courts that share the same normative principles, according to which constitutional conflict between different legal orders can be resolved. Moreover, this theory allows national constitutional court derogate from the EU obligation as a matter of national law, which is one of the more pluralist features of this conception. However, the deficit of Kumm's theory is that it aims only on constitutional conflicts, which means that his approach covers only part of the complex relationship between legal orders. Compared to Maduro, as will be shown below, he is dealing only with the relations between EU and national courts but not with the relations between EU's and national actors in general.

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[16] Kumm, M. Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism. In: Avbelj, Matej; Komárek, Jan (eds.). *Constitutional Pluralism in the EU and Beyond.* Oxford: Hart Publishing, 2012, p. 39 – 65.

[17] Joined Cases C-402/05 P and C-415/05 P *Kadi and AI Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

[18] Maastricht decision*, op. cit.*, note 4.

[19] Kumm, *op. cit.*, note 16, p. 54.

[20] Kumm, *ibid.*, p. 61 – 62.

2.2 Contrapunctual Law

Miguel Poiares Maduro introduced his model of constitutional pluralism in 2003.[21] The starting point of his conception is the understanding of constitutionalism as a mechanism for balancing competing interests. He was led by an idea to set up a concept of European constitutionalism which can help to solve EU's existing constitutional problems whose origin actually lies in national constitutionalism. He defines three paradoxes of constitutionalism (the polity, the fear of the few and the fear of the many, who decides who decides). Each of these paradoxes represents countervailing values and none of them is superior, *i.e.* there is no single solution to be adopted.[22] However, national as well as EU constitutionalism do not reflect these paradoxes. They are examples of the so-called single constitutionalism since they concentrate often just on the one part of the problem and do not reflect the other countervailing issues. According to Maduro, it is therefore dubious to consider the national or EU constitutionalism as the model which is error free and which can solve problems inherent in it.[23] There is no reason why national constitutionalism should have higher claim than European constitutionalism, if the source of EU's constitutional problems lies in national constitutionalism.

On this basis, Maduro builds his conception of constitutional pluralism, where the question of ultimate authority has different answers in the EU and national legal orders. He stresses the fact that one of the essential characteristics of constitutionalism is the concept of divided powers which requires the decision on who has the ultimate authority to be left unresolved. By this statement he rejects any hierarchical conception of European constitutionalism, because it would undermine this basic mechanism.[24]

Maduro's aim is to construct a theory that can be applied to the relationship between EU and national legal orders and which focuses on constitutional questions generally and not only on who has the *kompetenz-kompetenz*. He analyzes approaches taken by national constitutional courts and concludes that their review of the EU acts aims mainly on the protection of the national constitutional identities. According to him, the FCC's *Solange*[25] doctrine can be read not only as a challenge to the authority of EU law but also as a preservation of uniformity

[21] Maduro, M. P. Europe and the Constitution: What if This is as Good as it Gets?. In: Weiler, J.H.H.; Wind, Marlene (eds.). *European Constitutionalism Beyond the State*. Cambridge: Cambridge University Press, 2003, p. 74 – 102.

[22] Maduro, *ibid.*, p. 81 – 100.

[23] Maduro, *ibid.*, p. 88, 100.

[24] Maduro, *ibid.*, p. 96 – 97.

[25] Judgment of 29 May 1974, *Solange I*, 37 BVerfGE 271; judgment of 22 October 1986, *Solange II*, 73 BVerfGE 339.

of EU law with some FCC's constitutional control aimed only on the protection of constitutional essentials. Maduro sees similar approaches also in decisions of other national courts such as Italian Constitutional Court[26] or Belgian *Cour d'arbitrage.*[27] Thus, although there are claims of the CJEU and some national constitutional courts to the ultimate authority, these courts actually only made necessary constitutional arrangements to prevent collisions between them.[28]

Maduro sees his conception not only as a pluralism of legal orders in one European legal order, but also as a pluralism of different legal actors. In fact, the construction of the EU legal order was a process of cooperation between national and EU actors. It is this cooperation that lies at a heart of the success of European integration. Hierarchical construction of the European legal order is not suitable also since there is still a shadow of veto by national courts with regard to the EU law.[29] Thus, there is a reciprocal relationship, on the one hand of national courts which have a responsibility of interpretation and implementation of EU law, and on the other hand of EU law which is dependent on national actors.

This state of affairs is reflected in Maduro's "contrapunctual law" which serves as an instrument for heterarchical organization of the European legal order. This constitutional pluralism "constitutes a form of checks and balances in the organization of power in the European and national polities."[30] The idea that underlies this conception is to organize national application and interpretation of EU law into a coherent system, where national courts would justify their decision with regard to the broader European context. As a consequence, this should reduce possible conflicts between the national legal order and EU law. Furthermore, contrapunctual law protects identity of the national legal orders as well as of the European legal order by requiring respect of European and national courts to each other, especially by respecting their constitutional boundaries.[31]

Principles of contrapunctual law ensure on the one hand the respect to competing claims of different legal actors and on the other hand the coherence of EU legal order. In Maduro's conception of constitutional pluralism, these principles must be respected by all EU and national actors. The first principle

[26] E.g. Case no. 170/84, *Granital v Amministrazione delle Finanze dello Stato.*

[27] E.g. Case no. 12/94, *Ecoles Europeenes.*

[28] Maduro, M. P. Contrapunctual Law: Europe's Constitutional Pluralism in Action. In: Walker, Neil (eds.). *Sovereignty in Transition*. Oxford: Hart Publishing, 2003, p. 509 – 510.

[29] Chalmers, D. Judicial Preferences and the Community Legal Order [1997] 60 *Modern Law Review*, 164.

[30] Maduro, *op. cit.*, note 21, p. 98.

[31] Maduro, *ibid.*, p. 99 – 100.

is "pluralism" which stresses the importance of plurality of equally legitimate claims of authority as well as equal participation of the different actors. That means that neither of the legal orders is supreme over another. The second principle is the "consistency" where the commitment to the vertical and horizontal discourse is needed by all the actors. Third principle is "universalisability" which means that national decisions concerning EU law must be justified in universal terms. The last principle is the "institutional choice," according to which legal orders must be aware of institutional choices in any possible instance of the broad European community.[32]

In his newer article,[33] Maduro develops his conception further by claiming that his theory of constitutional pluralism can contribute to the development of a constitutional theory of the EU. He stresses that constitutional pluralism is what best reflects the relationship between national and EU legal orders, that there is no answer to the question of final authority and finally that constitutional pluralism is what best pursue the ideals of constitutionalism. According to Maduro "constitutional pluralism does nothing more than adapt constitutionalism to the changing nature of the political authority and the political space."[34]

Compared to Kumm's theory, Maduro's contrapunctual principles apply not only to the constitutional conflict, but also to the relationship between EU and Member States as a whole.

3. Pluralism or monism?

It is clear that Maduro's and Kumm's conceptions of constitutional pluralism has much in common. Even Maduro himself, notwithstanding his previous criticism of Kumm for the lack of integrity and coherence,[35] accepts this similarity.[36] Although both authors have developed their theories of constitutional pluralism consistently, the question remains whether they done this in a way which still reflects constitutional pluralism.

To answer this question, we need to determine whether these two conceptions are truly pluralist, in a sense advocated by authors, or whether they share

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[32] Maduro, *op. cit.*, note 28, p. 526 – 530.

[33] Maduro, M. P. Three Claims of Constitutional Pluralism. In: Avbelj, Matej; Komárek, Jan (eds.). *Constitutional Pluralism in the EU and Beyond.* Oxford: Hart Publishing, 2012, p. 67–84.

[34] Maduro, *ibid.*, p. 82.

[35] Maduro, *op. cit.*, note 21, p. 100 and Maduro, M. P. The Heteronyms of European Law [1999] 5 *European Law Journal* 166 – 167.

[36] Maduro, *op. cit.*, note 33, footnote 68.

characteristics typical for monism as well. If the conclusion would be that they do not reflect pluralism of legal orders, we would need to stop labeling them as constitutional pluralism. In the following, we will analyze major problems relating to the description of these theories as pluralist.

In the case of monism, which both authors reject, EU law trumps even national constitutional law and "national deviations from that rule are only conceived as pathological instances".[37] To achieve this hierarchical nature, the monist legal order needs to be unified. The question is whether this unified nature is present in Kumm's and Maduro's pluralism. If this is the case, then there might be a contradiction between the formal titles of the theories and their actual material content.

According to both authors, there is a common background which is shared by the EU legal order as well as by the national legal order. Maduro considers, with the reference to Tuori,[38] "the EU and national legal order as autonomous but part of the same European legal system."[39] Furthermore, he emphasizes the interlocked character of the EU and Member States legal orders with a reference to how these two orders influence each other and to the institutional connections between them.

The basis of the Kumm's conception is the principle of constitutional fit which reflects that there are common normative ideals which are shared by EU and national legal orders. According to Kumm, these principles constitute basis for constitutional pluralism and thus reflect the pluralistic conception of the legal orders.[40]

In other words, in Maduro's and Kumm's conceptions the national legal order and the European legal order constitute coherent and harmonious system, respectively the system based on shared principles, which emphasizes heterarchy between legal orders. However, the question is whether this claimed heterarchy is even possible in the case of such connected legal orders and whether such a connection between them can be still considered as constitutional pluralism.

If the space between different legal orders is so paved by the common principles as asserted by authors, then there is no space for broader diversity, which must be present in the theories whose basic principle is the equality of different legal orders. Since this equality is missing from both conceptions, the relationship between legal orders presented by Kumm and Maduro cannot be called heterarchical. In reality EU law and the EU interests will prevail in

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[37] Maduro, *op. cit.*, note 28, p. 503.

[38] Tuori, K. The Many Constitutions of Europe. In: Tuori, Kaarlo; Sankari, Suvi (eds.). *The Many Constitutions of Europe.* Farnham: Ashgate Publishing, 2010.

[39] Maduro, *op. cit.*, note 33, p. 70.

[40] Kumm, *op. cit.*, note 6, p. 375.

most cases over national ones since the coherence of the EU legal order, which is advocated by both authors, cannot be achieved by prioritizing the constitutional principles of Member States, *i.e.* by establishing heterarchical relationship. This inequality between legal orders is more visible in Kumm's theory which explicitly states that EU law has the strong presumptive weight over national law which needs to be rebutted for the national law claim to be taken into account. According to Kumm, this approach is justified by the functional argument that EU needs to secure the common market. Although the stability of the common market is essential for the functioning of the EU, it is also the exact claim which lies at a heart of the arguments presented to justify monist conception by the CJEU in its case law.

The application of both theories would therefore lead to the situation in which national constitutional courts would affirm their constitutional authority only in the marginal cases as it is today. This would mean that the question of which law is the supreme law in Europe is, contrary to what both authors claim, actually resolved since EU law will prevail in the majority of cases with some marginal national deviations. Since constitutional pluralism should be pluralistic and should therefore establish heterarchy between legal orders which would cover much more than just these marginal cases, the Kumm's and Maduro's conceptions are *de facto* still hierarchical.

Both theories are trying to define a conception for the relationship between European and national legal orders which would establish a harmonious and predictable relationship. It would be desirable to have European legal space where everything works as perfectly as these theories claim,[41] where everybody simply talks to each other and where everyone recognizes the same universal principles. Nevertheless, these theories see the relationship between orders unified to such a degree that their underlying principles are more monist in nature than pluralist. It was even claimed that the application of Maduro's contrapunctual principles may in the end result in the primacy of EU law.[42]

4. Conclusion

The aim of this article was to answer the question whether Kumm's and Maduro's conceptions of constitutional pluralism are actually pluralistic or rather

[41] Komárek, J. European Constitutionalism and the European Arrest Warrant: In Search of the Limits of „Contrapunctual principles" [2007] 44 *C.M.L.Rev.* 9. Author highlights problems of application of these theories to decisions of national constitutional courts.

[42] Komárek, *ibid.*, p. 33.

monistic. We have shown some deficits regarding the pluralist labeling of the discussed theories. However, our aim was not to criticize the way how these theories describe European integration or some of its aspects, since we understand that these conceptions might have many advantages when applied to the European integration.

We particularly wanted to highlight that even theories which on the first sight respect equality of legal orders and establish heterarchy between them, can be, in the material sense, much closer to the monist conception. This conclusion might be also applied to other theories which call themselves constitutional pluralist but in reality they are only mutations of the monism, statism, and/or pluralism. This situation might also be a result of some fashion.[43] The theory, which aim is to define the relationship between EU and national legal orders, should be labeled as constitutional pluralist only if the characteristics of pluralism prevail over the characteristics of other conceptions.

Another question is to which extent the deeper pluralism might reflect the actual state of affairs in contemporary Europe. Sometimes theories such as liberal constitutional theory or contrapunctual law might be more suitable. However, that does not mean that they can be titled as pluralist, if their real content reflects monist conception.

Although that both authors are trying to avoid taking positions where one legal order is to some degree supreme over another, they are still, as many others, rooted in the monist conception.

[43] Baquero Cruz, J. The Legacy of the Maastricht Judgment and the Pluralist Movement [2008] 14 *European Law Journal* 389.

Basic Aspects of Approximation of Ukrainian Insolvency and Restructuring Law with European Union Legislation

Anastasiia Fialkovska*

Summary: The urgency of the approximation of Ukrainian Insolvency Law with EU legislation was justified in the article. The definitions "insolvency" and "bankruptcy" were analyzed. The main goals and principles of EU Insolvency Law were described. The main aspects of the Insolvency Law in Ukraine were characterized. The state of approximation of Ukrainian Insolvency Law with EU legislation and outstanding issues of this process were analyzed. Restructuring as a new approach to business failure and insolvency was characterized. The main conclusions about the next stages of approximation were given.

Keywords: approximation, insolvency, bankruptcy, restructuring.

1. Introduction

Today insolvency is recognized as a natural phenomenon of the market environment. With the mechanisms contained in the insolvency law, mixed economy "cleans" itself from unpromising business entities, which are due to the use of bankruptcy procedures restructure their activities or leave market.

Despite the fact that the insolvency legislation is not mentioned as a subject for immediate approximation with European Union law, it is an important indicator of market reforms, and also acts as an indicator of a certain degree of success of reforms in the sphere of economics and law.

Actuality of approximation insolvency law may be proved by the fact that insolvency is one of civil matters. The field of judicial co-operation in civil matters is designated as an area of shared competence and the principles of subsidiarity and proportionality rule the division of powers between the Union and the Member States. Within this category, the EU has produced a number of legislative acts aimed at unifying the rules between member states and thus facilitating access to justice, including Regulation on insolvency proceeding.

* Ph.D. candidate at Faculty of Economic and Management of Production, Odessa National Economic University, Ukraine. Contact: fian192@gmail.com.

2. Bankruptcy versus Insolvency

The term insolvency is commonly confused with bankruptcy. Although both insolvency and bankruptcy refers to a situation whereby a legal entity's liabilities exceeds assets, insolvency refers to a financial state where as bankruptcy is a distinct legal concept as a matter of law.

Insolvency is defined as a financial condition or state when:

- a legal entity or a person's debts exceeds their assets;
- when a legal entity or person can no longer meet their debt obligations on time as they fall due.

Upon becoming insolvent, the legal entity or person must take immediate action to rectify the situation as soon as possible, in order to avoid possible bankruptcy.

Bankruptcy is defined as the result of a successful legal procedure that results from:

- an application to a relevant court by a legal entity or a person to have themselves voluntarily declared bankrupt;
- an application to the relevant court by a creditor of a legal entity or a person in order to have that legal entity or person declared bankrupt;
- a special resolution which a legal entity files with the Registrar of Companies in order to be declared bankrupt.

A state of insolvency can lead to bankruptcy. However, it is also possible that the state of insolvency could be temporary and fixable. Thus, insolvency does not necessarily lead to bankruptcy, but all bankrupt legal entities or persons are deemed to be insolvent.

3. EU Insolvency Law

Today in Europe half of all businesses do not survive the first 5 years of their existence. In the EU 200,000 firms go bankrupt per year – that is 600 a day, resulting in direct job losses of 1.7 million every year. Around a quarter of these bankruptcies concern businesses that work cross-border. This information reflects the importance of the development and improving of insolvency regulation.

At the beginning of the European unification process, cross-border insolvencies were governed by the international insolvency laws of the member states – as modified by bilateral treaties – only. It soon became clear that there was a need to establish common rules governing cross-border insolvencies. However, it took several decades to agree on such rules.

On 29 May 2000, the Council of the European Union adopted the Regulation on Insolvency Proceedings[1]. The European Insolvency Regulation was followed by two directives on the reorganisation[2] and winding-up of insurance undertakings and, respectively, credit institutions[3], both adopted by the European Parliament and the European Council.

The EU Insolvency Regulation entered into force on 31 May 2002. As a regulation, it does not need to be implemented by the member states but has to be directly applied by national courts. The most part of member states have also implemented both directives and amended their national laws accordingly.

EU Insolvency Regulation contains:

1. Insolvency procedural law – regulates the jurisdiction for insolvency proceedings, and some aspects of their course.
2. Insolvency substantial law – regulates e.g. the position of „liquidator".
3. Insolvency conflict rules – regulates the law applicable for the concrete proceedings.

The main purposes of the Regulation are to impose rules governing the jurisdiction in which an insolvency proceeding in the EU can be opened and subsequently administered, and to set rules for the recognition in other member states of those insolvency proceedings and the enforcement of those proceedings.

One of the main points that makes difference between European and International Insolvency procedural law is principle of controlled universality.

The international insolvency law is based upon principle of universality, i.e. the intention is to cover all debtor's assets no matter whether they are situated. The European insolvency law is based upon principle of controlled universality. According to it:

1. one insolvency proceeding shall exist, so called primary insolvency proceeding, which affects all the assets of the debtor;
2. the liquidator appointed in this proceeding may exercises his powers in another Member State, as long as no other proceeding has been opened there (Liquidator – any person of body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs);
3. beside this primary proceeding, secondary proceeding may exist in another state which may affect only the assets situated on the territory of that state and support the primary proceeding.

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[1] Council Regulation (EC) No 1346/2002, OJ L160/30.6.2000

[2] Directive 2001/17/EC on reorganisation and winding up of insurance undertakings of 19 March 2001 entered into force on 20 April 2003

[3] Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutii ons entered into force on 5 May 2004

Besides of this key principle, there are some another principles of EU Insolvency Law. They have been captured in the Principles of European Insolvency Law that have been presented in Brussels in June. The Principles are the result of looking beyond and behind these differences in structure, scope, concepts and formulation.

The Principles were presented as "….. the essence of insolvency proceedings in Europe as they reflect, on a more abstract level, the common characteristics of the insolvency laws of the European Member States". The other aim of the Principles is to provide a foundation for greater harmonization.

These Principles are dealt with the following topics:

§ 1 Insolvency proceeding
§ 2 Institutions and participants
§ 3 Effects of the opening of the proceeding
§ 4 Management of the assets
§ 5 Obligations incurred by, and fees of, the administrator
§ 6 Treatment of contracts
§ 7 Position of employees
§ 8 Reversal of juridical acts
§ 9 Security rights and set-off
§ 10 Submission and admission of insolvency claims
§ 11 Reorganization
§ 12 Liquidation
§ 13 Closure of the proceeding
§ 14 Debtor in possession

The Principles are followed by a General Commentary[4]. It starts with a brief introduction to the problem, followed by an explanation of the Principle itself. The Commentary does not provide exhaustive comparative reflections, but sketches in charcoal with references to approaches and solutions of national insolvency law systems. It furthermore indicates where these systems substantially deviate from a particular Principle and refers, where appropriate, to articles of the EU Insolvency Regulation[5]. The Principles focus mainly on business insolvency, do not deal with insolvency proceedings concerning e.g. insurance undertakings and credit institutions, do not address voluntary debtor-creditor-arrangements ("work outs") outside insolvency law, do not include obligatory information systems which have been set up in some countries

[4] Written by professors McBryde (Scotland) and Flessner (Germany).

[5] The EU Insolvency Regulation has chosen – not unquestionably – to refer to the "liquidator" as the person who administers or liquidates assets. The Principles use the term "administrator".

and do not address the issue of liabi1ity of directors and shareholders, as the grounds of liability can be manifold and vary from country to country. The Commentary is followed by ten National Reports. These reports are all structured in more or less the same manner and contain information on the most important types of insolvency proceedings, the players (institutions and participants involved in these proceedings), the protective effect of insolvency proceedings, the position of creditors and other important issues such as the reversal of juridical acts, set-off, the effect of insolvency on existing contracts and the adoption, contents and effects of reorganization plans and compositions. These National Reports are written with admirable oversight and clarity. The Principles, with its Commentary and the National Reports, here serve two other aims. They will enable lawyers with different national backgrounds to understand better the existing systems of insolvency law in Europe. With the coming into effect of the EU Insolvency Regulation there clearly is a need to understand the insolvency laws of the Member States better. It therefore may be regretted that the publication[6] lacks reports from Austria, Greece, Finland, Portugal and Sweden. It may be noted however that Principle 14 recognizes the DIP principle, where according to the Commentary every jurisdiction covered nowadays provides for an alternative, next to the classic insolvency (liquidation) proceeding, where the debtor is left in possession during a reorganization of his liabilities.

The Principles, although limited in scope and concerned countries, are a first attempt to tackle an area of (international trade) law that is of great commercial importance. After several decades of discussion and studying the differences some would never have thought that common foundations in Europe in this domain could be revealed. In the much shorter term the Principles, its Commentary and the National Reports provide scholars and practitioners with a much needed catalogue raisonné, bringing to the surface common foundations, policies and effects in constituent parts of Europe's insolvency law.

4. Ukrainian Insolvency Law

In Ukrainian Insolvency law in the section "General provisions" the definition of bankruptcy and insolvency are given:

[6] W.W. McBryde, A. Flessner and S.C.J.J. Kortmann (eds.), Principles of European Insolvency Law, Series Law of Business and Finance, Volume 4, Kluwer Legal Publishers, Deventer, The Netherlands, 2003; ISBN 90 130 0597 7.

- Bankruptcy – an economic court established inability of the debtor to restore its solvency and fulfill the creditors' claims allowed by the court, other than through liquidation procedure[7].
- Insolvency – inability of a subject of business activities to fulfill its pecuniary obligations to its creditors, other than through solvency restoration[8].

In EU Insolvency Law there is no strict definitions, but in our opinion, the definitions of Ukrainian law are similar or even the same like in international insolvency law.

The main legal act in the field of insolvency in Ukraine is Law "On Re-establishing Solvency of Debtors or Recognition of Debtors' Bankruptcy" which was adopted on 14 May 1992.

It includes insolvency procedural and substantial law which are reflected in ten sections of this legal act.

It was the first attempt to regulate lawfully the legal relationships of insolvency. The Law was rather poor and had only 22 articles which did not provide the necessary detailed regulatory requirements. The declared goal of the law was to regulate the judicial procedure of the bankruptcy (liquidation) of legal entities in order to satisfy creditors' claims.

The main drawback of the law was that it did not provide specific mechanisms for stoppage of the fulfillment of monetary obligations and tax obligations (mandatory payments) by a debtor, as well as the stoppage of legal measures to enforce these obligations. Since, at that time, the institute of professional insolvency practitioners (asset managers) did not exist, their functions were performed by creditors (who usually do not have the knowledge needed to carry out liquidation procedures). Technical and legal flaws of this Law were exclusively resolved by legal practice and relevant interpretations of the Supreme Economic Court of Ukraine. The said Law also contained provisions on reorganization, but the mentioned flaws prevented their use. And the unfavorable investment climate in Ukraine combined with the procedures of restoring solvency inhibited foreign investors from participating in the process.

In 1994, the Agreement on Partnership and Cooperation (hereinafter – PCA) was signed between Ukraine and the European Community and its Member States. Ukraine began the process of bringing national legislation up to EU standards, especially in certain priority areas (Article 51 of the PCA), including bankruptcy of companies. It was the improvement of bankruptcy law in order

[7] p. 2, The Law of Ukraine on Re-establishing Solvency of Debtors or Recognition of Debtors' Bankruptcy

[8] p. 2, The Law of Ukraine on Re-establishing Solvency of Debtors or Recognition of Debtors' Bankruptcy

to bring its provisions to EU norms and standards, in particular, to Council Regulation 1346/2000/EC of 29 May 2000 on insolvency proceedings.

Unlike previous versions of the law, the mechanism of the proceedings in bankruptcy cases was built on the principles of competition of creditors as the orderly collective satisfaction of creditors' claims. This version remained very far from perfect but eliminated many of the shortcomings of its predecessor. Specifically, a moratorium on the satisfaction of creditors' claims, a bankruptcy law sub-institute, was founded. Creditors were divided into two groups, long-term and current ones. Creditor's status (rights and obligations) in the bankruptcy case was determined by the nature of its claims against the debtor, its security, the time the commitment was incurred and its social significance. The particular emphasis of the Law was solvency restoration procedures. Accordingly, the debtor was granted more rights and preferences.

The adoption, in 2004, of the Commercial Code, which provided clarification of substantive norms in insolvency procedures, became an important development in the reform of bankruptcy law.

But as the law was developed by foreign advisers, it was not duly mesh with the existing legislative system, containing legal constructions which had been unknown in Ukrainian legislation and did not take into account the legal practice. Accordingly, many gaps and inconsistencies of the Law were settled by case-law, and with information letters and interpretations of higher courts. This state of the regulation, coupled with the significant growth of corruption in the judiciary of Ukraine led to that the proceedings in the bankruptcy cases in fact became a procedure for legitimizing crimes in the economic sphere and a tool for dispossession of participants in economic relations.

So, according to Doing Business, bankruptcy procedure in Ukraine lasts an average of 2.9 years, and the recovery rate is 8.2 cents per 1 dollar. It is among the worst in the region. Based on these data the IMF required the insolvency procedures to be reformed as one of the basic requirements for continued cooperation with the Government[9]. The main goal of the reforms should have been to provide a reliable protection of creditors' interests and to reduce the duration of the procedures in bankruptcy cases and the costs of these procedures. Moreover, the updated regulation should have been based on the proposals of the experts and consultants of the World Bank and the International Monetary Fund. In particular, the need to reform the bankruptcy system in the context of improving other areas of legislation was emphasized, including adapting the juridical system to the needs of effective bankruptcy proceedings through the implementation of appropriate corporate governance and institutional support

[9] p. 22 of the Memorandum of 2010

for the effectiveness of the bankruptcy system and appropriate state and non-state regulation. In accordance with the latest version of the Principles for Effective Insolvency and Creditor Rights Systems (2011), the developers suggested the use of advanced mechanisms as a means to maximum protection of the interests of the participants of bankruptcy proceedings, a new system of monitoring, diagnosing and protecting businesses from financial problems and crises and finding optimal ways to overcome insolvency. In particular, an attempt was made to improve bankruptcy proceedings; new ways of protecting the rights and legitimate interests of both debtors and creditors, as well as employees and the state were introduced; for the purpose of economy and efficiency a procedure for pre-trial rehabilitation of debtors was introduced, and the jurisdiction of all matters in dispute with the debtor was given to the commercial court which considered the bankruptcy case of the debtor.

As the Government of Ukraine is in constant need of external borrowing, a new phase of reform was started.

5. The state of approximation of Ukrainian Insolvency Law with EU legislation

During last five years some steps to approximate Ukrainian insolvency law with EU legislation have be done. On 18 January 2013 the Law of Ukraine on Introducing Changes to the Law on Re-establishing Solvency of Debtors or Recognition of Debtors' Bankruptcy came into effect. It makes a number of important changes to insolvency procedures in Ukraine.

The New Insolvency Law provides better protection for creditors whose claims are secured with a pledge. It also changes the framework for starting and carrying out an insolvency procedure in the Ukrainian commercial courts. There are also changes to the out-of-court debtors' rehabilitation procedure which may be followed before starting insolvency proceedings at a commercial court. The New Insolvency Law adds a new chapter of legislation on international cooperation in cross-border insolvency procedures (table 1).

A significant change concerns the restrictions on when unsecured creditors can join ongoing insolvency proceedings at a commercial court. Previously an unsecured creditor wishing to join proceedings had to file its claim within thirty days from the date of official publication of the start of proceedings. This period could not be extended, which meant that if an unsecured creditor missed the deadline, it could not join the proceedings regardless of the significance of its claims against the debtor. Now commercial courts handling insolvency cases will be obliged to accept the claim even if it was filed after the expiry

of the thirty-day period. Such claims, however, may only be satisfied after the claims filed by unsecured creditors on time have been considered.

Table 1: The structure of the Ukrainian Insolvency Law before and after reformation in 2013

Before18 January 2013	From 18 January 2013
SECTION I. GENERAL PROVISIONS SECTION II. BANKRUPTCY PROCEEDINGS SECTION III. LIQUIDATION SECTION IV. AMICABLE SETTLEMENT SECTION V. TERMINATION OF BANKRUPTCY PROCEEDINGS SECTION VI. SPECIFIC FEATURES OF BANKRUPTCY OF CERTAIN CATEGORIES OF BUSINESS ENTITIES SECTION VII. FINAL PROVISIONS	SECTION I. GENERAL PROVISIONS SECTION II. BANKRUPTCY PROCEEDINGS SECTION III. LIQUIDATION SECTION IV. SALE OF PROPERTY IN BANKRUPTCY PROCEEDINGS SECTION V. AMICABLE SETTLEMENT SECTION VI. TERMINATION OF BANKRUPTCY PROCEEDINGS SECTION VII. SPECIFIC FEATURES OF BANKRUPTCY OF CERTAIN CATEGORIES OF BUSINESS ENTITIES SECTION VIII. ARBITRATION MANAGER (ASSET MANAGER, LIQUIDATOR) SECTION IX. BANKRUPTCY PROCEEDINGS RELATING TO FOREIGN BANKRUPTCY PROCEDURE SECTION X. FINAL PROVISIONS

The New Insolvency Law requires that if a creditor files a claim expressed in foreign currency, the value of the claim must be specified in Ukrainian Hryvnias according to the National Bank of Ukraine's official exchange rate on the date the claim is filed with the court.

The New Insolvency Law requires that an out-of-court debtors' rehabilitation procedure be established and approved at a general creditors' meeting. It should then be filed with the relevant commercial court for final approval. The term of the rehabilitation procedure may not exceed twelve months from the day the plan is approved by the commercial court. During this term, it is not possible to start insolvency proceedings.

Another significant change is that secured creditors are now protected even if they are excluded from the creditors' committee. The debtor's secured assets are isolated from the main asset pool and reserved for settling secured creditors' claims. Secured creditors now also have the right to reject a reorganization plan approved by the creditors' committee and to withdraw from insolvency proceedings by having their claims settled by selling the pledged assets or by a direct purchase of the debt by other creditors.

Under the New Insolvency Law, official publication of the start of insolvency proceedings must be made on the official website of the High Commercial Court of Ukraine. Overall, the New Insolvency Law provides for more comprehensive and progressive regulation of the insolvency procedure and changes it in accordance with current economic and legal developments.

6. Outstanding issues of approximation

However, there are still some outstanding issues. Ukrainian Insolvency law contains provisions that can be regarded as discriminatory. Under certain provisions of the law, not all business organizations may be recognized bankrupt, which violates one of the fundamental principles in the field of competition. Insolvency law excludes state-owned enterprises from the range of subjects of bankruptcy law. This can be regarded as a violation of the basic principle of competition in the countries with developed market relations – all market participants should be equal and the law should apply to all legal subjects equally.

The other problem is that Insolvency law gives local governments the right to decide that bankruptcy proceedings against municipal enterprises can not be brought.

Thus, without a reform of Insolvency Laws, on the one hand, Ukraine will not be able to implement market reforms effectively, and on the other – some problems will arise outside the country if it will be necessary to protect their interests and property rights of Ukrainian businessmen. It is no coincidence that foreign investors do not yet see the advantages of investing in Ukraine (success stories) from the use of bankruptcy procedures to address the debt problems.

7. Restructuring: a new approach to business failure and insolvency

In March 2014, the European Commission published its "Recommendation on a new approach to business failure and insolvency". The primary subject of the Recommendation is the legal treatment of distressed but viable businesses. Its main objective is to ensure that viable enterprises in financial difficulties, wherever they are located in the Union, have access to national insolvency frameworks which enable them to restructure at an early stage with a view to preventing their insolvency, and therefore maximize the total value to creditors, employees, owners and the economy as a whole.

The Commission defines restructuring as a process by which the "composition, conditions, or structure" of a debtor's assets and liabilities are changed, "with the objective of enabling the continuation, in whole or in part" of its business activities.

The Commission has expressed concern at reports that distressed but viable businesses are being channeled into liquidation proceedings in some Member States. The result may be the break-up of business assets to be sold on a piecemeal basis, even though the business is worth more to creditors (and to other classes of stakeholders, such as employees) when preserved on a going concern basis. A restructuring is one way to preserve the value of such a business. A restructuring of liabilities (for example, through the write-down of debt or, in the case of a company, the conversion of debt to equity) could be used to restore the debtor to solvency so that it can continue to trade. Achieving this will require negotiation with affected creditors to procure their consent to compromise or otherwise alter their rights against the debtor. A restructuring procedure provided by law can, however, offer tools to facilitate reaching agreement – for example, by providing that in certain circumstances the decision of a prescribed majority of creditors to accept a restructuring plan can also bind dissenting creditors to the plan. Such tools can be provided within an insolvency code (for example, as part of a corporate rescue or reorganization procedure), or outside it – as in the case of the English scheme of arrangement.

The Commission's Recommendation is primarily focused on this type of restructuring tool – that provided by law to facilitate the negotiation of a binding restructuring agreement. It should be emphasized at the outset that it is perfectly possible to achieve such an agreement without recourse to a restructuring or insolvency procedure provided by law. Creditors can negotiate informally with a debtor to achieve a restructuring by consensus. Creditors with sufficiently similar interests and incentives (such as banks) may also develop their own restructuring processes, for use where a debtor with exposure to multiple creditors of that class becomes distressed. More formally, creditors or classes of creditors (such as bondholders) may commit themselves, before distress, to a restructuring process in a contract. These solutions may be more desirable than recourse to a formal procedure provided by law, not least because they may be less costly to achieve – recourse to formal restructuring or insolvency procedures can involve significant direct and indirect costs. Achieving such a solution may, however, be easier in the presence of a legal procedure that parties can "bargain in the shadow of", knowing that if they fail to cooperate, formal (public and costly) proceedings may have to be commenced. In addition, there will be some circumstances in which informal, industry or contractual solutions to distress are inappropriate (for example, because creditor interests

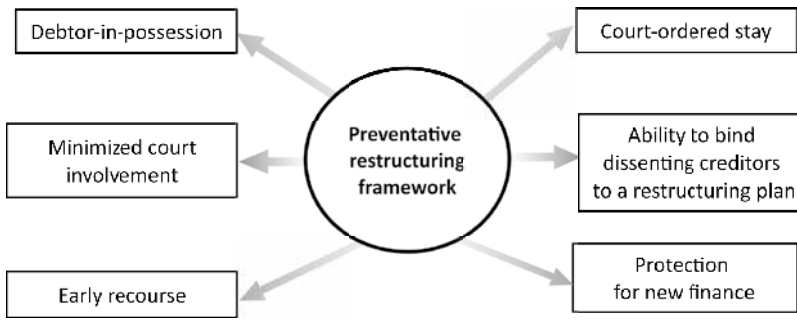
and incentives are too diverse to permit effective coordination), and then the presence of a restructuring procedure provided by law may be of direct utility to stakeholders.

In Ukrainian legislation the definition of restructuring is given in Insolvency: it is carrying out organizational, economic, legal, and technological measures to reorganize an enterprise, specifically through dividing the enterprise and transferring its debt obligations to the legal entity that is not subject to sanation, if this is stipulated by the sanation plan, and also change its management, forms of ownership, organizational and legal forms, which will facilitate the enterprises' financial rehabilitation, increase in the turnout of competitive goods, and efficiency in operating the enterprise and satisfying creditors' claims.

It is more broad. But in general this definition has the same context like EU's.

There are six core principles emphasized in the Commission's recommendations for a "preventative restructuring framework" in each Member State (Fig. 1).

Figure 1: Core principles of restructuring



These principles are complementary and as such should be analyzed together, rather than in isolation. The six principles are:

1. Early recourse: the Commission recommends that a debtor be able to have recourse to the restructuring framework at an early stage, before factual insolvency. In Member States where restructuring tools are presently contained within insolvency procedures that can only be commenced after a debtor is insolvent, adherence to this principle would require a change in the law to make such tools available earlier, without recourse to the full insolvency procedure. The Commission does not, however, recommend unrestricted access to its restructuring framework. To prevent misuse of the procedure by solvent companies (for example, as a device to coerce

a compromise where the debtor is fully capable of fulfilling its existing obligations), the Commission recommends restricting the availability of the framework to debtors already in "financial difficulties", such that there is a "likelihood of insolvency".

2. Minimized court involvement: the Commission recommends permitting a debtor to have recourse to the restructuring framework without the need to formally open court proceedings. More generally, it emphasizes the need for a swift and inexpensive procedure, and as such recommends restricting court involvement to circumstances where necessary and proportionate to safeguard the rights of creditors and others affected by a proposed restructuring plan (see principle 5 below). The Commission does contemplate the involvement of a court in some other limited circumstances (including where the debtor seeks a stay of creditor enforcement action; see principle 4 below), but its overall emphasis is on minimizing the need to have recourse to a court. Conformity with this principle could require significant change in jurisdictions that presently require courts to undertake a wider range of tasks in a restructuring process (for example, holding meetings for creditors to vote on a plan).
3. Debtor-in-possession: the Commission recommends that the debtor "keep control over the day-to-day operation of its business" while the restructuring framework is used. This principle is designed to ensure that the business can continue to be run while the possibility of restructuring is explored, with minimal disruption to ordinary operations. Leaving the debtor in control of the business may also help to incentivize early entry into the framework, consistent with principle 1. The principle of leaving managers in control might be regarded as controversial in jurisdictions that presently require the relinquishing of control in insolvency processes, but there is no necessary inconsistency. The Recommendation focuses on legal tools to enable restructuring, and not on the broader question of the design of insolvency procedures (which typically involve a much wider range of activities, such as investigations into managerial conduct, and the avoidance of pre-insolvency transactions).
4. Court-ordered stay: the Commission recommends that the debtor be empowered to seek a stay of individual creditor enforcement action (including by secured creditors), by application to a court. The stay is designed to enable the assets of the business to be kept together, preventing their piecemeal dismemberment by creditors. Since a stay impinges on the ordinary rights of creditors to enforce on default, its availability might in some circumstances be predicted to increase rather than decrease the cost of credit ex ante. For this reason, the Commission recommends a series of safeguards,

including time limits (initial stay of up to four months, subject to renewal up to a maximum duration of 12 months), and an obligation to lift the stay when no longer necessary to facilitate the adoption of a restructuring plan. The Commission also contemplates Member States imposing other conditions on the availability of the stay. States might, for example, require evidence of the viability of a debtor's business, so as to exclude use of the procedure by non-viable businesses (that is, those whose assets are not worth more kept together than broken up in a piecemeal sale). The Commission does however recommend that the stay be granted where creditors with a "significant" amount of claims support the negotiation of a restructuring plan, and the plan has a reasonable prospect of being implemented and of preventing the debtor's insolvency.

5. Ability to bind dissenting creditors to a restructuring plan: the Commission recommends that the restructuring framework provide for a plan to be negotiated between debtor and creditors (secured or unsecured), and – where approved by the requisite majority of creditors in affected classes – sanctioned by a court, with the effect that dissenting creditors are bound by it. The Commission also recommends power to sanction a plan approved by some classes but not others, with the result that it would be possible for a majority of classes to bind dissenting classes (that is, for those classes to be "crammed down"). Various safeguards are called for, including a requirement that the plan does not reduce the rights of dissenting creditors below that which they might reasonably be expected to have received if the debtor's business had instead been liquidated or sold on a going concern basis, as the case may be. Procedural requirements are also stipulated to ensure creditors are notified of the plan, can object to it, and can appeal against it. As others have noted, aspects of the Commission's proposals for restructuring plans appear to borrow from the English scheme of arrangement procedure, which enables a court to sanction a binding scheme that has the consent of the prescribed majority of creditors (or of creditors in an affected class), subject to a range of substantive and procedural safeguards. It is important to acknowledge that the administration of this scheme procedure with due safeguards has required significant judicial input and expertise (for example, to develop principles for the proper constitution of classes).
6. Protection for new finance: the Commission recommends that those who provide new finance to a debtor in accordance with the terms of a court-sanctioned restructuring plan be shielded from the operation of avoidance provisions in insolvency law, and from "civil and criminal liability relating to the restructuring process", except in the case of fraud.

8. Conclusions

Regulation of relations in the sphere of bankruptcy is aimed at ensuring equal protection of creditors and the debtor, the creation of open and clear rules for economic agents on the market – both domestic and foreign. Perspective Ukraine's membership in the EU requires the adaptation of bankruptcy legislation to the European standards. However, some provisions introduced in the new edition of the Law of Ukraine "Re-establishing Solvency of Debtors or Recognition of Debtors' Bankruptcy", not only do not meet the European requirements of the unified law on bankruptcy, but reject the accumulated achievements in restoring the solvency of business entities. Some positions and contradictions contained in the specific requirements complicate their prospective application and may lead in practice to a reduction of the expected effect.

One way to solve this problem in Ukraine is legislative regulation-making process of regulatory legal acts of subjects of the rule-making and accounting of provisions. The necessary condition and the main principle of a rule-making process is the legitimacy as an objective of property rights as a whole.

Thus, creating a national state legal system in accordance with EU regulations, it is necessary at the same time adapting existing laws to take new ones, agreed with the legal field of the EU legislation. It is important to consider that the process of approximation of Ukrainian legislation requires the harmonious cooperation of all branches of government.

Approximation of the Ukraine Competition Law with the EU Law

Iuliana Kikhaia*

Abstract: The author of this paper focuses on the issues of approximation of the Ukrainian competition law with the EU law. She also compares the main existing forms of adaptation of the legislation (approximation, harmonization, unification). In the paper further are described the historical background of the competition law development; the main categories of the competition law of the EU and Ukraine are compared.

Keywords: Approximation, harmonization, unification, competition, competition law, horizontal and vertical agreements, anticompetitive agreements, abuse of a dominant position, concentration.

1. Introduction

In the last decade of the XX century (after Declaration of Independence) Ukraine embarked on the building of a democratic state, transition to the market economy with effectively functioning mechanism of competition. Ukraine elected integration into European economic and political legal space as its geopolitical strategic direction. Today, this line defines the priority principles of domestic and foreign policy of Ukraine. For the first time one of the priorities of Ukraine's foreign policy to enhance the participation in the European cooperation was enshrined in the Resolution of the Verkhovna Rada of Ukraine № 3360–12 from 02.07.1993 «About main directions of foreign policy of Ukraine».[1] The first practical step towards realization of the European integration strategy, which initiated a partnership between the European Communities and their Member States and Ukraine was signing in 1994 the Partnership and cooperation agreement.[2] In the Strategy of Ukraine's integration into the

* Ph.D. candidate at Faculty of Economic and Management of Production, Odessa National Ecoe nomic University, Ukraine. Contact: uliana_kih@ukr.net.

1 About main directions of foreign policy of Ukraine, Resolution of the VRU 1993, № 3360–12, the Official Journal of the Verkhovna Rada (hereinafter to as «OJVR»), 1993, № 37, p. 379.

2 Partnership and cooperation agreement between the Ukraine, of the one part, and the European Communities and their Member States, of the other part, OJVR 1994, № 46, p. 415.

European Union, approved by the Decree of the President of Ukraine from 11.06.1998 p. № 615/98[3], which was aimed at ensuring Ukraine's accession to the European political, information, economic and legal space, adaptation of Ukrainian law to the EU law was identified as one of the main directions of the integration process.

The current stage of Ukraine's European integration development characterized by signing the political chapters of the EU-Ukraine Association Agreement on the EU Summit on 21 March 2014, and signing the remaining sections of the Association Agreement on 27 June 2014 (which will enter into force once all EU Member States have ratified it).[4] Today as previously one of the main preconditions for the success of these processes is achieving an appropriate level of consistency of the Ukrainian legislation with the European Union legislation.

Art. 1 of the Strategy of Ukraine's integration into the European Union determines adaptation of Ukrainian law to the EU law as «convergence with contemporary European legal system, that will ensure development of political, business, social and cultural activity of Ukrainian citizens, economic development of the state within the EU framework and will facilitate the gradual growth of citizens welfare, bringing it to the level existing in the EU Member States. Adaptation of Ukrainian law envisages reforming of its legal system and gradually brought it in line with European standards». Thus, one of these paper goals will be a brief overview of definitions that define the category of "law adaptation" (approximation, harmonization, unification) to identify the most optimal for Ukraine in its current development of European integration strategy.

In the Art. 10 of one of the EU's most ambitious bilateral agreements, The Deep and Comprehensive Free Trade Area (DCFTA)[5] – part of the Association Agreement between the EU and the Republic Ukraine, focused on protection of competition, prohibition and punishment for acts that distort competition and trade.[6]

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[3] Strategy of Ukraine's integration into the European Union, available at: http://zakon1.rada.gov.ua/laws/show/615/98 [28.06.2015].

[4] A look at the EU-Ukraine Association Agreement, available at: http://eeas.europa.eu/top_stories/2012/140912_ukraine_en.htm [28.06.2015].

[5] The Deep and Comprehensive Free Trade Area (DCFTA), available at: http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150981.pdf [28.06.2015].

[6] Chapter 10 of DCFTA established the following provisions: «the Parties prohibit and sanction certain practices and transactions which could distort competition and trade. Anti-competitive practices such as cartels, abuse of a dominant position and anti-competitive mergers will be subject to effective enforcement action. The parties agree to maintain effective laws and an appropriately equipped competition authority. Both Parties agree to respect procedural fairness

Thus, in these paper, taking into account the belonging of protection the economic competition relations to the important issues of the Ukrainian integration process, will be considered the role and importance of competition at ensuring industrial competitiveness, will be given a brief characteristic of the historical background of the competition law development and also will be conducted the comparative analysis of general categories of the EU and Ukrainian competition law in order to identify the extent of their compliance and recommendations for final approximation.

2. Forms of the law adaptation (approximation, harmonization and unification): comparative review

As noted above, an important prerequisite for successful realization of EU-Ukraine integration is the adaptation of Ukrainian legislation to the EU law. In Ukrainian legislation (The concept of Ukraine's legislation adaptation to the European Union legislation, approved by the Resolution of the Cabinet of Ministers of Ukraine from 16.08.1999 № 1496) adaptation of the legislation is defined as the process of convergence and gradually bringing into conformity with EU law.[7] Ukrainian Act about the national program of Ukraine's legislation adaptation to the EU law[8] from 18.03.2004 sets the purpose of Ukrainian law adaptation – achieving compliance with acquis communautaire.

It should be noted, that in the European communities till 1990s issues of harmonization and approximation of law belonged only to the competence of the Member States, Associated States should not have deal with such matters. And only from 1990s approximation of law started to be the obligation of Associate States. It is also important to note that European law by itself does not define these categories. But they are quite substantially discussed in the juridical scientific literature.

In current legal scientific thought under «approximation» is understood: «the process of adoption, amendment or repeal of law to align the provisions of national law with the provisions of the EU law to create appropriate conditions

and firms' rights of defense. Ukraine will align its competition law and enforcement practice to that of the EU *acquis* in a number of fields. Competition law will apply to state-controlled enterprises. This ensures that companies of both Parties have equal access to each other markets and there is no discrimination by monopolies…».

[7] The concept of Ukraine's legislation adaptation to the European Union legislation, available at: http://zakon4.rada.gov.ua/laws/show/1496–99-п [28.06.2015].

[8] Ukrainian Act about the national program of Ukraine's legislation adaptation to the European Union legislation, OJVR, 2004, № 29, p. 367.

for the implementation of the EU legal order».[9] In other words, approximation is a one-direction adaptation of Associated State law to the EU law.

In contradistinction to «approximation» the term «harmonization» involves «bringing into conformity» and is used to characterize «the process of adaptation of legal norms of the Member States only, i.e. exclusively within the EU».[10]

In comparison with harmonization «unification» is «the process of implementation uniform legal norms in national legal systems to the convergence of legal systems or creating the basis for a common international legal system. A common way for law unification is international legal conventions, which formed regulatory requirements that are subject to implement in national legal systems unchanged».[11] In other worlds, the result of unification is a complete changing of individual features of Member States national legal orders and the adoption at EU level the new legal order.

Thus, terms «harmonization» and «unification» define the processes occurring within the EU itself (with the participation of Member States on establishing the EU legal order). In turn, Associated States aims its activity at approximation of national legislation to EU law. So, Ukraine at the present stage of its European Union integration (it also directly defined in the Association Agreement) should approximate its national legislation to the European Union law.

The process of approximation, as noted by doc. *Šišková N.*[12] involves the necessity to carry out the following actions:

1) previously adopted rules of law must be brought into compliance with EU law and newly adopted legal rules already must comply with EU law;
2) also the State, which approximate its legislation, must take into account the projects of the European Union law published in the EU Official Journal and important laws of Member States as well.

Later (after acquisition of full membership in European Union) the State, which approximates its legislation, will receive the right to develop the European Union legal order together with over Member States.

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[9] Zabigajlo, V.K. (2000). Ukrainian Law in the context of the approximation to EU Law. *Ukrayino-yevropejs`ky`j zhurnal mizhnarodnogo ta porivnyal`nogo prava [Ukraine, European Journal of International and Comparative Law]* ,vol. 1, pp. 7–13 (in Ukr.).

[10] *Šišková, N.* (ed.). From Eastern Partnership to the Association. A legal and political analysis, 1st edition, Cambridge Scholars Publishing, – Newcastle upon Tyne, NE6 2XX, UK, 305 p. – p. 116.

[11] Gomonaj V.V. (2009). Approximation of the Ukrainian Law to the legal system of the European Union. Derzhava i pravo [State and Law], vol. 44, pp. 204–212 (in Ukr.).

[12] *Šišková, N.* (ed.)., ibid, p. 118.

3. EU and Ukraine competition law: importance, overview, comparison

3.1 Definition of the competition, its role and importance

In general under the competition is understood the rivalry between the companies for the most favorable conditions for the production and marketing with the purpose to gain an advantage over competitors.

From the economic point of view competition is the resistant mechanism of regulation of the production in the conditions of a free market.

The role and importance of competition as the basic element of the market mechanism can be shown in next provisions:

1) it affects the production with the purpose of its optimal conformity with consumption;
2) it is a comparison tool of the enterprises efficiency and stimulation the most effective ones;
3) it «discarde» inefficient enterprises from the market – those that are not able to offer goods at a price and quality no worse than the competitor's;
4) it stimulates development of innovations.

Competition serves the strategic precondition for the competitiveness of national enterprises. In the conditions the EU-Ukraine integration Ukrainian participation in this process as a country with competitive economy is very important. In turn, the competitiveness of a number of Ukrainian companies is questionable, and European companies included in the Ukrainian market is more technologically advanced. Therefore, one of the Ukrainian strategic objectives at the present stage is development of an effective competitive environment.

However, the effective functioning of a competitive mechanism might be broken, for example, by the abuse of dominance or concerted actions of the enterprises themselves that adversely affect the industrial competitiveness. Thus, an important prerequisite for the formation of a competitive economy is a well functioning mechanism of competition that is properly regulated by the state. And in the conditions of EU-Ukraine integration – those, that corresponds with the EU competition rules.

And last interpretation – (juridical) – of the competition law – it is a set of legal rules which regulate and protect the economic competition (ensure the functioning of the market economy in order to competition has not be distort).

And, summing up the competition role in the formation of industrial competitiveness and the need of its legal regulation, it should stay on a comparison of the main objectives of competition law in the EU and Ukraine.

In the EU according to Protocol (No 27) of the Treaty on European Union[13] amended by the Lisbon Treaty – *«the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted».*

Constitution of Ukraine[14] generally establishes the right to entrepreneurial activity and sets up the rule that *«State shall ensure the protection of competition in pursuit of entrepreneurial activities»* and also clarifies that abuse of a monopoly position, unlawful restriction of competition and unfair competition shall be prohibited.

The law on economic competition protection[15] which defines legal bases of support and protection of the economic competition and restriction of monopoly in business activities is aimed at *«ensuring the effective functioning of the Ukraine's economy on the basis of competitive relations development».*

Thus, the aims of competition law in EU and Ukraine in general are essentially similar, but if in EU the emphasis is directed at forming the system of undistorted competition, in Ukraine – this aim is focused on economic competition protection and also the main specific instruments of such protection are mentioned (for example, restriction of monopoly). The main core of Ukrainian competition policy is focused on abuse of monopoly position that was caused by the historical background of competition law formation. Ukrainian competition law started to develop after Declaration of Independence of Ukraine in 1991 (the complete lack of market mechanism and economic competition was inherited from an administrative command economy, also the existence of a state monopoly for the means of production and excessive concentration of production), unlike EU competition law, which began to develop with the European integration itself since 1951.

3.2 Basic stages of EU competition law development

The formation of EU competition law started after the adoption of Treaty establishing the European Coal and Steel Community (1951). The main contribution of the Treaty establishing the European Coal and Steel Community in the regulation of competition relations was the prohibition of cartel collusion and abuse of dominant position. In 1957 in Rome the Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community were signed. In the Treaty establishing the European Economic Community the similar concept of the prohibition of cartel collusion and

[13] Protocol (No 27) on the internal market and competition of the TEU.
[14] Art. 42 of the Constitution of Ukraine, OJVR 1996, № 30, p. 141.
[15] The law on economic competition protection, OJVR 2001, № 12, p. 64.

abuse of dominant position was enshrined. In the early stages of the EEC competition law development it was only the tool for creating a common market.

In the 1990s EU competition law changed significantly. In practice of the European Commission and the European Court of Justice increased the importance of economic analysis and identification of direct benefits of functioning competition also European Commission's attention has been directed to horizontal cartels control and control of concentration.[16]

At the beginning of the millennium, in the conditions of EU enlargement the process of modernization of EU competition law started (envisaged for changing procedural rules, particularly decentralization in the exceptions of prohibited agreements – together with the European Commission this rules began to apply and the EU Member States). Also, considerable attention was paid to such process as "more economical approach", which involves assessment of violations of EU competition law on the basis of their direct impact on competition and consumers and not just on the formal signs of competition law violation.

And the last significant milestone in the EU history is the adoption the Treaty of Lisbon (entered into force in 2009) – is an amending treaty to the existing framework governing the functioning of the EU. Specific changes to the competition rules the Treaty of Lisbon has not brought. The wording of the internal market has changed a little: «the internal market … includes a system ensuring that competition is not distorted».[17]

Thus, the differences in historical background of EU competition law development and the Ukraine's one lies in the fact that in the 1990s, the EU has already been formed the basis of competition law, in Ukraine at that time only began the transition to a market economy and the development of the Ukrainian law in the competition governing. Further in the paper the basic stages of Ukrainian competition law development will be discussed.

3.3 The formation of Ukrainian competition law

Adoption of the competition rules of law (in 1990s) took place under conditions of high monopolization of national economy, state regulation of production and pricing, significant loss of economic links after the collapse of the USSR, the inflationary crisis and recession.

Stages of competition law formation and the process of demonopolization of Ukraine's economy is conventionally divided into two phases[18] (see Tab. 1):

[16] *Šišková, N. a kol.* Evropské právo 2 – Jednotný vnitřní trh. Praha: Wolters Kluwer ČR, 2012, p. 97–98.
[17] Ibid, p.99.
[18] Rosetska, Yu.B. (2008). Institutsyni zasadi rozvitku konkurentnih vidnosin v ekonomitsi Ukrayini [The institutional foundations of development of competitive relations in economy of Ukraine]. Palmira, Odessa, 252 p. (in Ukr.).

Table 1: Stages of competition law development and demonopolization of Ukraine's economy

Depressive phase (from 1991–1998): overcoming the crisis (hyperinflation and recession) in Ukraine's economy, the adoption of the first laws in the field of economy demonopolization	Stabilization phase (from 1999): competition policy orientation on improving the competitive relationship
Ukraine initiated the antimonopoly legislation: in 18.02.1992 The act on the limitation of monopolism and the prevention of unfair competition in entrepreneurial activities was adopted. This law established the initial assumptions of economy demonopolization: definition of a monopoly position on the market (market share > 35% is considered as a monopolistic position in the market). It also established the prohibition of anticompetitive agreements and merger control. Although this law was aimed at regulating competition relations and corresponded with Ukrainian realities of those time, it differed from the European Union competition law.	Antimonopoly legislation was transformed into the legislation of economic competition protection. In 11.01.2001 The law on economic competition protection № 2210-III[19] was adopted. This «new law moves Ukrainian competition regulation significantly towards the EU model; noteworthy national specifics however remain in force».[20] This law defines the main categories of competition law: abuse of monopoly position, anticompetitive concerted actions of undertakings, concentration and others, on which further in the paper will be given a comparative analysis from the perspective of compliance with EU competition law.
By the adoption of The law on the Antimonopoly Committee of Ukraine in 1993[21] was created the Antimonopoly Committee of Ukraine (AMCU) and was determined its competence, organization and accountability. Formation of Ukrainian AMCU regional branches was completed in early 1995 after the creation of regional departments throughout the country.	The legal status and competence of AMCU, its mission and objectives in the system of Ukrainian government were specified.
One of the most important steps in the formation of Ukrainian competition law was the adoption in 28.06.1996 the Constitution of Ukraine, in Art. 42 of which have been installed the foundations of competition protection[22]	Ensuring the coexistence of large, medium and small enterprises as well as enterprises different forms of ownership, and so on. contributed the increasing of competitive pressures in the national economy of Ukraine.
These measures facilitated restriction of manifestations of monopolies, the appearance of tens of thousands independent enterprises and certainly contributed the implementation of the Constitution of Ukraine in the field of protection of competition.	These measures were designed to overcome the structural crisis and gain a competitive activity in a transitional type of Ukrainian economy as well as the approximation of the legal regulation of competition in Ukraine with the rules of EU competition law.

[19] The law on economic competition protection, OJVR 2001, № 12, p. 64.
[20] Šišková, N. (ed.): From Eastern Partnership to the Association. A legal and political analysis, ibid, p. 260.
[21] The law on the Antimonopoly Committee of Ukraine, OJVR 1993, № 50, p. 472.
[22] Art. 42 of the Constitution of Ukraine, ibid.

3.4 The main categories of EU and Ukraine competition law: comparative aspect

First of all it is important to start with characteristic of the basic principles and main categories of EU competition law with the aim to make a comparison with the Ukrainian competition regulation. EU competition law prohibits both: unilateral practices (the abuse of dominant position) and multilateral practices (the anti-competitive agreements), it also deals with concentration (rules of competition law prohibit such mergers and acquisitions which could essential prevent competition in the market).

The basis of EU competition law is the Treaty on the Functioning of the European Union (art. 101 of which concerned on agreements between undertakings, decisions by associations of undertakings and other concerted practices; art. 102 – abuse of a dominant position within the internal market). Control of market structural changes (mergers and acquisitions) is not regulated by the founding Treaties, but it is based on a Council Regulation (EC) № 139/2004[23]. Also regulation of competitive relations in the EU is carried out by the decisions of the Court of Justice.

The largest success Ukrainian competition law in approximation to EU competition law has in the regulation of *horizontal and vertical agreements* (as defined by Ukrainian law – anticompetitive concerted actions of economic entities). Art. 101 of Treaty of the Functioning of the European Union in general defines the concept of vertical and horizontal agreements as follows: «agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and have as their object the prevention, restriction or distortion of competition within the internal market shall be prohibited»[24]. Examples of agreements that may lead to the prevention, restriction or distortion of competition within the internal market include agreements which directly or indirectly fix purchase or selling prices or other trading conditions, limit or control production, markets, technical development, apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, etc.[25]

Ukrainian competition law deals with the notion «anticompetitive concerted actions of economic entities», that provides a standard approach to this definition, and constitutes «the conclusion of agreements in any form, decisions by

[23] Council Regulation (EC) № 139/2004 on the control of concentrations between undertakings (the EC Mergers Regulation), OJ L 24, 29. 1. 2004, p. 1.
[24] Art. 101 (1) of the TFEU.
[25] Ibid.

associations in any form, as well as any other concerted competitive behavior (activity, inactivity) of economic entities… Anticompetitive concerted actions are concerted actions that resulted or may result in prevention, elimination or restriction competition»[26].

EU competition law allows certain exceptions from the prohibited agreements. According to Art. 101 (3) TFEU any agreement in case of «improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit»,[27] and do not conflict with other requirements defined in this article, is valid from the date of its conclusion without the need for its notification to the European Commission. Another circumstance under which an agreement may be allowed is it minor importance (the de minimis rule). Agreement between undertakings even if they affect trade between Member States doesn't restrict competition if market shares of undertakings involved in it are small.[28] And the last group of exceptions – the so-called block exemptions, which constitute the general exemptions in a business line or industry with the purpose to increase competitiveness. The Block Exemptions on Horizontal cooperation agreements, for example, is directed «to encourage undertakings, including small and medium-sized undertakings in their research and technological development of products, technologies or processes…»[29].

Compared with the regulation of exceptions to the horizontal and vertical agreements in the EU, Ukraine also comply with certain exceptions. In particular, there are exceptions that allow small and medium enterprises to conclude agreements of the joint purchase of products that won't lead to substantial restriction of competition and enhance competitiveness of small and medium enterprises.[30] Some block exemptions in the area of delivery and usage of goods if they don't lead to a significant restriction of competition also provides by the Ukrainian competition law.[31] However, there are differences in the regulation of exceptions between the EU and Ukraine competition law. In Ukraine, still remains in force a system of individual exemptions from prohibited agreements, which may be permitted by the AMCU, and such exclusion

[26] The law on economic competition protection 2001, Art. 5–6.

[27] Art. 101 (3) of the TFEU.

[28] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Art. 101 (1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ C 291, 30. 08. 2014, p. 1.

[29] Commission Regulation 1217/2010/EU of 14 December on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 335, 18. 12. 2010, p. 36.

[30] The law on economic competition protection 2001, Art. 7.

[31] The law on economic competition protection, 2001, Art. 8.

covering a wider than in the EU list (for example, agreements which contribute to improving the production or purchase of goods, technical, technological and economic development, rationalization of production and so on).[32] Another important difference is that in Ukraine the Cabinet of Ministers of Ukraine may allow concerted action, which was not authorized by the AMCU if their participants will prove that the positive effect for the public interest prevails negative effects of the restriction of competition.[33]

Art. 102 TFEU prohibits *abuse of a dominant position*. From the text of Art. 102 TFEU arising next essential elements that characterize the concept of abuse of a dominant position:

– action that is considered as abuse of a dominant position, *must be done by one entity;*
– *such entity should have a dominant position in the relevant market;*
– *there must be a dominant position within the Internal market or its substantial part;*
– *entity's actions which are considered as a possible violation of Art. 102 TFEU should be qualified as abuse of a dominant position;*
– *such abusing should affect trade between Member States.*[34][35]

The concept of a dominant position of undertaking was formulated in the judgment of the case United Brands. «The dominant position … relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers».[36]

In contrast to this Ukraine competition law in determining the entity's monopoly position in the market comes from the size of its market share (see Tab. 2).

The dependence of the definition of monopoly (dominant) position on a market in the Ukraine competition law only from the size of its market share makes it different from an European concept of a dominant position. Common in the EU and Ukraine competition law is that it is forbidden not dominant (in Ukraine – monopolistic) position at all, but its abuse.

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[32] The law on economic competition protection, 2001, Art. 10.

[33] Ibid.

[34] Vovk, T.V. (2006). *Sy`stema konkurentnogo zakonodavstva Yevropejs`kogo Soyuzu. Pravove regulyuvannya pravy`l konkurenciyi v Ukrayini. Shlyaxy` adaptaciyi zakonodavstva Ukrayiny`* [System of competition laws of the European Union. Legal regulations of competition in Ukraine. Ways adaptation of Ukraine law]. RVA "Triumf", Kyiv, 416 p. (in Ukr.) – p. 86.

[35] Formulated by the authors classification of elements that characterize the concept of abuse of dominant position is based on the interpretation of Alison Jones and Brenda Sufrin, *EC Competition Law : Text, Cases and Materials* (Oxford Univercity Press 2001), p. 226.

[36] ECJ judgment 27/76 United Brands, [1978] ECR 207.

Table 2: Monopoly position of economic entities in the market[37]

Number of economic entities on the market	Market share which they occupy	Additional conditions to determine the monopoly position
1	≤ 35 %	the entity does not feel significant competition, in particular as a result of the relatively small size of the market shares belonging to competitors
	> 35 %	the entity does not feel significant competition
≤ 3	> 50 %	this group of economic entities does not feel significant competition
≤ 5	> 70 %	

The list of abuses of a dominant position in EU legislation covering such types of undertaking's activities as: directly or indirectly imposing unfair purchase or selling prices, limiting production, markets or technical development to the prejudice of consumers, applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, etc.[38] Although the list of abuse of entity's monopoly position in the market under the Ukraine law[39] is slightly larger than the list of abuses of a dominant position in EU, as a whole they form the standard list.

And last important issue is connected with the *control of concentration*. In the EU this area is regulated by the Council Regulation № 139/2004[40]. In Ukraine – by the Chapter V of the Ukrainian law on economic competition protection. The definition of concentration in Ukrainian competition law is approximated to the EU's definition and covers mergers and acquisitions, but «Ukrainian law doesn't distinguish between sole and joint control and it is not clear whether a change in the quality of control would constitute a concentration»[41]. The European Commission is empowered to examine all concentrations that are carried out on the scale of the EU and (aggregate worldwide turnover of all the undertakings concerned exceeds 5 billion euro; and the aggregate Community-wide turnover of each of at least 2 of the undertakings concerned exceeds 250 million euro). In Ukraine the notification is based on more less turnovers (worldwide turnover exceeds 12 million euro and turnover in Ukraine exceeds 1 million euro) and on market share (if market share of

[37] The law on economic competition protection 2001, Art. 12.
[38] Art. 102 of the TFEU.
[39] The law on economic competition protection 2001, Art. 13.
[40] Council Regulation (EC) № 139/2004 on the control of concentrations between undertakings (the EC Mergers Regulation), OJ L 24, 29. 1. 2004, p. 1.
[41] *Šišková, N.* (ed.): From Eastern Partnership to the Association. A legal and political analysis, ibid, p. 261–262.

combined entities exceed 35 %). The competent authorities both in EU (the European Commission) and in Ukraine (AMCU) evaluate if the concentration will restrict or distort the competition. It can be allowed by the competent authorities after such evaluation if the competition will not be disrupted. The most important difference from the EU competition law in this area is that in Ukraine the Cabinet of Ministers can allow concentration not cleared by AMCU if the positive effect for public interests prevail the negative of competition restriction.

4. Conclusions

Genesis of Ukrainian competition law after the Declaration of Independence indicates the progress in matters of approximation to EU competition law. However, Ukraine still remains in the transition to a market economy with a well-functioning competition mechanism that will be adapted to EU competition law. Most of all legal regulation of competition relations in Ukraine approximated to the EU model in the area of prohibited agreements, but some changes are needed (for example, fully introduction of the de minimus standart); in the area of abuse of dominance – rule of law that defines a monopoly position of an entity depending on its market share have to be changed.

AMCU has developed a Plan of implementation of some legislative acts of EU competition law[42] (which includes, for example, measures to bring the control of concentration in accordance with requirements of Art. 1, 5(1) and 5 of Council Regulation (EC) № 139/2004, also definition of requirements to vertical agreements between entities concerning the delivery of goods in accordance with which these agreements are allowed and do not require the permission of AMCU and some others). According to this Plan all differences between EU and Ukraine competition law should be eliminated till the end of 2017.

Nowadays Ukraine also has to continue the development of the competitive environment without any barriers to competition in order to achieve the competitiveness of the national economy and creating DCFTA with the EU with the intention to become a Member State.

[42] Plan of implementation of some legislative acts of EU competition law approved by the Resoо lution of Cabinet of Ministers of Ukraine № 167 from 04.03.2015, available at: http://zakon4.rada.gov.ua/laws/show/167–2015-p [30.06.2015].

INFORMATIONS, NOTES AND SPEECHES

Europe after the economic crisis: towards a Political Union

Fausto de Quadros*

Addrees presented at the 3rd Annual Conference of the Czech Association for European Studies in Prague (12th and 13th june 2014)

First of all, I would like to thank Professor Siskova for having invited me to be here today. It is for me a great pleasure to take part in this Conference. And I have also a great pleasure to be in this town. Prague is for all the European citizens a symbol of freedom and democracy. During many decades you fighted hardly to restore peace and democracy in your land.

The economic and financial crisis that the European Union is still now facing is, as it has correctly come to be understood, the most serious crisis in the history of European integration. The Member States and the European citizens have seen the entire Monetary Union at risk of collapse, they have reached the conclusion that Economic Union is far from being achieved and that Political Union is still a distant dream. Given this situation, the first reaction of the Union and the member States should be one of humility in recognizing that, despite all the progress that European integration has made over these sixty years, there is still a lot to do to satisfy the wishes of the Founding Fathers of the integration, and of all of us, in order to have a united Europe which is shaped around the values that have always been part of the civilizational heritage of the European Union and which are today set out in the Treaties, specially in the article 2nd of the Treaty of the European Union. We must, therefore, change our behavior.

Europe needs to awaken quickly from this crisis. The crisis has exposed the vulnerabilities within many States but it has also revealed Europe's inadequacy, bashfulness and, sometimes, lack of accuracy in adopting appropriate measures to come out of this crisis. It has been shown that the Union was not ready to share a common currency, although, in all truthfulness, it must be said that the crisis is not only a crisis of the euro but also, and perhaps even more

* Professor of European Law and International Law at the Law Faculty of the University of Lisbon, Jean Monnet Chair on Constitutional Law of the European Union – Political Union, Director and Academic Coordinator of the Centre of Excellence of the University of Lisbon. Contact: faustoquadros@gmail.com.

so, an internal crisis of the States which has repercussions in the euro zone. And it has been shown that, in the face of such a deep crisis, Europe is not capable of acting in a concerted manner. Economic and monetary integration is not compatible with intergovernmental economic and fiscal policies or with unilateral attitudes of certain Member States as to how to come out of the crisis. When they agreed to be bound by the European Budgetary Treaty, the States committed themselves to putting their public finances in order and achieving a balanced budget, which requires greater supervisory powers of the Commission and the European Central Bank. For their part, the European institutions, before reforming themselves, need to help the States to make the necessary reforms within them, above all in their economic and financial sectors. As was decided in the European Council of October 2012 and later developed in the "speech of the 4 Presidents" (van Rompuy, Barroso, Juncker and Draghi), there is an urgent need to conclude the Union's integrated financial network, by delivering and finishing the Banking union, the Single Supervisory Mechanism and the Single Resolution Mechanism. But we cannot forget that democratic legitimacy and accountability are essential to a genuine Economic and Monetary Union. In order to create that integrated financial network it is essential to advance with political integration, it is necessary to deepen the Political Union. There is an urgent need for a strong political commitment from the institutions of the Union, from the Member States and from the economic and social partners towards deepening the Political Union. It has been proven that without more Political Union, the European Union, including Economic and Monetary Union, is at risk of regressing.

Yet, contrary to what is sometimes thought, the deepening of Political Union should not begin by giving greater power to the institutions and by strengthening their supranational power. Before this, we need to create a new political environment within the Union. That political environment is based on the following requirements. First requirement, realism: all of us need to be realistic in recognizing that Economic Union and Political Integration are a long way beyond Monetary Union and that if they do not advance, Monetary Union is at risk of definitive failure. In order for the current economic and financial crisis to be definitively eradicated and for it to cease endangering the European social model, as it is currently endangering it, it is urgent that we advance in the Economic Union and progress in the Political Union. Second requirement, confidence: all of us must be firmly determined to quickly solve the current crisis in order to quickly restore confidence to the economic and social operators and to the citizens in general. In order to achieve this climate of renewed confidence there needs to be a broad consensus among the European institutions, the political powers and the economic and social partners. Confidence

is the key for the economy and for the entire policy of growth that the Union has to undertake to beat the crisis. Without confidence there is no investment, and without investment there is no growth. And, above all, without investment in education, in research, in innovation and in new jobs. Third requirement, equality of the States: the Union must respect the principle of equality of the States. All of the States involved in this European project are important and all of them are equally important; there are no States in the Union that are more important than others. This is how Article 4(2) of the Treaty of the European Union should be read, after Lisbon. Fourth requirement, solidarity: it should be remembered that European integration began in the 1950s as a project of solidarity and that solidarity between the States is the keyword for the European construction, all the more so when it has become a vast, heterogeneous Union of 28 States. This crisis has demonstrated that solidarity and interdependence among the States and the European peoples is more necessary than ever. No State, however big it might be, can spare that solidarity. It would be a serious setback for the Union if we now returned to intergovernmental methods and formulas to solve disputes and disagreements among the Member States. Only if we act together within the Union will we be able to save our social model, ensure security and stability in Europe, defend democracy and the Rule of Law, protect our interests in the international community and help our companies to compete at the global level. And fifth requirement, fundamental rights: the Union may not waste the set of fundamental rights which are the Community's best symbol of the values for which it has evolved, especially with the Lisbon Treaty and the Charter of Fundamental Rights. The assertion of European Integration as a political and cultural project is an advantage which distinguishes our project from all other similar projects on the political world stage. When we, rightly, say that the European project is, first and foremost, a political and cultural project, and not merely a trade project, we mean that, for the Union, at the heart of the Economy is the Human Being and not the markets or rating agencies, especially when we know that the markets and the rating agencies often act without rules and according to the law of the jungle. In its current state of integration, the European project cannot only be regarded as merely a trade project. We have to return to Churchill's formula, which I will remind you of: we unite people, not states. Therefore, requiring States, in order to solve the crisis, to adopt austerity measures which disproportionately harm basic social rights and, namely, which ignore the minimum ethics of survival for the Human Being, is an attack on the values which underpin the Union and, specifically, breaks with the European social model. The values which underpin the Union, and which are now set out in Article 2 of the Treaty of the European Union, are non-negotiable. The crisis cannot be overcome simply

with austerity; it will be overcome with sustained growth. In other words, we need growth with social welfare, with social cohesion and with the creation of new jobs, above all for the younger generation.

Only after this political environment has been created should we move towards reforming the institutions, in order to strengthen the community method in the deepening of political integration and to construct a federal vision for Europe. With regard to the reform of the institutions, there is an urgent need to consolidate the supervisory powers of the Commission and of the European Central Bank in such a way that budgetary discipline is unreservedly guaranteed at State level. The European Budget Treaty must be complied with, but this will only happen if there is an assurance of heavy budget discipline by the States. But, here also it will be necessary to act with respect for social welfare.

Dear Colleagues, the Union must begin a profound debate on these issues, and quickly. This is the right time for reflecting and debating on the future of the Union from the perspective that I have just proposed to you. Unfortunately the election for the European Parliament was an good opportunity to debate it but it was missed. But we must insist on this debate. We have to show in that debate that we are all in solidarity with the project for the growth and deepening of the Union in order to be able to overcome this difficult challenge with which the European continent is confronted in this advanced stage of globalization. It would be very grave if nationalistic and populist talk on integration were to eclipse the assertion of the need to strengthen our project of solidarity and progress for all European citizens, both the most privileged and the most disadvantaged. It would be very grave if that debate did not give us reasons to overcome the Euro-skepticism which is growing at an alarming rate in Europe. It would be very grave if we lost out in that debate to those who will argue for a return to the isolationistic and nationalistic formulas that Europe knew in the past, with such disastrous consequences. It would be very grave if we give up in the way to build a strong and solid Europe of citizens. We have to explain to public opinion that of course we need more Europe but, above all, we need better Europe.

Thank you for your attention.

REVIEWS

Šišková, N. et al.: *From Eastern Partnership to the Association* – The Legal and Political Analysis. Newcastle upon Tyne: Cambridge Scholars Publishing, 2014, 305 p., ISBN 978–1-4438–5819–9

The monograph called **From Eastern Partnership to the Association – The Legal and Political Analysis** (the outcome of a Jean Monnet project titled "Eastern partnership and its prospects with a view a legal approximation, rule of law and human rights") is an excellent in-depth study of the European Union's policy towards its Eastern neighbours, particularly Ukraine, Belarus, Moldova, Azerbaijan, Georgia and Armenia. Both in respect of analysis and evaluation, the book breaks new ground and is a welcome addition to our existing knowledge on the European Union and Eastern partnerships. Professor Naděžda Šišková as editor of the study has been succesful in creating a quality team of authors.

The book brings together contributions from a team of 17 authors with various professional backgrounds. They represent not only researchers and professors of scientific institutes for legal studies, political science studies and universities (namely, the Faculty of Law, Universität Heidelberg, Germany; the Faculty of Law and Faculty of Social Sciences, Charles University, Prague, Czech Republic; the Faculty of Law, Palacky University, Olomouc, Czech Republic; the Faculty of Law, Comenius University, Bratislava, Slovakia; Kiev Mohyla University, Ukraine; the Academy of Advocacy of Kiev, Ukraine; and the Law School, Tallinn University of Technology, Estonia), but also practicing lawyers and renowned experts in various branches of law (the Legal Secretary of the Court of Justice of the European Union, Luxembourg; the Director of the EU Law Department of the Ministry of Foreign Affairs of the Czech Republic; the Vice-Chairman of the Office for Protection of Competition of the Czech Republic; and an analyst of the Constitutional Court of the Czech Republic). The volume, though written by several authors, is very consistent both substantively and stylistically, which should be credited primarily to Naděžda Šišková in her role as editor. The book consists of a Preface written by the Commissioner for the Enlargement and European Neighbourhood Policy, Štefan Füle; an Editorial Introduction; three Parts; 15 Chapters; and a Conclusion. Given the numerous worthwhile chapters—written by different authors—on the one hand and space limitations provided for this review on the other, this text contains general remarks without broad reference to any single chapter of the study written by particular authors.

The first part deals with the Eastern Partnership and Association agreements as part of European External Relations Law, and brings together four

chapters examining the place and status of the Eastern Partnership Policy in the European External Relations (Petra Lustigová); the evolution of the Association in EU External Relations Law (Pavel Svoboda); the interpretation, implementation and enforcement of Association agreements (Emil Ruffer); and legal aspects of the European Neighbourhood Policy (Liudmyla Falalieieva).

The second part of the book, titled "General Overview of the Bilateral Agreements with Eastern Partnership Countries: A New Generation of Bilateral Agreements", is concentrated namely on the relationship between the EU and Ukraine (Roman Petrov, Naděžda Šišková) and the relationships between the European Union and the countries of South Caucasus, such as Armenia, Azerbaijan and Georgia (Ondrej Hamulák, Achil Chochia). I particularly appreciate the definition of the new generation of bilateral agreements presented by Naděžda Šišková (pp. 105–126).

The third part, called "From Eastern Partnership to the Association in the Light of Legal Approximation, Human Rights and the Rule of Law", is composed of seven contributions focusing particularly on the Rule of Law as the most important principle and foundation of the EU aquis (Peter Christian Mueller-Graff); new conceptions of the protection of fundamental rights in the EU (David Petrlík); the development of democracy (Ondřej Blažo); and the importance of a constitutional judicial review for the protection of Rule of Law, human rights and democracy (Soňa Matochová). Of particular interest is the chapter titled "Historical and Theoretical Aspects of Approximation of Law in Central Europe", written by Vlasta Kunová.

The final part of the monograph thoughtful and logical conclusions written by Naděžda Šišková. As such, the book summarizes and explains one of the most fascinating developments of contemporary history; the extension of the democratic concept of "State" to eastern non-member states of the European Union. This process is still in full movement, so there is no escape from disturbing questions, such as: "Is this transition already achieved?", or "Is this a long-term development oscillating between ups and downs?" A simple answer cannot be given. But this monograph offers rich material and keen observations by some of the most knowledgeable legal and political analysts. From such a treasure of information and analysis some fundamental regularities can be extracted. The study under review deals with emerging democracy in the process of modernization. Modernization is the more recent part of the historical process of civilization, and is still rapidly ongoing. Modernization means innovation, as shown by open, mobile societies and the introduction of democracy and the increase in its dynamics. Change is introduced by mostly new elites. A sequence of characteristic cleavages typifies the modernization process from national conflicts to social and economic conflicts. The dynamics

of innovation create new winners and losers; thereby, existing political cleavages are aggravated and new ones are created. Innovation and coherence are contrasting and conflicting phenomena. After periods of rapid modernization and democratization, cleavages rise to a point of "hard regulation" by conflict, breakdown, and retreat, and eventually to fundamentalism, dictatorship or anarchy. After turnaround or takeover by more successful political systems, a new push towards modernization follows. The lengths and depths of such political "waves" are difficult to forecast. This study makes a valuable contribution to such a process of democratization.

The reviewed monograph is undoubtedly an interesting analysis of the development from Eastern Partnership relations to the Association agreements. It is quite informative and fact – oriented. Almost every significant aspects of Eastern Partnership and Association has been portrayed. For researchers and teachers engaged in the study of European law, this concise study is extremely useful and interesting.

I find the book to be a great contribution, to be well structured and, in many ways, in its own manner, unique in the framework of European law, as nothing this extensive has previously been contributed in the field. Furthermore, the book is written in a way that is easy to comprehend for both lawyers and political scientists. The publication will also act as a hugely significant source for any further debate concerning the future of the process of transition from Eastern Partnership to the Association.

I strongly believe that this publication will attract the attention of the wider legal and political science public focusing not only on European law and international law, but also on comparative law in general.

Josef Blahož
The Institute of State and Law of the Academy
of Sciences of the Czech Republic
elected member of the International Academy
of Comparative Law in Paris
poctova@ilaw.cas.cz

Van Elsuwege, P. and Petrov, R. (eds.): *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union*, London and New York: Routledge Press, 2014, 268 p. ISBN: 978–0-415–64043–5.

This new publication edited by two leading authors in the field of the EU external Relations law -– Peter Van Elsuwege and Roman Petrov, is dedicated to the related issues of the Eastern Neighbourhood policy. Especially, it is focusing on the analysis of the legal aspects of the EU's relations with the Eastern partnership countries, including the approximation of laws and other methods of the "acquis export". The book is published by the renomed Routledge in London and New York in 2014. To the great advantages of the publication belongs the fact, that it deals with two areas which are not still sufficiently analyzed in the scientific literature: legislative approximation and application of EU law beyond the EU borders. To the second advantage of the book belongs the reflection of the diversity of the approaches and the analysis done from the varies perspectives – from the point of view of the Member states as well as the states of the Eastern partnership as the authors team involves the researchers from these countries.

The book is a welcome contribution to literature on EU external relations law and other persons who are interested in EU law.

In generaly it deals with the phenomenon of application of EU law beyond the EU borders. In particular, the book focuses on two dimensions of this process. First, it analyses the legal and institutional foundations of this extraterritorial application of EU law in third countries. Second, it analyses the results of legal approximation and regulatory convergence with regard to the EU's eastern neighbours (the countries of the Eastern Partnership and Russia). The choice of this region as a case study is justified by the fact that the relevant countries do not have a perspective of full EU membership. However, the EU policy towards the Eastern Partnership countries and Russia encourages these countries to voluntary harmonise their legislation with the EU *acquis*. Results of this research are relevant for studying the effectiveness of present and future EU external regional policies aimed at the promotion of EU common values and EU legislation into the legal orders of third countries.

The book is well structured and logically comprehensive. The study is divided into two parts. Part 1 deals with an overview of the instruments and mechanisms of the process of legislative approximation and application of EU law beyond the EU borders. Christophe Hillion looks at anatomy of EU norm export towards the EU's neighborhood. Aaron Matta differentiates the methods of acquis export. Dimitry Kochenov deliberates about the scope and role of the

EU common values in the domain of the EU external policy. Guillaume Van Der Loo analyses the EU-Ukraine deep and comprehensive free trade area as an example of a coherent mechanism for legislative approximation. Sieglinde Gstoel writes about the prospects of a Neighborhood Economic Community between the EU and its Eastern partners. Adam Lazowski and Steven Blockmans focus on the challenges to the legal rapprochement of the Western Balkans and the EU.

Part 2 offers a comprehensive study of the experience of legislative approximation and application of EU law in the EU's neighborhood. Part 2 contains detailed country reports from Ukraine, Moldova, Georgia, Armenia, Azerbaijan, Belarus and Russia. Contributors of Part 2 (Roman Petrov, Anna Khvorosiankina, Gaga Gabrichidze, Narine Ghazaryan, Anna Hakobyan, Maksim Karliuk and Paul Kalinichenko) provide in depth analysis of direct and indirect application of EU law in legal systems of their countries. Country reporters study the link between the approximation efforts and the application of EU law by national executive and judiciary. Country reporters from Belarus and Russia (Maksim Karliuk and Paul Kalinichenko) put forward the concept of "back door harmonization" that is inherent to the East European countries which are not willing closer rapprochement with the EU. In concluding remarks Peter Van Elsuwege and Roman Petrov argue that in the absence of any explicit membership perspectives legislative approximation between the EU and the East European countries does not aim at the full incorporation of the entire EU acquis. In practice the East European countries 'gradually but surely develop a new model of 'integration without membership', which is based on the application of sectoral EU acquis and legislative approximation aiming at economic integration through the establishment of bilateral Deep and Comprehensive Free Trade Areas.

In conclusion, the book is a well researched source of information on EU external relations and promotion of the EU acquis into legal systems of the EU's eastern neighbors, as it brings a deep analysis of high quality made in the field, which creates a key element of the External relations law of the Union. That is why the publication is very welcomed and can be strongly recommended for specialists in EU law, political scientists and other persons, who are interested in External relations law of the EU.

Naděžda Šišková
Head of the Jean Monnet Centre of Excellence in EU Law
at Faculty of Law, Palacký University in Olomouc
President of the Czech Association for European Studies
nadezda.siskova@upol.cz

Klimek, L. *European Arrest Warrant*, Cham: Springer International Publishing, 2015, 375 p. ISBN 978-3-319-07337-8

The reviewed book offers a comprehensive look at the instrument of European arrest warrant (EAW) and undoubtedly it is the result of a widespread research. Libor Klimek benefits here from his long-term interest in issues related to the EAW. He created a text that enriches doctrinal knowledge and, moreover, which is an excellent guide for all lawyers who are dealing with the EAW in their practice. The book is dedicated to almost all issues related to the institute of EAW. It took the opportunity of analysis of previous case-law and provides a critical view of the application of this instrument for more than ten years since its introduction into practice.

The author in the first part deals with theoretical basis and discusses the historical background and development of the EAW. Very valuable in my view is the chapter (no. 3) devoted to the question of the legal basis for the adoption of the Framework Decision of 13 June 2002 on the European arrest warrant. Given the specificities of the former third pillar it helps to understand the particulars of EAW.

The second part contains an analysis of the practical implementation of the EAW and covers issues of its release, execution and institutional background within the surrender procedures. I consider as the most valuable chapter no. 5, where the author presents the principles of surrender procedure. There is one part dedicated to the principle of surrender procedure itself (specialty, double criminality, reciprocity) and another part addressed to the general principles behind a cooperation in criminal matters (mutual trust and mutual recognition). An interesting addition is present in chapter no. 9, in which the author describes the specific mode of surrender procedure in Nordic Countries.

The third section presents the process of implementation of the Framework Decision. The author here deals mainly with the legislative issues but this rather technical part is supplemented by an analysis of the state of implementation in particular Member States, thus the readers will get the information about some differences that arose during the implementation process.

The fourth chapter contains a detailed analysis of case law associated with the EAW. Thorough analysis of the relevant CJEU case law, which gives answers to many difficult questions (removal of double criminality requirement, question of application of ne bis in idem principle, grounds for non-execution of the EAW, crashes between EAW and fundamental rights, understanding of the specialty principle) has important analytical value for the doctrine but is especially relevant for the practice. Chapter 12 provides an analysis of the case

law of constitutional courts and analyses important constitutional questions that EAW brought into the European legal discourse.

The fifth part of the work involves evaluation of the EAW. Author offers evaluation through comparison with the traditional extradition proceedings and complements it by the description of the views of the doctrine as well as EU institutions.

The last sixth section provides an analysis of current developments related to the EAW and wide cooperation in criminal matters in the EU. It is dedicated particularly to the long-discussed issue of procedural rights of persons in criminal proceedings. The author analyses the Directive 2010/64 / EU on the right to interpretation and translation, Directive 2012/13 / EU on the rights to information in criminal proceedings and Directive 2013/45 / EU on the right of access to a lawyer in criminal proceedings and in EAW proceedings. This chapter offers the comprehensive study and practical guide to the latest development in the field of European cooperation in criminal matters.

Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA (FD EAW) and EAW itself are among the most frequently accented topics related to the European integration. This legal institute attracted attention of the representatives of the doctrine in within many spheres of legal research (European law, criminal law, constitutional law, international law and human rights law). Introduction of the EAW and surrender procedures, which replaced the traditional extradition law, need to be considered as the turnover in patterns of interstate cooperation in criminal matters. Besides this, it is obvious that new rules of cooperation also raised difficult questions about the frontiers of European integration, the nature of law, which originated within the former third pillar and the question of the relationship of the EU law and national law of the Member States.

Suppression of the cross-border crime and the surrender of suspects or convicted persons have played one of the key roles within the third pillar cooperation. The main objective of the EAW FD was to simplify and unify this area of cooperation and reduce the possibility of criminals to avoid prosecution. The execution of the EAW = automatic surrender of requested person is based on the principle of mutual recognition of foreign judicial decisions. Inspiration for the introduction of this concept emerged from the experience with the functioning of the internal market, where mutual recognition forms an elementary aspect of freedom of movement (especially goods). Transferring the principle of mutual trust and mutual recognition from the sphere of economic integration into the area of state cooperation under the third pillar has not been so smooth. The reason of complications lay primarily in the specifics of the third pillar

and the area of criminal law in general. EAW and the principles it is based on transformed also the contours of European constitutionality. The anticipated necessity of critical analysis of this instrument before national courts became a reality in the decision of several high judicial authorities across the EU. It was the constitutional courts of Poland, Germany, the Czech Republic and Belgium, and the Cypriot Supreme Court, which had an opportunity to assess the compliance of the surrender procedure based on the EAW with the principles and norms of their constitutional legal systems.

EAW is the complex legal instrument which requires the complex study and expertize. The book of Libor Klimek fulfils this requirement and enriched the up-to-date knowledge of legal scholarship. The book must be considered as a complex volume. It offers doctrinal depth views as well as practical relevance and, moreover, is written in a clear and interesting language. The advantage of this book in comparison to other similar works lays in its contemporaneity, some time lapse offering the retrospective view and high quality work with the case-law. It is a work that I highly recommend to academics, practicing lawyers, state officials and students who intend to research or further study in this area. European Arrest Warrant by Libor Klimek is a work we can rely on and the volume we may follow in next research of EAW.

Ondrej Hamulak
Faculty of Law, Palacký University in Olomouc
ondrej.hamulak@upol.cz

INSTRUCTIONS FOR AUTHORS

Submission of manuscripts

- 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.
- Articles should not normally exceed 10 000 words (including notes and references).
- Review articles should normally be no more than 4 000 words in length.
- Book reviews should normally be between 8 00 and 1 500 words.
- Submit the manuscript via e-mail at: ondrej.hamulak@upol.cz
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